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## Garrison Lecture 2002 Reunion Roundtable Transcript

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**LLOYD K. GARRISON LECTURE**  
**REUNION AND ROUNDTABLE**  
**TRANSCRIPT**

**February 20, 2002**

**Nicholas Robinson:** It is an accepted convention of the lawyer's art to incorporate by reference, and I incorporate by reference the biographies of each of our distinguished panelists. Zygmunt of course, needs no introduction, as you have just been introduced to perhaps more of him than he wanted to tell you: His wonderful lecture is his own introduction.

There are two individuals who would have been here, and who had planned to be here, but because of personal conflicts are here only in spirit. Bill Rodgers will be the person to most regret not being here in light of an announcement that will be made tomorrow evening at the National Environmental Law Moot Court Competition about an award to his law school. Prof. Rodgers was the author of the first real horn book in our field, trying to synthesize and restate environmental law in one masterful concise way. He has been a prolific scholar. The other is Oliver Houck. Oliver undertook a second career in environmental law down at Tulane. He has been a masterful and insightful critic of the shortcomings of the vast amount of environmental legislation. He ably sets out for us further goals for water quality and ecosystem management that students and law professors alike are aspiring toward. Their contributions to prior Garrison Lectures, published in the *Pace Environmental Law Review*, illuminated our understanding of this field of law, and in time each will find occasion to reflect and comment upon this symposium. See William H. Rodgers, Jr., *Defeating Environmental Law: The Geology of Legal Advantage*, 15 *PACE ENVTL. L. REV.* 1 (1997); Oliver Houck, *Environmental Law and the General Welfare*, 16 *PACE ENVTL. L. REV.* 1 (1998).

The more immediate gratification will be provided now from those who are seated here at the half-round table in front of the Robert Fleming Moot Court Room. There are essentially two generations of legal scholars here. David Sive, Joe Sax, and Dan Tarlock are the Garrison Lecturers of the first generation.

David Sive, whose archives are now upstairs in the Law Library above us, is known as the "Father" of public interest environmental litigation in the U.S.A. His litigation papers are now open for public scrutiny. Scholars and law students can learn from David through his archives. We have been privileged that David Sive has chosen to teach here with us at Pace. He was one of those pioneers along with two others, Dan Tarlock and Joseph Sax, who were there in 1969 at Airlie House in Warrington, Virginia, at the very first conference on the topic of "Law and the Environment." See MALCOLM BALDWIN & JAMES K. PAGE, JR., *LAW AND THE ENVIRONMENT* (Walker Publishing Co., New York 1970). Before this Airlie House event, lawyers and law schools doubted whether our field of law could exist. Like "Law and Art or Law and Sports" the question was asked, "Is it a field or isn't it a field?" In pondering a second question, "what are we going to do about the deteriorating environment?" it became evident that Environmental Law would develop as a new distinct field of law in its own right. This conference launched the first modern definition, or perhaps I should say the first post-modern definition, of what has since become the field of environmental law.

Professor Joseph Sax is the acknowledged Dean of all of us in environmental law, both those who teach in it as well as the practitioners. After his return to teaching at Boalt Hall in Berkeley, California, from service as Counselor to Interior Secretary Bruce Babbitt, the Section on Environmental Law of the Association of American Law schools at its meeting in San Francisco a couple of years ago feted him. His festschrift was a remarkable tribute to the capacity of a single law professor to shape the thinking of an entire generation of teachers and their students. We are all immeasurably grateful to him for his dedication over many decades.

Dan Tarlock is also a prolific scholar, law professor who has advanced environmental law in several areas, not the least of which as the architect—along with his colleague Stewart Deutsch, who is here with us in the front row, now the Dean at Rutgers Law School—of the critically important model for environmental legal education at Chicago-Kent, College of Law. Law Schools across the U.S.A. have studied and drawn guidance from Chicago-Kent's innovations. His contributions to environmental policy for water management have been substantial.

Beyond those who were at Airlie house, the field of environmental law has been immeasurably strengthened by a second generation of scholars who challenge the first generation asking,

"Where is this field going?" Richard Lazarus and Gerald Torres are Garrison Lecturers of this second, probing, generation.

As Richard Lazarus has exhaustively demonstrated in his Garrison Lecture on the U.S. Supreme Court, it is clear to most of us that the U.S. Supreme Court has yet to learn its own continuing legal education lesson that it is no longer "law and the environment," but it is now "environmental law." There is a sense that the court is stuck in a pre-modern conceptual notion that the legislation on environment merely is a sub-class of administrative law or a mere subject of administrative law. Like his Garrison Lecture, Prof. Lazarus' insightful writings have become landmarks of legal literature in our field.

Gerald Torres is a master of environmental law, among his scholarly pursuits. He has come to us bringing new insights into environmental justice. His understanding of our shared stake in the commons, as evidenced by his Garrison Lecture on the atmosphere, has really staked out further agendas for environmental law reform, much as Oliver Houck has. He, like Joseph Sax, served in the Clinton administration in the eye of the recent political storms, serving in the Department of Justice. I suppose it is better to be in the eye of the storm than to be buffeted by the storm, but he will tell us which is which.

Finally, our moderator Gustave Speth is someone who transcends both generations and continues to be a key figure in environmental law; that is to say you're still a young guy Gus. When he was a law student he observed (as did many) that "there is something wrong with the quality of our environment." He acted on his concerns. Gus, with others pulled together the leadership to organize what became the National Resources Defense Council (NRDC). He rose in the Carter administration to chair the President's Council on Environmental Quality, and through that position chartered some major policy breakthroughs including, laying a foundation for what has become known as "sustainable development." Gus went on to advance the same agenda as the head of the World Resources Institute. Over the last several years, as the head of the United Nations Development Programme (UNDP), he was at the center of the defining sustainability and sustainable development internationally. All of us in Academia are fortunate that the Yale School of Environmental Science and Forestry brought him into University education where he has been an outstanding leader in furthering multi-disciplinary approaches to environmental management. We are fortunate to have him chairing

our panel today. Gus should be challenging for our round-table, to probe the lecturers minds and test the rigor of their views. It is a privilege for us to welcome Gus to lead our discussion. It is a role for which he is uniquely qualified to discharge.

What unites the two generations assembled at this table, are at least three elements, beyond the fact that it has been a great privilege for all of us, and for all of you too, to have been on the ground floor of starting a new field of law, defining a new discipline of law.

First, a theme that hopefully will emerge out of this debate, is one which the speakers have demonstrated in their individual Garrison Lectures. There is indeed an independent jurisprudential foundation for the field of environmental law. It is not "law and sports;" it is Environmental Law because this discipline is rooted in what Emerson wrote about in his essay, *Nature*, and in what Emerson's students, John Muir and John Burroughs, understood, and ultimately in what their student, Teddy Roosevelt, came to understand. See Ralph Waldo Emerson, *Nature* (1836), reprinted in facsimile with an introduction by Jaroslav Pelikan (Beacon Press, Boston, 1985); see also PAUL BROOKS, *SPEAKING FOR NATURE*, (San Francisco, Sierra Club Books, 1980).

Second, our Garrison Lecturers share dissatisfaction with the conservation policies that took hold during the Progressive Era. Despite the acknowledged gains of early conservation laws, they are not good enough. We do not have a stewardship of natural resources yet, and in their Garrison Lectures and in the writings and in the debate today, we discern a shared dissatisfaction with the shortcomings of our public policies.

Third, an admirable element evidenced in each of these individuals—something of the environmental emphasis in each of their lives and their writings—is a conviction that you can shape economic and social policies and practices to restore the quality of the natural environment and to build sustainability into our use of natural resources. Their scholarship invited law reform and they each engender such reform.

Now whether my hypothesis is true or not is what Gus Speth is about to examine.

**Gus Speth:** I can't tell you how meaningful it is for me to be here with people I have respected and admired for so long. Since this is an anniversary occasion, to reminisce is not totally inappropriate. I recall that when I had the idea of starting up what eventually

became NRDC, I went to the Ford Foundation and asked them if they had any interest. I was told to go see the top guy and I said "Who's that?" It was David Sive. So I rushed over to David's office, and I remember sitting there with David in 1968 and receiving enormous encouragement. That was an important milestone in getting NRDC out of the starting blocks. Later, David agreed to join the first NRDC Board of Directors.

At NRDC, one of the first pieces of litigation I undertook was to petition the Securities Exchange Commission (SEC) to require environmental disclosures under the National Environmental Policy Act and the securities laws. We had a hearing before the SEC on our petition, and our star witness was Congressman Dick Ottinger. That was a lot of fun. These things don't go away—there is now an effort to revisit the issues we raised with the SEC. Then one day I was sitting in NRDC minding my own business, as usual, when an EPA staff member from Jeff Miller's era came over and said, "please sue us, sue us quickly." This was said because the Corps of Engineers and the White House were insisting that EPA limit the reach of Section 404 of the Clean Water Act. The water act is pretty clear; we brought the lawsuit and won it fairly easily. But, as with the SEC case, the issue persists. Just recently the scope of Section 404 under the Clean Water Act was before the Supreme Court.

Joe Sax was always a hero to us from those very early days and others here on the panel have done so much, as have many in the audience. It's great to be here with you.

What can I say to be a little provocative? For one, the heyday of environmental law is past. Is that possible? I'd like to hear the panelists on that. Second, we desperately need environmental law reform. We can't get it because there isn't enough trust in the system for people to sit down and work out better solutions. Third, we need a new paradigm of environmental governance in the country—a new generation of environmental policy that is very different from the one we developed with Ed Muskie. Do we need a new generation of environmental laws for the nation, and what would they look like?

I've been working lately on the global-scale environmental problems. With the exception of the ozone depletion issue, the negative environmental trends we pointed out in the Carter Administration twenty years ago, say in the *Global 2000 Report*, are pretty much still with us. We said then that we were losing an acre a second of tropical forest, and that's what happened over the

last twenty years. And so on down the list. We even had the global warming issue nailed twenty years ago. In the Carter Administration we commissioned the Charney Report from the National Academy of Sciences. It still holds up today. We've known for twenty years the seriousness of these problems. What we did about them is to respond by developing international environmental law. The primary effort that has been made over the past twenty years to deal with global challenges has been a legal, regulatory response. People who wanted to do something about these problems have spent the bulk of their time and energy negotiating conventions and protocols. I would argue that allocation of resources—most of the effort to this predominantly legal response—has meant that even the legal response has been ineffectual. We haven't done the other things that could have made conventions work. The whole process is rigged against the environment in a dramatic way because almost nobody, domestically or internationally, has had the courage to bell the cat, which is an economic system that is full of perverse subsidies and does not capture environmental costs in prices. We don't do this and no amount of environmental law of the traditional type is going to have a big effect until we do. I think we've over-committed to a legalistic response to the exclusion of many other things that we could have been doing.

Here's an hypothesis which maybe someone would want to challenge: The environmental regime approach that we've taken internationally (having a framework convention and then following it up with protocols) worked well with acid rain in Europe, did really well with the Ozone Convention and in the Montreal Protocol, but foundered on biological diversity and climate—the bigger, more difficult, more deeply rooted problems. In sum, we're failing to deal with the big issues through these legal regime processes.

**David Sive:** I'm honored to be the first to pick out from all of the subjects which Gus Speth discussed, any subject to which I can contribute a little bit more specifically. What I would contribute is really just some remarks about the relationship of the political process and the legal process. I will set out what I think is a fairly clear synopsis of that relationship and ask that to serve as the floor of some discussion, if it is of interest.

I start out with the premise that litigation is more important in the development of environmental law than in virtually any other field of public or private law. One of the reasons is that vir-

tually every important environmental dispute takes a political form and takes action in the political process whether it be local, state or national. If it isn't resolved in the early stages of that process and becomes a real problem, litigation ensues. Often people wait for the litigation, particularly citizen-plaintiffs because they're always at a comparative disadvantage economically and strategically. That being so, there is a political side and a legal side.

