

June 2015

Environmental Law and the Collapse of New Deal Constitutionalism

Arthur F. McEvoy

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Recommended Citation

McEvoy, Arthur F. (2013) "Environmental Law and the Collapse of New Deal Constitutionalism," *Akron Law Review*: Vol. 46 : Iss. 4 , Article 3.

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ENVIRONMENTAL LAW AND THE COLLAPSE OF NEW DEAL CONSTITUTIONALISM

*Arthur F. McEvoy**

I.	Introduction	881
II.	Environmental Law: Regulation, Democracy, Human Rights.....	888
III.	Environmental Law at the Zenith of the New Deal Regime.....	895
IV.	Environmental Law and the Decay of The New Deal Regime.....	900
V.	Conclusion	907

I. INTRODUCTION

Modern environmental law is at once the crowning achievement and the Achilles' heel of the legal regime that took shape in the United States during the Roosevelt Administrations of the 1930s and 1940s. To be sure, environmental law did not emerge full-blown from the New Deal, like Athena from the head of Zeus:¹ it has deep roots in the common law of nuisance² as well as in Progressive-Era regulation over natural resources.³ By itself, also, New Deal policy for natural resources

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1. ROBERT GRAVES, *THE GREEK MYTHS* 21 (2012).

2. *See, e.g.,* *Boomer v. Atlantic Cement*, 257 N.E.2d 870 (1970). *See also* Daniel A. Farber, *The Story of Boomer: Pollution and the Common Law*, 32 *ECOLOGICAL L. Q.* 113 (2005).

3. *See, e.g.,* SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE*

hewed closely to the Progressive-Era model of utilitarian, development-oriented command-and-control regulation by centralized expert agencies.⁴ Still, what distinguished the new environmental law of the early 1970s from its predecessors was the way in which reformers brought to it ideas and tools that the New Deal generation had developed for use in such other progressive campaigns as antidiscrimination, election reform, labor relations, and social welfare. These reforms, which took place at what—in hindsight—appears to have been the peak of the New Deal regime’s vigor, transformed U.S. environmental law to no less an extent than the New Deal had revolutionized American law generally. At the same time, however, just as environmental law took New Deal reform to its historical limit in the 1970s, it also catalyzed the reaction that thereafter undermined not only environmental protection but the entire suite of late twentieth-century progressive reforms.

The last few years have seen a good deal of historical stock-taking among scholars interested in environmental law—perhaps because 2010 marked the fortieth anniversary of Earth Day, perhaps due to the nation’s changed political climate after 2001, and perhaps because many of the participants in the activity of the early 1970s are nearing retirement age and thus taking the measure of their own careers. One of the most articulate assessments came from Richard Lazarus, a lawyer who had argued environmental cases before the U.S. Supreme Court for thirty years, first as a lawyer in the Reagan Administration and later as a law professor donating time to environmental organizations. In the summer of 2010, President Obama appointed Lazarus Executive Director of a commission charged with investigating the Deepwater Horizon disaster.⁵ In his 2004 book, *The Making of Environmental Law*, Lazarus pronounced the record of environmental law since 1970 “remarkably successful,” the field “having evolved from radical intruder into an essential element of a mature legal system in a democratic society.”⁶ Dire predictions from both Right and Left notwithstanding,

PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (Univ. of Pittsburgh Press ed. 1999).

4. The New Deal’s environmental legacy was the subject of a 2002 symposium sponsored by the Roosevelt Presidential Library and other organizations. See, e.g., *FDR AND THE ENVIRONMENT* (Henry L. Henderson & David B. Woolner eds., 1st ed. 2005).

5. John M. Broder, *Panel is Unlikely to Lift Drilling Ban This Year*, N.Y. TIMES, June 22, 2010, available at http://www.nytimes.com/2010/06/22/us/politics/22panel.html?_r=0; *Richard Lazarus Named as Executive Director of National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling*, U.S. DEP’T OF ENERGY (June 22, 2010, 12:00 AM), <http://energy.gov/articles/richard-lazarus-named-executive-director-national-commission-bp-deepwater-horizon-oil-spill>.

6. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 253 (2004).

environmental law had neither destroyed American capitalism nor failed to head off impending eco-catastrophe.⁷

Lazarus pointed to significant victories over the period, particularly in those areas of concern that had motivated the reforms that followed in the immediate wake of the first Earth Day. Regulation under the Clean Air Act of 1970 relieved cities like Los Angeles of the brown haze of automobile exhaust that regularly drove their citizens into hiding indoors. The nation's waterways, while not entirely "fishable/swimmable" as the Clean Water Act had promised, were relatively free, nonetheless, of the municipal sewage and industrial waste that set fire to the Cuyahoga River in 1969. On land, the hazardous waste statutes of 1976 and 1979 cut off the flow of toxic waste into landfills and went far to clean up the hundreds of leaking and dangerous sites that had accumulated by then. Government, often in cooperation with private landowners, brought a number of endangered species back from the brink, at least for the time being. A few particularly nasty pollutants, notably fluorinated hydro-carbons and lead additives to gasoline, had dropped out of use.⁸

Lazarus, who graduated college in 1976 and law school three years later, wrote with an insider's perspective; *The Making of Environmental Law* focuses primarily on the field of practice, as it emerged in "a relative blink of an eye" in the early 1970s and within a decade had left "the legal landscape transformed completely."⁹ Another writer, Joseph DiMento, had earned both a law degree and a doctorate in Urban Planning by 1974. Perhaps influenced by his personal history, he took a longer view that rooted more deeply in the 1960s. "Various environment-related events, issues, and factors in the 1960s contributed to the birth of environmental law," he wrote in 2010.¹⁰ Most important for DiMento was the cultural and political mobilization that swept up much of his generation at the time, of which environmentalism was an integral part.¹¹

Like lawyers, historians frame events against different backgrounds, depending on what they aim to prove. The value of a

7. *Id.* at 251.

8. See A. MYRICK FREEMAN, III ET. AL., PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 93 (Paul R. Portney & Robert N. Stavins eds., 2d ed. 2000).

9. Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L. J. 75, 77 (2001).

10. Joseph DiMento & Kazuto Oshio, *Forgotten Paths to NEPA: A Historical Analysis of the Emerging Environmental Law in the 1960s United States*, 27 J. OF AM. & CAN. STUD. 19, 20 (2009).

11. *Id.* at 36.

perspective depends on what it illuminates and what it obscures. Adam Rome thought it curious that historians of the 1960s paid very little attention to environmentalism, while people who called themselves “environmental” historians tended to ignore the profound influence that the upheavals of the sixties must have had on Earth Day and its sequelae.¹² The key to this puzzle, Rome thought, lay in the ambivalent politics of post-World War II environmentalism, which was as likely to lean to the right as to the left and which therefore contrasted with the generally left-leaning politics characteristic as well of the time as of historians who have written about it. Rome’s perspective enabled him not only to highlight underappreciated contributions of women, leftists, and counter-cultural young people to postwar environmentalism but also to emphasize the diversity and complexity of the forces that drove social change generally during the period.¹³

Along the way, Rome paid his respects to Samuel P. Hays’s *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955-1985*, which appeared in 1987 and remains one of the most powerful contextualizations of environmentalism available.¹⁴ Hays was one of the first historians to combine his professional skills with a personal interest in environmental issues. His first book, *Conservation and the Gospel of Efficiency*, appeared as early as 1959. It analyzed the development of federal policies for conserving water, timber, and rangeland and pointed up the contradictions between the Progressive Movement’s centralized, bureaucratic approach to regulation, on the one hand, and the parochial, determinedly non-scientific impulses that actually drove natural resources politics on the other.¹⁵ Hays’s later work showed how cultural changes in the post-World War II era—suburbanization, rising standards of living, and increased demand for outdoor recreation—contributed to postwar environmentalism’s emphasis on preservation, aesthetics, and other intangible values to which the more utilitarian Progressive movement had paid little attention.¹⁶

One scholar with formidable skills both in history and in law was J. Willard Hurst, who came of age in the 1930s and spent his entire

12. Adam Rome, *Give Earth a Chance: The Environmental Movement and the Sixties*, 90 J. AM. HIST. 525, 525-26 (2003).

13. *Id.* at 552-53.

