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## A Different Kind of "Republican Moment" in Environmental Law

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# A Different Kind of “Republican Moment” in Environmental Law

Richard J. Lazarus<sup>†</sup>

A little over a decade ago, Professor Dan Farber was the first to suggest that modern environmental laws may have resulted from a “republican moment”—an “outburst[] of democratic participation and ideological politics”—created by widespread and then-rising public demand for environmental protection.<sup>1</sup> The term “republican” invokes the political tradition referred to as “civic republicanism,” which stresses the willingness of individuals to undergo sacrifices to promote the public good.<sup>2</sup> Farber posited that the “original 1970 Earth Day looks very much like a ‘republican moment.’ An estimated 20 million Americans participated in a variety of public events that day. More than 2000 colleges, 10,000 high schools and elementary schools, and 2000 communities took part.”<sup>3</sup>

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† Copyright © 2003 by Richard J. Lazarus, Professor of Law, Georgetown University Law Center. Thanks are owed to John Podesta, Lois Schiffer, Anne Shields, Gary Guzy, and John Lesly, all of whom provided comments on an earlier draft, and to Kelly Moser, Georgetown University Law Center Class of 2003, for her valuable research assistance. Most of all, Michael Doherty, Georgetown University Law Center Class of 2001, deserves great credit for creating the database that serves as the basis for the graphs of congressional voting that appear in this article. *See infra* note 58.

1. Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 66 (1992) (quoting James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 292 (1990)).

2. *Id.* at 66 (citing Pope, *supra* note 1, at 311).

3. *Id.* Farber does soften his hypothesis somewhat, however, by subsequently acknowledging that “the term ‘republican moment’ may be misleading” in this context “to the extent that it suggests that very short periods of high-pitched public interest alternate with periods of nearly total public apathy.” *Id.* at 67. According to Farber, a “continuum” more accurately depicts the role of public opinion in promoting environmental protection law: “Earth Day of 1970 represented a peak, but there have been lesser peaks of public pressure sparked by events such as Love Canal or Three Mile Island. In between these peaks, public attention is lower, but not nonexistent.” *Id.* Much of modern environmental law can, accordingly, be further explained as resulting from legislative responses to major environmental crises, such as the

The theoretical significance of such a “republican moment” lies in the contention that, without such a moment, environmental protection laws would never exist because of their radically redistributive nature. Environmental protection laws are invariably redistributive; they impose substantial costs on some and confer substantial benefits on others.<sup>4</sup> For that reason, the institutional barriers to the enactment of such laws are particularly high; there are always political forces ready to resist their enactment and, under our nation’s lawmaking system, it is much easier to stop a law from being enacted than to secure legislation.

What makes the hurdles impeding the enactment of environmental protection laws even higher than for most redistributive laws is not just the threshold fact that the identity of those who benefit from the laws often differs greatly from those who must absorb their costs. The primary source of those obstacles is the spatial and temporal distribution of the costs and benefits associated with environmental protection laws. Because of the nature of ecological cause and effect, the benefits and costs of environmental protection are naturally spread over great spatial and great temporal dimensions. Costs are imposed by restricting activities in locations that may be far removed physically—by hundreds and even thousands of miles—from the places that enjoy the benefits of those restrictions.<sup>5</sup> Similarly, costs are imposed by restricting activities that are occurring at times that may be far removed temporally—not just by years but potentially by decades and even centuries—from those future generations who will enjoy the benefits of those restrictions.<sup>6</sup> Consequently, politically and economically powerful vested interests in the here and now are invariably ready to oppose the enactment of laws that will benefit those elsewhere or in the future. Moreover, because of the expansive spatial and temporal dimensions of analyzing such cause and effect, there is almost always a fair amount of scientific uncertainty in assessing the benefits, while the more immediate economic costs appear to be far more concrete and

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“burning” of the Cuyahoga River, Love Canal, or the Exxon Valdez oil spill.

4. This is not to suggest, of course, that those who pay substantial costs enjoy no corresponding benefits or that those who enjoy benefits pay no costs. The disparities are not so absolute. It is a matter of degree and proportionality.

5. Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 249-53, 256-62 (2000).

6. *Id.* at 253-55, 262-65.

certain.<sup>7</sup> Only during a "republican moment," scholars such as Farber have argued, is it possible to overcome the otherwise preclusive barriers that exist to the enactment and implementation of meaningful environmental legislation.<sup>8</sup>

The purpose of this Essay is to propose and discuss the possibility that the nation currently faces another, albeit very different, "republican moment" that may well test the future of environmental protection laws in the United States. This new "moment" has as its modifier an uppercase "Republican" rather than a lowercase "republican." While the latter "republican" invokes the political tradition referred to as "civic republicanism," the former "Republican" refers instead to the current National Republican Party. The "moment" facing environmental law is the virtually unprecedented ascendancy of the Republican Party in all three branches of the federal government.<sup>9</sup>

## I. THE DEMISE OF BIPARTISANSHIP IN ENVIRONMENTAL LAW

Thirty years ago, the mere suggestion of a partisan divide in environmental protection law would likely have been treated as an anathema. At the time of environmental law's first "republican moment," environmental law was popularly celebrated as bipartisan in keeping with the notion of the existence then of a widespread public consensus favoring

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7. My faculty colleague, Lisa Heinzerling, however, has well explained how the purported costs of environmental protection law may be far more uncertain than it appears and susceptible to great exaggeration. See Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 1984-86 (1998).

8. A more complete discussion of the factors that make environmental lawmaking especially difficult and how those factors have influenced environmental law's evolution since the early 1970s is contained in my forthcoming book, *The Making of Environmental Law*, to be published in 2003 by the University of Chicago Press. Some of the discussion in this essay is derived from that book, including some brief excerpts from the current draft manuscript.

9. Although the Republican Party was similarly dominating all three branches of the federal government at the very outset of the presidency of George W. Bush, that dominance was both extraordinarily thin—with fifty senators elected from each party—and short-lived because the Republican senator from Vermont, James Jeffords, declared soon thereafter that he would vote to provide the Democrats with the majority necessary for the opposition party to ascend to the leadership positions in that legislative chamber. See Katharine Q. Seelye & Adam Clymer, *Senate Republicans Step Out and Democrats Jump In*, N.Y. TIMES, May 25, 2001, at A1.

stronger environmental protection laws. Indeed, it was the bipartisan nature of the environmental movement that enhanced its attractiveness. In the late 1960s, the nation was otherwise reeling from an onslaught of socially divisive political issues, ranging from the Vietnam War to civil rights. Environmental protection provided a much needed opportunity for Americans to rally around a positive, aspirational objective for the future. Whether because of genuine personal beliefs or political self-interest, both of the major political parties quickly proclaimed themselves supporters of stronger environmental laws.

It was, accordingly, Republican President Richard Nixon who seized upon the environmental issue with great gusto early in his term.<sup>10</sup> Nixon signed into law the National Environmental Policy Act (NEPA)<sup>11</sup> with much fanfare on January 1, 1970.<sup>12</sup> In February of that year, the president delivered to Congress a far-reaching and ambitious agenda for environmental legislation in his "Environmental Message."<sup>13</sup> In December, Nixon created the Environmental Protection Agency (EPA)<sup>14</sup> and, on the very last day of the year, signed into law the Clean Air Act Amendments of 1970,<sup>15</sup> which established the nation's first sweeping pollution control law.

During this time period, Democrats held the leadership positions in both the House and Senate and unabashedly competed for the environmental mantle with Republicans in Congress and in the Nixon White House. Congress passed sweeping laws by overwhelming majorities as no one from either political party wanted to be seen as the enemy of environmental protection. As summed up by one legislator, explaining his reluctant vote in favor of safe drinking water legislation in 1974, "After all, if one votes against safe drinking water, it is like voting against home and mother."<sup>16</sup> The

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10. See J. BROOKS FLIPPEN, *NIXON AND THE ENVIRONMENT* 50-79 (2000).

11. 42 U.S.C. §§ 4321-4370 (2000).

12. FLIPPEN, *supra* note 10, at 50-52; see National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

13. Richard Nixon, *The President's Message to Congress Recommending a 37-Point Administrative and Legislative Program*, 6 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 160 (1970).

14. Reorg. Plan No. 3 of 1970, 3 C.F.R. § 1072 (1970), *reprinted in* 5 U.S.C. app. at 184 (2000).

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

16. 120 CONG. REC. 37,594 (1974) (remarks of Sen. Cotton).

average votes in favor of major federal environmental legislation during the 1970s was seventy to five in the Senate and 331 to thirty in the House.<sup>17</sup>

The Clean Air Act Amendments of 1970 were the product of the combined (albeit not necessarily cooperative) efforts of President Nixon and congressional leaders in the Democratic Party, including Senator Edmund Muskie who chaired the influential Senate Committee on the Environment and Public Works.<sup>18</sup> Other prominent congressional Democrats supporting strong environmental legislation included Senator Gaylord Nelson who promoted the idea of the first "Earth Day,"<sup>19</sup> and Senator Henry "Scoop" Jackson who pioneered NEPA through Congress.<sup>20</sup> At the same time, vocal skeptics of strict environmental laws included prominent Democrats, most often from the South, such as Alabama's Jamie Whitten, who chaired the House Appropriations Committee and who notoriously boasted that he could undermine the stringency of environmental laws through the budgetary process.<sup>21</sup> On the other hand, some of the nation's most celebrated environmental leaders included many members of the Republican Party, including early EPA Administrators William Ruckelshaus and Russell Train, and congressional leaders such as Representative Paul McCloskey of California.<sup>22</sup>

Finally, the leading environmental judges of the 1970s included judges nominated by both Democratic and Republican presidents. For instance, D.C. Circuit Judge Skelly Wright was nominated by President Kennedy, and Second Circuit Judge James Oakes was nominated by President Nixon.<sup>23</sup> Judge

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17. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 311, 323. These lopsided votes on the final bills enacted by Congress, however, may well mask a series of closely contested votes on various amendments to specific parts of the bill. *Id.* at 323 n.47.

18. E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326-29 (1985).

19. See, e.g., GAYLORD NELSON ET AL., BEYOND EARTH DAY: FULFILLING THE PROMISE 105-63 (2002).

20. See Henry M. Jackson, *Foreword: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073, 1079 (1970).

21. Lazarus, *supra* note 17, at 338.

22. Beverly Beyette, *Earth Day Observance: The Day Politics Stood Still*, L.A. TIMES, May 23, 1985, available at 1985 WL 2181382; Peter Milius, *What Presidents Do: Decant Some Wine from New Bottles*, N.Y. TIMES, Nov. 3, 1980, at A4.