My second generalization is that virtually always it's the political determination that is the final one. There are so many cases where that can be proven; the Tellico Dam Controversy is perhaps the leading one. The reason is obvious—that the legislative body can always undo or reverse what the legal process determines in a lawsuit.

With the two processes going on simultaneously and the political process as the final determination, the question arises: How do the people involved in both processes behave? What is the relationship of the courts—the judicial process to the political process? Are there hazards or dangers in the consideration of the basics of what that relationship should be? The problem is highlighted by the fact that the same individuals or organizations, I cite NRDC as an example that Gus mentioned, are involved in both the political process and the judicial process.

One example that I always give is one of the early cases involving Dick Ottinger and myself, when we were fighting against the Hudson River Expressway. Dick was chairing an investigation committee in Congress. He represented the area of the proposed roadway. He conducted an investigation and ran into problems of the accessibility of documents. At the same time as his hearings were going on, I was engaged in the discovery process in the lawsuit and I succeeded in securing important documents dealing with the inner workings of the Rockefeller Administration through the discovery process which could not be had in the legislative process that Dick was engaged in. I sent those documents down to him (unfortunately about two days late because the Greyhound Bus had lost them—that was the means of transportation at that time).

The problem arises as to whether the litigation process can be abused in feeding the political process and the political determination. Is that an abuse of the litigation process? Is it an abuse of one's powers as the attorney? You all understand the tremendous depth and scope of the process of discovery in a civil action; discov-



ery that goes beyond and is a more powerful instrument than the discovery which can be conducted by a congressional or other legislative committee?

You have the problem of whether the use of the litigation process, which is one's privilege and one's duty if it is done within ethical bounds, is unethical if used to serve the political process to add to the bases of the ultimate political decision. Here, one other aspect of the litigation process is important, and that is the sheer media power of the litigation. Somehow the staged comeback aspect of civil litigation (criminal litigation too, but we're speaking mainly about civil cases) gives it tremendous media value. We see that for instance, in the little bit of litigation process in the cross-questioning of witnesses in the Enron case now. The question I pose now is: Is there any difference in the second era of the development of environmental law in the relationship of the political and judicial processes? Do the same problems arise, and is there, among those problems, a question as to the ethical conduct of the attorneys involved? By the attorneys I include the individuals, or the large number of public interest organizations, again using as an example, NRDC.

My own view is that the analysis that I've tried to present about the relationships continues, and will continue, including the most important one—that the ultimate determination is virtually always the legislative determination. Are those the aspects of the development of environmental law, aspects which are continuing and will continue into the future as they have in the past?

That's as much as I would contribute at this point to start things off on what, to me, is the most fascinating aspect in my own personal experience of participation in the making of environmental law. That personal experience is really as much in the political phase of environmental law making, mostly with the national organizations, as it is in the litigation aspects.

**Speth:** That's a great start. Thank you very much, David. Joe Sax.

**Joseph Sax:** I will try to respond specifically to the three very good questions that Gus presented and try to follow his injunction to be as pithy as possible! The first question, you may recall, was whether the heyday of environmental law has passed. As to that, I can be particularly pithy—no, it has not passed. I think the central point is that as long as environmental problems continue to be

important and to be important on the Nation's and the World's agenda, there will be an essential place for law and for the legal process, although the way in which it interacts with these problems undoubtedly will change over time.

That brings me to the second question on which I can say a little bit more, and that is whether we need environmental law reform, but can't get it? I think anybody who has observed the legislative process in the United States over any period of time will recognize that unlike some other countries, we have a strong inclination not to engage in comprehensive reform, not to engage in elaborate processes of recodification, that we tend to move by fits and starts, we tend to move by indirection. An example of how we do work, and I think it suggests that we can and do get reform even though we don't get it in a very visible and direct way, would be the Endangered Species Act on which I've worked a good deal. Recent years have shown that on both sides of the debate, everyone agrees that the law ought to be reenacted and significantly changed, though people have very different views on how it ought to be changed. The fact is, under the auspices of the Endangered Species Act (ESA) some quite dramatic things have happened. Some of you will remember the long struggle to try to get a national land use law that Congress was never willing to enact. Well, the Endangered Species Act is a National land use law, but we've got it in a way we never could have gotten it directly. What that basically means is that for the first time we are beginning to look at a lot of our problems on what most people would call an ecosystemic basis. If you look at a place like the California Bay Delta, we are engaged in a process of environmental restoration there that embraces all the traditional jurisdictional lines of both agencies and governmental boundaries, and we are managing a huge river basin system. That is the kind of thing we could not have done directly through legislation and yet, in place after place in the United States, we are seeing ecosystem-based management of a kind that I think can only be described as fundamental reform. So I think that question needs to be (at least in the domestic context) understood in the context of the way the American Government works.

That leads me to the third question. Gus asked if we need a new environmental paradigm? I think the answer is, yes. And we're getting it. One needs to be patient to understand how these things are happening. I guess I would look at it this way: It seems to me there have basically been three eras of environmental

consciousness. The first, the so-called Teddy Roosevelt, or John Muir era, in which we were setting aside preserved enclaves, parks, forests, refuges and that sort of thing with the notion that you could save some places in more-or-less pristine condition and then let the economy go to work, essentially unconstrained to meet our commodity and other economic needs. Then we move to the era in which Dave Sive and I first came in, what I guess you might call, the pollution control era. And it seems now where we are (not that those problems do not continue to be important) on the front edge of what I would call an era of restoration. Attention is turning more away from the question of just stopping bad things. The Tellico Dam that you heard about earlier was a good example of that and how we are doing the job of restoration. That is, bringing back some substantial degree, of natural services to systems that have been gravely degraded over the years. Wetland restoration would be a classic example of this new approach. I think restoration is the action part of what I believe to be the new paradigm—a view of the economy of nature as a valuable, capital asset that can be utilized so that you get services off of it in the sense of letting it pay some income (make some economic use of it), but where the capital itself needs to be preserved relatively intact. And that's what restoration is about.

To go back to the second question, I think that's what we have been at least beginning to accomplish in the context of laws like the Endangered Species Act by means of habitat-based conservation plans. In that sense, I think we're moving along in a positive way. The older you get, the more patient you are about these things. So, I tend to be more optimistic now than I was 30 years ago . . . I'm saying that in a serious way because you see things from a somewhat longer time span and you realize you can achieve some important positive things, but you're not always moving forward as rapidly as you'd like to.

**Speth:** Joe, that was great! Gosh, I wish I were getting more patient!

**Audience:** You're too young!

**Speth:** I keep getting madder about how things are going in our country. Mr. Lazarus, please.

**Richard Lazarus:** I see the three issues Gus raises as similar, but not precisely the same as Joe. The first is the "heyday" ques-

tion; the second concerns the question of trust in the system; and the third is the “new generation” question. On the heyday, my initial impression is that perhaps our collective heyday (those on the panel, myself included) has passed, but I don’t think environmental law’s heyday is passed, and very much for the same reason Joe suggested. So long as the problems are there—and the problems *are* there—the challenges remain. The challenge is the one that David Sive suggested, which is a challenge presented by any effort to make environmental law. David Sive expressly referred to it as “the making of environmental law.” It is exceedingly difficult to make environmental law because environmental law has to respond to the kinds of problems that the ecosystem presents us with in terms of humankind’s interaction with the ecosystem. When you have cause and effect in pollution or restoration, you have cause and effect spread out both spatially and spread out temporally. Environmental law must reflect those spatial and temporal dimensions.

That’s extraordinarily hard to do. It is hard to fashion rules that address cause and effect when they are spread out over space and very hard to address cause and effect spread out over time. Consider just the huge distributional implications of striking different equilibria in rule selection, in terms of who must pay the costs of complying with the resulting rules and who receives the benefits of such compliance. When who is paying the cost and who is receiving the benefits is spread out over time and space, it is very hard to obtain agreement over what the rules should be.

That leads me to the second question, which is whether we can have more trust in our system of making environmental laws? My bottom line is that it is very hard to have a lot of trust because distrust is a deliberate part of the design of U.S. law-making institutions. Ours is a nation that is very suspicious of governmental controls; it’s a nation that, for that very reason, fragments power every way it can; we fragment lawmaking power horizontally between the different branches; we fragment lawmaking power vertically between different layers—federal, state, and local; and we fragment lawmaking power within branches of any one layer, between for instance the authorization, the appropriations committees of a lawmaking body such as the House or Senate. Such fragmentation by design makes it hard to make laws and fosters distrust. That is what, at minimum, checks and balances and separation of powers are all about.

Environmental law must, by necessity, work its way through such lawmaking institutions. And, as it does so, there is going to be a lot of friction and distrust generated. Between branches. Between different sovereigns. Between authorization and appropriation committees. It is not happenstance that the *Chevron* case, the major judicial review case, is an environmental law case. It is not a happenstance that *Morrison v. Olsen*, the independent counsel case, is an environmental case. It is not happenstance that a lot of legislative veto provisions were included in environmental law statutes until struck down by the Supreme Court in *Chadha*. It is not happenstance the regulatory takings issue started within an environmental case, *Pennsylvania Coal v. Mahon*. Or, that the major standing decisions of the last decade or so have almost all been environmental cases.

Environmental law—addressing it and making it through those legal institutions—generates great friction, great controversy, and, therefore, substantial litigation. It will continue to generate litigation in the future as it has in the past.

Turning to the third and final question—the “new generation” of environmental lawmaking—it is hard to improve on what Joe has already said. His bottom line is right. Nor is this surprising given that all of us up here on the panel are his students. The article he wrote in *Stanford Law Review* on the “economy of nature” is one of the best environmental law articles I have ever read. It is a great article. It provides an analytic framework for thinking about environmental law and the regulatory takings issue, but also many other legal controversies, including the rising issue of the validity of federal environmental law as an exercise of congressional Commerce Clause authority. I would add here only that one obvious area for reform and movement can be in the area of global environmental law, but here I must confess that, like Joe, my own expertise lies in the domestic arena.

Moreover, when one contemplates the environmental law-making challenges presented in the international arena, they increase dramatically. As shown by global warming, the spatial dimensions increase, the temporal dimensions increase, yet there is a virtual vacuum of effective law-making institutions. As before, it is hard to make law. It's hard to make it domestically; it's even harder to make it internationally.

I would anticipate that we will accomplish the necessary law-making only by exploiting as much as possible the lawmaking needs of the economic trade movement, as a profit motive to create

international frameworks and institutions for lawmaking. By exploiting that profit motive and using it as leverage for environmental lawmaking, in a manner analogous to the way that the proponents of the Clean Air Act back in 1970 used the leverage of the fact the auto industry wanted pre-emptive national legislation and that's how we got a very good strong law, and that the forest industry wanted legislation in 1976 and that's why we got the National Forest Management Act. When industry and the regulatory community need lawmaking institutions, that is when we tend to get them.

Finally, there are two other issues that will need to be addressed much more in the future. One is non-point source pollution and the other is synergistic effects. For both, the environmental justice movement has been a primary instructor for all of us about the need for greater fairness and the need to take into account the aggregation of risks that occur in certain disproportionately-burdened communities.

**Speth:** Thank you very much, Richard. I was reminded when you mentioned the non-point pollution program that we used to refer to that program as the 'pointless program.'