14. See e.g., SAMUEL P. HAYS, *BEAUTY, HEALTH, AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-1985* (1987); see also Mark Cioc & Char Miller, *Interview with Samuel P. Hays*, 12 ENVTL. HIST. 666 (2007).

15. HAYS, *supra* note 3, at 1890-1920.

16. *Id.* at 22-32.

career—save for wartime service with the Office of Strategic Services, during which he wrote a series of articles on the American law of treason—teaching Legislation and Legal History at the University of Wisconsin.¹⁷ Hurst reinvented the academic study of law, from one focused narrowly on institutions and doctrine to one concerned with the multidisciplinary analysis of relationships between law and society, economy, and environment.¹⁸ His masterwork was a legal history of the lumber industry in Wisconsin, entitled *Law and Economic Growth*, which appeared in 1964.¹⁹ Hurst got the idea for this “grim and passionate”²⁰ book from a chance meeting with the wildlife ecologist Aldo Leopold, who also taught at Wisconsin. Leopold introduced him to “the then-strange word ecology” and impressed him with the “tremendous interrelation between the facts of botany and the facts of wild life and human beings and what they did with the earth.” Hurst recalled also that Leopold “was very interested in what had happened to trees.”²¹

Hurst himself was not particularly interested in environmentalism *per se*—“there were no environmentalists” in the woods, as he put it²²—but he cared deeply about the central issue of environmental law: society’s capacity to use law effectively to protect its common interest in shared values. The nineteenth-century clearing of the Lake States forests showed how creative Americans at all levels of society could be in using law to promote economic development, but also how progress “meant throwing away much that a broader future development could use.”²³ Hurst quoted John Quincy Adams: “The thirst of a tiger for blood,” Adams thought, was “the fittest emblem of the rapacity with which the members of all the new states fly at the public lands.” “the richest inheritance ever bestowed by a bountiful Creator upon any

17. See, e.g., J. Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, (1944-45).

18. See, e.g., Robert W. Gordon, *J. Willard Hurst and the Common-Law Tradition in American Legal Historiography*, 10 LAW & SOC’Y REV. 9 (1975); Stewart Macaulay, *Willard’s Law School*, 1997 WIS. L. REV. 1163; Arthur F. McEvoy, *Willard Hurst’s Scholarship: Pragmatism and Morality*, 1997 WIS. L. REV. 1191.

19. See, e.g., JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1835-1915* (1964). See also Arthur F. McEvoy, *The Lumber Book*, 10 ENVTL. HIST. 724 (2005).

20. The appellation is Robert Gordon’s. Gordon, *supra* note 18, at n.125.

21. Hendrik Hartog, *Snakes in Ireland: A Conversation with Willard Hurst*, 12 LAW AND HIST. REV. 370, 379 (1994).

22. *Id.* at 387.

23. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 70 (1956).

national community.” “It were a vain attempt to resist them here,” Adams concluded.²⁴ As much a product of his time as any writer, Hurst combined a New Dealer’s faith in the capacity of intelligent government to promote social progress with a keen awareness, which he took from the mid-century Protestant theologian Reinhold Niebuhr, of “the tragic element, not just in life but in human history, the sense of limitations of energy, courage, imagination, vitality that adhere in being a human being.”²⁵ It was a historian’s job, Hurst thought, to evaluate the record of government’s performance in the intelligent and humane management of social affairs.²⁶ His key insight, that “the structure of legal institutions itself was a major factor in determining what they accomplished or what they could accomplish,”²⁷ led him later in his career to emphasize our system’s inherent difficulties in promoting intangible, widely-shared, and cross-generational values in public policy.²⁸

This Article, which is a précis for a book in progress about the history of late twentieth-century U.S. environmental law, argues that our modern environmental law is peculiarly a creature of the New Deal. Despite its obvious legacy from common-law nuisance and Progressive regulation, what makes modern environmental law different from anything that came before is the way in which reformers built it out of parts copied from New Deal reform projects: cooperative federalism, the tax-and-spend power, representation-reinforcing, rights trumps, and so on. Environmental law’s history, its character, its accomplishments, and its shortcomings thus entwined with those of the New Deal regime as a whole, as it reached the peak of its vigor in the early 1970s and decayed gradually but steadily thereafter. Historians are rightly skeptical of “rise and fall” stories that ascribe any organic structure or teleology to the arc of a culture. Historians find such arcs all the time nonetheless, in American history just as readily as in the Third Reich or the Roman Empire. As literary devices, narrative arcs have no inherent truth of their own; what matters is the extent to which they help us understand our history in useful ways. As a regime or a “legal culture,” then—the term is Lawrence Friedman’s—the New Deal has a life history, much as

24. *Id.* at 68.

25. Hartog, *supra* note 21, at 375. *See, e.g.*, REINHOLD NIEBUHR, BEYOND TRAGEDY (reprt. Charles Scribner’s Sons 1947); REINHOLD NIEBUHR, THE IRONY OF AMERICAN HISTORY (1952).

26. Gordon, *supra* note 18, at 48.

27. Hartog, *supra* note 21, at 376.

28. *See, e.g.*, JAMES WILLARD HURST, LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS (1982). *See also*, JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES (1977).

did the Jacksonian Era that began in the early nineteenth century and ended with the Civil War, or the Victorian, laissez-faire era that emerged out of Reconstruction and collapsed, in its turn, during the Great Depression of the 1930s.²⁹

Environmental law was the New Deal's crowning achievement: its gifts and its failings epitomized those of the regime that spawned it, in the prime of its career. This Article makes its argument in three steps. First, the doctrines, strategies, and legal devices that environmental lawyers put together in the early 1970s were those which lawyers in the New Deal tradition developed for other purposes. Environmental lawyers used citizen suits, standing doctrine, and other devices in new and different ways, in the process not only inventing a new field of legal practice but also strengthening other areas of law that relied on them as well. Second, environmental law emerged as a coherent practice in the early 1970s, just at the point when the congeries of projects that we identify with the New Deal—antidiscrimination, social welfare, industrial democracy, public works, a militant foreign policy—peaked in its ambition, its reach, and in the level of its political support. Even though it was a particularly noisy period, politically, hindsight makes clear that the New Deal regime was never as strong, before or since, as it was at that moment. Since the 1970s, finally, environmental law has both manifested the internal decay of the New Deal regime and catalyzed the increasingly powerful attacks on the regime that emerged after 1980. Environmental law has been a key target for anti-New Deal reformers precisely *because* it epitomizes the essential character of the entire suite of late-twentieth-century projects, from affirmative action to universal health care, that reformers aim to dismantle. In the end, the rise and fall of environmental law may have much to tell us about the character of American law in the late twentieth century generally.

29. Although historians make their living by creating and criticizing such periodizations, this particular one has an intuitive sense to it that most historians will recognize, whether they build their own work around it or not. The constitutional law scholar Bruce Ackerman uses a highly articulated version in his book, *WE THE PEOPLE, VOL. 1: FOUNDATIONS* (Harvard Univ. Press, 1998); *VOL. 2: TRANSFORMATIONS* (Harvard Univ. Press, 1998). On "legal culture," see Lawrence M. Friedman, *The Place of Legal Culture in the Sociology of Law*, 8 *LAW & SOC.* 186 (2005); Lawrence M. Friedman, *The Concept of Legal Culture: A Reply*, in *COMPARING LEGAL CULTURES* 33 (David Nelkin ed., 1997); Lawrence M. Friedman, *Legal Culture*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION SUPPLEMENT I*, 303-05 (Leonard W. Levy ed., 1992); Lawrence M. Friedman, *American Legal Culture: The Last Thirty-Five Years*, 35 *ST. LOUIS U. L.J.* 529 (1991).

II. ENVIRONMENTAL LAW: REGULATION, DEMOCRACY, HUMAN RIGHTS

Environmental law as such, as a defined area of practice with a bar association, annual meetings, journals and law-school curriculum all its own, emerged quite suddenly in the few years around Earth Day 1970. It invented itself, however, not from scratch but by recombining familiar ideas and devices and directing them toward a new purpose, much as President Nixon created the Environmental Protection Agency that same year by rearranging parts of the Federal Departments of Agriculture, Interior, Health, Education and Welfare, as well as from the Food and Drug Administration and the Atomic Energy Commission.³⁰ As Nixon explained,

Our national government today is not structured to make a coordinated attack on the pollutants which debase the air we breathe, the water we drink, and the land that grows our food. Indeed, the present governmental structure for dealing with environmental pollution often defies effective and concerted action. Despite its complexity, for pollution control purposes the environment must be perceived as a single, inter-related system. Present assignments of departmental responsibilities do not reflect this interrelatedness.³¹

Like the E.P.A., environmental law generally came into being by just such a process of cobbling-together of spare parts: like Frankenstein's monster, its critics might say.