23. Federal Judicial Center, *Judges of the United States Courts*,

Wright famously wrote for the D.C. Circuit that it was now the “judicial role” to ensure that important environmental policies “heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”<sup>24</sup> Judge Oakes still sits on the federal bench and, during the past three decades, he has earned a reputation for consistently promoting aggressive application of environmental protection requirements.<sup>25</sup>

Today, however, a starkly partisan divide exists in environmental law. Notwithstanding the persistence of remarkably similar rhetoric by candidates for elected office from the two major political parties, the two parties represent very different views on the efficacy of existing environmental protection law and the need for its reformation.<sup>26</sup> These differences are not matters of incidental emphasis or tone; they express starkly contrasting visions of both the substantive ends as well as the means of environmental law. The Republican Party generally favors less stringent environmental controls and increased resource exploitation,<sup>27</sup> while the Democratic Party generally favors stronger environmental protection standards and resource conservation and preservation laws.<sup>28</sup>

Much of the substantive policy disputes derive from differing attitudes towards the use of discount rates in assessing the benefits of environmental controls as well as differing degrees of faith in the ability of future technological

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[http://www.fjc.gov/newweb/jnetweb.nsf/fjc\\_bio](http://www.fjc.gov/newweb/jnetweb.nsf/fjc_bio) (last visited Feb. 18, 2003).

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

25. See, e.g., James L. Oakes, *The Judicial Role in Environmental Law*, 52 N.Y.U. L. REV. 498 (1977) (urging “more active judicial participation in the evolution of environmental law”); Lois J. Schiffer & Timothy J. Dowling, *Reflections on the Role of the Courts in Environmental Law*, 27 ENV'T L. 327, 332 (1997) (stating that Judge Oakes has been singled out as being “particularly instrumental in the progressive development of our environmental laws”).

26. See Jonathan Cannon & Jonathan Riehl, *Presidential Greenspeak: How Presidents Talk About the Environment and What It Means* 1-21 (Dec. 2000) (unpublished working paper draft, on file with author) (discussing the “presidential rhetoric on the environment from 1970 to the present”).

27. See Republican National Committee, *American Partners in Conservation and Preservation: Stewardship of Our Natural Resources*, <http://www.rnc.org/GOPInfo/Platform/2000platform6.htm> (last visited Jan. 7, 2003) (describing the 2000 platform for the Republican Party).

28. See Democratic National Committee, *The 2000 Democratic National Platform: Prosperity, Progress, and Peace*, <http://www.democrats.org/about/2000platform.html> (last visited Jan. 8, 2003).



innovation to obviate the need for controls now. For instance, the higher one discounts the value of future benefits created by environmental protection laws, the less significant those benefits appear to be in determining today whether they are worth the more immediate and certain costs of pollution controls and resource conservation measures.<sup>29</sup> So too, the more one is willing to discount as just another future monetizable benefit the human lives saved in the future from environmental controls today, the less necessary those present environmental controls become.<sup>30</sup> Finally, the more optimistic one is about the ability of future technology to address environmental problems or to provide ready substitutes for some natural resources, the less worthwhile it seems to undertake economic sacrifices now. In 1970, there was no discernible divide between the two parties on these underlying assumptions. As described in more detail below, that no longer seems to be true today.

The differences in viewpoint and outlook between the two major parties, however, extend even further and deeper. They are fundamentally opposed on matters of lawmaking principles, including the extent to which private property rights to natural resources should be protected, the efficacy and neutrality of market forces, and the necessity of a strong national government on matters of public health and welfare. Contemporary leaders of the Republican Party, including both those holding elected office and those within the party's professional staff, are far more persuaded of the inviolability of private property rights in natural resources than are their Democratic counterparts,<sup>31</sup> who are more likely to be persuaded of the need for government regulation because of the spatial and temporal spillovers caused by unrestricted resource

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29. See Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations, and the Environment*, 46 VAND L. REV. 267, 279-87 (1993); Lisa Heinzerling, *Environmental Law and the Present Future*, 87 GEO. L.J. 2025, 2069-77 (1999).

30. Compare John J. Donohue III, *Why We Should Discount the Views of Those Who Discount Discounting*, 108 YALE L.J. 1901 (1999) (arguing that discounting and cost-benefit analysis is a tool that should be used in regulatory decision making), with Lisa Heinzerling, *Discounting Life*, 108 YALE L.J. 1911 (1999) (rebutting Donohue's argument).

31. See, e.g., Republican National Committee, *supra* note 27, <http://www.rnc.org/GOPInfo/Platform/2000platform6.htm> ("We link the security of private property to our environmental agenda for the best of reasons: Environmental stewardship has best advanced where property is privately held.").

exploitation.<sup>32</sup> Furthermore, those in the Republican Party are more accepting of the proposition that market forces provide an efficacious and neutral basis for the allocation and distribution of the nation's natural resources wealth.<sup>33</sup> Democrats are more willing to perceive the limitations of the market in this respect and to question the market's alleged "neutrality."<sup>34</sup>

The partisan divide in environmental law has deepened to such an extent in recent years that it is now evident in the workings of all three branches of the federal government. As described below, each of the branches displays the effects of such a divide, ranging from the legislative branch, where it is most expected, to the judicial branch, where it is not.

#### A. EXECUTIVE BRANCH

The first two years of the George W. Bush administration make quite plain the depth and extent of the chasm growing between the two political parties on environmental protection policy. The current administration has sought to reverse almost all of the major environmental initiatives promoted by the Clinton administration at the EPA and the Departments of Agriculture and of the Interior. Reminiscent of the early years under President Ronald Reagan in the 1980s, the new administration immediately undertook a series of widely publicized changes in the direction of national environmental policy that drew the condemnation of environmentalists, the

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32. See *infra* note 34.

33. See Republican National Committee, *supra* note 27, <http://www.rnc.org/GOPInfo/Platform/2000platform6.htm> ("Our way is to trust the innate good sense and decency of the American people. We will make them partners with government, rather than adversaries of it. . . . Wherever it is environmentally responsible to do so, we will promote market-based programs that are voluntary, flexible, comprehensive, and cost-effective.").

34. See, for example, Democratic National Committee, *supra* note 28, <http://www.democrats.org/about/2000platform.html>, which states,

The Republicans have tried to sell off national parks; gut air, water, and endangered species protections; let polluters off the hook; and put the special interests ahead of the people's interest. They are wrong. Out [sic] natural environment is too precious and too important to waste.

And we must dramatically reduce climate-disrupting and health-threatening pollution in this country, while making sure that all nations of the world participate in this effort. Environmental standards should be raised throughout the world in order to preserve the Earth and to prevent a destructive race to the bottom wherein countries compete for production and jobs based on who can do the least to protect the environment.

protest of leaders in the opposing political party, and the attention of the national news media.<sup>35</sup> President Bush appointed Gale Norton and Spencer Abraham, prominent supporters of increased natural resource development, to head, respectively, the Department of the Interior and the Department of Energy—two of the most important environmental policy-making positions in the federal government.<sup>36</sup> Based on the advice of Secretary Abraham and others, the president quickly took the dramatic step of unilaterally withdrawing the United States from the Kyoto Protocol on Climate Change.<sup>37</sup> After weeks of meetings with industry leaders, the vice president subsequently announced a new national energy policy that, environmentalists contend, reflected the priorities and economic interests of White House allies in the energy industry.<sup>38</sup> Environmentalists argued, in particular, that the new energy policy favored more domestic oil production and less environmental protection and paid little attention to conservation opportunities.<sup>39</sup>

Both the EPA and Interior likewise have since steadfastly pursued policy changes that provoked accusations that business interests are being unduly favored at the expense of

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35. See, e.g., Editorial, *Clueless on Global Warming*, N.Y. TIMES, July 19, 2001, at A24; Editorial, *Grizzlies at Risk*, N.Y. TIMES, May 19, 2002, at 14; Editorial, *Landscapes Under Siege*, N.Y. TIMES, Mar. 7, 2002, at A30; Alison Mitchell, *Democrats See Gold in Environment*, N.Y. TIMES, Apr. 22, 2001, at 20; Editorial, *More Environmental Rollbacks*, N.Y. TIMES, Oct. 29, 2001, at A10; Editorial, *Nature Overrun*, N.Y. TIMES, Apr. 4, 2002, at A22; Editorial, *No Greens Need Apply*, N.Y. TIMES, Aug. 19, 2001, at 12; Editorial, *Park Rangers With Respirators*, N.Y. TIMES, Mar. 6, 2002, at A20; Editorial, *Parks Under Siege*, N.Y. TIMES, Apr. 24, 2002, at A26; Editorial, *Poor Marks on the Environment*, N.Y. TIMES, Jan. 28, 2002, at A14; Katharine Q. Seelye, *Bush Team Is Reversing Environmental Policies*, N.Y. TIMES, Nov. 18, 2001, at A20.

36. Thomas B. Edsall, *Federalist Society Becomes a Force in Washington: Conservative Group's Members Take Key Roles in Bush White House and Help Shape Policy and Judicial Appointments*, WASH. POST, Apr. 18, 2001, at A4.

37. David E. Sanger, *Bush Will Continue to Oppose Kyoto Pact on Global Warming*, N.Y. TIMES, June 12, 2001, at A1; see Douglas Jehl & Andrew C. Revkin, *Bush, in Reversal, Won't Seek Cut in Emissions of Carbon Dioxide*, N.Y. TIMES, Mar. 14, 2001, at A1.

38. NAT'L ENERGY POL'Y DEV. GROUP REP., NATIONAL ENERGY POLICY: RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE (2001); Editorial, *One-Way Discussion on Energy*, N.Y. TIMES, Mar. 28, 2002, at A30; David E. Sanger, *In Energy Plan, Bush Urges New Drilling, Conservation and Nuclear Power Review*, N.Y. TIMES, May 17, 2001, at A1.

39. Don Van Natta, Jr. & Neela Banerjee, *Bush Energy Paper Followed Industry Push*, N.Y. TIMES, Mar. 27, 2002, at A20.

environmental protection. The EPA withdrew (only to later reinstate in the face of widespread criticism) the Clinton administration's stricter arsenic standard for drinking water,<sup>40</sup> promulgated changes in Clean Air Act rules that undermined the basis of a major enforcement initiative launched by the Clinton administration against major stationary sources of air pollution,<sup>41</sup> suspended and then reversed new, very ambitious Clinton administration regulations to implement the Clean Water Act's water quality standards,<sup>42</sup> announced its opposition to a reauthorization of the Superfund tax on industry for the cleanup of hazardous waste sites,<sup>43</sup> and relaxed rules barring the disposal in valleys and streams of thousands of tons of fill from "mountaintop mining."<sup>44</sup>

Similarly, at the Department of the Interior, Secretary Gale Norton took a series of steps that abruptly changed Interior policy from that formulated under the prior Democratic administration and then-Secretary of the Interior Bruce Babbitt. Secretary Norton eliminated strict Clinton administration environmental regulations and bonding requirements applicable to mining on public lands,<sup>45</sup> authorized oil drilling near national parks,<sup>46</sup> barred the reintroduction of grizzly bears to the northwest,<sup>47</sup> reversed the Clinton

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40. Douglas Jehl, *E.P.A. to Abandon New Arsenic Limits for Water Supply*, N.Y. TIMES, Mar. 21, 2001, at A1; Katharine Q. Seelye, *E.P.A. to Adopt Clinton Arsenic Standard*, N.Y. TIMES, Nov. 1, 2001, at A18.