**Lazarus:** I hope it's better today.

**Speth:** Dan Tarlock, please.

**Dan Tarlock:** Thanks. When you first announced the order of the panel, I thought you were going strictly in chronological order, but I'm really glad to be put after Richard Lazarus. I'll tell you what, I'll trade you my stature for your age! Probably not a good trade on your part, but I'll be happy to take the age part. By now you will see, I think, a certain similarity among responses of panels, and mine is going to track somewhat Joe Sax's with a different spin. I've been trailing along in his wake for about thirty-five years now, so there is no reason I should stop now. To sort of answer the questions this way, look at the history of the modern environmentalism as we've indicated, based on two strategies: Sue the hell out of them, and federalize everything. Those were both necessary and really, fundamental achievements when you think of the barriers that existed in 1970. So then the question becomes, what now? It's like a movie actor—well, you did that thirty years ago, what's your latest picture? Sort of the general problem that environmentalism I think is facing, turns out to be

much more complicated on every level than we ever imagined back then despite what my friend, Eric Fryfogle says, just reading all the Leopold's is not enough. It's a very complicated problem. Let me zero in on two.

One is when things are federalized, or internationalized, it is the same thing. You kind of get first order solutions, so we tacked on a lot technology to bad activities and we're trying to do that at the global level. Again, that's a necessary step, but it avoids the second order questions which are, as Gus said, really economic. Environmentalism involves everything now from the kind of orange juice we drink in the morning to the more mega questions, like why we continue to create welfare queens among farmers. And it's the whole range and we don't like to address those. The second thing, which I think is driving a lot of modern environmentalism that Richard touched on at the end and which Joe Sax has touched on, is that it is land stupid. That is, we are now moving into the areas where you center on land. That, of course, is where federalism breaks down the most for various reasons from lack of incomplete control to the high cost of exercising what Federal powers exist to real questions of the lack of uniform standard for biodiversity land use issues. So this leads to where Joe sort of left off and I just want to spin this out a little bit.

The biggest thing on the agenda these days is deals. Everybody is doing deals. Ad hoc deals, cow fed is kind of the model, but you've got lots of watershed deals, lots of habitat conservations plans. And the real questions is: What does this mean? There are two ways to look at them. One is we got here to deals just because we couldn't do anything else. It's hard to federalize any more so we're doing an end-run around federalism, or there are a lot of other people who see this as a much more positive development tied to democracy. I'm right in the middle. I can't make up my mind yet on deals, but that's all right because we don't know enough about the success of the deals. They're all in play and we don't know how they're going to work out. So let me just tick off what my primary concern is and be a little less optimistic than Joe, but not quite. Deals are very dangerous. You might give away the store. That is, if you look at the incentive for deals, people go into them, especially the so-called regulated community, because they expect to be better off than with the regulation. Therefore, it is really hard to find the right incentives and you're seeing a lot what I call, "rule of law litigation" challenging deals and that will continue, although it will take a different cast than

in the past because I think you are seeing more cases that don't invalidate the deal itself, but try to zero in what the really weak parts are. That is, where the parties really didn't come to the kind of agreement they should have. That's my take on deals. They have to be watched very carefully. They need a lot of attention and a lot of attention to the theories that underlie them.

Let me just say one further thing. Getting older is the right perspective for environmentalism. A couple of years ago I was at an environmental conference in Sydney, Australia and gave a short, hopeful talk, suggesting that there were certain fundamental ideas converging in international environmental law that would provide a framework for future development, and I was viciously attacked by one of the many post-modern Marxist academics in the Australian University system. Finally, after she finished, I said, "look, whenever you talk about environment, you have to make a fundamental decision before you start the talk that you're going to be optimistic today or pessimistic." So I said, "it is Sydney, I love Sydney, I'm in an optimistic mood." In a domestic context, I'm in a more mixed mood. But that, I think, is the dilemma of environmentalism.

**Speth:** Thank you. These have been really fascinating interventions.

**Tarlock:** Ann Powers, please.

**Ann Powers:** Well, since I'm one of the hosts here, and we still have one Garrison Lecturer who hasn't spoken, may I yield my time to Gerald first?

**Speth:** Absolutely.

**Gerald Torres:** So much has already been said that I would have wanted to say that I hesitate at the risk of repeating it, but I will not hesitate so much as to remain silent. I am by nature, and I suspect by pathology, optimistic. I often attribute it to growing up in California when I did, but I am now living in Texas and remain optimistic which, I suggest, is what leads me to think that there may be a pathology attached. I want to answer Gus' questions as well, and I will try to do it as pithily as possible. The first, remember, was whether the heyday of environmental law has passed and I think the answer to that is no. A specific style of environmental law and environmental law making has changed, but one of the



things that has made it change is that the success of what has been called the first generation of environmental movement. What has changed are the normative foundations that underlie laws that deal with resources and the environment. When the legislature passes laws that are going to have an effect on the environment, they know they will have to take into account that impact. So environment does modify law in a real way. I think that the change in the underlying normative assumptions, even if they remain contested, is foundational and that means that the evolution of environmental law is going to continue from a different place than it began.

Second, do we need a new paradigm for environmental governance or environmental law reform? The pressures that environmental challenges have placed on the legal system have resulted in the kind of decisions that Prof. Lazarus has outlined. I think the standing issues, for example, are critical. Who gets to speak for what and when and how are you going to limit it? But I think there are other things happening. For instance, in engineering, industrial ecology is emerging as a sub discipline in direct response to the regulatory structure that was spawned by the pollution control regime that Joe talked about. Ecosystem management is now the phrase, but it really does talk about wide scale thinking about what happens on the ground and how natural systems interact so that media specific statutes are often looked at in combination to assess what actions ought to be taken. EPA's cross media enforcement strategy was predicated upon a kind of ecosystem management. Cross media enforcement really does force you to take into account how natural systems interact. If you look at the cognate disciplines that lawyers rely on to think hard about environmental law, what you are going to find is that the environmental movement has changed some of the foundations of those cognate disciplines.

The hard nuts to crack are going to be the international environmental issues and the concomitant problem of global control. There are two things, I guess, or maybe more that I want to say about that. The first is that we are still in the infancy of establishing a serious kind of trans-global legality. That one of the things we take for granted in the domestic system is the proper functioning of law. Where you have something less than that in the international system, you have got to counterfeit institutions that will produce the same effect that we rely on law to produce in a domestic system. The other problem is that when you start with institu-

tion building you have to be able to translate the big decisions down to the level of operating procedures. That is the only way that international law functions with a global reach. It needs, ultimately, to be reflected in effective operational procedures. That requirement challenges my pathological optimism, or maybe it is a source of the optimism, I'm not sure yet. We are creating international law and trying to tackle the problems of globalism while living through the early stages of the decline of the nation state. I'll be dead before it happens, but what we're going to see is the ultimate decay of the nation state as the operative source of legality in international regimes. That is the process that is at work globally now. And that is one of the processes that we are going to have to face as we tackle the issue of environmental degradation on an international scale.

**Speth:** I think that was a very provocative point because the rate of economic growth now of the world economy means that it will double in size in twenty-five years. Thank you. Ann, do you want to go now, or do you want to pass the buck again?

**Powers:** Let me say a couple words here to address the questions that you asked. The first was "Has environmental law seen its heyday? Is it on the way out?" And I certainly hope not. We are in an academic setting here, and would be in great trouble if we are producing environmental lawyers for jobs that are not going to be out there. Even if we may have seen the heyday, environmental law has become mainstream. There is no developer now who is going to do a major deal without having both his tax lawyer and his environmental lawyer there. I think we are simply seeing shifts in the way that environmental law is used, which does have important ramifications, of course, for how we teach it.

We do need changes in our environmental laws. We do need some reform, but I thought that Prof. Sax's comment that we move in fits and starts was quite apt. It took us a long time to get changes in the Clean Air Act. We are not going to see again a number of statutes like those that were passed in the early 1970s, but now we are attempting to rationalize our laws to make them work a little bit better and that has to continue. Do we need a new environmental paradigm? I think that we are already seeing new environmental paradigms, and they are not just legal. They are structural. For example, we are seeing efforts on the watershed

level to try to bring together stakeholders to revise the way that resources are protected and pollution is prevented.

So certainly we have some new directions that we are moving in, but there are issues that I think need to be looked at very closely. One is the way that we use such tools as economics and cost benefit analysis economics. How do we employ economics in the assessment of our environmental programs, our environmental laws? The environmental public interest community has often felt that when you start discussing economics in conjunction with environmental law, or in conjunction with the environment, that the environment loses because we do not do a very good job of quantifying the services and benefits that are provided by the environment. Certainly there is beginning to be a great deal of academic interest in quantifying those services, but still, is economic analysis going to be a tool that helps us to get better programs at lower cost, or is it going to be simply a distraction for those working in the environmental area?

The same is true with cost-benefit analysis. No one would want a program that would cost a lot and did not give us any benefit. However, the factors that go into a cost-benefit analysis are very difficult to assess, very subjective. But unfortunately, cost benefit analyses are often presented as if they are solid science when, in fact, they are often really just a matter of subjective judgments.

So I think that some of these issues definitely have to be addressed as we move on in the environmental area, but I do not think that our students need to rush out and get tax degrees at this point.

**Speth:** We'll always be lawyers. Thank you very much. Zyg, you get to clean up. I'm sorry I missed your presentation. I wish I had been here.

**Zygmunt Plater:** Well, then, let me just give the briefest reprise of what I spoke about. Politics, as David Sive just reminded us, continues to part of everything we do. When you bring a piece of litigation, you are not just litigating in the law. You're also litigating in the court of public opinion and in the political process, as Gus well understands.

Addressing Gus's three talking points, I don't purport to offer a grand synthesis, but let me take a chop at each:

**I. Has the heyday of Environmental Law passed?** Well, what is a heyday? If we're asking whether our field is the Media Issue of the Moment, that's one thing. No, our initial moment of glitz has clearly passed. And a magic time it was, too, in the late '60s and early to mid-'70s! Even Richard Nixon declared that "These must be the years when America pays its debts to the past by reclaiming the purity of its air, its water and our living environment. It is literally now or never," and he signed more environmental bills into law—more than twenty by my count—than any president before, since, or, probably, ever to come.

Three or four years later, of course, Nixon realized how far our political moment had carried him from his center of gravity, and he hastily retrenched, advising his Cabinet to "Get off the environmental kick." J. BROOKS FLIPPEN, *NIXON AND THE ENVIRONMENT* (Univ. of New Mexico Press 2000) quoted in RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (forthcoming 2003).

But if now we're considering whether our field is still of pressing daily importance, that's easy. What we work with every day is real and of extraordinarily great societal significance. That hasn't diminished since the first Earth Day, but rather it has increased. Our understanding of what is at stake, in geophysical, cultural, civic, and generational terms continually expands. It turns out that our environmental concerns overwhelmingly are based in reality, and if our society were ever to ignore that, it would find that reality has a way of biting back. Either way, there will continue to be a great deal of reality for environmental lawyers to contend with.

Here's a recent example of continuing real environmental challenges: Dianne Dumanowski, co-author of *Our Stolen Future*, comes to my class every year or so. See Theo Colborn, Dianne Dumanowski & John Peterson Myers, *OUR STOLEN FUTURE: ARE WE THREATENING OUR FERTILITY, INTELLIGENCE, AND SURVIVAL?—A SCIENTIFIC DETECTIVE STORY* (Plume 1997). Have you read the book? It's the *Silent Spring* of the trans-millennium. During one of her visits we talked a bit about the Woburn toxic well contamination case—you know, the John Travolta case—where basically there was a bad guy making a business decision to dump some very bad crud in one particular discrete place. And Dianne jumped into the discussion and reminded us how dated that setting was, how far it was from today's cutting edge. "That's the kind of paradigm that your field started out with," she said, and I

paraphrase: "Of course, for the time it was important. You marshalled your tools, and litigated to force the bad guy to stop and pay, stigmatizing whomever you could identify as bastards. But do you realize that these days we are being exposed to far broader systemic problems, for instance, in the way we are regularly surrounded by ever more subtle consumer chemical hazards? Every year our modern industries bring roughly 1,500 new chemical compounds into the economy, to be emitted from thousands if not millions of different consumer-exposure sources. Many of them present serious risks far beyond cancer, including hormone-disruptor or hormone mimic effects, but only a dozen or so are checked for such broad metabolic effects. We are unwitting parts of a global experiment."