These particular parts, however, came off shelves originally stocked during Franklin Roosevelt's New Deal in the 1930s.³² The New Deal's contributions to what we now recognize as environmental law

30. *See, e.g.*, RICHARD NIXON, SPECIAL MESSAGE TO THE CONGRESS ABOUT REORGANIZATION PLANS TO ESTABLISH THE ENVIRONMENTAL PROTECTION AGENCY AND THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION 578-586 (July 9, 1970), available at <http://quod.lib.umich.edu/p/ppotpus/4731750.1970.001>.

31. *Id.* at 586.

32. The historiography of the New Deal is vast. One of the earliest works retains its luster after half a century. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER 1919-1933 (Mariner ed., Houghton-Mifflin 2002); ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 1933-1935 (Mariner ed., Houghton-Mifflin 2003); ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL 1935-1936 (Mariner ed., Houghton-Mifflin 2003). *See also* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (1963) and ELLIS HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (reprt., Fordham Univ. Press, 1995). A more modern synthesis that won the Pulitzer Prize for History is DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945 (1999). *See also* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

included a vastly extended scope of Federal authority, exercised through the powers to tax and spend and to regulate interstate commerce. Environmental law also contained a set of “representation-reinforcing” devices that the New Deal developed to enhance the power of diffuse and disorganized interest groups to discipline newly-empowered government agencies to the good of the whole people. Post-Earth Day environmental law, finally, incorporated a number of “trumps” that limited the power of government agencies to invade particular interests that required special protection from political interference. Those three elements—federal power, counterbalanced by representation-reinforcing devices and trumps for human rights—together made up the foundation of late twentieth-century American government. They achieved their most powerful synthesis in the environmental law of the 1970s.

The most visible legacy of Franklin Roosevelt’s four terms as President was the tremendous arsenal of power that his administrations amassed in the Federal Government as they confronted the challenges of global depression in the 1930s and Fascism in the 1940s. Most important was the vastly enhanced scale of Federal taxation and spending, which financed not only the machinery of government but public works like Hoover Dam on the Colorado River, relief for the indigent and unemployed, loans for farmers and homeowners, and so on. New Deal spending frequently came with strings attached for purposes of social engineering: workers paid with Federal money, for example, got wage-and-hour protection, the right to unionize, and (eventually) protection from racial discrimination in hiring.³³ Federal power also came to bear in the form of statutes regulating business behavior across the length and breadth of the economy, from finance to fishing. The New Deal established its authority to do this under Congress’s power to regulate commerce only after an epic confrontation with the U.S. Supreme Court, which began cooperating after an apparent change of heart in 1937 and, after that, changes in personnel. After a few false starts, New Deal regulation settled into the durable pattern in which Acts of Congress would sketch the broad outlines of policy but delegate implementation and enforcement to administrative agencies, typically one per industrial sector such as broadcasting, aviation, finance, and so on.

33. National Industrial Recovery Act, ch. 90 §7(a), §203(c), 48 Stat. 195, 195-96, 203 (1933) (repealed 1966); Reaffirming Policy of Full Participation in the Defense Program by All Persons, Regardless of Race, Creed, Color, or National Origin, and Directing Certain Action in Furtherance of Said Policy, 6 C.F.R. § 3109 (1941), *available at* www.eeoc.gov/eeoc/history/35th/thelaw/eo-8802.html.

New Deal regulation differed in significant ways from that of the Progressive Era. Many Progressive reforms aimed at guaranteeing the integrity of market processes by controlling the public behavior of participants in particular industries, as in finance,³⁴ trade in goods generally,³⁵ or food and drugs.³⁶ Others prohibited traffic in particular commodities deemed inimical to public welfare, such as oleomargarine,³⁷ lottery tickets,³⁸ wildlife taken in violation of state law,³⁹ or prostitutes.⁴⁰ Progressive-Era natural resources law likewise operated in the public arena, typically by way of bringing efficiency and expertise to the management of the public domain. The Rivers and Harbors Act of 1899, an important precursor of the modern Clean Water Act, prohibited the discharge of “refuse matter of any kind or description whatever” into the navigable waters of the United States except by permit.⁴¹ Like other Progressive reforms, the Rivers and Harbors Act worked on *public* behavior (discharging waste): modern pollution law, by contrast, controls discharges by regulating what kinds of technology businesses may use *inside* their factories. The intrusion of state power into investment and management is a legacy of the New Deal.⁴²

For many of its opponents, environmental law represents the apotheosis of the kind of powerful, centralized, and above all intrusive government that exfoliated under the New Deal. Environmental statutes have taxed and spent on significant public works programs, notably among them a system of wastewater treatment plants under the Clean Water Act and the program of hazardous waste cleanups under the Superfund statute, whose formal name is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”).⁴³ Indeed, the key environmental statutes—Clean Air, Clean Water, Endangered Species, Resource Conservation and Recovery

34. See, e.g., Federal Reserve Act of 1913 12 U.S.C. ch. 3.

35. See, e.g., Federal Trade Commission Act of 1914, 15 U.S.C. §§41-58 (2006).

36. See, e.g., Pure Food Act, ch. 3915, 34 Stat. 768, 768-772 (1906) (repealed 1938).

37. See, e.g., Oleomargarine Act, ch. 840, 24 Stat. 209, 209-13 (1886) (repealed 1939). See *McCray v. United States*, 195 U.S. 27, 63-64 (1904).

38. See, e.g., Federal Lottery Act of 1895, 18 U.S.C. § 1301 (1994). See *Champion v. Ames*, 188 U.S. 321, 363-64 (1903).

39. See, e.g., Lacey Act of 1900, 16 U.S.C. §§ 3371-3378.

40. See, e.g., Mann Act of 1910, 18 U.S.C. §§ 2421-2424 (1998).

41. See Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-407 (2006).

42. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1247-48 (1986).

43. See, e.g., Grants for Construction of Treatment Works, 33 U.S.C. §§ 1281-1301 (2012); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2012).

and so on—made up the core of a burst of regulatory invention between 1968 and 1976 that generated ten new Federal agencies and dozens of new statutes, many of which regulated multiple industries all at once and in new and significantly more intrusive ways.⁴⁴ One of the new agencies, the EPA, has since its quickening in 1970 grown into one of the largest bureaucracies in the Federal Government, with (as of 2010) some 17,000 employees and an annual budget of \$10.5 billion. When anti-government reformers complain about excessive regulation, the environmental kind is never far from the top of the list.

What made the New Deal different from other twentieth-century efforts to exert some kind of political control over the market economy—those of the Soviet Union, Germany and Japan, most notably—was that at the same time the New Deal subjected business to public authority it also enhanced the “countervailing power” in government of non-business, traditionally subordinate groups. Guaranteeing workers’ rights to organize and to bargain collectively with management was the cornerstone of this process.⁴⁵ Going further, the so-called “*Carolene Products* doctrine” (named after a 1938 Supreme Court decision *United States v. Carolene Products Co.*)⁴⁶ suggested that, under the constitutional order then emerging, courts would presume that Congress knew what it was doing when it regulated “ordinary commercial activities” and would presume the legitimacy of such legislation.⁴⁷ Courts would, however, reserve more careful scrutiny for acts that threatened to undermine the political processes that kept Congress from overstepping its bounds: by curtailing Bill of Rights freedoms, for example, or by compromising rights to vote, assemble peaceably, or petition the government.⁴⁸ The constitutional scholar John Hart Ely referred to this device as “representation-reinforcing.”⁴⁹ Another device, the Administrative Procedure Act of 1946, got its start as a Republican move to make New Deal agencies *more* responsive to business interests, not less, but over time became one of the most

44. David Vogel, *The “New” Social Regulation*, in REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS 161-62 (Thomas K. McCraw ed., 1981).