41. Matthew L. Wald, *E.P.A. Says It Will Change Rules Governing Industrial Pollution*, N.Y. TIMES, Nov. 23, 2002, at A1. For the EPA's "New Source Review" rules, see 67 Fed. Reg. 80,186 (Dec. 31, 2002). For the Agency's proposed complementary changes to the meaning of "routine maintenance," see 67 Fed. Reg. 80,290 (Dec. 31, 2002).

42. 66 Fed. Reg. 53,044 (Oct. 18, 2001) (amending 40 C.F.R. § 130.7(d)(1)); Eric Pianin, *EPA Jettisons Clinton Rule on Cleaning up Waterways*, WASH. POST, Dec. 21, 2002, at A2.

43. Katharine Q. Seelye, *Bush Proposing Policy Changes on Toxic Sites*, N.Y. TIMES, Feb. 24, 2002, at A1; Katharine Q. Seelye, *Bush Slashing Aid for E.P.A. Cleanup at 33 Toxic Sites*, N.Y. TIMES, July 1, 2002, at A1; Editorial, *Shortchanging Superfund*, N.Y. TIMES, July 6, 2002, at A12.

44. Editorial, *Burying Valleys, Poisoning Streams*, N.Y. TIMES, May 4, 2002, at A12.

45. Mining Claims Under the General Mining Laws, 66 Fed. Reg. 54,834 (Oct. 30, 2001) (codified at 43 C.F.R. pt. 3800); Katharine Q. Seelye, *Bush White House Reverses Clinton Decision on Mining*, N.Y. TIMES, Oct. 26, 2001, at A14.

46. Timothy Egan, *Bush Administration Allows Oil Drilling Near Utah Parks*, N.Y. TIMES, Feb. 8, 2002, at A14.

47. Seelye, *supra* note 35.

administration policy to reopen Yellowstone National Park to snowmobiling,<sup>48</sup> and reduced a Clinton administration two-year mining moratorium on one million acres under consideration for national monument designation to a ban of new mining on only 117,000 acres of the land.<sup>49</sup> The Secretary has also spearheaded the administration's effort to open up the Alaska Arctic National Wildlife Refuge to oil exploration and development, which the Clinton administration had consistently opposed.<sup>50</sup>

Finally, the Forest Service has rejected two major environmental initiatives that the Clinton administration promoted. The first called for enhanced environmental protection in forest service planning both by enhancing environmental review and by imposing greater substantive limits on the extent to which activities in the national forests could impinge on environmental values, especially species diversity.<sup>51</sup> The Bush administration first postponed the effectiveness of those rules and more recently proposed new rules that significantly scale back on substantive and procedural forest planning requirements.<sup>52</sup> The second major Clinton initiative from which the Bush administration Forest Service is apparently retreating concerns protection of roadless areas in national forests. The Forest Service promulgated highly protective rules at the very end of the Clinton administration.<sup>53</sup> The Forest Service has since stepped away from actively defending those rules from industry court challenge, which reportedly prompted the resignation of both the Chief and Deputy Chief of the Forest Service.<sup>54</sup>

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48. *Park Rangers With Respirators*, *supra* note 35.

49. *Interior Ends Clinton Mining Moratorium on 1 Million Acres in Southwestern Oregon*, [33 Current Developments] *Env't Rep.* (BNA) 1208 (May 31, 2002).

50. See, e.g., Michael Grunwald, *Interior: Drilling Won't Violate Polar Bear Pact*, WASH. POST, Jan. 18, 2002, at A23; Michael Grunwald, *Warnings on Drilling Reversed*, WASH. POST, Apr. 7, 2002, at A1; Don Van Natta Jr., *Video Inspires New Dispute over Alaska Refuge Drilling*, N.Y. TIMES, Apr. 12, 2002, at A22.

51. The prior Clinton administration rules were published at 36 C.F.R. pt. 219 (2002).

52. 66 Fed. Reg. 27,552, 27,555 (May 17, 2001) (codified at 36 C.F.R. pt. 219); see Robert Pear, *Bush Plan Gives More Discretion to Forest Managers on Logging*, N.Y. TIMES, Nov. 28, 2002, at A1. The Forest Service's newly proposed rules are set forth at <http://www.epa.gov/nsr/rm-rule.pdf>.

53. 66 Fed. Reg. 3244 (Jan. 2001) (codified at 36 C.F.R. pt. 294).

54. Douglas Jehl, *Forest Service Chief Quits, and Asks Bush to Hold Firm*,

## B. LEGISLATIVE BRANCH

The notion that a partisan divide exists in Congress is hardly shocking. After all, unlike the other two branches of the federal government, the entire organizational structure of Congress is expressly premised upon the existence of such a meaningful partisan divide; there is the “majority” party and the “minority” party. The leadership of committees, the number of committee staff, and the ability to bring bills to the floor and to a vote, all derive from a legislator’s affiliation with a political party, whether that particular party is in the majority. Accordingly, partisan politics result.

The increasingly partisan nature of environmental politics in Congress during the past thirty years is nonetheless quite striking, but because of its increased intensity rather than its mere existence. To provide some measure of that phenomena in the legislative branch, I undertook an examination over time of the environmental voting record of members of Congress on environmental issues during the past thirty years. I used as the basis for my review the scoring of individual members of Congress that is performed each year by the League of Conservation Voters (LCV).<sup>55</sup> The LCV bases its scores on a member’s vote on certain bellwether environmental issues during each session of Congress. A member of Congress is awarded positive scores every time she or he votes in favor of positions that the LCV has identified as supportive of environmental protection policies.<sup>56</sup> Accordingly, a legislator who has voted on every occasion in such a manner receives a score for the year or legislative session of “100,” while a

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N.Y. TIMES, Mar. 28, 2002, at A19; Elizabeth Shogren, *A Natural Split with Bush, and Many Quit—Environment: Longtime, Key Officials Who Favor Conservation Say They Are Frustrated by New Rules*, L.A. TIMES, June 3, 2002, at A1. The Ninth Circuit nonetheless recently upheld the Clinton administration Forest Service rules, which environmental groups defended by intervening in the case. *Kootenai Tribe v. Veneman*, 2002 U.S. App. LEXIS 25467, at \*4 (9th Cir. Dec. 12, 2002). The court of appeals reversed a district court decision that had enjoined implementation of the Clinton administration roadless rules. *Id.*

55. The LCV is a nonprofit environmental organization that describes itself as the “political voice of the environmental movement and the only organization devoted full-time to shaping a pro-environment Congress.” League of Conservation Voters, *About LCV*, at <http://www.lcv.org/about/index.asp> (last visited Feb. 18, 2003).

56. LEAGUE OF CONSERVATION VOTERS, 2002 NATIONAL ENVIRONMENTAL SCORECARD (2002), available at <http://lcv.org/pics/pdfs/scorecard02final.pdf> (last visited Jan. 24, 2003).

legislator who has voted in opposition to those policies receives a score of "0."<sup>57</sup> Because the LCV has regularly tabulated these scores since 1971, which essentially marks the beginning of the modern environmental law era in the United States, these data are extraordinarily revealing of political trends over time.<sup>58</sup>

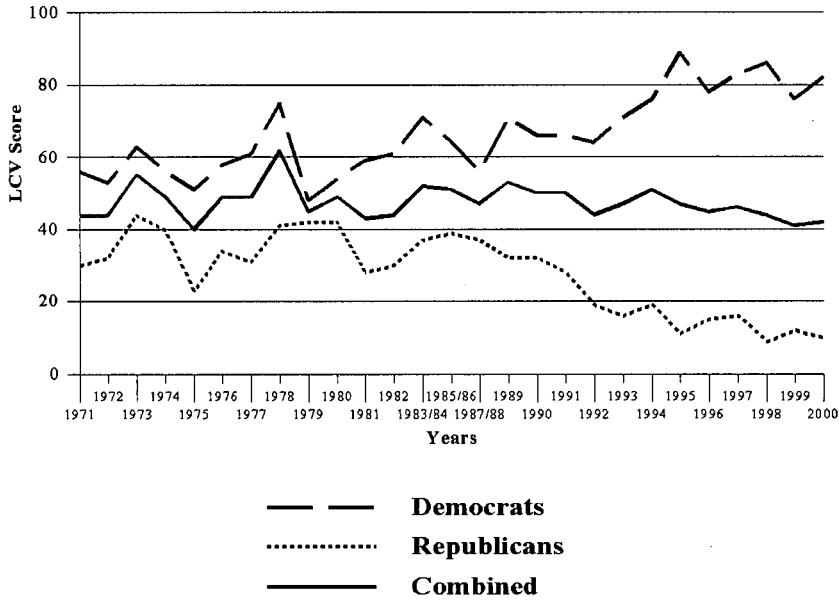
The results of this survey are reproduced on the following pages in a series of graphs. The findings that can be fairly drawn about the voting patterns of Democrats and Republicans from these results are several and set forth below. Some relate to the Congress as a whole. Some relate more to one chamber rather than the other. Finally, some break the partisan voting trends down even more to consider the extent to which the partisan divide may have increased more or less in various geographic regions of the country. One quite obvious pattern evident throughout is the impact of the dramatic shift of southern conservatives from the Democratic to the Republican Party since the early 1970s.