It turns out that many of these substances about which *Stolen Future* speaks are extremely volatile, with horrific consequences (sterility, fetal deformities, retardation and learning disabilities) produced by very small exposures, and they travel in the natural air and water cycles spreading all over the globe, concentrating ultimately at the poles. Dumanoski reminds us, as did Rachel Carson, that we must be concerned with systemic network effects, not just the actions of unpleasant individuals. The science of that book is really quite extraordinary. It forces a recognition that our job today is only rarely a process of finding bad guys and forcing an accounting. Now our cognition must be systemic, and that means it's all the bigger and more difficult. We are just beginning to imagine the transnational legal standards and mechanisms that might permit us to have some confidence that these systemic challenges can be met in coming years. To me, concerned as I am with encouraging more of our best and brightest into this field, that means that whatever a "heyday" is, there will be a lot of material and satisfactional "paydays" ahead for people deeply involved in this important field.

**II. Are we losing trust in the system? Do we need environmental law reform, but can't get it?** To some extent people have indeed probably lost some of their trust in the system. I want to note, for example, that many of us have far less faith in the Judiciary than we did in the 1970s, when courts were the tribunals and the primary branch of government that made government responsive to citizens concerned about environmental quality. It seems to me that the Meese-Sununu strategy starting in 1981 of choosing judges so cynically for their marketplace anti-regulatory perspective—an unprecedentedly calculated attempt to

change the law according to a particular agenda by handpicking such judges, rejecting the Missouri Plan and the traditional neutral ABA processes for selecting our best judicial candidates—has been quite pernicious. The reforms I see being pushed most potently today are regressive, as I noted in my talk—a cacophony of voices calling for a crescendo of constraints on government through narrowed standards for delegations, expanded theories of regulatory takings, devolution to the states, cost-benefit binomials dictating regulatory standards, the subversion of citizen enforcement. That agenda is troubling. We need more, not less, competent and responsive forums for the important issues we face in this field. Many of us have been quite despondent about the skewing of the judiciary, the suborning of many regulatory agency programs, the low level of debates in Congress, the way the civic merits of important issues are drowned in manipulated PR campaigns and invisible maneuvers.

On the other hand, it seems to me quite extraordinary that just in the past week Congress has actually passed a campaign finance law that doesn't look like mere pap. If you're talking about faith in the system, we can and must now look beyond the judiciary, and I think that there are useful things that are going on now in Congress. Many of us feel hope that recurring vivid disasters (we humans unfortunately are most likely to be catalyzed into corrective action by disasters), are going to be bringing new pressures for transparency. The Enron debacle, for instance, in this regard may fulfill a useful role by reminding us of what flourishes in the dark. This actually, I suppose, gets us to the third point.

**III. Do we need a new environmental paradigm for this new generation?** We could of course talk about a new generation of more sophisticated environmental laws. I'd love, for example, to see a Superfund created as part of the Endangered Species Act so that private individuals could get reimbursements in situations where their property uses are constrained by species protections. The fund could be derived from fees from entrepreneurs who seek the privilege of developing projects that impinge on critical habitat or otherwise require incidental take permits. But this, though dramatic, would be merely a fine-tuning adjustment upon an existing statute. Or, as I was saying, given the recognition of new systemic problems requiring redress, like those I mentioned that are chronicled in *Stolen Future*, we may have to invent some new systemic regulatory structures.

I believe Gus Speth was thinking, however, about something quite different, about fundamentally changing our current approaches to environmental protection. The rubric we hear most is the rubric advocating a new era of active Partnership between government and regulated industries, with the ascendancy of benefit-cost accounting as the litmus of government regulations' validity.

Me? I don't want to see any changes in environmental law that subvert the areas in which we have found responsive mechanisms and effective standards, and too many of the "reforms," as in the Contract with America, Congress appeared targeted on exactly those areas where meaningful constraints were being applied against the excesses of the marketplace. I don't think it is wise, for instance, to move away from the possibilities for citizen enforcement in agencies and courts. A great deal of the old stuff is good. But there are surely areas in which changes are necessary—in increasing needs for transparency, for instance, as I mentioned, but these areas are not likely to be high on the "regulatory reform" docket.

I'm glad you mentioned benefit-cost techniques. I wish I had a nickel for every time I've heard one of the "regulatory reformers" say "This nation must impose serious benefit-cost analysis so we won't continue to have ridiculous cases of wasteful diseconomic regulation like the snail darter." Marshall Breger, a proponent of the Contract reformers, once said something like that at an AALS meeting, at which point of course I proceeded to erupt that "The snail darter case was given one of the most articulated benefit-cost analyses in history, and your guys had absolutely no interest in its conclusions because they didn't fit your agenda." For all its vaunted utility, benefit-cost analysis is most often bannered by proponents with a targeted political agenda, and is clearly not a trustworthy neutral tool.<sup>1</sup>

In this regard, a final snail darter story and a suggestion. When the pork barrel committees slipped that 42-second rider overriding the Statute and our injunction, we did manage to bring

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1. Post-Discussion Note: I used to opine that benefit-cost analysis is a helpful tool but only that; it should not be used prescriptively to set regulatory standards or to induce regulatory agencies into an abdication of their broader public responsibilities. My colleague, Lisa Heinzerling, who knows much more about that stuff than I, tells me she's concluded I was too generous. She has concluded that the undertaking itself is seductively misleading and thus often not helpful. Our use of economics must first be made more realistic and expanded—I'd say into three economies, as you have heard—before it can become a tool in which we trust.

it back to the Senate and the House for one more vote trying to get a motion to strike the provision from the appropriations bill. Cecil Andrus, the Chair of the God Squad, bless him, sent a letter to every single member of Congress saying, and I paraphrase again, "You asked us to review this project. We found unanimously that it makes no economic sense, not to mention it's also unsafe under current and past dam safety criteria, so please strike this rider and if you don't, I'm going to urge the President to veto the bill." They didn't strike the rider (and Carter didn't veto the bill, though that is another story). But every member of Congress got that letter, and majorities in both chambers still voted for the dam and against the darter. Why? It's not because they didn't know the facts. It's because *they knew that America did not know the facts*, and so they were able to carry on the same old inside game.

So I think one change that is surely needed in environmental law, and beyond, is a drastic expansion in how the public receives relevant and significant information. We've taken steps in this direction with TRIs and data posted on environmental agency websites. Transparency in environmental regulation may indeed be on the increase. But I have been wondering recently whether we could go a step further, setting up a more sophisticated and digestible e-mechanism for the public to see and hear the logic and details so often lost in the current diluted form of policy debates through sound bites and limbaughian anecdotes. See Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, The Press and the Dickey Game of Democratic Governance*, 32 ENVTL. LAW 1, 35-6 (2002)

How about this: We need a public interest cyclopedia and electronic forum in cyberspace. What if every member of Congress who stood to make a speech against the ESA—about how endangered species were impoverishing the South, or allowing houses to catch fire in kangaroo rat habitat in California, or blocking huge hydroelectric dams, or stopping thousands of economic projects across the nation—had known that reporters could go to one comprehensive public interest information website where their allegations would be laid out and contradicted by the facts? Wouldn't public debate, given such an innovative informational mechanism, tend to move closer to the truth? Such a website could contain a compendium of different environmental issue sectors, each with summaries of the opposing assertions and authoritative presentations of the public interest case, charts, maps, data, sound bites, lists of published sources and experts available to respond to re-



porters' queries, online photographs and B-roll video footage.<sup>2</sup> Reporters themselves would be straightened up by the knowledge that if they wrote stories that ignored information readily available in one consistent authoritative location, they would be caught out as incompetent. Such an experiment should be worth trying for civic-minded foundations willing to risk a couple million dollars in a high-aspiration venture that could change the nature of modern public policy discourse in government.<sup>3</sup> It seems to me that we have informational and communications technology close at hand for which we scarcely have conceived a role in democratic governance, but it could provide a decisive new forum for exploring and publicizing the merits of government policy and process. As has been said, environmental law inevitably carries one deep into the challenges of democracy.

**Speth:** I think this group deserves a round of applause. Audience, the floor is yours. You could direct your questions at the mic over here, you could shout, you could direct your question at a particular individual, or let us decide how to deal with it.

**Richard Ottinger:** I think there is far too much harmony on this panel. And it alarms me because I see things from such a differ-

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2. Post-Discussion Note: B-roll is the video footage on unsolicited free cassettes that is supplied, along with written materials, to hundreds of news outlets across America by industrial lobbyists seeking to shape public perceptions of their issues. It contains generic images that can be cut into the nightly TV newscasts as news footage or as a backdrop for the heads of newscasters. For a chemical manufacturing story, for instance, the lobbyists' B-roll would show a plant in the hazy background, with nesting birds and kids fishing in the foreground. A timber video clip would not show clearcuts but rather a father and son pair of lumberjacks neatly trimming a selectively cut tree. The strip mine B-roll would show manicured excavations and spotless reclamation. A few scruffy anarchist hoodlums would dominate B-roll images of debates on international environmental accords. B-roll downloadable from a public interest information archive would show less idyllic, less sanitized views of industrial production and resource extraction and on international environmental debates would show peaceful, middle class demonstrators marching by the thousands or soberly discussing the countervailing tendencies of unhindered global marketplace economics and long-term global civic values.

3. Post-Discussion Note: Successful implementation of such a public interest informational archive would obviously spawn corollary opposing archives that would be far better funded and sponsored by the short term profit-maximizing perspectives of the marketplace. However, the resulting facilitated marketplace of information would by its nature delve deeper into the factual realities and logic of the issues. Most public interest advocates seem to believe implicitly that complex facts, when comprehensively explored and analyzed, ultimately lead to progressive conclusions. Thus, leveling the playing field of access to the information communication process, on balance, would ultimately serve the progressive public interest as well as the Holmesian ideal of a free market in ideas.

ent perspective. I see a President and Congress who believe that environmental protection is just an impediment to economic progress. I see judges being appointed who are completely unsympathetic to environmental protection. I see standards, such as the standard for suing, being constricted. I see energy policies devoted, not to reducing pollution, but increasing subsidies for coal, oil, and nuclear power that is dangerous and adds to our problems. Population is galloping ahead where the pollution problems and the poverty problems are not being addressed, where the United States is not only failing to exercise leadership, but is a dissonant voice and the international foray attempting to address these problems most prominent of which is global warming. So, I don't know why you guys are so happy!

**Lazarus:** Just a very quick comment. I think part of the answer is found in Joe's last line, and that's a question of your temporal—your time horizon here. Patience is required. Your diagnosis of the present is quite apt. There currently exists a tremendous threat to the existing environmental law framework here in the U.S. If you look at it historically, however, there have been a series of similar threats in the past. There may have made more environmental statutes in the first few years of the Nixon Administration, but Nixon pretty quickly abandoned any pretense of being an environmental President with his veto of the Federal Water Pollution Control Act and his empowerment of congressionally-authorized funds. So too, Presidents Ford and Carter, to some extent, challenged many of the environmental laws in the 70s. It was very much Congress and the courts held firm.

In the 80s, there was the Reagan revolution, in which Reagan, as a Presidential candidate, ran against the then-existing federal environmental law framework. Again, however, Congress and the courts (although the latter less and less as the 80s progressed), maintained the balance. Congress also responded to the Reagan Administration by enacting even stronger laws.