45. The term is John Kenneth Galbraith’s. See, e.g., JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952).

46. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

47. *Id.* at 152-153.

48. *Id.* at n.4. On the *Carolene Products* decision, see Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985). See also Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

49. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88 (1980). See also Ron Replogle, *The Scope of Representation-Reinforcing Judicial Review*, 92 COLUM. L. REV. 1592 (1992).

important tools with which activists forced government agencies to balance environmental values with economic and political ones.⁵⁰

These “countervailing” or “representation-reinforcing” devices, developed in the 1930s and 1940s, together made possible what Lazarus called “the enormously radical redistributive thrust” of post-1970 environmental law.⁵¹ The National Environmental Policy Act of 1969,⁵² the first of the new wave of environmental statutes, made agencies prepare environmental impact statements to accompany proposed regulations through the political process. While NEPA’s intended purpose was to promote rational, scientifically-informed lawmaking for resources and environment, its most important contribution may have been that it made it easier for citizens’ groups to gain access to information about government projects and thus to organize to influence them before they became law.⁵³ In economic terms, impact analysis redistributed political power by forcing developers to subsidize the information costs of environmental and community organizations. Another way in which environmental statutes redistributed power downward was through the “citizen suit” provisions by which most of them authorized non-governmental parties to sue not only private polluters but government officials who failed to meet their responsibilities under the law.⁵⁴

A third, crucial element of the New Deal constitutional order was the promise, also articulated in the 1938 *Carolene Products* decision, that the courts would closely monitor federal legislation that discriminated against what it called “discrete and insular minorities” of different racial, religious, or national backgrounds. With the powerful examples before them not only of anti-Semitism in Germany but of racism in the American South, the Justices reasoned that such prejudice was an especially powerful tool with which particular interests could hijack the political process to their own benefit and against that of the

50. See, e.g., Administrative Procedure Act of 1946, 5 U.S.C. §§ 500 et seq. (2012). Karl Brooks emphasized the importance of the Administrative Procedure Act in the development of environmental law in KARL BROOKS, *BEFORE EARTH DAY: THE ORIGINS OF AMERICAN ENVIRONMENTAL LAW 1945-1970* (2009).

51. LAZARUS, *supra* note 6, at xi-xii.

52. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370.

53. See e.g., COUNCIL OF ENVTL QUALTY, *CITIZEN’S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD* (Dec. 2007).

54. Clean Air Act § 304, 42 U.S.C. § 7604 (1990); Clean Water Act § 505, 33 U.S.C. § 1365 (2002); Endangered Species Act of 1973 § 11(g), 16 U.S.C. § 1540(g) (1973); Resources Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (1984); Comprehensive Environmental Response, Compensation, and Liability Act § 310, 42 U.S.C. § 9659 (2002).

nation as a whole.⁵⁵ The “Rights Revolution” that grew out of the *Carolene Products* decision eventually brought about, not only school desegregation in the 1954 case of *Brown v. Board of Education*⁵⁶ but also varying degrees of Constitutional protection for other ethnic and religious minorities, for women, for the disabled, and for homosexuals. Roosevelt himself argued that only by defending militantly the rights of its citizens could a government powerful enough to manage an advanced, interdependent industrial economy keep itself from veering off into totalitarianism.⁵⁷ For Roosevelt, these included not only the original Bill of Rights but the “Four Freedoms” that he articulated in his 1941 address to Congress on the state of the Union: freedom of speech, freedom to worship, freedom from want, and freedom from fear.⁵⁸ In his 1944 State of the Union address Roosevelt promulgated his “Second Bill of Rights”—to a living wage, education, insurance against unemployment and old age, adequate health care, and so on—economic rights necessary for “true individual freedom” in a modern political economy.⁵⁹ Although it seems to have drawn little attention at the time, the 1944 address outlined the social-welfare state that came into being in the United States over the next generation.⁶⁰ In the 1970 case of *Goldberg v. Kelly*,⁶¹ for example, the Supreme Court brought the *Carolene Products* doctrine to bear on state welfare agencies when it held that terminating people’s benefits without “some kind of hearing” left the recipients immediately destitute and unable to defend themselves, thus undermining the agencies’ ability to correct their own mistakes.⁶²

Roosevelt did not include the right to a healthy environment in his “Second Bill of Rights.” Still, the kinship between environmental rights and rights to education, health care, and social insurance seemed plain

55. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

56. 347 U.S. 483 (1954).

57. Franklin D. Roosevelt, *Address to the Congress on the State of the Union, January 6, 1941*, in 1940 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 672 (1941), available at <http://name.umdl.umich.edu/4926581.1940.001>.

58. *Id.* at 663.

59. Franklin D. Roosevelt, *Message to the Congress on the State of the Union, January 11, 1944*, in 1944-1945 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 40-41 (1950), available at <http://name.umdl.umich.edu/4926605.1944.001> [hereinafter Roosevelt, *Message to the Congress on the State of the Union*].

60. For an unromantic view of the 1944 address, see KENNEDY, *supra* note 32, at 784. A more positive appraisal is CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

61. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

62. *Id.* at 262-64.

enough to lawmakers thirty years later. An early draft of the National Environmental Policy Act proclaimed just such a right in its preamble; although the phrase did not appear in the final version, similar provisions occasionally made their way into state environmental protection statutes.⁶³ Other “rights trumps” in environmental law include the Endangered Species Act of 1973,⁶⁴ which bars the national government from undertaking activities that threaten listed species or their habitat, and mandates in the Clean Air and Clean Water Acts that pollution standards be set to protect human health without regard to cost.⁶⁵ State courts invoked the ancient public trust doctrine to require developers to leave wetlands and shorelands in their natural condition so as to preserve their aesthetic and ecological benefits.⁶⁶ Like the “preferred freedoms” of the *Carolene Products* doctrine, such devices put firm limits on the extent to which the core values of a free society could be manipulated in the service of politics or profit.⁶⁷

Environmental law effectively tapped the significant energy available in the culture of the late 1960s and early 1970s, not because the ideas in it were especially new but rather because it adapted available tools and strategies to pressing issues in a new and vital way. Chief among these tools were the enhanced fiscal and regulatory power that the New Deal had created to combat the Great Depression. Environmental law also incorporated two other strategies by which the New Deal kept government power within constitutional bounds: citizen suits and environmental impact statements reinforced citizens’ power to use “ordinary political processes” to “bring about the repeal of undesirable legislation,” as the *Carolene Products* decision put it,⁶⁸ while such devices as the public trust doctrine and the Endangered Species Act’s “no-harm” provisions put essential values beyond the reach of exploitation for economic or political gain. For Lazarus, these “redistributive” elements lay at the heart of environmental law’s

63. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 805-06 (2d ed. 1994).

64. 1973 Endangered Species Act, 16 U.S.C. § 1531-1544 (2008)

65. See, e.g., Clean Air Act § 109(b), 42 U.S.C. §7409(b) (1971); Lead Industries Assn. Inc. v. Env’tl Prot. Agency, 647 F.2d 1130, 1138-39 (D.C. Cir. 1980); Clean Water Act § 101(a)(2), 33 U.S.C. § 1251(a)(2) (2002); Chem. Mfrs. Ass’n v. U.S. EPA, 870 F.2d 177, 205 (5th Cir. 1989); see William H. Rodgers, Jr., *Benefits, Costs, and Risks: Oversight of Health and Environmental Decision making*, 4 HARV. ENVTL. L. REV. 191, 201-02 (1980).

66. *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971); *Just v. Marinette County*, 201 N.W.2d 761, 767 (Wis. 1972). See also Molly Selvin, *The Public Trust Doctrine in American Law and Economic Policy*, 1789-1920, 1980 WIS. L. REV. 1403, 1439-40.

67. See generally Alpheus Thomas Mason, *The Core of Free Government, 1938-1940: Mr. Justice Stone and “Preferred Freedoms,”* 65 YALE L.J. 597 (1956).

68. *United States v. Carolene Products*, 304 U.S. 144, 152-54 (1938).

transformative power.⁶⁹ In many ways, then, environmental law represented the quintessence of New Deal governance. As Hurst put it, environmentalism harnessed both power and reason in the service of the common good, while reinforcing the community solidarity and wide dispersal of power essential to social progress.⁷⁰ Environmental law achieved this remarkable synthesis when it did partly because its structure so closely matched that of the New Deal regime, and partly because it did so at the historical moment when that regime was at its most energetic.