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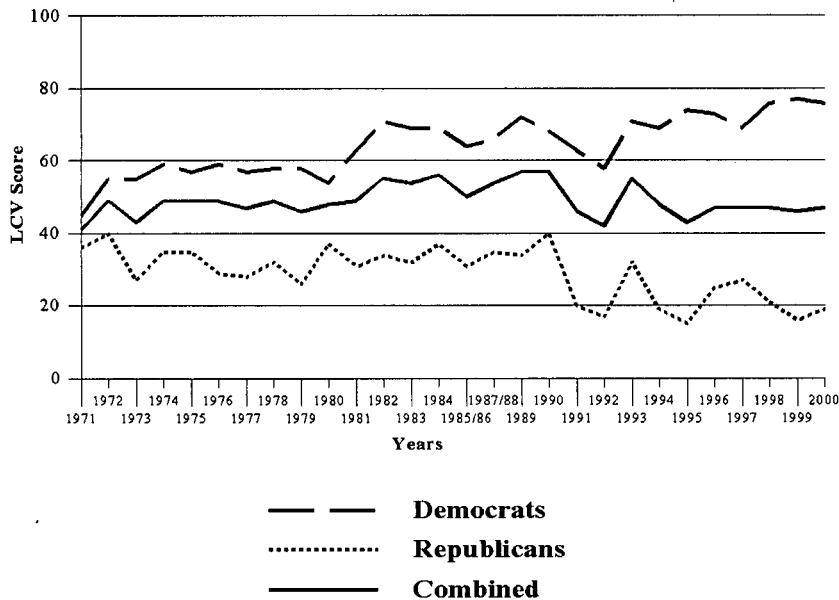
57. . *See id.*

58. Compilation of this data was, however, an enormous undertaking masterfully performed by a recent graduate of the Georgetown University Law Center, Michael Doherty, Class of 2001, while he was my student research assistant. It required his creation of a database for each year that included all of the LCV scores for individual members of Congress for each legislative session, organized both by political party and by geographical region of the country. It also required Doherty's ensuring that the many incidental changes in LCV's scoring system over time (e.g., treatment of abstentions and absences) did not demonstrably affect the reported trends, which he accomplished by recreating what the LCV scores would have been had precisely the same scoring system been used throughout the thirty-year period. Finally, Doherty had to account for numerous permutations, including both individual members leaving office or even their switching political parties in the middle of a term of office.

**Graph 1: Senate LCV Scores, 1971-2000**



**Graph 2: House LCV Scores, 1971-2000**





### 1. Finding 1 (Graphs 1 and 2)

The average LCV scores in Congress remained essentially the same between 1971 and 2000 in both the Senate and House. Indeed, the scores for the two endpoints (1971 and 2000) for each chamber are essentially identical, between 40 to 50 for both. There is some movement within the thirty years in terms of the average scores, including a high average score peak in the Senate in 1978 over 60, and a longer period of higher scores in the House in the 1980s of between 50 and 60. Notably, a comparison of the scores in the House and the Senate shows that the average scores of the two chambers are roughly the same, with the Senate slightly decreasing over time and the House slightly increasing over time.

### 2. Finding 2 (Graphs 1 and 2)

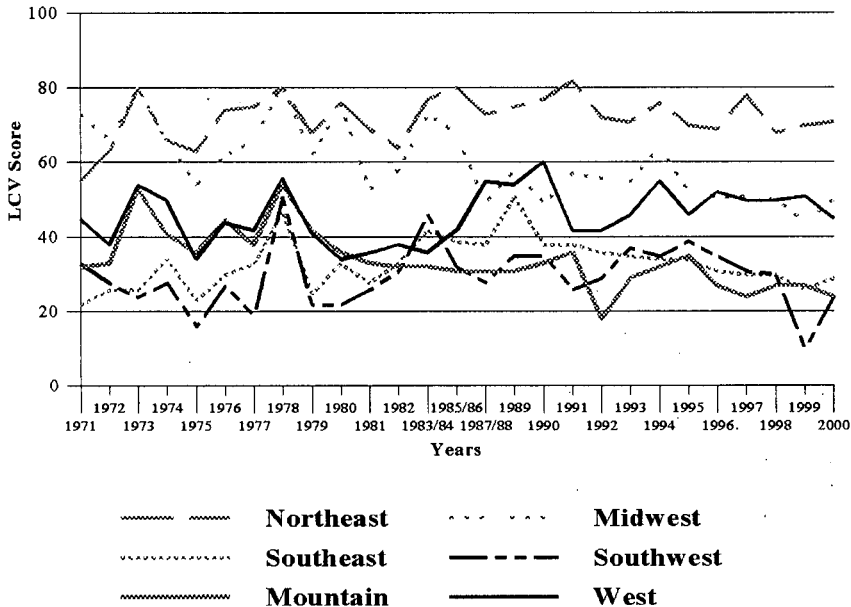
The average LCV scores of the Democratic members of Congress have been consistently higher than their Republican counterparts for the entire thirty-year period reviewed. That has been true for both legislative chambers. The difference, however, between the average scores of the Democratic and Republican members has dramatically increased over time in both chambers. In the House, the difference between the average LCV scores of the two parties was only about 9 points in 1971 (Democrats (45) and Republicans (36)), but increased by more than sixfold to approximately 58 points by the year 2000 (Democrats (77) and Republicans (19)). In 1971, the difference in the average scores in the Senate was approximately 27 points in the Senate (Democrats (57) and Republicans (30)), but that difference increased more than twofold to approximately 71 points by 2000 (Democrats (81) and Republicans (10)).

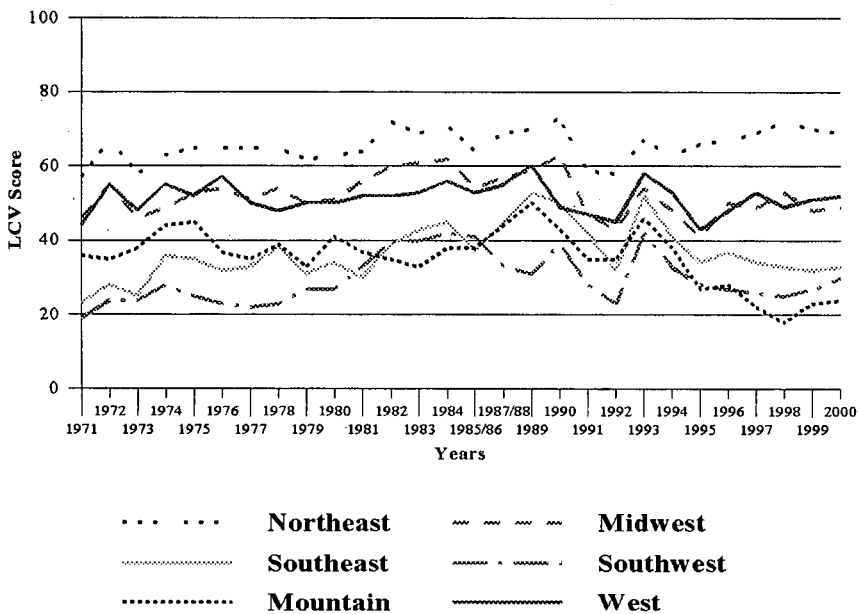
### 3. Finding 3 (Graphs 1 and 2)

The LCV scoring trends suggest that there were several distinct moments during which the two parties split further apart on environmental issues. In the Senate, the disparity in voting remained fairly constant, with the LCV scores going up and down together from 1971 until 1988. In 1989, however, in the aftermath of the election of President George H.W. Bush, the two parties plainly commenced to stake out very different positions on environmental issues. At that time, the scoring trends worked in opposition to each other, rather than in parallel fashion. The Senate Democratic scores began to rise

somewhat sharply while the Republican scores simultaneously declined just as sharply. In the House, the end result is similar—a growing divide between the two political parties—but the pathway to that result has been a bit different. In the early 1970s, during the first year of President Nixon’s second term, the House Democratic scores veered significantly up, while the House Republican scores declined even more. Then again in 1980, the House Democratic scores continued to increase significantly, and the House Republican scores decreased somewhat. Finally, foreshadowing what was to occur in the Senate a year or so later, in the early 1990s, the House Republican scores began to decrease precipitously while the House Democratic scores generally rose to higher levels than ever before.

**Graph 3: Senate LCV Scores, 1971-2000, by Regions**



**Graph 4: House LCV Scores, 1971-2000, by Regions**

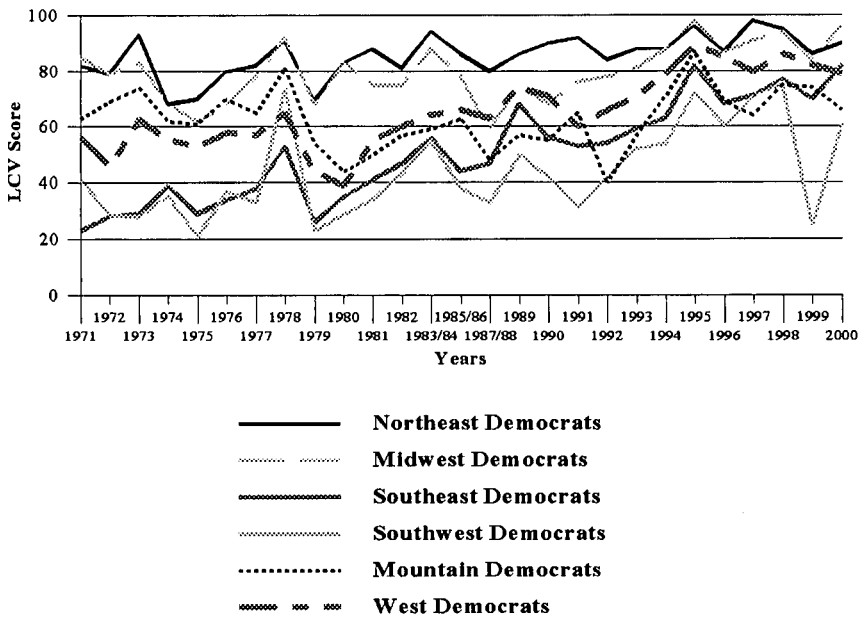
#### 4. Finding 4 (Graphs 3 and 4)

Examination of regional trends in the voting of all members of Congress, regardless of political party affiliation, reveals high volatility in the scoring patterns over time.<sup>59</sup> While sometimes the trends are parallel (up together or down together), quite often they are not. This strongly suggests not only partisan divides but also some regional divides on issues of national environmental policy. In other words, there are national environmental laws that either the costs or benefits of which disproportionately favor or disfavor one region of the country over another. These differences, however, are largely