In the 90s, the same debate took place, but with a switch in positions. We still had one branch, the judicial branch, starting to part ways with the environmental community. The legislative branch, Congress, did a seemingly sudden switch and started asserting the kinds of policy positions that the Reagan Administration officials had been saying during the 1980s. But, now in the 1990s, the Clinton Administration took the pro-environmental position that the legislative branch had advocated in the 1980s.

What's unsettling right now is this is the one time since 1970 that we almost had all three branches and all parts of all three branches fairly affirmatively aligned to try to rewrite federal environmental law, with no checks and no balances within the Federal Government. The judicial branch right now, especially at the Supreme Court, seems ready to question some of the fundamental constitutional premises of much federal environmental lawmaking. Both chambers of the legislative branch seemed ready to initiate a major rewriting of federal environmental law until Senator Jim Jeffords last May gave the Democratic Party the leadership positions in the Senate. It is, I believe, however, no coincidence that Jeffords apparently did so in part to become Chair of the Senate Committee on the Environment and Public Works. Why? He is from a downwind state. And we had Sen. Chafee before, and we had Sen. Stafford before.

Historically, we have managed to step back from the precipice. I'm worried about how close we are, but the fact is, environmental law has matured to such an extent over the last twenty years that there will be a backlash as there was against Anne Gorsuch if you try to go too far in cutting back on stringent environmental protection laws. The fact is that there is a multibillion, if not trillion dollar, pollution control industry in the United States now that didn't exist twenty years ago. There are a lot of jobs and a substantial proportion of our economy is now dependent upon these laws. We now have a much better recognition of the fact that a lot of jobs, much of the economy, a lot of wealth is dependent upon the preservation of a natural resource. The fact is you need it for farmers in the *TVA v Hill* case; you need clean water for the silicon chip industry out West. We are today much more appreciative that the health of our Nation's economy is dependent upon the preservation of nature's bounty and the services that it provides. For that reason, I am fairly confident that even if substantial reforms occur, there will be a tempering effect on the extent of those reforms. So, if you're patient, I think time is on our side.

With that said, I must acknowledge that the very first law review article that I wrote on a public trust doctrine, I remember Michael Blumm from Lewis and Clark wrote back that I was "hopelessly naïve" and I met him later at a conference and I said, "naïve," yes but how could he say "hopeless" since he hadn't even met me beforehand. But, I may still be.

**Speth:** Who else would like to respond to Dick's provocative comments? Nick?

**Robinson:** May I exercise a right of reply about these international themes? I think both Dick Ottinger and Gus Speth are right. Treaties by themselves do not mean anything more than does a statute. It must be implemented. There are examples of treaties, like the Convention on the International Trade In Endangered Species (CITES) which is the international analog to our Endangered Species Act, through which most of the nations' customs inspectors have become international game wardens. They are the enforcement arm for making sure that species, which member states agree that are endangered, are not to be traded, nor are their parts, or their hides, or products made from them. It is also interesting to me that the Aarhus Convention on Public Participation and Access to Justice, an international treaty whose negotiation was sponsored through the UN Economic Commission for Europe, is basically the same as the United States Freedom of Information Act, together with provisions for citizen suits and access to judicial review, plus the environmental impact assessment of the National Environmental Policy Act (NEPA). All these provisions, in effect now written into one statute, have come into force. The Eastern European and eventually the Western European states will have to figure out how to adapt to these requirements, as they adhere to the Aarhus Convention. But, if you take a look at Zyg's premise that democracy is a key element to our ability to protect the environment, it is important to note how international law is paralleling, if not mimicking, what we in the U.S.A. have been pioneering in these grass roots battles that David Sive and others have described. So there is something to be said for the role of treaties.

Of course, Richard Lazarus is absolutely right in inquiring where industry is going to eventually come out with respect to environmental stewardship. In industry, more progressive elements, like Shell and British Petroleum have reconceptualized their role and are now promoting hydrogen fuel cells quite strongly as an eventual successor to pollution and CO<sub>2</sub> emitting petroleum fuels. Hydrogen fuel cell technology, because of industry decisions being taken today, will replace a great deal of petroleum in driving motor vehicles in the next twenty years. Leading elements in industry have figured out that this is necessary, because of global greenhouse effect, that our commercial economy

cannot burn all the oil. Moreover, these companies want to be in business 100 years from now and oil will become more valuable for the petrochemical industry than for burning, which is effectively wasting it. Even a "weak" treaty, like the Convention on Biological Diversity, has stimulated a lot of national decision-making on the ground. Brazil has set up biological corridors larger than the British Isles and is now figuring out how to shape the laws and management systems to sustain them. The initial treaty for the Vienna Convention for the Protection of Stratospheric Ozone first appeared to be a "paper tiger." The States Parties agree that *if* there is a problem, then we agree to cooperate to fix it. Within half a decade, scientists documented that there is a problem and nations had banned most uses of manufactured chlorofluorocarbons (CFCs) around the world. Now, we still have not reclaimed all the CFCs in our refrigerating and air-conditioning units. In fact, in Britain a perverse result has come about in which some people are rather angry that there is a tax on replacing their old refrigerators in order to reclaim the CFCs, so they are discarding them in protest. Of course, this prevents reclaiming the CFCs, and the midnight dumping of your private 'fridge is going on to escape the tax.

There is something further that nations can do through new treaties. There is an effort afoot internationally to redefine soil. Now this sounds, perhaps, absurd. But what is soil to everyone in this room? Is it real estate? Is it something we walk over? Is it something we take for granted? You do not conceptualize soil as a living organism and yet, soil is composed of a myriad of living organisms and everything in soil is part of the building blocks of life that environmental law seeks to protect. If you reconceive soil, you may reconceive the things that flow from the traditional thinking about mere "dirt." This would be analogous to what happened as Joe Sax says, with the Endangered Species Act or the development of ecosystem management as a tool. We should take instruction from another Greek, Archimedes, who posited that with the correctly positioned lever he could move the earth. These sort of reforms to basic assumptions are the levers that we must adopt if we would change the prevailing paradigm of unsustainable conduct.

**Tarlock:** I don't know if it is provocative, but I'll maybe put your remarks in a little broader context and disagree with Zyg in order to get things going. To me, there are two fundamentally related problems within environmentalism and environmental law. One,

it's negative rather than positive. That's why I realize how important it is to sue the government, and you have to keep suing it, but ultimately it doesn't lead to an affirmative vision. And the other related problem is there is much process and procedure in environmental law but not much substance. That makes it, I think, a very weak political movement and that's why a time like now is really scary. So the question is, "what's there to back it up?" Well, there are really two things. It's either morals or science. My view, for better or worse, is that the morals project has pretty much failed. There is certainly an environmental sensibility. Everybody is in favor of the environment, but I don't think we really have a moral foundation. You get certain surprises when the religious right deemed the Endangered Species Act a literal Noah's Ark and shocked a lot of republicans in Congress. But, in general, environmentalism is a product of the enlightenment. It doesn't have much of a religious base. There is a lot of what I would call revisionists to green theology from Judaism through Christianity, but I don't think it contributes too much. So that leaves science and the big problem with science is that it can't deliver fast enough what we want it to do. So environmentalism is stuck in this embrace with science and it's a very delicate problem because the future challenge is going to be producing and managing the science to define both the problems and the remedies. And that's tough because we haven't been able to do that too well. Environmentalism, as I say, is more sensitive to changes in politics that we would like it to be.

**Speth:** Yes. That gentleman, please. While he's getting ready, has anybody checked out the data on the Bush carbon dioxide reduction plan? The analysis shows that the Bush plan calls for a seventeen percent decrease in carbon intensity over the coming decade. Do you know what the decrease in carbon intensity has been over the past decade? Seventeen percent. The Administration's plan says that CO<sub>2</sub> emissions will go up fourteen percent in the coming decade. What did they go up in the last decade? Fourteen percent.

**Torres:** I think that Paul Krugman put it best: A single word can make a big difference. You and I would rather eat cheese than a cheese *food*. And you'd rather reduce greenhouse gases than greenhouse gas *intensities*.

**Bruce Pardy:** My question is about ecosystem management and I'd like to ask it in the context of a theme of Prof. Plater's lecture, which was the degree to which environmental matters are subject to political forces. Many of you have referred to ecosystem management in that context today. Prof. Torres has talked about it. It is part of Prof. Sax's 'third era of restoration.' Prof. Robinson has just spoken about it as a tool. But the nature of management, especially in the context of environmental law which as Prof. Lazarus has said, is very difficult to make rules—hard and fast legal rules—about environmental matters. This means that environmental management is about making decisions in the absence of rules, which by definition means it's discretionary. Prof. Houck, who is not here today, has criticized the management idea basically, because it is so open and so free of rules. Management comes down to whatever it is we decide to do, and if so, then it means it is whatever the agencies decide to do. So if one of the trends in environmental law today is towards management and if it is something that we are all in favor of, how does that help us get away from the trend of having environmental matters so subject to that degree of political forces? Are we not traveling in the wrong direction?

**Sax:** You ask a very profound question, and let me just make one response and I don't mean to be comprehensive. I talked about an 'age of restoration' and what that means is that we're trying really for the first time to identify some appropriate balance between these ecosystem services that are so important and so valuable and also the services that we need to support social life. One of the good things we've done moving away from old enclave preservation theory is to recognize, as several people on the panel have noted, that effectively you need to manage all our land and water resources with regard to these problems. It isn't just what we do in Yellowstone Park. But once you expand your perspective, the question is, how are we going to put all of this together? There are no answers that science can give us to those things. There are no exactly right answers to those things, because we don't have some very specific identified goal at the end of the road from which we can generalize to all the problems in the United States or the world. I don't think that limitations should be a source of frustration, because the nature of the process that we're engaged in involves judgments, continual on-going judgments. If you think about a version of what we talk about as adaptive management,

we're learning more, our values are in process, our understanding of these things is in process. To the extent that we're moving forward and not standing still, or we're not moving backward, that's what we're engaged in. I think it's chimerical to seek some fixed kind of goal.

**Torres:** Yes. And I think there are two responses. First, to say things are discretionary is not to say that they are not without boundary. One of the things that management requires is bounded discretion, so the question is where do those boundaries get constructed. The issue that Dan left off when he listed those three points is power, which goes directly to the point that Zyg made—that politics is about distribution and use of social power. I don't think anyone on the panel said that we're all going to march happily and frictionlessly to an environmental paradise. It is going to be a struggle, that one of the things that we have to do is engage as lawyers, but also as members of a political community around those values that are illuminated by environmental law. Let me give you one short story, a story of Sierra Blanca. Sierra Blanca is a place in west Texas. West Texas, for those of you who don't know, is a lot of wide, open spaces. An interstate compact for the disposal of low-level nuclear waste was negotiated between New York, Vermont and Texas. Texas has agreed to take the low-level radioactive waste of Vermont and New York as well as the New York sludge. The state would contract to spray the sludge onto the soil around Sierra Blanca and bury the nuclear waste out in those wide-open spaces. I guess they figured that this was a good idea because there were only a few people living there and they were mainly poor and they mainly spoke Spanish. It went through two administrative processes and was approved both times. A permit was granted and the trucks were loaded and ready to roll. The disposal was stopped by activists' saying, "Wait a minute, you need to conduct public hearings as the law requires and they need to be conducted in the place where the dump is going to be created." The long and short of it is they went through that process and the plan was ultimately approved again but the head of the TNRCC, which is the acronym for the Texas National Resource Conservation Committee (which is also known as Train Wreck) realized that the political costs of granting the permit were too high. Moreover, the dumpsite happened to be over an aquifer that feeds into the Rio Grande. Thus there were long range, international implications in Mexico, and representatives



from Mexico intervened in the process as well. All of these forces came together to stop something that looked like a slam-dunk. I am optimistic because that slam-dunk loss was converted into a victory through concerted action. But, it is going take that kind of action and that kind of involvement and that kind of transparency to make the future work.