III. ENVIRONMENTAL LAW AT THE ZENITH OF THE NEW DEAL REGIME

Although those who forged modern U.S. environmental law in the early 1970s did so by cobbling together rules, doctrines, and other legal devices that had been available since the 1930s, what they came up with looked so different from what they had known before that it seemed to have “organized itself,” as Senator Nelson said of Earth Day.⁷¹ Lazarus disagreed with the “oft-repeated fiction that environmental law spontaneously began in the late 1960s and early 1970s”; tracing its emergence instead to significant shifts in public awareness of environmental problems as they worked upon long-standing traditions of public concern over natural resources, public health, and workplace safety.⁷² Still, the suddenness of the change and what Lazarus called its “radically redistributive nature” pointed to some kind of historical discontinuity that required explanation.⁷³ The environmental law scholar Daniel Farber described the change as a “republican moment”—one of the occasional periods in American political history in which politics as usual gives way to a burst of enhanced democratic participation and ideological struggle.⁷⁴ Such periods are more likely than normal times to generate political change more fundamental and far-reaching than the normal pull and haul of interest group balancing.⁷⁵

69. LAZARUS, *supra* note 6, at 40.

70. James Willard Hurst, *Legal Elements in United States History*, 5 PERSPECTIVES IN AMERICAN HISTORY 3, 88-89 (Donald Fleming & Bernard Baylin eds., 1971); Gordon, *supra* note 18, at 47-48.

71. GAYLORD NELSON, SUSAN CAMPBELL & PAUL A. WOZNIAK, BEYOND EARTH DAY: FULFILLING THE PROMISE 9 (2002)

72. LAZARUS, *supra* note 6, at 43-54.

73. *Id.* at 44.

74. Daniel Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992).

75. James Pope, *Republican Moments: The Role of Diverse Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 292-93 (1990). The “republican moment” thesis has

The years around Earth Day were a confusing vortex of war in Southeast Asia, liberation struggles and cultural upheaval at home, and high-octane politics everywhere.⁷⁶ Environmentalism had its own constituency and its own program, but it drew life and energy from the struggles going on around it. Indeed, what gave environmental law an extra push at its birth was that most of the highly-charged issues in one way or another concerned the working-out of the transformation of American law that began during the New Deal. Environmental laws made up the largest share of the blizzard of new statutes that Congress put out in the late sixties and early seventies, but they closely resembled, in structure and function, companion statutes concerning workplace safety, consumer protection, employment discrimination, and so on. Federal courts, meanwhile, ratified Congress's initiatives but also elaborated the "countervailing" elements of the *Carolene Products* doctrine in environmental as well as in workplace, consumer, and discrimination cases. State governments also pursued environmental reform in their own jurisdictions, along with significant reforms in family law, product safety, and other areas. Again, environmental law may have seemed new at the time, but from the beginning it developed in parallel with other reforms, all which had their roots in the New Deal of the 1930s.

The economist David Vogel counted thirty-two new federal statutes dealing with energy and environmental issues in the late sixties and early seventies, chief among which were NEPA in 1969, the Clean Air Act in 1970, the Federal Water Pollution Control Amendments of 1972, and the Endangered Species Act of 1973. He also counted sixty-two new Congressional acts concerning consumer safety and health and twenty-one covering job safety and other working conditions.⁷⁷ Their common aim—from pollution control to consumer products liability and workplace safety to employment discrimination—was to control the socially destructive behavior not just of particular industries but of business *in general*: where New Deal statutes governed the economy sector by sector, the new wave of laws addressed particular problems across the entire economy. Any given business now had to answer not

generated a lot of literature on its own. See, e.g., Farber, *supra* note 74; Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85 (2001); Christopher J. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws, 1969-1973*, 9 DUKE ENVTL L. & POL'Y F. 29 (1988).

76. A good introduction to the period is JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974* (1996).

77. Vogel, *supra* note 44, at 161-162.

only to its particular oversight agency but also to different bureaucracies for environmental, worker safety, employment, and other issues. Like Lazarus, Vogel noted that these new statutes “critically affected the balance of power between business and nonbusiness constituencies,”⁷⁸ dispersing power downward and outward according to the pattern set during the New Deal but greatly amplified in the new wave. The new statutes affirmed the welfare-state principles of Roosevelt’s “Second Bill of Rights,” but at the cost of significantly increasing the weight and complexity of the regulatory burden on individual businesses.⁷⁹ The environmental statutes were thus not only a part, but a leading part, of a wave of regulatory reform matched in all of American history only by the Progressive Era of 1900-1920 and the New Deal itself.

The federal courts played their part, as well. Many of the environmental decisions that came down in the early 1970s did little more than to affirm that Congress had indeed meant what it said. As Judge Skelly Wright of the D.C. Circuit Court of Appeals put it in a decision forcing the Atomic Energy Commission to comply with NEPA, environmental impact analysis “attest[s] to the commitment of the Government to control, at long last, the destructive engine of material ‘progress;’” it “makes environmental protection a part of the mandate of every Federal agency and department.”⁸⁰ In the 1978 case of *TVA v. Hill*,⁸¹ however reluctantly, the Supreme Court likewise determined that the Endangered Species Act also meant what it said: “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.”⁸² Other decisions in the early 1970s enhanced the standing of environmentalists to intervene in regulatory processes on behalf of widely-shared environmental values and to prevent ecological harms more uncertain and indirect than the narrow, focused economic ones that courts had previously required.⁸³ On yet another front, *Citizens to Preserve Overton Park v. Volpe*,⁸⁴ in 1971, held that federal agencies

78. *Id.* at 164.

79. Robert Rabin also noted the difference in character of the regulatory statutes of the sixties and seventies. See Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1278-95 (1986).

80. *Calvert Cliffs’ Coordinating Comm. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

81. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

82. *Id.* at 194.

83. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 685 (1973); see generally *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Reserve Mining Co. v. Envtl. Prot. Agency*, 514 F.2d 492 (8th Cir. 1975).

84. 401 U.S. 402 (1971).

had no discretion to prefer economic values over environmental ones when a statute indicated Congressional preference for the latter.⁸⁵ *Overton Park* became a controlling case in administrative law generally; after 1971 it became difficult to separate environmental law from administrative law in general.

As it turns out, the federal courts were as busy as Congress in the early 1970s, not just in the environmental area but across the entire New Deal agenda. *Goldberg v. Kelly*,⁸⁶ the decision that afforded welfare recipients protection from arbitrary termination of their benefits, came down in March, 1970, one month before Earth Day.⁸⁷ The antidiscrimination prong of the *Carolene Products* doctrine reached its apogee the next year when *Swann v. Charlotte-Mecklenburg Board of Education*⁸⁸ permitted busing as a remedy for school segregation, *Griggs v. Duke Power*⁸⁹ defined unlawful discrimination in terms of the disparate impact of ostensibly race-neutral employment practices, and *Reed v. Reed*⁹⁰ held that state laws discriminating against women violated the Equal Protection clause of the Fourteenth Amendment.⁹¹ In *New York Times v. United States*⁹² that same year, the Supreme Court defended “political processes which can ordinarily be expected to bring about the repeal of undesirable legislation”⁹³ when it turned back the Nixon Administration’s effort to suppress publication of Defense Department documents on the history of the Vietnam War.⁹⁴ Finally, in 1973, *Roe v. Wade*⁹⁵ prohibited states from criminalizing abortion under the Due Process clause of the Fourteenth Amendment.⁹⁶ Together, then, in environment as well as more traditional areas, in the courts as well as in Congress, the decisions of the early 1970s represented the high point of the New Deal agenda.

The late 1960s and early 1970s were revolutionary times in state government also, not only with respect to environment but across a broad front of reform in the New Deal tradition. California’s 1969 water

85. *Id.* at 411-412.

86. 397 U.S. 254 (1970).

87. *Id.* at 262-64.

88. 402 U.S. 1, 31 (1971).

89. 401 U.S. 424, 436 (1971).

90. 404 U.S. 71 (1971).

91. *Id.* at 76-77 (state law preferring males over females as administrators in probate held violation of equal protection clause).