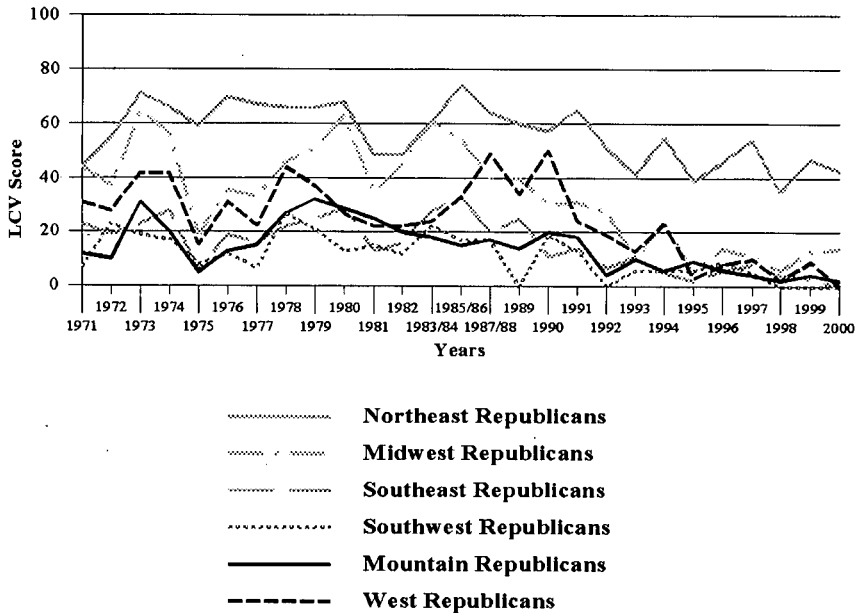
59. The graphs that divide the nation regionally are based upon the following classifications: (1) Northeast: Maine, Vermont, New Hampshire, Connecticut, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Pennsylvania, Maryland; (2) Midwest: Michigan, Illinois, Indiana, Ohio, Wisconsin, Iowa, Missouri, Minnesota; (3) Southwest: Texas, Oklahoma, Louisiana, Arkansas, New Mexico; (4) Southeast: Virginia, South Carolina, North Carolina, Florida, Georgia, Mississippi, Alabama, Tennessee, West Virginia, Kentucky; (5) Mountain: Colorado, Idaho, Wyoming, North Dakota, South Dakota, Kansas, Nebraska, Utah, Montana; and (6) West: Washington, California, Nevada, Oregon, Hawaii, Alaska, Arizona.

discernable in the scores of the Senate, rather than the scores of the House. For the House scores, the relative movements of the scores of members of Congress are more synchronized and consistent than those in the Senate. To the extent that many environmental laws tend to impose short-term costs and yield longer-term benefits, the difference between the two chambers may, in this respect, reflect the notion that senators are better politically able to take a longer term perspective than are those in the House, who must be responsive to two-year election cycles.

**Graph 5:** Senate LCV Scores, 1971-2000 (Democrats by Regions)



**Graph 6:** Senate LCV Scores, 1971-2000 (Republicans by Regions)



#### 5. Finding 5 (Graphs 5 and 6)

Examination of regional trends in the voting of senators, distinguishing between the members based on their party affiliation, shows that there has been a remarkable geographic convergence within both parties, albeit in precisely opposite directions: The Democratic Senate scores went up while the Republican Senate scores went down. For each party, differences between regions generally diminished over time.

#### 6. Finding 6 (Graphs 5 and 6)

The extent of the convergence is underscored by simply comparing the two endpoints of the survey: 1971 and 2000. In 1971, both the Democratic and Republican Party scores for the Senate were almost evenly spread out. The high Democratic score was in the 80s and the low Democratic score was in the low 20s. The other four regional scores for the Democratic senators hovered around 40, 60, and 80. Similarly for the Republican senators, there were two high scores tied in the mid-40s and a low score just below 10. The other three regional

scores for the Republican senators were around 10, 20, and 30. By contrast, by the year 2000, the scores within both parties had, with a notable exception converged; they were no longer so spread out.

#### 7. Finding 7 (Graphs 5 and 6)

The degree of convergence in LCV scores was substantial for both of the major political parties, but even greater for the Republican senators, largely because the scores for several regions decreased to 0. For the Democrats, the LCV score for each region increased, and rather than being spread out over more than 60 points as in 1971, scores were spread out over fewer than 40 points, with four regions fewer than 20 points apart. The biggest single change occurred in Southeastern Democrats, who had the lowest regional score in 1971, more than 60 points lower than the highest score; but, by 2000, the Southeast contingent had increased by almost 60 points, to only about 15 points lower than the leaders in the Midwest. Over the next thirty years, the Northeast Democratic senators generally maintained the highest LCV scores. With the exception of the Northeast Republican senators, even greater regional convergence occurred within the Senate Republicans. In the year 2000, the Southeast, West, and Southwest Republican senators shared the same LCV score of 0, the Mountain Republican senators had a score lower than 5, and the Midwest Republican senators had a score of about 15. The Northeast Senate Republicans stand alone by defying any such convergence; their LCV score in 2000 is essentially the same as it was in 1971, although they had much higher LCV scores for almost all of the time period in between, maintaining scores in the high 60s and low 70s from 1973 through the mid-1980s.

#### 8. Finding 8 (Graphs 5 and 6)

One of the most dramatic occurrences during the past thirty years is the contrasting nature of changes in LCV scores between Southeast Senate Democrats and Southeast Senate Republicans. Both started at virtually the same spot in 1971, with LCV scores just above 20. But, during the next thirty years, the Democratic scores increased by more than 60 points to over 80, while Republican scores decreased as much as they possibly could—to 0. One obvious explanation is that the enormous discrepancy simply reflects the general abandonment of the Democratic Party by southern conservatives since the

1960s and the corresponding rise in number and power of Southern Republicans.<sup>60</sup> The LCV scores are in that respect largely a symptom of that abandonment. Environmental protection matters were not themselves necessarily a precipitating event for that occurrence.

## 9. Summary of Findings

Taken together, what the LCV scoring trends make plain is that the political partisanship dramatically increased in Congress between 1971 and 2000. What began in 1970 as a relatively bipartisan political issue has become, thirty years later, a largely partisan issue about which there is little common ground between the two political parties, notwithstanding their common political rhetoric in campaigning. The two major political parties fundamentally disagree about what constitutes sound environmental protection policy. Individual members of Congress are increasingly voting on environmental lawmaking proposals based on their party affiliation and on party policy rather than on any notion that a particular proposal might be more or less beneficial or costly to any single distinct geographical region. With the exception of the northeastern United States, the differing geographical perspectives that one might naturally expect to generate differing policy viewpoints no longer seem so controlling.<sup>61</sup> The northeastern "exception" is likely explained by the fact that the northeastern United States tends to be downstream and/or downwind from sources of air and water pollution, such as power plants, and, consequently, more likely to be benefited by stricter pollution control laws on out-of-state

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60. *See generally* EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2002).

61. For example, national environmental protection and natural resource conservation policies often have very distributional ramifications in terms of costs and benefits that are skewed geographically. *See supra* note 59 and accompanying text. Tough interstate air and water pollution control laws impose higher costs on upstream and upwind states to the benefit of downstream and downwind states. Resource conservation policies applicable to resource development on public lands impose more concentrated costs on local economies out west that have grown dependent on the maintenance of the resource extraction industry. Of course, this is not to suggest that the upstream and upwind states do not themselves benefit from the environmental laws, just that they are subject to the costs and often receive fewer of the benefits than do downstream or downwind States. Western states similarly benefit from many of the resource conservation laws applicable to public lands.

pollution sources.

There is also significant evidence confirming that the regulated community now perceives such a partisan divide in environmental law and has, accordingly, adjusted its support of candidates for office. In particular, an analysis of contributions by industry subject to environmental regulation to the political campaigns of Democrats and Republicans reveals shifts over time that are virtually identical to the shifts in the LCV scores of the two parties. Between 1990 and 2002, the amount of money that the energy and natural resource industry contributed to Democratic candidates significantly decreased (from 42% to 26%) while the amount contributed to Republican candidates correspondingly increased during that same time period (from 58% to 74%).<sup>62</sup> A more focused inquiry into the campaign contributions of the coal industry is even more striking. Coal industry campaign contributions went from 59% to Republicans and 41% to Democrats in 1990, to 88% to Republicans and 12% to Democrats in 2002.<sup>63</sup>

### C. JUDICIAL BRANCH

Finally, the impact of the increasing partisan chasm on environmental issues between the two major political parties is not simply confined to their conduct as appointed policy makers in the executive branch or as elected officials in the legislature. There is reason to believe that such a partisan divide is similarly reflected in their respective appointees to the judiciary, as reflected in the votes of judges in individual environmental cases as well as the substantive content of the resulting judicial opinions. To be sure, no one has yet undertaken a broad-based, systematic, and empirical evaluation of the relationship, if any, between the political party affiliation of those who appoint judges and the decisions of those judges in environmental cases. But the handful of those scholars who have made some effort—some based on anecdotal evidence, some on rough sampling, and some on more rigorous empirical data—all agree that such a politically partisan dimension does seem to exist.

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62. The Center for Responsive Politics, *Energy/Natural Resources: Long-term Contribution Trends*, <http://www.opensecrets.org/industries/indus.asp?Ind=E> (last visited Jan. 19, 2003).

63. See The Center for Responsive Politics, *Coal Mining: Long Term Contribution Trends*, <http://www.opensecrets.org/industries/indus.asp?Ind=E1210> (last visited Jan. 5, 2003).



Much of the academic inquiry has focused on the D.C. Circuit. The D.C. Circuit is a natural subject of academic focus in considering the partisan nature, if any, of judicial treatment of environmental law issues because of the central role that court has played in environmental law. The D.C. Circuit is unique in that respect because, by congressional design, it is the court that considers a disproportionate number of the many challenges to federal agency environmental decision making. The court has jurisdiction, sometimes exclusive and sometimes concurrent with other courts of appeals, to review environmental agency rulemakings in the first instance on petition for review, and in other instances simply on appeal from lower court determinations.<sup>64</sup>

In 1988, after examining the D.C. Circuit's record, Professor Richard Pierce noted that many of those appointed to the D.C. Circuit were, prior to their appointment, involved in partisan politics.<sup>65</sup> Pierce further concluded that new members of the D.C. Circuit, whether appointed by a Democratic or Republican president, "experience[d] a difficult, and as yet incomplete, transition from their prior active role in the partisan political process."<sup>66</sup> According to Pierce, "Deeply ingrained differences in political perspective become particularly apparent when the D.C. Circuit reviews agency policy decisions with significant ideological implications: the fate of a major agency policy decision reviewed by the D.C. Circuit will vary with the composition of the panel that reviews the agency action."<sup>67</sup> Of particular relevance to environmental law, Pierce further found that "[i]n cases with significant ideological implications—most major agency rulemakings—[D]emocratic D.C. Circuit judges are more likely to reverse agency policies at the behest of individuals, and [R]epublican D.C. Circuit judges are more likely to reverse agency policies challenged by business interests."<sup>68</sup>

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64. See, e.g., 33 U.S.C. § 1369(b) (2000) (Clean Water Act judicial review provision); 42 U.S.C. § 6976(a)(1) (2000) (Resource Conservation and Recovery Act judicial review provision); *id.* § 7607(b) (Clean Air Act judicial review provision).

65. Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 300.