**Tarlock:** Three quick things, first of all, you should ask Brad Karkkainen from Columbia, who is right behind you, who is doing a lot of very creative thinking on these issues today. Second thing, if Ollie Houck were here, I would disagree with his premise that you can successfully run ecosystem management through lawsuits enforcing the laws to the letter. I think there are real limitations with this approach. Second, which the jury is still out on, is deals. I'll just give you a citation: Take a look at a case called, *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d. 1274 (2000), a review of a very complicated and somewhat flawed habitat conservation plan in Sacramento, California. It is written by Judge Levi, who has two interesting characteristics: First, he is the son of Edward Levi, former Dean of the University of Chicago and Attorney General during the Ford Administration, and second, he is, I think, a Reagan appointee who is just a magnificent judge and has written some really first-rate environmental opinions. What is interesting about this opinion is, he basically separates what was good about the deal. He basically said he's not going to second guess every scientific decision that has been made, but instead, he zeroed in on the bad parts of the deal—essentially where the Department of Interior and the Fish and Wildlife Service gave away the store. They basically approved a plan and did what the Federal Government does—an un-funded mandate. They approved the plan without having the financial structure in place to finance the reserve. Not a good idea and he invalidates it on that ground (that part). But to me it is a very promising example of the second-generation 'rule of law' litigation. So, it is not about discretion per se, it is figuring out what is good discretion and what is bad discretion?

**Audience:** Let me just say that I agree with the questioner and also with Joe Sax's take on it, that there is a good deal of discretion. I also agree with Gerry Torres, that it need not be bonded discretion. But, I think we've got to look at ecosystem management as something that goes beyond a series of independent, unrelated ad hoc deals and start looking toward putting together the

kind of systematic oversight in monitoring each of those deals to insist on clear performance targets. Standards of performance are to replicate successful models, and I think that is one of the serious shortcomings of the ecosystem management as it is developed to date in this country. There are a number of quite interesting and quite promising local experiments, but not yet that kind of systematic oversight and the kind of national network of supervised experiments insistent on meeting minimal standards of performance and intervention from the top when there is a failure to meet the performance objectives that are set at the local level—that is kind of the next stage in the ecosystem management that I think that we need to be working on.

**Audience:** I would have enjoyed hearing more on the transnational aspects of environmental problems and I think there are two aspects. One, many times a problem is shared by countries as along the Rio-Grand River, where there is a lot of pollution that sweeps over both sides and we know it exists in Texas with the aquifers. Another aspect though is using a similar methodology or argument in dealing with the problems common to two or more countries, and sharing information because a lot of countries have the same environmental problems. Generally environmentalists don't have as much of a war chest as the polluters have. Maybe one paradigm for this could be the tobacco situation where there is a global litigation against tobacco based on the success in the U.S.—that 360 billion dollar, ten-year settlement, which is now being used by a lot of countries to file lawsuit against the tobacco companies in their own country. It can save them a lot of time, and you may be aware, the tobacco industry is of special interest to Pace.

**Robinson:** Well, your question has two aspects, product and process. Let's first look at product management. The Stockholm Convention of last year on Persistent Organic Pollutants (POPs), basically now takes decisions that we have already taken in the State of New York, to ban Aldrin and some other these pesticides. These chemicals frankly, do not disappear after initial use. They just move around in the ecosystem and bio-accumulate within you and me. The POPs treaty is a very courageous convention and it is going to enter into effect rather quickly. It will create a bright line internationally, in which certain named chemical products are just going to be banned. Now, the evidence is fairly strong for the chemicals already listed in the POPs Convention, but lots of

other chemicals have yet to be banned. And of course, cigarettes are not chemicals, are they? They're a different kind of chemical. While scientists worry about polyaromatic hydrocarbons (PAHs) when they result from cigarette smoke and enter into our lungs, too few scientists and policy-makers today worry about the tail-gates of our automobiles along our roadways. This problem will blossom some day as an ecological crisis all across America, endangering the public health of people around highways. It is only a matter of time when that little time bomb is perceived.

"Process" though, is perhaps more fundamental than product management. Politically re-defining your product is controversial. The question of spillover effects across borders is being addressed, but not always in a benign way, by the processes established under the North American Free Trade Agreement (NAFTA). Journalist Bill Moyers on the Public Broadcaster's System has shown how some commercial interests exploit NAFTA in a big way and not for the use of the level playing field on trade to basically undermine stricter environmental standards within any of the three NAFTA states. We also address this problem through our federal environmental legislation, which consistently contains a little clause in the statute that provides, in effect, that "local people can protect their environment more than the minimum of the federal standard." We seem to have sacrificed that local option in favor of a level trade playing field across localities. Interesting enough, when the Oil Pollution Act was fought through Congress, the whole question of whether to have stricter state standards in the United States to protect our coastal waters from oil pollution prevailed over a huge international campaign saying this is going to close down the international shipping of oil. Under OPA, the inland barge in oil must respond now if one state enacts stricter controls to safeguard their inland waters. OPA permits that extra protection and when pressed Congress went right down the line and decided to let the local people protect their environment. It is important, therefore, to devote care to how we define even the process of whether or not we shall have a regimen that can be protective of the environment.

**Sax:** I wonder if we could get a comment from our moderator based on his experience in the international realm, which he has deprived us of thus far.

**Speth:** I think we over emphasized the legal regime approach in dealing with global-scale concerns, to the exclusion of spending some real resources on these problems and to the exclusion of other approaches. But, I want to ask another question. We have people here who have been in this field for a while, sometimes going back to the beginning, and I want to ask if we haven't made two very serious mistakes in this period, and to get your thoughts. One is did we terribly neglect environmental education in the United States for the past thirty years? How did we end up where we are today if we haven't? The other is, did we make a serious mistake when we went along so thoroughly with the command and control approaches of the Clean Air and Water Acts while not promoting from the outset the use of market mechanisms and trying to get the prices right. If we had thirty years of trying to work that issue into the system, we might be a lot better off today.

**Tarlock:** I'll give you an anecdote that explains why you can't blame the second mistake on the environmentalists. A couple of years ago I was in a property right's workshop in Montana, and there was a Judge Douglas Ginsberg, the almost Supreme Court nominee. He excoriated environmentalists for being economically naïve and for ignoring all the fundamental laws of economics. So, finally I said, "Look, we may have been a little bit late, but basically all the mainstream environmental organizations have come around to the idea of pricing tradable permits, etc." I said, "The real problem is industry which fought it for years, and years, and still continues to fight a lot of it." His answer was, "They hate competition and it has to be crammed down their throats." I don't know if it was a mistake, but nobody was ready for it when it was proposed.

**Sive:** Just a short comment on your question Gus as to whether we made a mistake in not putting enough resources into environmental education: I think that is correct, but, it is explainable because it took years for the environmental ethic to seek out of, and go beyond the traditional environmental leadership organizations. I think that it's just a matter of time to have environmental education secure larger budget appropriations. But, the second question you raised—as to whether an error was made by the environmental community in not paying attention to economic solutions of the environmental problems which were being addressed—overlooks one, I think, important aspect of the early environmental law development, and that is so much of it was fo-

cused upon the protection of natural beauty. If you go through the principal cases, beginning with Storm King Mountain and going through Mineral King Canyon and the Hudson River Expressway and all the other cases which made early environmental law—they were concerned with the protection of particular bits of natural beauty and that engaged their tension to result necessarily in posing environmental law development as the championing of non-economic purposes and objectives. So that the failure to reach out for economic solutions to the environmental problems, which were addressed in the early stages, was just a necessary result from that particular concentration on the protection of natural beauty beginning again with Storm King Mountain.

**Robinson:** Just a quick note on education. I served on my local school board for a couple of terms.<sup>4</sup> I once went to the District Superintendent and said, “You know we have a mandate in New York State Law that says you have to teach, you have to observe Arbor Day every year.” It is true, there is a mandate in New York State Law that says you have to teach to observe Arbor Day. *See* N.Y. ENVTL. CONSERV. LAW, § 3-0301 (2001). The Superintendent smiled, and the rest of the School Board smiled as there was no funding for this mandate, and of course we still do not observe Arbor Day. There is a reason we have lots of trees now in New York and that was put in as a mandate when there were very few trees left in Westchester County, N.Y., except some ornamental plantings around the villages. New Yorker’s had clear-cut most of the coastal areas then. Today, another anecdote that suggests maybe the teachers in the secondary and primary schools are succeeding, even without the funding, is that along with Prof. Steve Dyeus of Vermont Law School, I have been called upon from time to time to lecture at the U.S. Military Academy at West Point. I have been very impressed at the evolving attitudes of the cadets. When I first lectured, it was clear that the cadets were ordered to come to the classes on environmental law and attended my international environmental law lecture because they were required to be there. A few enrolled in the elective environmental law course in the Law Department to fill requirements. The more recent times, ten to fifteen years later, the cadets enrolled in large numbers because they wanted to take the course, and they knew as much about a lot of the international environmental issues I proposed to present in my guest lecture. Now, this change was not

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4. Public Schools of the Tarrytowns, New York.

anything I did, but was because of the effective teaching by secondary school teachers. It is quite remarkable to observe the greening of the college students across the U.S.A. If we use West Point as one measure of the greening of part of the elite of the United States, new values for stewardship of nature are taking hold to some extent.

**Speth:** Let me take this opportunity to respond to Joe's invitation to comment a bit about international environmental affairs. I think a very useful presentation was made by the World Business Council for Sustainable Development, when they set out three scenarios. One is called, FROG, First Raise Our Growth. Most of the world is in the FROG mode, saying, "Let's not do anything about these problems until we achieve a certain number of our economic objectives." Certainly that is what George Bush just said about the Kyoto Protocol. The second scenario they call GEO Polity. It is basically a legal approach, using treaties and protocols. In GEO Polity, governments move in and guide the market towards sustainability. It is basically a top-down approach. The ultimate GEO Polity institution would be a world environment agency. The third scenario, which I think the WBCSD favored, they call the "Jazz Scenario." Jazz is very improvisational; it's bottom-up; it's people just doing things. Jazz is a world of unscripted initiatives with lots of transparency. It is information rich. Now, if you ask where I see the action, the real action, not just the talk, not just the negotiation, not just the paperwork, but the real action today, the real action is Jazz. There are remarkable things going on in greening cities all over the world; check out the website of the International Council of Local Environmental Initiatives. You've got remarkable things going on in some major corporations where greenhouse gas reduction goals are being set and met, exceeding the Kyoto goals; check out the website of the Pew Climate Center. You've got the NGO's—they play Jazz better than anyone. We have things like the Forest Stewardship Council and now the Marine Stewardship Council, establishing essentially private guidelines for sustainable forest management and sustainable fisheries. Government is looking at these processes from the sidelines, wondering how this private governance is happening. You've got initiatives like NRDC and other NGO's around the world telling Mitsubishi that it cannot build a salt operation in a whale calving area in Baja, California, and Mitsubishi pulls out under pressure. All this is going on, this Jazz, and it's happening

and it's very promising. You can argue that one reason we are hearing so much Jazz is because of all the traditional classical music coming out of GEOPolity Hall. So perhaps what we really see is—what is the musical term?—fusion.