92. 403 U.S. 713 (1971).

93. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).

94. *New York Times*, 403 U.S. 713.

95. 410 U.S. 113 (1973).

96. *Id.* at 166.

pollution control statute was a model for the federal Clean Water Act three years later.⁹⁷ California and Wisconsin courts extended their states' public trust doctrines to protect environmental and aesthetic values in tidelands and wetlands in 1971 and 1972, respectively.⁹⁸ The California decision, *Marks v. Whitney*,⁹⁹ went so far as to authorize any member of the public to sue developers on behalf of environmental trust values as well.¹⁰⁰ The California Supreme Court invented the modern law of products liability in the late 1960s and early 1970s; after 1964 strict liability for injuries caused by defective products became one of the most widely- and rapidly-adopted reforms in the thousand-year history of the common law.¹⁰¹ In 1968 the California Court did away with traditional landowner's immunities in tort, as well, reasoning that "whatever may have been the historical justifications for the common law distinctions (between business invitees, social guests, and trespassers), it is clear that those distinctions are not justified in the light of our modern society."¹⁰² California pioneered no-fault divorce in its Family Law Act of 1969;¹⁰³ by 1987 every state had provided for some form of marital dissolution without proof of fault¹⁰⁴ Reforms in environment, tort, and family law were all of a piece: they all entailed the effort to use state power, as the California court put it, "in an effort to do justice in an industrialized urban society, with its complex economic and individual relationships."¹⁰⁵

This was the goal that Roosevelt had set in his "Second Bill of Rights" speech, when he insisted that "true individual freedom cannot exist" in an advanced industrial society "without economic security and independence."¹⁰⁶ Reasoned, pragmatic government regulation, kept

97. See, e.g., Porter-Cologne Water Quality Control Act of 1969, Cal. Water Code §§ 13000 et seq. (West 2012).

98. See Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L.REV. 665, 667-668 (2012).

99. 491 P.2d 374 (1971).

100. *Id.* at 380; see also *Just v. Marinette County*, 201 N.W.2d 761 (Wisc. 1972)

101. See, e.g., *Greenman v. Yuba Power Products Co.*, 59 Cal. 2d 57, 62-63 (Cal. 1963) (adopting strict liability for defective products); RESTATEMENT (SECOND) OF TORTS § 402(A) (1964) (same); *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1155 (Cal. 1972) (plaintiff required only to prove that defect caused injury, not that product was "unreasonably dangerous"); *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455-46 (Cal. 1978) (two-prong test for design defect).

102. *Rowland v. Christian*, 443 P.2d 561, 567 (Cal. 1968).

103. See, e.g., 1969 Cal. Stat. 3312.

104. Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 292 (1987).

105. *Rowland*, 443 P.2d at 566 (quoting *Kermarec v. Compagnie Generale*, 358 U.S. 625, 630-631 (1959)).

106. Roosevelt, *Message to the Congress on the State of the Union*, *supra* note 59, at 41.

straight and narrow by clean politics and human rights protections, was the New Deal formula for progress in the late twentieth century. This vision reached the peak of its strength during the tumultuous years of the late 1960s and early 1970s, although few at the time could perceive it through all the noise, just as the Jacksonian regime entered its prime in the 1830s and the Victorian, laissez-faire vision dominated American politics in the first decade of the twentieth century. Environmental law went so far in so short a time precisely because it developed along with parallel efforts to promote economic democracy, public education, social insurance, equal justice and other New Deal objectives. Leading environmental lawyers at the time certainly had high expectations for the transformative potential of the movement.¹⁰⁷ What they could not know at the time was that environmental law would begin to decay almost immediately thereafter, along with the entire edifice of New Deal governance, and that the achievements of the early 1970s would mark out the regime's most vulnerable points.

IV. ENVIRONMENTAL LAW AND THE DECAY OF THE NEW DEAL REGIME

Opposition to environmental law began to coalesce almost as soon as the field took shape. President Nixon had signed the National Environmental Policy Act,¹⁰⁸ conjured the Environmental Protection Agency, and declared the 1970s the “decade of the environment;”¹⁰⁹ in preparation for his re-election campaign he competed with potential rivals in the Democratic Party for credibility as an environmental reformer.¹¹⁰ As soon as it became clear how much the new model of environmental regulation would entail reallocating resources and redistributing wealth and power out of their customary channels, Nixon's enthusiasm waned. He vetoed the Federal Water Pollution Control Amendments just before the 1972 elections after deciding that the environmentalists were “going crazy.”¹¹¹ He later announced in Cabinet that it was time to “get off the environmental kick.”¹¹² Ronald

107. See, e.g., Joseph Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 MICH. L. REV. 471 (1970); Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Object*, 45 S. CAL. L. REV. 450 (1972); Lawrence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1973).

108. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370.

109. RICHARD N. L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 229 (2d ed. 2006).

110. William H. Rodgers, Jr., *Where Environmental Law and Evolutionary Biology Meet: Of Panda's Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25, 58-59 (1993).

111. Lazarus, *supra* note 6, at 77-78.

112. *Id.* at xii.

Reagan became President in 1981 believing that he had a mandate to curtail the power of the Federal Government in general and the EPA in particular, although he soon learned otherwise.¹¹³ Thereafter, although environmentalists continued to build on the gains of the early 1970s, they increasingly fought a defensive campaign in Congress, in the courts, and in politics.

As before, the fate of environmental law entwined with those of antidiscrimination, electoral reform, social welfare, and other kindred New Deal projects. Because environmental law had been the last New Deal program to emerge, and particularly because it so powerfully synthesized the regime's entire repertoire of ideas and strategies, it became one of the earliest and most inviting targets for opponents wishing to push the regime back wherever they could. Many of the reasons for the change in fortunes rooted in large-scale, long-term shifts in economic and environmental conditions globally. Other reasons were intrinsic to environmental law itself: political vulnerabilities correlated to the strengths that had propelled the project's initial success. In a way, the shared nature of the movement's virtues was its chief vulnerability: environmentalists focused on defending their own programs for the New Deal values that they entailed, while those bent on dismantling the New Deal generally could attack those values wherever they appeared.

Soon after Earth Day a number of different ecological, economic, and social parameters began to shift in a way that would make progress in environmental lawmaking more difficult. Chief among these is probably the end of U.S. hegemony in the world market for petroleum: U.S. domestic production peaked at roughly 3.5 billion barrels in 1971, at which time the United States was already importing a third of its supply from foreign sources.¹¹⁴ With the help of U.S. foreign policy, American firms kept such tight control over the global supply (and thus the marginal price) of oil that the average price of domestic crude oil kept within a very narrow range between \$20 and just over \$23 (in 2010 dollars) every year between 1951 and 1973.¹¹⁵ In the latter year the Organization of Petroleum Exporting Countries ("OPEC") became the most powerful influence on the price of oil.¹¹⁶ Thereafter, American

113. ANDREWS, *supra* note 109, at 257-261.

114. U.S. ENERGY INFORMATION ADMINISTRATION, U.S. CRUDE OIL SUPPLY AND DISPOSITION (Dec. 28, 2012), *available at* http://www.eia.gov/dnav/pet/PET_SUM_CRDSND_K_M.htm.

115. DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER 241-42, 413-419, 607-608 (rev. ed., Simon & Schuster 2008).

116. *Id.*

dependence on cheap fossil energy became less a problem to be solved through environmental engineering and increasingly an imperative to be maintained through foreign policy and domestic politics.¹¹⁷

Other ecological parameters came to the end of extended periods of relative stability at about the same time. Total water use in the United States peaked in 1980, after growing steadily since 1950; a growing population thereafter had to use limited supplies more efficiently.¹¹⁸ Over the postwar period U.S. agriculture committed itself to the industrial production of feed grains; by the end of the century, the U.S. generated 40%-45% of the world corn supply and 70% of global exports.¹¹⁹ Yields grew steadily after 1940 and with relatively little year-to-year variation between the late 1950s and the early 1970s. Researchers disagree on whether the apparent stability was due to irrigation and crop technology or to climatic conditions.¹²⁰ After the mid-1970s U.S. yields and prices manifested greater instability; the increasing diversion of corn to fuel production enhanced the trend, with significant effects on the global market.¹²¹ Meanwhile, by 1980 atmospheric scientists had come to agree that the Earth's climate was both warming and destabilizing as a result of greenhouse gases emitted largely from the combustion of fossil fuels. Evidence for anthropogenic climate change had been mounting for some time, although a slight cooling trend between 1945 and 1975 had for a while masked the human impact and forestalled consensus until that point.¹²² Postwar American culture, including modern environmentalism, thus matured in a hothouse environment maintained by cheap energy and the accident of an equable

117. *Id.*

118. NATIONAL ATLAS, WATER USE IN THE UNITED STATES, available at http://www.nationalatlas.gov/articles/water/a_wateruse.html; see, e.g., CHARLES FISHMAN, THE BIG THIRST: THE SECRET LIFE AND TURBULENT FUTURE OF WATER (2012).