66. *Id.*

67. *Id.*

68. *Id.* at 302. In 1999, Professor Pierce published the results of a new study concerning the likelihood of Democratic versus Republican appointed

More recently, Professor Richard L. Revesz undertook an empirical analysis of the D.C. Circuit and reached even starker conclusions.<sup>69</sup> Revesz examined the specific allegation that “judges appointed by Republican [p]residents vote principally for laxer regulation and judges appointed by Democratic [p]residents vote for more stringent regulation.”<sup>70</sup> Revesz concluded that “ideology significantly influences judicial decision making on the D.C. Circuit,” especially in cases “raising procedural challenges, that are less likely to be reviewed by the United States Supreme Court.”<sup>71</sup> Revesz further found that “a judge’s vote (not just the panel outcome) is greatly affected by the identity of the other judges sitting on the panel; in fact, the party affiliation of the other judges on the panel has a greater bearing on a judge’s vote than his or her own affiliation.”<sup>72</sup>

Professors Frank B. Cross and Emerson H. Tiller reached similar conclusions based upon their empirical examination of the tendency of D.C. Circuit panels to defer to federal agency administrative determinations, pursuant to the Supreme Court’s ruling in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>73</sup> Based upon their review of the more than two hundred D.C. Circuit rulings between 1991 and 1995 in which the question of judicial deference was raised, Cross and Tiller “found that panels controlled by Republicans were more likely to defer to conservative agency decisions (that is, to follow the *Chevron* doctrine) than were the panels controlled by Democrats. Similarly, Democrat-controlled panels were more

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D.C. Circuit judges voting to deny an environmental plaintiff standing and found, during the period of the 1990s that he studied, that “Republican judges voted to deny standing to environmental plaintiffs in 79.2% of cases, while Democratic judges voted to deny standing to environmental plaintiffs in only 18.2% of cases.” Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1760 (1999).

69. See Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997).

70. See *id.* at 1717-18.

71. *Id.* at 1719.

72. *Id.* Then-Chief Judge Harry Edwards vigorously challenged Professor Revesz’s conclusions, Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1343-54 (1998), which prompted a formal reply by Revesz, see Richard Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805, 805 (1999).

73. 467 U.S. 837 (1984); see Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175-76 (1998).

likely to defer to liberal agency decisions than were those controlled by Republicans.<sup>74</sup> The authors further "found that the presence of a whistleblower—that is, a minority member with *Chevron* deference favoring the minority member's political preference—significantly increases the chances that the court majority will follow doctrine. . . . [A] partisan split panel does not negate all partisan influences[, but] it clearly moderates such influences."<sup>75</sup>

There are also particular structural reasons why the D.C. Circuit may be more susceptible to political partisanship than other courts. As Revesz explained, "Judges on the D.C. Circuit have a far higher political profile than do federal judges generally. Before their appointment to the bench, a disproportionate number of them serve in Congress or in political positions in the [e]xecutive [b]ranch."<sup>76</sup> Moreover, because the D.C. Circuit is the only federal appellate court of general jurisdiction not located within a State, it is the most likely federal court to reflect the policy-making preferences of the president who nominates judges to that court. Unlike all the other federal courts of appeals, there is no senator from the District of Columbia who must be consulted and, sometimes, assuaged during the nomination process because of a presumption that the nominee will be a constituent (let alone a substantial political supporter) of that member. D.C. Circuit judges, in fact, need not be residents of the District of Columbia.

Finally, my own less statistically rigorous review of the environmental decisions of the United State Supreme Court suggests the same partisan tendencies, albeit less pronounced. While it is hard to perceive much of a distinct "environmental protection dimension" to any of the Justices historically<sup>77</sup> with the exception of Justice Douglas,<sup>78</sup> one can nonetheless fairly posit that a Justice appointed in current times by a Democratic president is more likely to vote in favor of results favored by

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74. Cross and Tiller, *supra* note 73, at 2175.

75. *Id.* at 2175-76.

76. Revesz, *supra* note 69, at 1720.

77. See generally Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703, 716-21 (2000) (concluding that there is "too much cacophony in the votes of individual Justices to support a thesis that environmental concerns are generally a motivating factor in the Court's decisions").

78. See *id.* at 724.

environmentalists than would a Justice appointed by a Republican president.<sup>79</sup> In the existing political climate, Republican appointees to the High Court are far more likely to be sympathetic to enhancing constitutional protections of private property rights, restricting citizen standing to maintain environmental lawsuits, and limiting the national government's Commerce Clause authority to address environmental protection and resource conservation concerns, such as endangered species and wetlands protection. President Bush's repeated statements during his campaign that Justices Scalia and Thomas represent the kind of judicial philosophy he would like to promote on the Court makes that quite clear,<sup>80</sup> as does the Republican Party's obvious disapproval of the voting record of Justice Souter.<sup>81</sup>

In contrast, the voting records of Justices Ginsburg and Breyer, a Democratic president's most recent nominees to the Court, place those two Justices on the opposite end of the

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79. *See id.* at 725, 812 app. D; *see also* Richard J. Lazarus, *Environmental Law and the Supreme Court: Three Years Later*, 19 PACE ENVTL. L. REV. 653, 674 app. B (2002). Of course, there are certainly counter examples both in terms of individual Justices and specific cases. For instance, both Justice Stevens and Justice Souter, who were appointed by Republican presidents (Gerald Ford and George H.W. Bush), tend to vote for results favored by environmentalists, while Justice White (appointed by John F. Kennedy) tended to vote in favor of results more supported by business interests. It is likewise not difficult to find individual cases where even very conservative Justices appointed by Republican presidents, such as Justice Scalia, voted in favor of the result favored by environmentalists. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 329-31 (1994). The Court's recent unanimous rejection of industry challenges to EPA rulemaking under the Clean Air Act certainly makes plain that the more conservative Justices harbor no overriding antipathy to environmental protection law. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 459 (2000). The environmental protection dimension in most cases considered "environmental" by environmentalists, regulated industry, and environmental law specialists in the bar and in legal academia, is simply irrelevant to the individual Justices in their consideration of the legal issue before the Court, as it often should be. *See Lazarus, supra* note 77, at 716-21. As described in the text above, however, and elaborated upon more fully elsewhere, *see id.* at 744-63, there are many cross-cutting legal issues regularly raised in environmental lawmaking, the appreciation and proper judicial disposition of which depend upon a judge's appreciation of the special challenges that pollution control and resource management laws present.

80. *See* Neil A. Lewis, *Presidential Candidates Differ Sharply on Judges They Would Appoint to the Top Courts*, N.Y. TIMES, Oct. 8, 2000, § 1, at 28.

81. *Id.* ("[T]he influential group of Republicans eagerly hoping to gain control of the White House and the nominating procedure has adopted 'No More Souters' as its private slogan . . .").

environmental protection spectrum from Justices Scalia and Thomas on virtually all of the cross-cutting constitutional law issues of central and contemporary importance to environmental law. Justices Ginsburg and Breyer favor more relaxed approaches to standing requirements as applied to environmental citizen-suit plaintiffs,<sup>82</sup> a less aggressive role for the Takings Clause as applied to environmental restrictions on private property rights,<sup>83</sup> and a more expansive view of congressional Commerce Clause authority to regulate activities affecting environmental quality.<sup>84</sup> Justices Scalia and Thomas, by contrast, favor more demanding standing requirements,<sup>85</sup> a more aggressive application of the Takings Clause,<sup>86</sup> and a more limited view of congressional Commerce Clause authority.<sup>87</sup> In the federal system, accordingly, the relevant philosophies of prospective judicial nominees, including on matters related to environmental law, have become routine fodder for partisan campaigning in national elections.<sup>88</sup>

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82. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC)*, 528 U.S. 167, 173-74 (2000).

83. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1484-90 (2002).

84. See, e.g., *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174-97 (2001) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting).

85. See, e.g., *Friends of the Earth*, 528 U.S. at 198 (Scalia, J., joined by Thomas, J., dissenting).

86. See, e.g., *Tahoe-Sierra*, 122 S. Ct. at 1496-97 (Thomas, J., joined by Scalia, J., dissenting).

87. See, e.g., *Solid Waste Agency*, 531 U.S. at 161-62.

88. See, e.g., Lewis, *supra* note 80. In the states, where many judges are subject to varied electoral processes, a judge's actual or prospective votes in environmental cases have become a topic of judicial political campaigning. See John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217, 217-21 (2001). Both environmentalists and business interests have injected their competing concerns into judicial campaigns. See, e.g., David V. Hawpe, *Looking into the Gift Horse's Mouth*, COURIER-J. (Louisville), Nov. 28, 1999, at 3D (describing how coal interests campaigned against a candidate for the Kentucky Supreme Court because he was perceived as unduly sympathetic to environmental protection laws); Political advertisement for the Oregon League of Conservation Voters (2002) (on file with author) (opposing the candidacy of David Hunnicutt for the Oregon Court of Appeals because of his anti-environmental agenda, and posing the question, "[s]hould we let a fox guard our henhouse?"). The problems resulting from the increased politicization of the state judiciary has prompted state regulation of judicial campaigning. See *Republican Party v. White*, 122 S. Ct. 2528, 2542-44 (2002) (O'Connor, J., concurring).

## II. THE PORTENT OF ENVIRONMENTAL LAW'S SECOND "REPUBLICAN" MOMENT

Because of the partisan divide that now dominates environmental law in national politics, the emergence of environmental law's second "Republican moment," albeit the first one with a lower rather than an uppercase "r," may well be enormously significant in the law's evolution. Most simply put, much of environmental law's evolution during the past thirty years, both its successful resistance to deregulation efforts and its persistent expansion, can be traced either to the bipartisan appeal of environmental issues or to the divided nature of the federal government.

Environmental law's obituary in the United States has been written repeatedly during the past several decades, in response to a series of powerful, seemingly overwhelming efforts to reverse course.<sup>89</sup> Not long after initially embracing environmentalism, President Richard Nixon became one of the sharpest critics of environmental protection law.<sup>90</sup> Nixon advised his Cabinet to "[g]et off the environmental kick"<sup>91</sup> and he vetoed the Federal Water Pollution Control Act Amendments of 1972, which became law only upon Congress's override of that veto.<sup>92</sup> In 1980, presidential candidate Ronald Reagan campaigned successfully on a platform openly hostile to federal environmental protection regulations, and upon taking office, he immediately sought to reduce substantially their scope and reach.<sup>93</sup> In its final year, the George H.W. Bush administration similarly took specific aim at environmental protection, with the President's Council on Competitiveness

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89. PHILIP SHABECOFF, *A FIERCE GREEN FIRE* 120 (1993); Bob Benenson, *GOP Sets the 104th Congress on New Regulatory Course*, 53 CONG. Q. 1693, 1693-96 (June 17, 1995); Anthony Downs, *Up and Down with Ecology—The "Issue-Attention Cycle,"* 28 PUB. INT. 38, 43-46 (1972); Bill Keller, *Diverse, Established, Professional: Environmental Movement Checks Its Pulse and Finds Obituaries Are Premature*, 39 CONG. Q. 211, 211 (Jan. 31, 1981); *The Rise of Anti-Ecology*, TIME, Aug. 3, 1970, at 42, 42.