**Sive:** If I may, I would like to make one more addition to my comment before regarding to what extent the environmentalists are at fault in the environmental movement in not emphasizing substance—the substance of reform of the allocation of economic resources and that is to the extent that the early environmental law development was developed in major litigation. The litigations, the early litigations, were directed almost exclusively at process. Take the NRDC cases, *Natural Resources Defense Council v. Morton*, and the early NEPA cases. They were directed at process in part because, process poses a question of law, which is review of the last, to whether the administrative determination is simply correct or incorrect, not a review of the determination of substance where one has to prove much more than abusive discretion and abuse of the power of the administrative agency. So, the failure to address economic solutions to the main principle environmental problems was a natural outcome, natural result of, the necessity to concentrate in the early litigations, which formed the basis of environmental law in the early stages; necessity to concentrate on the issues which were more re-viewable in the cases which were brought.

**Audience:** I am a student of environmental law here at Pace, and I would like to thank you all for coming here today, first thing. I have a lot of thoughts that I'm going to try condensing them. I have seen everyone point in the same direction, and I've come to unburden you. I don't think it is environmentalism that has been asleep for all these years, but actually economics which has been asleep for all these years. I have also heard people trying to claim their position as a discipline of itself and I think you're quite right. I think that it is actually all the other disciplines, like science and economics and morals, which are sub-sets of the environment, which is the primary category. I heard Mr. Tarlock say that environmental law and environmentalism has a problem, and it's negative, not positive—it is reactionary and it tells you what you cannot do and it doesn't point you in the right direction. I wanted to point out that economics is, from my understanding, in support of environmentalism. I think it is our biggest ally here. And some of the inroads that are being made—what is on the frontier—is

fixing the signals and creating the incentives to do right through taxation. I haven't heard anyone address taxation and I'm looking to hear from the pioneers of what they think about using green fee's, green tax's, etc. For example, there are ways of taxing uses of carbon and ecosystem services, such as if you wanted to use a wetland, you'll have to pay a green fee. There are a lot of innovative thoughts in this area and I would like to know some of your thoughts.

**Plater:** This is not my corner of the field, but didn't someone just a moment ago mention Pigouvian taxes? I think the reformist possibilities for assessing such taxes for certain regulated discharges has some substantial utility, if ever such taxes could be accurately calibrated and assessed, and not be subverted in the monitoring and collection process. It works in Germany in the coal production industry. The fact that it works there in Germany doesn't mean it would work in the U.S. In fact, maybe that proves it wouldn't. Think about the obstacles to making such systems work in the American setting where there is such resistance to government mandates. So as I was saying, sounding like a broken record, it always comes down to politics, right?

**Powers:** If I might? I would like to follow-up, Gus, on your question about whether we might have gotten further if we had used something besides the regulatory and litigation paths we took. Assuming that economic incentives or other devices might have gotten us where we want to be, I wonder whether there was any realist alternative in the 1970s and 80s, because the environment had no legitimacy. Anybody who was an environmentalist was considered somewhat odd, and I think it was only through litigation, through court decisions, that the environment was given a legitimate place. And so, we now can build on what we have done through our litigation and through our regulatory mechanisms. And if you're going to have some kind of pollutant trading program, you have to have a regulatory system that sets some kind of baseline. So, I wouldn't worry too much about lost opportunities.

**Lazarus:** In addition, all the information you generally need to set the fees and to do the taxes is the same information you often need for everything else. One accomplishes less information cost saving in pursuing market incentives than it might first appear. There is also a significant potential that market incentives, such as taxes and fees, can be perverted, captured, by the regulated



community. The fees are exploited, but with no environmental return at all. People are very creative at finding ways to tap into market incentives and actually not get a lot of actual environmental controls at the other end. My worry always has been that you end up with the likelihood of greater expenditures at least from the Federal fisc one way or another, for less return.

The kind of command and control approach in our existing federal statutes is also not nearly as rigid or unduly expensive as often claimed. Time and time again, policymakers are told by industry ahead of time how much it is going to cost industry to comply with strict environmental controls—how it is going to cost zillions of dollars—and the fact is, it doesn't. There are economic incentives built into command and control and, industry, given the incentive of command and control, usually finds much cheaper ways to accomplish things than they ever did before. We've actually had the advantages of economic incentives within a command and control system, which has given us a lot more certainty in terms of the environmental objectives that we achieved, without huge losses in economic efficiency.

**Speth:** You'll be interested in this story, positive or negative, depending upon how you feel about that issue. I had the misfortune of being in charge of Clinton's transition for environment and energy and part of a sub-part of that, we generated a lot of options for the administration on green fees. In particular, on carbon tax and energy taxes, and we gave them to the incoming administration and they welcomed them and they were really very interested in the carbon tax and then they started worrying about politics of it and they shifted the carbon tax to a BTU tax. The BTU tax went into the Clinton Administration's first economic plan. When it got to Congress, the industry started saying, well, . . . they weren't interested. It was very cleverly done. They sent one segment of interest up to the lobby of Congress and said you shouldn't really have the BTU tax here. It is okay to have it over here, but exempt this activity and these people and then they did that a few times and pretty soon it became such a swiss cheese of false legislation, that industry just kind of moved in and killed the whole thing. So, the BTU tax died very early in the Clinton Administration and with it, if you like this idea, it died, I think, the possibility of really flowering and growing in this area. It really never has come back, at least to my knowledge. The National level was a way of doing things. The basic idea that we were trying to push was that you

could shift some of the tax burden off of things that you wanted to encourage like working and savings and investing, and put the tax burden on things you wanted to discourage, having a tax shift. Some of that is going on in Germany and other places today, but not here. I think the story that the National Association of Manufacturers carefully orchestrated this attack on the BTU tax and others is pretty well documented now in the series of articles that came out after the fact.

**Audience:** I come to you wearing three hats, I'm a coordinator of a young environmental professionals group, and I'm also coordinating a local Hastings Waterfront Watch Group in my hometown and I work for an organization called "The Federated Conservationist of Westchester County" based here at Pace Law School. We're working together with high schools to encourage teachers to create different environmental programs for students. I really appreciated your contribution, Prof. Robinson, particularly when you mentioned going to your school board. I would like to know what I should do if teachers and school boards are not responding? How do you recommend this to some of the foremost environmental activists, leaders, lawyers and professors? How do you motivate and inspire a change in beliefs? Is it Media? Is it Government? What channels do you suggest they use? I also wanted to add that I feel very privileged to be here and to listen to all of you speak.

**Robinson:** We will need to have a further discussion on this topic. But, I think that school board members care about their children. When they realize that they are not going to have enough water this summer or that the question of the quality of the water or other things in their schools affect their children, then suddenly they wake up and you see changes. I think that it has to be made very specific. The mission of primary and secondary education has not been to protect the environment, but rather the focus has been to produce good scores and get people into college.

**Speth:** I want to again thank the members of the panel for responses. Last question please.

**Nicholas Targ** (EPA OFFICE OF ENVIRONMENTAL JUSTICE): I have a question that's primarily directed to Professor Plater (who was my Environmental Law professor when I was at Boston College Law School). It addresses some of the issues of

democracy, transparency, power and politics, and citizen litigation as a primary environmental enforcement tool. That is, Professor Plater, in your talk on the Tellico case you talked about the involvement of the farmers and other local people in the case. And I was wondering, as a result of the case did they feel more, or less empowered—encouraged maybe to address issues like this proactively in the future, or not? In a lot of ways the presentation you gave us on TVA's Tellico Dam is an issue of environmental justice. My question goes to evaluating the use of litigation, bringing outside court proceedings into a community to address local problems faced by local people on an ongoing basis.

**Plater:** The questioner, I am proud to acknowledge, is a product of our Boston College Law school environmental law program. Nicholas Targ currently serves as coordinator of EPA Environmental Justice matters all over the United States. Perhaps this provides me a way to respond to Dick Ottinger's earlier challenge that we as a panel were being too upbeat, too satisfied with the way things are. This question gives me an opportunity to redress that a bit, to be a bit dismal.

Mr. Targ is indeed correct that Tellico was in some respects an environmental justice case. Some of the farmers were quite low-income citizens, and TVA was quite hard on the Cherokees, who felt very much beat up upon in the case.

I don't have a cheery report on the citizens' memories and feelings about the Tellico snail darter case. The citizens who fought the dam, and were ultimately able to prove the dysfunctional nature of the project and the solid common sense of their own case for the fish and the river valley, feel not at all empowered. They feel quite bitter and cynical. When a CBS reporter asked Burrell Moser, who fought the dam for a dozen years, how he felt in retrospect, he just spat on the ground and said—"It's a hell of a country, ain't it?" Nellie McCall told the reporters, "I'm going to hurt about this as long as I live" until the day she died.

A large part of our frustration is that America still doesn't know about our case. Jan Schlichtmann of the Woburn toxics case and I used to commiserate that one of the miserable feelings of cases like ours in retrospect was that people did not realize how we had been reamed—by the courts in his case and Congress in ours. Schlichtmann carried that burden until the book and movie *Civil Action* came out and observers finally could recognize some of the rather skewed rulings that crushed most of his clients'

claims. In our case, Tellico Dam and the snail darter, I guess the way I could try to put a more optimistic spin on it would be to say that, hey, you know, in no other country in the world could a little group of local people so lacking in money and political power . . . and tenure, have carried such an issue to the highest levels of the nation's governmental processes. That possibility still survives and it is ultimately important to democracy. Some you win, and some you lose.

**Speth:** I thought that was a good patriotic note. But I will take instructions from our host. It's time to thank the panel, thank you very much.

**Powers:** I have the pleasant task of personally thanking our panel members. We have a small token of our appreciation from Pace Law School here and certificates for each of you for your participation, so thank you very much. In addition, I have the honor of announcing the Garrison Lecturer for 2003 and 2004. We hope that we will see you all back again next year, although it probably won't be at this time but will probably be in April of 2003 to hear J. William Futrell give the Garrison Lecture. I'm sure many of you, if not all of you, know Bill. He is the President of the Environmental Law Institute, and has been President for 17-18 years. He has lead the Environmental Law Institute to become one of the most important non-profit organizations in the world, working on environmental research, environmental management and education. He has been a teacher, has a BA from Tulane and he did post-graduate work at Fulbright in East Europe at the Free University of Berlin, he has a JD from Columbia, he was a Professor of Law at the University of Alabama and the University of Georgia, President of the Sierra Club for a period and I think, as Bill would say he always wants to be noted that he is also a Marine. And yes, several of us have served on the board of Environmental Law Institute and we could always be assured that whenever we had a board meeting, there would always be at least one Sierra Club story and at least one Marine Corps story. So, Bill will join us this time next year. I'm honored to announce that in 2004, Edith Brown Weiss will be our Garrison Lecturer. Many, if not all of you, are aware of her "Sterling" qualifications. She has an AB from Stamford, a JD from Harvard, a PhD from Berkeley and a LLB from Chicago-Kent. She is now on the Faculty at my alma mater, Georgetown Law School, and will make our second Georgetown Law Professor at the Garrison Lecture. As you know,

she has written in the area of Public International Environmental Law Water Resources. So we are very happy to announce those two future Garrison Lecturers. With that, we invite Professor Miller to make some summarizing remarks here.

**Jeffrey Miller:** I have been assigned the formidable task of summarizing everything that our lecturers have said over the last several years and today. I have a great advantage over you in this, however, because I doubt that any of you have read all eight of their talks and certainly not two or three times in the last couple of weeks, as I have. This has been quite an interesting task for me.

One of things that you'll all appreciate is that they all began their talks with hymns of praise to New York for our pioneering in the environmental law effort, starting with the preservation of the Adirondacks. Teddy Roosevelt continued that effort, first as Governor of New York and later as President, making our National Parks and Forests blossom. Later of course, our own David Sive and Lloyd Garrison helped to breathe new life into old laws, developing environmental law. And later our moderator Gus Speth, helped found NDRC in New York City with David Sive on the board. The Environmental Defense Fund was founded at about the same time in New York City. And of course, the role of the media in New York has played a very important role. Where was Rachel Carson's *Silent Spring* first published? In the *New Yorker*. Would we have a Superfund without Love Canal? No. Would anybody know about the Love Canal without the *New York Times*? No.