119. Christopher J. Kucharik & Navin Ramankutty, *Trends and Variability in U.S. Corn Yields Over the Twentieth Century*, 9 EARTH INTERACTIONS 1, 3 (2005).

120. *Id.* at 8-10; see also Rosamond Naylor, Walter Falcon, Erika Zavaleta, *Variability and Growth in Grain Yields, 1950-94: Does the Record Point to Greater Instability?*, 23 POPULATION & DEV. REV. 41 (1997).

121. Kucharik & Ramankutty, *supra*, note 119, at 3-4; see, e.g., COLIN CARTER, GORDON RAUSSER, & AARON SMITH, DEP'T OF AGRIC. & RESEARCH ECON., THE EFFECT OF THE U.S. ETHANOL MANDATE ON CORN PRICES (2012), available at http://agecon.ucdavis.edu/people/faculty/aaron-smith/docs/Carter_Rausser_Smith_Ethanol_Paper_submit.pdf.

122. See, e.g., Kyle L. Swanson, George Sugihara, & Anastasios A. Tsonis, *Long-Term Natural Variability and 20th-Century Climate Change*, 106 PROC. NAT'L ACAD. SCI. 16120 (Sept. 22, 2009). The landmark warning is J. Hansen et al., *Climate Impact of Increasing Atmospheric Carbon Dioxide*, 213 SCI. 957, 964-65 (Aug. 28, 1981). See generally SPENCER R. WEART, THE DISCOVERY OF GLOBAL WARMING (Rev. ed. 2008).

climate.

Political developments after the mid-1970s merged with ecological and economic forces to undermine the ground on which environmental law stood. One such development is that American politics became increasingly polarized. In the 1930s, party affiliation seemed to play little role in determining how members of Congress voted on particular measures. Since 1977, however, the influence of party on voting patterns has increased until, by 2011, Congress was more polarized by party than at any time since Reconstruction. Political scientists attributed the change to the collapse of bipartisan consensus over New Deal economic policy and, especially, the end of Democratic Party dominance in the states of the Old South.¹²³ Political polarization seems both to have led and followed the marked increase in economic inequality that also took place after 1980, after a period going back to the late 1930s in which New Deal economic policies maintained a relatively steady and equal distribution of income.¹²⁴ The political scientist Jacob Hacker, meanwhile, has shown how government policies that since the New Deal have pooled and socialized the risks of unemployment, sickness, old age, and so on, have since 1980 decayed to “tatters.”¹²⁵ Environmental protection became law in the early 1970s, with lopsided bipartisan support, as a way of alleviating the risk that pollution posed to public health and welfare: it decayed after 1980, along with other social-welfare programs, as the political foundations of the New Deal regime collapsed.

The attack on environmental law began almost as soon as its outlines became clear in the early 1970s. Old-line manufacturing

123. NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 16 (2006); *see also An Update on Political Polarization (through 2011)*, VOTEVIEW BLOG (Jan. 30, 2012), <http://voteview.com/blog/?p=284>.

124. *See, e.g.*, Thomas Piketty and Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q. J. OF ECON. 1 (2003). Updated in Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (with 2011 updates)*, BERKELEY (July 17, 2010), available at <http://elsa.berkeley.edu/~saez/saez-UStopincomes-2011.pdf>. By 2008 the share of income going to the top 0.01% of earners in the United States, including capital gains, was higher than at any point in the twentieth century. *Id.* at Figure 3. Where after-tax income for the top 1% of earners grew 129.4% between 1979 and 2003, the increase for the middle 20% was only 15.2%. Joel Friedman, Isaac Shapiro, & Robert Greenstein, *Recent Tax and Income Trends Among High Income Tax Payers*, WASHINGTON, DC: CENTER ON BUDGET & POL'Y PRIORITIES (Apr. 10, 2006), available at www.cbpp.org/4-10-06tax5.pdf. Real wages, on the other hand, had by 2004 declined 16% from their peak in 1972. U.S. BUREAU OF LABOR STATISTICS, processed at *Are Workers Losing Ground*, FED. RESERVE BANK OF ATLANTA, http://macroblog.typepad.com/macroblog/2005/12/are_workers_los.html (last visited May 5, 2013).

125. JACOB S. HACKER, *THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT AND HOW YOU CAN FIGHT BACK* 166 (2006).

industries like steel and auto resisted the Clean Air Act's intrusion on their investment decisions so strenuously that two early commentators were led to observe that the clearest measure of the Act's potential to change the way regulated industries did business was the effectiveness with which those companies resisted it.¹²⁶ Direct attacks on the Commerce Power—the mainspring of New Deal regulation—generally came to naught.¹²⁷ More successful were efforts to limit the effectiveness of representation-reinforcing and human-rights limits on agency decision-making: beginning the late 1970s the Supreme Court enhanced the authority of agencies to follow their own interpretations of facts¹²⁸ and of law¹²⁹ against the objections of environmental intervenors. A series of decisions in the 1990s pushed back the broad standing to sue agencies on behalf of environmental values that the courts had set in the 1970s;¹³⁰ one of these also managed to reinterpret the substance of the Endangered Species Act so as to require agencies to balance economic considerations with species preservation in administering the Act.¹³¹ A 1992 decision, *Lucas v. South Carolina Coastal Council*,¹³² went so far as to suggest that property owners had Constitutional rights, not just to hold on to their land but also to develop it for profit, which may trump statutory requirements that certain lands be left in their natural state.¹³³ Although the basic structure of environmental law remained intact through the end of the century, partisan conflict among Congress, the agencies, and the Executive Branch slowed statutory development to a halt, promoted complexity and rigidity in regulation, and encouraged both industry and regulators to pursue their goals by evading rather than engaging formal law.

Perhaps the most powerful threat to environmental law at the turn

126. Richard Walker & Michael Storper, *Erosion of the Clean Air Act of 1970: A Case Study in the Failure of Government Regulation and Planning*, 7 B. C. ENVTL. AFF. L. REV. 189, 210 (1978); William F. Pedersen, *Why The Clean Air Act Works Badly*, 129 U. PA. L. REV. 1059, 1085-87 (1981).

127. One of the most direct commerce-power attacks came against the Clean Air Act but was turned back by a unanimous Court in *Whitman v. American Trucking Assoc., Inc.*, 531 U.S. 457, 472-76 (2001). One somewhat successful attempt concerned the authority to regulate wetlands, *Solid Waste Agency of Northern Cook Cnty. (SWANCC) v. U.S. Army Corps of Engin'rs*, 531 U.S. 159, 171-74 (2001).

128. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 540-44 (1978).

129. *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

130. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-68 (1992).

131. *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

132. 505 U.S. 1003 (1992).