90. FLIPPEN, *supra* note 10, at 135-37.

91. *Id.* at 214.

92. See 118 CONG. REC. H37054-61 (1972) (House's veto override); *id.* at S36871-79 (Senate's veto override); *id.* at S36859-60 (president's veto statement).

93. DAVID VOGEL, *FLUCTUATING FORTUNES—THE POLITICAL POWER OF BUSINESS IN AMERICA* 246-47 (1989); Raymond Tatalovich & Mark J. Wattier, *Opinion Leadership: Elections, Campaigns, Agenda Setting, and Environmentalism*, in *THE ENVIRONMENTAL PRESIDENCY* 147, 156-57 (Dennis L. Soden ed., 1999).

singling out environmental laws for its regulatory reform efforts.<sup>94</sup> Bush ended his presidency in 1992 by seeming to abandon his earlier support of efforts to forge international environmental law agreements. He threatened not to attend the Earth Summit in Rio de Janeiro, and he was the last president of a country to agree to come.<sup>95</sup> Bush declined to have the U.S. sign the Biodiversity Protocol at Rio and insisted on a weakened version of an agreement on global climate change.<sup>96</sup> The international embarrassment of U.S. recalcitrance was so great that EPA Administrator William Reilly wrote a memorandum to all EPA employees critical of the administration and the president.<sup>97</sup>

A few years later in 1995, the Speaker of the House of Representatives, Newt Gingrich, and the 104th Congress promoted the "Contract with America," deliberately designed to cut back on environmental laws by reducing federal budgets used for their implementation, by relaxing requirements that states implement environmental controls, by permitting industry to emit higher levels of pollution, and by compensating property owners for reductions in property value resulting from environmental restrictions.<sup>98</sup> Finally, as described above,<sup>99</sup> the current administration of President George W. Bush has, to date, been marked by a series of efforts to reduce the scope and intensity of federal environmental regulations.

In the past, none of these efforts has been successful, largely because of the bipartisan appeal of environmental law or the existence of separation of powers between the three branches of government. Environmental protection law in the

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94. See Keith Schneider, *Administration's Regulation Slayer Has Achieved a Perilous Prominence*, N.Y. TIMES, June 30, 1992, at A19.

95. Keith Schneider, *Bush Plans to Join Other Leaders at Earth Summit in Brazil in June*, N.Y. TIMES, May 13, 1992, at A5; Keith Schneider, *Bush on the Environment: A Record of Contradictions*, N.Y. TIMES, July 4, 1992, at A1.

96. Steven Greenhouse, *Ecology, the Economy and Bush*, N.Y. TIMES, June 14, 1992, § 4, at 1.

97. Keith Schneider, *Bush Aide Assails U.S. Preparations for Earth Summit*, N.Y. TIMES, Aug. 1, 1992, at A1.

98. John H. Cushman Jr., *Congressional Republicans Take Aim at an Extensive List of Environmental Statutes*, N.Y. TIMES, Feb. 21, 1995, at A14; John H. Cushman Jr., *House Approves a New Standard for Regulations*, N.Y. TIMES, Mar. 1, 1995, at A1; John H. Cushman Jr., *House Clears More Limits on Environmental Rules*, N.Y. TIMES, Mar. 3, 1995, at A19; Editorial, *The GOP's War on Nature*, N.Y. TIMES, May 31, 1995, at A20.

99. See *supra* notes 35-54 and accompanying text.

United States has not only surmounted each major challenge, but it seems paradoxically to have rebounded and thrived as a result of those challenges. The premature predictions of its demise in the mid-1970s were followed within that same decade by congressional enactment of even more ambitious laws relating to clean air, clean water, and the disposal of hazardous chemicals and wastes.<sup>100</sup> The early efforts of the Reagan administration in the 1980s to reduce the federal role in environmental protection ultimately yielded only the converse: Congress adopted a series of even more demanding federal environmental controls.<sup>101</sup>

Likewise repudiated in the 1990s was the Contract with America. Federal environmental protection requirements seemed instead to become reinvigorated by that challenge, resulting in a further tightening of pollution standards<sup>102</sup> and, for the first time, meaningful efforts to curtail interstate pollution<sup>103</sup> and to address the long-neglected environmental

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100. Congress enacted the Resource Conservation and Recovery Act (RCRA) and the Toxic Substances Control Act in 1976, added comprehensive amendments to both the Clean Water and Clean Air Acts in 1977, and passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), popularly known as "Superfund," in 1980. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795; Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976); Clean Water Act Amendments of 1977, Pub. L. No. 95-217, 91 Stat. 1566; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

101. See Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (amending RCRA); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (amending CERCLA). See generally James Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351, 351-53 (1986) (noting that Congress's dissatisfaction with the recalcitrance of the Reagan administration and the EPA spurred Congress to increase its regulatory power).

102. During 1996, not coincidentally a presidential election year, Congress sought to shed the "anti-environmental" image generated by the "Contract with America" by passing two somewhat expansive amendments to federal pesticide and safe drinking water laws. See Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489; Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613.

103. John H. Cushman Jr., *E.P.A. Acts to Require Big Cut in Air Emissions by 22 States*, N.Y. TIMES, Oct. 11, 1997, at A9; John H. Cushman Jr., *U.S. Orders Cleaner Air in 22 States*, N.Y. TIMES, Sept. 25, 1998, at A14; Matthew L. Wald, *E.P.A. is Ordering 392 Plants to Cut Pollution In Half*, N.Y. TIMES, Dec. 18, 1999, at A1.



concerns of poor and minority communities.<sup>104</sup> Finally, in 2001, partly in response to the Bush administration's initial environmental policies, Senator James Jeffords of Vermont stunned the nation by leaving the Republican Party to become an Independent aligned with the Democratic Party.<sup>105</sup> Jeffords's switch allowed the Democrats to obtain majority status in the Senate and Jeffords to become the Chair of the Senate Committee on the Environment and Public Works.<sup>106</sup>

For that same reason, however, the emergence in 2003 of this new "Republican" moment in environmental law may have enormous portent. For the first time ever, since the beginning of the modern environmental law era, the political appointees and nominees to all three branches of the federal government are effectively controlled by one political party that seems largely united in its willingness to question and fundamentally reform existing pollution control and resource conservation laws.<sup>107</sup> In the 1970s, 1980s, and 1990s, divided government and bipartisan politics blocked major reform efforts. In the 1970s and 1980s, Democrats in Congress played a significant role in blocking the reform efforts undertaken in the Nixon, Reagan, and Bush administrations.<sup>108</sup> The only difference in the 1990s was that the Republicans controlled Congress and the Democrats controlled the executive branch; Republicans in Congress sought the same kind of reforms that Republicans in the executive branch had sought in the 1980s, but the Democrats in the executive branch, rather than those in Congress, played the critical role in blocking major reforms.<sup>109</sup>

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104. See Richard J. Lazarus, "Environmental Racism! That's What It Is," 2000 U. ILL. L. REV. 255, 266-73.

105. See Katherine Q. Seelye & Adam Clymer, *Senate Republicans Step Out and Democrats Jump In*, N.Y. TIMES, May 25, 2001, at A1.

106. *Id.*

107. By contrast, although the Democratic Party was the dominant party in the late 1970s when Jimmy Carter was president, greater division existed then than apparently does today within the Democratic Party on environmental issues. During the first two years of the Clinton administration, similar divisions existed within the Democratic Party, and the federal judiciary was then dominated by Republican appointees.

108. See, e.g., Dale Russakoff, *EPA Chief Is Assailed at Hearing: Gorsuch Decries "Political" Goals Behind Criticism*, WASH. POST, Feb. 16, 1983, at A1; Henry A. Waxman, *The Environmental Pollution President*, N.Y. TIMES, Apr. 29, 1992, at A1.

109. See 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, 85-88, 90-95 (2001).

Moreover, in the 1970s and 1980s, the coalitions that opposed what they perceived to be an undermining of necessary protections included prominent Republicans as well as Democrats. Hence, even while President Reagan enjoyed a Republican Senate majority in the early 1980s, the Republican senator who chaired the Senate Committee on the Environment and Public Works, Vermont's Robert Stafford, was a classic Northeast Republican who did not share the views of those seeking to reduce the law's protections. Senator Stafford and his staff worked closely with the minority Democratic staff on the Environment Committee to block the efforts of his own party's administration to make major changes in the laws. In the 1990s, Speaker of the House Gingrich was similarly stymied by Northeast Republicans both in the House, including New York's Sherwood Boehlert, and in the Senate, including Rhode Island's John Chafee who then chaired the Senate Committee on Environment and Public Works.<sup>110</sup> Finally, as previously described, it was yet another Northeast Republican, James Jeffords, who stood as a barrier at the beginning of the current Bush administration's term in office.

Two years later, the political dynamic has dramatically shifted and in potentially historic fashion. The leadership of the Republican Party seems fairly united, including its chairs of the relevant legislative committees and Cabinet officials. In the Senate, for example, Oklahoma Republican Senator James Inhofe is replacing Independent Senator James Jeffords as Chair of the Senate Committee on the Environment and Public Works.<sup>111</sup> New Mexico Republican Senator Pete Domenici is replacing Democratic Senator Jeff Bingaman (also from New Mexico) as the Chair of the Senate Committee on Energy and Natural Resources.<sup>112</sup> Senator Inhofe has been a longstanding critic of the EPA's policies and Senator Domenici has long advocated increased resource development on public lands, including oil and gas exploration in the Arctic National Wildlife Refuge.<sup>113</sup> The most recent LCV scores for Senators Inhofe and Domenici for the First Session of the 107th Congress were a 0 and an 8, respectively, while the scores of Senators Bingaman

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110. See John H. Cushman Jr., *Moderates Soften G.O.P. Agenda on Environment*, N.Y. TIMES, Oct. 24, 1995, at A1.

111. Eric Pianin & Helen Dewar, *Oil, Air, Energy Laws in Play—Environmentalists Fear New Senate*, WASH. POST, NOV. 18, 2002, at A1.