Of course, the history of New Yorkers as founders and progenitors of environmental law gives us a glorious past. But that doesn't last very long. In order to maintain our glory here in New York we must continue to develop new ideas and do new things. We hope we are contributing greatly to that here with our environmental program at Pace Law School.

One of the lecturers who is not here, Bill Rodgers, tried to explain environmental law using a metaphor from geology. He described environmental law as exhibiting geologic complexity, full of anomalies, box canyons that go nowhere, and constant erosion. This is a bit of a "half empty glass" approach. Most other lecturers instead have used a biological metaphor for environmental law. You have heard several of them talk about different generations, calling David Sive the parent of environmental law. I much prefer

the biological metaphor because biology is living; it's not dead. Geology is the study of a dynamic system, but a system that is nevertheless dead, notwithstanding Nick Robinson's plea for treating the soil as an animal. But biological systems are live systems; indeed, they are complex adaptive systems. We have heard time and time again here how complex our environmental law is, and it's true. Our environmental laws, even our environmental goals, are complex. We want to protect the environment, but what is the environment? What does it mean? Bill Rodgers described a decades-long conflict under several environmental statutes involving sea lions at the Ballard Locks between Lake Washington and Puget Sound that eat the Steel Head Salmon, migrating through the Locks. Several statutes required us to protect the Steel Head Salmon from the sea lions, leading us to many interesting environmental law issues. Rodgers informed us neither of those species were indigenous to the area, they were both non-native species. Of course, the Ballard Locks were not a natural phenomenon either. What does it mean to protect the environment in that situation? What does it mean to protect nature? What is Nature? How do we protect ecosystems that are always changing? How do we manage them? There aren't any easy answers to these questions. There is a whole range of answers that are reasonable and there is a whole range of answers that are not reasonable. Figuring out where in that range of reasonable answers to come out is a political question as well as a judgmental question. Once you begin to recognize the complexity of the system, not just the legal system, but the environmental system that you're dealing with, it isn't easy. Right answers are not always there. So, using this biological metaphor, I think it takes us more into the heart of environmental law than does the geological metaphor.

I also like the biological metaphor because in order to have generations, you must have parents. That brings us back to Lloyd Garrison and David Sive who in many ways are, if not *the* two parents, certainly two of a rather small group of parents of environmental law. Think about the Federal Power Act. That statute did not have as its objective protecting the environment. In fact when that Act was drafted, nobody even heard of the terms, "environment" or "ecological system." Lloyd Garrison somehow found words in the statute that could be seized on by the court to say that the Federal Power Commission must consider the environmental values, the aesthetics of the landscape, the protection of the environment. He was the first to ever read that statute to con-

vey such a meaning. That's creative lawyering and creative lawyering at its best. David Sive continued the *Scenic Hudson* litigation by creatively using the new Clean Water Act. That's how parents work, they create new life or, in this context, new legal ideas.

Of course, parenting is more than just creating new life, it is also nurturing it and David Sive certainly has done that in his founding and continuing activities with ALI/ABA, ELI, NRDC and many other environmental organizations.

The first generation breathed new life into old laws, breathed environmental values into laws enacted without environmental values in mind. The first generation used litigation, waking people up, generating publicity, gaining time to use the political process to stop particular projects. In a way this was negative litigation: Stopping something, stopping harm to the environment.

The second generation, of course, was involved in the panoply of statutes from the 1970s, beginning with NEPA and ending with CERCLA, and the avalanche of permits and regulations from Congress and the administrative agencies. We tend to think of the environmental statutes as being huge in their volume, and they are, but they don't yet surpass the Internal Revenue Code in volume. Of course, if we had gone the way that Gus Speth suggested to gain environmental protection through tax deduction and other economic incentives, even the tax professors wouldn't be able to get through the Internal Revenue Code. EPA's regulations, however, far surpass the regulations of the Internal Revenue Service. It looks as if our environmental bureaucrats are out-performing our environmental Congressmen, at least if volume is a measure of performance.

Ollie Houck, who unfortunately isn't here, identified the institutionalism of transparency and the search for alternatives as critical to the success of environmental law in this second generation. We have heard a lot about transparency here. Zyg Plater's talk was infused with it, even if he didn't use the word "transparency" throughout. What he was talking about was getting people to know the facts. If people know the facts, they're much more likely to reach a rational decision than if they don't know the facts. Transparency in the government is about that. It is about building trust because decisions are made in the open with all the facts out on the table. He also writes that we are one of the few countries in the world where transparency occurs, and therefore, we're one of the few countries in the world where the public good

and the environment get any kind of a chance. Sometimes, they win. But when you go to Latin America, for instance, you may find a constitutional provision protecting the environment. You may find all kinds of great environmental statutes. But you won't find any transparency in the government; decisions are not made in the open and information is not readily available. And you won't find the same degree of implementation of environmental laws in parts of Brazil that you find here, even in the region's most progressive countries. Transparency is important for democracy and it's important for environmental law. Unfortunately, we haven't achieved 100% transparency here. When you look at the Department of Defense proposal to create an office of disinformation, that is transparency turned on its head. Transparency is about trust of government. How can we trust a government that will spread disinformation as well as good information? That's not really transparency.

Ollie Houck also says that the search for alternatives has been more successful in our pollution control program than in our natural resource management programs. He says that our efforts to manage natural resources have simply failed. From what we have heard today, that sounds as though it's a bit of an overstatement. We are developing some new ways to deal with natural resource use, but we have more constitutional and traditional problems dealing with them than we do with the pollution control. Ollie's right, we have been blessed on the pollution control side by concepts like Best Available Technology, which we know how to deal with. We have engineers, tinkers, and inventors who can work on pollution control devices and make money out of them, but it is much more difficult dealing with natural resource management issues.

What will the third generation be like? We've heard, I think, some of its likely characteristics. It will probably reflect increased globalization, increased extra-legal deal-making, increased dealing with ecosystems as a whole rather than just parts of them.

Gus Speth asked if we wouldn't be better off today if we had pursued an environmental pollution program based on economic incentives rather than on command and control legislation. My own question, in the same nature, is whether we made a great mistake when we went off in different directions, controlling air pollution, controlling water pollution, and controlling waste, rather than controlling all of them in a more holistic way. Wouldn't we have been better served by figuring out the best place



for our residuals to end up and which residuals were the most critical to spend our resources on? We might have gotten a more interesting and effective generic program that way.

Each generation spends part of its formative years wondering if there is a God and if so, what is she like? I guess every generation of environmental lawyers must spend time wondering if there is such a thing as environmental law, and if so, what is she like? In law we save a lot of the public's time and energy by confining these existential questions to law school faculty. If you look at the enrollment of jurisprudence courses, it will tell you that most lawyers are happy to keep it with the tenured professors. But it is a valid question, and one that we have to ask because Rich Lazarus tells us out of the 250 Supreme Court decisions on environmental law, no environmental jurisprudence has evolved. No environmental principles have been enunciated. The Court treats all of these cases as just an odd branch of administrative law, raising no peculiar environmental law questions. Dan Tarlock suggests that there is no jurisprudential basis to environmental law because the bedrock principle—that we enunciate that we're stewards of the environment for succeeding generations—flies in the face of the traditions and values of Western law. It gives neither the environment nor future generations any kind of standing or any legal interests. Our basic legal interests in nature have been exploitive, and that's just not the kind of ethic that underlies environmentalism. Environmental law, therefore, seems in many respects at odds with the western legal tradition.

There's a certain amount of truth to Tarlock's observation. When we ask if there is environmental law and what is its basis, we can't answer that question so easily. The answer that we have been developing here today is that environmental values, in fact, are slowly inculcating themselves as basic societal values. To the extent that happens over time, environmental values will seep into our jurisprudence, but that has not gotten far enough along yet to make environmental law fit entirely comfortably in the western legal tradition.

One of the interesting aspects of environmental law, particularly when we ask what environmental law is, is this disparity between the pollution control law and natural resource law. The environmental laws administered by EPA, the Department of Interior, the Department of Agriculture, and the National Oceanic and Atmospheric Administration are rather disjointed; they're not

connected in any way; and the basic ideas are often so different that they lack coherence.

Gerry Torres has made the best case of integrating the two aspects of environmental law in his talk, "Who Owns the Sky?" He starts with trading air pollution rights, which is clearly part of the pollution control side of environmental law. He then wonders about the long term implications of such trading that ultimately gives air resources to private industry. Whose air resource is being given away? It's the public's resource, isn't it? Shouldn't we expand the public trust doctrine to the whole atmosphere as a way of conceptualizing and controlling these trading ideas? Torres is trying to marry the two aspects of environmental law. He not only asks a good question, he begins a good integration effort.

Through the years we hear recurring Cassandra-like warnings of impending problems with the environment and of attacks on environmental law. I wonder from time-to-time why we have to fight the same fights every few years. This reminds us that we are in a generational biological system. That means we have to learn and deal with many of the same problems that our parents had to learn and deal with. We learn some of the problems from them, but many of life's problems we have to learn ourselves. We'll be running into many of the same environmental problems and environmental law issues in every generation. If we experience backlashes and setbacks, hopefully the next generation will achieve restoration and go beyond where we were. This is a bit like evolution.

We can see this happening in a way with *Scenic Hudson* and Storm King. The first generation of environmental lawyers stopped the construction of the Storm King pump storage unit and protected the landscape in the Hudson Highlands. The second generation discovered that existing power plants on the River were destroying its fisheries because their cooling water intake structures suck the fish roe along with the billions of gallons of water that they are taking for cooling purposes. NRDC joined others to challenge the water pollution permits issued to seven power plants up and down the near part of the Hudson, on the grounds that EPA was not fulfilling its statutory mandate to control the intake structures. That challenge was ultimately settled and one of the settlement requirements was that Con Edison agreed to abandon forever its plans to build the Storm King plant. The Storm King dispute, wasn't ultimately settled until the second generation. Now in the third generation, the Pace Law Envi-

ronmental Litigation Clinic has sued EPA to force it to promulgate Best Available Technology requirements for intake structures on power plants. The Clinic has also challenged permits for the same power plants that NRDC challenged the generation before. Both challenges centered on the inadequacy of controls on the cooling water intake structure to prevent fisheries depletion. The difference between the challenges is that the permits NRDC challenged lacked controls. While the permits the Clinic now challenges have some controls, which the Clinic contends aren't adequate.

This is an example of all of three generations working on permeations of the same problem. There have been some victories along the way, but the forces of evil keep appearing and have to be batted down. But the Highlands are still with us, as spectacular as ever. If you look at an engraving from West Point from the last century, from the 1820s, it is a beautiful riverscape with sailboats and admiring observers. You can go to the same place today at West Point, look at the same landscape, and it's just as beautiful. That's thanks in a great part, to David Sive and to succeeding generations of environmental lawyers who have been working on these issues. But the same issues will recur in the future, although perhaps in different permeations. That's just part of biology, evolution, and complexity.

Thank you all very much.

**Sive:** I've had to point out for many years that the original Storm King Suit was brought by Lloyd Garrison. It is he whom we honor by this series of lectures. I did not participate in the original lawsuit except as a board member of Scenic Hudson. I did participate in the suits along the Hudson, but I think it is necessary that we end on a note honoring the person whom we're honoring by this series of lectures.

**Robert Goldstein:** I really want to thank everyone who has participated today. I thought it was a wonderful exercise. We'll do it again next year, all of us, in a few years maybe. Again, thanks to the panelists.

**Powers:** And please come back and join us again next year when we have the honor of having Bill Futrell as the Garrison Lecturer.