133. *Id.* at 1028-32; see, e.g., Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1433-56 (1993).

of the twenty-first century, however, came from a resurgent right wing committed to attacking vestiges of the New Deal system wherever they appeared, from Social Security to affirmative action to abortion rights to consumer product safety.¹³⁴ Opposition to environmental regulation was an early and leading motive for a large part of the resurgent Right. Among lawyers, one of the first was soon-to-be Justice Lewis Powell, who in 1971—at the height of the “republican moment” in which modern environmental law took shape—wrote a manifesto for the U.S. Chamber of Commerce in which he asserted that “our government, our system of justice, and the free enterprise system” were under “broadly based and consistently pursued” assault on a scale “quite new in the history of America.”¹³⁵ College campuses were “the single most dynamic source” of the attack, but Powell also singled out “politicians” who stampeded “to support almost any legislation related to ‘consumerism’ or to the ‘environment.’”¹³⁶ Powell, who was himself a moderate Democrat, then outlined a detailed, long-range, remarkably prescient plan for the defense of business hegemony in American law and culture.¹³⁷ Opposition to environmental law motivated a number of other New Right organizers, including Joseph Coors of Colorado, who seeded the Heritage Foundation in 1973, and Paul Weyrich, a Wisconsin political reporter who co-founded the Heritage Foundation and who organized the American Legislative Exchange Council the same year. Energy companies were particularly eager to support right-wing organizations that engaged environmental issues in politics and in the courts.¹³⁸ In 2010, a Republican Senator denounced the EPA as “Public

134. On the new right, see GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945* (rev. ed. 1996); JERRY Z. MULLER, *CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT* (1997); DAVID FARBER, *THE RISE AND FALL OF MODERN AMERICAN CONSERVATISM: A SHORT HISTORY* (2010); sympathetic works include JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* (2004); LEE EDWARDS, *THE CONSERVATIVE REVOLUTION: THE MOVEMENT THAT REMADE AMERICA* (1999).

135. The Powell Memorandum may be found, among other places, at Reclaim Democracy.org. Lewis F. Powell, *Confidential Memorandum: Attack of American Free Enterprise System*, http://reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html. (last visited Jan. 28, 2013).

136. *Id.*

137. See, e.g., Jeffrey Rosen, *The Unregulated Offensive*, N. Y. TIMES MAG., Apr. 17, 2005, available at www.nytimes.com/2005/04/17/magazine/17CONSTITUTION.html?_r=0&pagewanted=print&position=.

138. Jane Mayer, *Covert Operations: The billionaire brothers who are waging a war against Obama*, THE NEW YORKER, Aug. 30, 2010, available at www.newyorker.com/reporting/2010/08/30/100830fa_fact_mayer?printable=true; Alec Report:

Enemy Number One of our farmers and ranchers.”¹³⁹

Conservatives learned from experience during the Reagan Administration that frontal assaults on the environmental statutes of the early 1970s were unlikely to succeed. Public opinion continued to value environmental amenities, at least so long as their cost was not too onerous. Important parts of the business community had by the 1990s come to terms with pollution control and impact analysis, had made investments in plant and equipment accordingly, and even come to appreciate the efficiencies and public favor that came with them.¹⁴⁰ Even the increasingly conservative Supreme Court was unwilling to trim the Commerce Power back to its pre-1937 extent.¹⁴¹ Likewise, when Republicans took control of both houses of Congress in 1994, for the first time in four decades, their “Contract with America” pledge to dismantle key aspects of the New Deal regime failed to make much headway.¹⁴² Like social security or union membership or the other entitlements that Roosevelt named in the Second Bill of Rights, Americans had generally come to accept clean air and clean water as “self-evident” elements of “human happiness and well-being.”¹⁴³

Still, as Justice Scalia wrote in the law review article that presaged his later attacks on environmental standing, “important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the Federal bureaucracy’ . . . and a good thing, too.”¹⁴⁴ National struggles over environmental regulation shifted over into appropriations committees, out of public view, while Republican

Corporate America’s Trojan Horse in the States: The Untold Story of the American Legislative Exchange Council, NAT. RES. DEF. COUNCIL (2002), available at <http://www.alecwatch.org/11223344.pdf>.

139. Robert James Bidinotto, *Where EPA is Public Enemy #1*, AM. SPECTATOR, Sept. 30, 2010, <http://spectator.org/archives/2010/09/30/where-epa-is-public-enemy-1>.

140. LAZARUS, *supra* note 6, at 161-165.

141. An early “delegation” attack on the commerce power came in a challenge to the Occupational Safety and Health Act of 1970, *see Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607, 671-88 (1980). An explicit and revealing debate over the legacy of the New Deal between Justices Rehnquist, Thomas, and Souter may be found in *United States v. Lopez*, 514 U.S. 549, 549-68, 584-615 (1995), which was the first decision since the New Deal to find a challenged statute unauthorized by the Commerce Clause. The most direct attack to date is probably *Am. Trucking Ass’n, Inc., v. E.P.A.*, 283 F.3d 355, 363-64 (D.C. Cir. 2002), *reversed in part sub nom. Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457 (2001).

142. *See, e.g.*, “Republican Contract with America” 1994, NAT’L CTR. FOR PUB. POLICY RESEARCH, available at www.nationalcenter.org/ContractwithAmerica.html. *See also* MICKLETHWAIT & WOOLDRIDGE, *supra* note 134, at 7; LAZARUS, *supra* note 6, at 129-132.

143. Roosevelt, *Message to the Congress on the State of the Union*, *supra* note 59, at 41.

144. Antonin Scalia, *The Doctrine of Standing As An Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 17: 881, 897 (1983).

efforts to disable regulations made much more progress in the financially-strapped states than in Washington.¹⁴⁵ After 2003 Republicans for a time controlled both Congress and the Executive Branch, while Republican appointees dominated the federal courts. Budgetary pressure, political appointees hostile to the agencies they led, and steady erosion in the courts left many career officers demoralized and large parts of the law simply unenforced.¹⁴⁶ If the basic edifice of environmental law remained intact by the end of the new century's first decade, it was hard to say precisely how much business still went on inside.

V. CONCLUSION

Modern environmental law precipitated so magically out of the chaos of the 1960s partly because of the extraordinary quantum of civic energy that was loose in the country at the time, partly because social knowledge was available both to explain the source of environmental problems and to make them seem fixable, and partly because of the particular events—the Santa Barbara oil spill, especially—that focused that energy when it was available.¹⁴⁷ The legal elements that went into making it, however—centralized, expert-driven economic regulation, a broad franchise for participation in policymaking, and special protection for human rights and other values that might otherwise be lost in the process—had been available for some time. Americans had put them together in the 1930s and 1940s in order to meet the successive challenges of the Great Depression and war against Fascism. Environmental protection was only one of the projects to which the

145. LAZARUS, *supra*, note 6, at 156-159. *See, e.g.*, Leslie Kaufman, *G.O.P. Push in States to Deregulate Environment*, N.Y. TIMES, Apr. 15, 2011, available at www.nytimes.com/2011/04/16/science/earth/16enviro.html?pagewanted=print.

146. *See, e.g.*, Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Hampering E.P.A.*, N.Y. TIMES, Mar. 1, 2010, available at www.nytimes.com/2010/03/01/us/01water.html?pagewanted=print; Charles Duhigg, *Millions in U.S. Drinking Dirty Water, Records Show*, N.Y. TIMES, Dec. 8, 2009, available at www.nytimes.com/2009/12/08/business/energy-environment/08water.html?pagewanted=print. *See also* NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING*, ch. 3 (2011), available at www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/content-detail.html; J. DAVITT MCATEER ET AL., *UPPER BIG BRANCH: THE APRIL 5, 2010, EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES* (2011), available at www.nttc.edu/programs&projects/minesafety/disasterinvestigations/upperbigbranch/UpperBigBranchReport.pdf.

147. On “focusing events” and the non-linear dynamics of reform, *see* JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICES* (2d ed. 2003).

regime forged in the New Deal applied itself, but it emerged when the regime was at the peak of its strength and its strategies proven in application to civil rights, universal education, interstate highways, and the other great projects of late twentieth-century government. As it was in many ways the New Deal regime's most ambitious program, environmental law became an early and favorite target for the regime's critics: its vulnerabilities as well as its virtues epitomized those that characterized the New Deal from the beginning. Although it was clear on the fortieth anniversary of Earth Day that neither New Deal loyalists nor their critics would create the future in their own image, it was also clear that environmental protection would remain an important public responsibility so long as representative government survived in the United States.

Environmental law is at its core a creature of the New Deal, welfare-regulatory regime that emerged in the United States during the 1930s and dominated American politics for the rest of the twentieth century. Understanding environmental law from that perspective offers useful insights, not only into the subject itself but also into the essential character of such other late twentieth-century ambitions as technocracy, civil rights, and social welfare. The inter-relatedness of the different parts is the key point. The different projects that emerged from the Second Bill of Rights got as far as they did because they used the same tools and built on the same vision; that they could not defend that common vision better than they have is an important reason for the decline of each.