112. *Id.*

113. *Id.*

and Jeffords were 64 and 76, respectively.<sup>114</sup>

Virtually the only Northeast Republican in a relevant leadership position anywhere in the national government is EPA Administrator Christine Todd Whitman from New Jersey. Indeed, her prior stint as Governor of New Jersey is precisely why many environmentalists were initially optimistic about her appointment to the EPA.<sup>115</sup> Administrator Whitman, however, has yet to prove herself as an effective, independent environmental policy maker in the current administration and there is no reason to anticipate that she will change in that respect in the next few years, assuming that she decides to remain in the position at all.<sup>116</sup> Hence, unlike in the past, there is no apparent backstop in Congress, the executive branch, or in the judiciary, to a substantial overhauling of the nation's environmental protection laws.

Nor do the nation's environmental groups seem as able as they have been in the past to prevent the accomplishment of a major deregulatory initiative. The past successes of those organizations have largely depended on their ability to tap into public concerns and to lend their expertise to branches of government sympathetic to their concerns. In the current political environment, however, such a sympathetic government ear is increasingly hard for environmentalists to discover, as it is difficult for environmentalists to attract the attention of the public, let alone, financial contributors. In the early 1980s and again in the mid-1990s, environmental activists quickly converted public concerns with the environmental policies of the Reagan administration and then with the 104th Congress into their own political muscle. The memberships of environmental organizations dramatically increased as did their fundraising.<sup>117</sup>

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114. LEAGUE OF CONSERVATION VOTERS, *supra* note 56, available at <http://lcv.org/pics/pdfs/scorecard02final.pdf>.

115. See, e.g., David M. Halbfinger, *Passion for Politics and the Outdoors—Christine Todd Whitman*, N.Y. TIMES, Dec. 23, 2000, at A15.

116. See Editorial, *Christie Whitman's Tribulations*, N.Y. TIMES, Nov. 27, 2002, at A22.

117. See JOHN B. JUDIS, *THE PARADOX OF AMERICAN DEMOCRACY—ELITES, SPECIAL INTERESTS, AND THE BETRAYAL OF PUBLIC TRUST* 199-201 (2000). For instance, at the beginning of the 1980s, the ten leading environmental organizations had a combined membership of 3.3 million. By the end of the decade, they boasted 7.2 million members. *Id.* at 199. The perception environmentalists promoted that the Reagan administration was attacking federal environmental laws also boosted fundraising. *Id.* By 1985, the ten leading environmental organizations had increased their combined

Today, no comparable massive infusion of funds and resources seems headed to national environmental organizations soon. Public support for strong environmental protection measures remains strong, but two developments have reduced the ability of the national groups to rally public concern to bolster their resources. First, the Republican Party has steadfastly avoided including a major reform of environmental laws as any part of its overt political agenda. Republicans have strategically sought to deemphasize their policy differences with Democrats on environmental issues. They have sought, in short, to avoid any repetition of the political mistakes they made with sweeping rhetoric during both the early Reagan years and the initial celebration of the "Contract with America" a decade later.

Second, and perhaps even more fundamental, the public's attention is simply elsewhere right now. Post-September 11th, the more immediate threats created by the specter of a nation going to war, coupled with increasing economic hardship, has redirected the public's focus from the longer-term perspective of environmental law. Both the fundraising and political organizing abilities of environmental organizations have, accordingly, been substantially undercut.

Finally, the changing environmental perspectives of the federal government coupled with the changing (mis)fortunes of the environmental community are major reasons why several states have very recently displayed some willingness to assume leadership roles. Just a few years ago, the major voices heard from the states seemed to be from those voicing complaint about the heavy-handedness of the federal government in compelling state acceptance and administration of strict pollution control laws. Heads of state environmental agencies complained that the EPA was interfering with state effectiveness, while insisting that "states are not branch offices of the Federal Government."<sup>118</sup> The EPA publicly expressed its skepticism of the effectiveness of some state efforts, concluding that many states lacked either the capacity or the will to

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receipt of donations to \$218 million per year; by 1990, those donated sums had more than doubled to over one-half billion dollars. *Id.*

118. See John H. Cushman Jr., *E.P.A. and States Found to Be Lax on Pollution Law*, N.Y. TIMES, June 7, 1998, § 1, at 1; *The Federal-State Relationship: A Look into EPA Regulatory Reinvention Efforts: Hearing Before the Subcomm. on Oversight and Investigations of the Committee on Commerce*, 105th Cong. (1997).

enforce environmental requirements aggressively.<sup>119</sup> The EPA threatened on several occasions to withdraw federal approval of state programs but rarely carried out those threats.<sup>120</sup>

Today, the states are the ones either cajoling the federal government to do more or are themselves initiating more demanding regulation. Consistent with the partisan divide now dominating environmental law, however, it is almost exclusively Democrats that are leading the challenge to reductions in the federal environmental role.<sup>121</sup> The northeastern states (led by six Democratic attorneys general) condemned the federal government's recent reduction of air pollution control requirements under the Clean Air Act and filed a lawsuit immediately after the EPA made its decision final.<sup>122</sup> California, led by a Democratic governor and attorney general, seems now to be resurrecting the leadership role that it took in environmental law in the 1960s. California has sought to regulate carbon dioxide emissions, a greenhouse gas linked to global warming, stepping into an area of pollution control that the EPA has long declined to embrace and the current administration has retreated from altogether.<sup>123</sup> California has also taken a leadership position in promoting so-called "zero-emission" motor vehicles.<sup>124</sup> Somewhat ironically, the federal government has now joined with the auto industry

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119. See Rena I. Steinzor, *Reinventing Environmental Regulation Through the Government Performance and Results Act: Are the States Ready for the Devolution?*, 29 ENVTL. L. REP. 10074, 10082 (1999) (citing U.S. GENERAL ACCOUNTING OFFICE, EPA AND THE STATES—ENVIRONMENTAL CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP, GAO/RECD 95-64 (1995); OFFICE OF INSPECTOR GENERAL, U.S. EPA, SEMIANNUAL REPORT TO THE CONGRESS, APR. 1, 1997 THROUGH SEPT. 30, 1997, EPA-350-R-97-002, at 8 (1997)).

120. *Id.* at 10082.

121. The only significant exception is New York's Republican Governor George Pataki, who has generally been supportive of strong environmental protection laws, especially those aimed at sources outside New York that affect the quality of the environment within New York's borders. Governor Pataki has been openly critical of the Bush administration. See Wald, *supra* note 41.

122. Eric Pianin, *New Pollution Standards Prompt Suit: 9 States Challenge U.S. Decision to Relax Rules*, WASH. POST, Jan. 1, 2002, at A1; Katharine Q. Seelye, *9 States in East Sue U.S. over New Pollution Rules*, N.Y. TIMES, Jan. 1, 2003, at A1; Wald, *supra* note 41.

123. Editorial, *California Leads on Warming*, N.Y. TIMES, July 8, 2002, at A18; Danny Hakim, *At the Front on Pollution*, N.Y. TIMES, July 3, 2002, at A1.

124. See CAL. HEALTH & SAFETY CODE § 43018(b)-(c) (West 1996); CAL. CODE REGS. tit. 13, § 1962 (2001).

in opposing California's efforts, arguing that federal law preempts such state efforts at innovation.<sup>125</sup>

### CONCLUSION

I expect that I am the only person participating in this Symposium celebration of Professor Dan Farber who knew him when environmental law's first "republican moment" was, in fact, underway. Dan and I first met when he was a senior at University High School in Urbana, Illinois in the fall of 1966, when I was a mere "subfreshman" (i.e., seventh grader) at that same school. Then, there was no EPA and Earth Day did not yet exist. There was no National Environmental Policy Act,<sup>126</sup> Clean Air Act,<sup>127</sup> Clean Water Act,<sup>128</sup> Comprehensive Environmental Response, Compensation, and Liability Act,<sup>129</sup> Endangered Species Act of 1973,<sup>130</sup> Resource Conservation and Recovery Act,<sup>131</sup> Toxic Substances Control Act,<sup>132</sup> National Forest Management Act,<sup>133</sup> Federal Land Policy and Management Act,<sup>134</sup> or Surface Mining Control and Reclamation Act.<sup>135</sup> Not only was Love Canal back then just a glimmer in Hooker Chemical's eye, but the Cuyahoga River had not yet caught fire, and Santa Barbara had not yet borne witness to the enormous environmental devastation caused by a massive offshore oil spill.<sup>136</sup> Environmental protection then was just emerging as a bipartisan issue with widespread public demand for stricter pollution control and resource conservation laws.

Whatever environmental law's missteps and inefficiencies,

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125. Editorial, *Retreat on Clean Air*, N.Y. Times, Oct. 14, 2002, at A20; Katharine Q. Seelye, *White House Joins Fight Against Electric Cars*, N.Y. TIMES, Oct. 10, 2002, at A20.

126. 42 U.S.C. §§ 4321-4370 (2000).

127. *Id.* §§ 7401-7671.

128. 33 U.S.C. §§ 1251-1376 (2000).

129. 42 U.S.C. §§ 9601-9675.

130. 16 U.S.C. §§ 1531-1544 (2000).

131. 42 U.S.C. §§ 6901-6992.

132. 15 U.S.C. §§ 2601-2692 (2000).

133. 16 U.S.C. §§ 1600-1687.

134. 43 U.S.C. §§ 1701-1785 (2000).

135. 30 U.S.C. §§ 1201-1328 (2000).

136. See RICHARD N. L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES—A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 387 (1999); Donald G. McNeil Jr., *Upstate Waste Site May Endanger Lives*, N.Y. TIMES, Aug. 2, 1978, at A1.

it is clear that the legal revolution reflected in the nation's great experiment in modern environmental law during the ensuing decades has reaped enormous benefits for both present and future generations of Americans. Largely because of its strong pollution control and resource conservation laws, the United States managed to achieve both enormous economic growth while decreasing air and water pollution in much of the country and at least maintaining the status quo in many other areas. The kind of enormously destructive environmental practices, witnessed elsewhere around the globe, were not replicated within our borders. Our greatest lapses, ranging from wetlands protection to species diversity, have been in regulatory gaps rather than in excessive controls, or in our ability simply to export environmental destruction to far off lands—for instance, by exporting hazardous waste to developing nations or by promoting the destruction of tropical rainforests for livestock grazing—while enjoying the economic fruits of that destruction here at home.

Only time will tell whether environmental law's now-looming second "Republican moment" will be as significant for environmental law's subsequent evolution as was its first "republican moment." There is no doubt room for improving environmental law by addressing past mistakes both by reducing regulatory excesses and filling regulatory gaps. The Republican Party now assumes the responsibility, however, to ensure that it does not convert the opportunity for responsible reform into an occasion for widespread repudiation of what has been one of the nation's striking success stories in lawmaking, once supported by prominent Republicans and Democrats alike.

