ESSAY

JUDICIAL MISSTEPS, LEGISLATIVE DYSFUNCTION, AND THE PUBLIC TRUST DOCTRINE: CAN TWO WRONGS MAKE IT RIGHT?

BY

RICHARD J. LAZARUS*

Professor Joseph Sax's environmental law scholarship has inspired generations of lawyers and legal scholars, including my very first law review publication in 1987, which questioned the way that some public interest advocates were enlisting Sax's seminal work on the public trust doctrine to champion environmentalist causes. In our

* Howard J. & Katherine W. Aibel Professor of Law, Harvard Law School. This Essay is based on a talk I delivered in April 2015 at a symposium held at Lewis & Clark Law School in honor of Professor Joseph Sax, "Environmental, Natural Resources, and Energy Law—Developments in the Public Trust." *See Environmental, Natural Resources, and Energy Law*, LEWIS & CLARK LAW SCHOOL, https://law.lclark.edu/live/events/27491-developments-in-the-public-trust-doctrine (last visited Nov. 21, 2015). I would like to thank former Lewis & Clark Professor Erin Ryan for inviting me to participate in that symposium, the students and other faculty organizers of that event for all their assistance, and the other speakers for the wisdom of their own presentations and comments on my own, especially Gerald Torres and Dan Farber. Hope Babock, as always, also provided invaluable counsel on an initial draft of this Essay. Also warranting my gratitude are Anna Gunderson, Harvard Law School Class of 2015 and Taylor Lane, Harvard Law School Class of 2017 for their excellent research assistance in support of that talk and this Essay, and Elizabeth Bewley, Harvard Law School Class of 2015, and Cassandra Mitchell, Harvard Law School Class of 2017, for their excellent editorial assistance in converting the talk into a written Essay. Finally, I would like to thank Julia Olson, Executive Director and Chief Legal Counsel of Our Children's Trust, for her candid and thoughtful critique of my presentation at the Lewis & Clark conference. Although we plainly disagree about the efficacy of the atmospheric trust as an effective basis for a litigation strategy, I have nothing but great admiration and respect for the important work she is doing to try to persuade law- and policy-makers to reform our nation's laws as needed to address climate change for the benefit of present and future generations. Certainly none of this Essay's criticism of those atmospheric trust advocates who unfortunately couple that advocacy with a denunciation of existing environmental law and public servants who administer those laws is directed at Ms. Olson or her organization.

last conversation not long before his passing, Joe asked me whether I still believed now what I wrote in 1987 with the benefit of almost three decades of hindsight. This essay expands on the answer I gave Joe that evening. The essay first acknowledges the significant ways in which I clearly fell short in anticipating trends in environmental law, and for that reason, I agree that my original thesis warrants revision—especially with regard to the role of the public trust doctrine as a viable basis for defeating regulatory takings challenges. Next, the Essay discusses how, by contrast, I would not change my thesis in other respects and why, for that reason, I question the efficacy of relying on atmospheric trust doctrine theories in litigation to address the pressing issue of global climate change. The Essay is especially critical of atmospheric trust doctrine advocacy that relies on unduly harsh and demeaning criticism of existing environmental law and the career public servants who strive for its effective implementation.

I. INTRODUCTION

Last April, I joined other environmental and natural resources law scholars at Lewis & Clark Law School to celebrate the life and legal scholarship of Professor Joseph Sax, especially his seminal article on the public trust doctrine: *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*.[1] That 1970 article, more than any other, has inspired generations of environmental lawyers and legal scholars. It is without scholarly peer in the field of environmental law, as was its author.

Joe Sax played an enormously influential role in shaping my thinking about environmental and natural resources law—as he did for many other legal academics. It is no overstatement that I literally began my academic career in the early 1980s thinking about the public trust doctrine and Joe Sax. One of my first oral arguments after graduating from law school was on behalf of the United States before the California Supreme Court in the Mono Lake public trust water rights case.[2] And my first law review article as a

[1] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

[2] *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 711 (Cal. 1983) (listing author as an attorney for the United States).

brand new professor, published in 1986,[3] was on Joe Sax's public trust doctrine thesis. The article arose out of my experience as counsel for the federal government, first in the Mono Lake case and then in another California public trust doctrine case before the U.S. Supreme Court.[4]

The thrust of my 1986 article's thesis was to question the continuing value of the public trust doctrine as a necessary and appropriate basis for advancing environmental protection goals.[5] I saw the principal value of the public trust doctrine as twofold. The first was to provide a public property basis for resisting the exercise of private property rights in natural resources deemed contrary to the public interest.[6] The second was to provide citizens with a right to sue to prevent the government from acting contrary to public trust interests in natural resource conservation and preservation.[7] I argued that the public trust doctrine was becoming at best unnecessary and at worst counterproductive. Unnecessary because trends in legal evolution were, wholly apart from the public trust doctrine, otherwise weaving a new fabric for natural resources law—reflected in new federal and state statutes, regulations, and common law doctrine—that made resorting to the expansive notions of the public trust doctrine increasingly of less value.[8] And potentially counterproductive because the public trust doctrine rested on the perpetuation of absolutist notions of property rights that I worried were inconsistent with those same trends.[9] Finally, I argued that reliance on ever-expansive public trust doctrine theories was misguided because it rested on assumptions of judicial expertise and the judiciary's championing of environmental protection concerns that I worried could not be legitimately or safely assumed over the longer term.[10] I relatedly worried that reliance on the public trust doctrine risked unleashing a populist rebellion against environmental protection laws by putting environmentalists on the weaker side of the debate on how laws should be made and the role of the courts in lawmaking in a non-constitutional context.[11]

Not surprisingly, mine was a controversial thesis—one not welcomed by many of my colleagues in the environmental law community. Some described me as "cynical" or, completely missing my point, dubbed me a conservative scholar favoring economic development over environmental protection.[12] My good friend and faculty colleague, Lewis & Clark law

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3 S*ee* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986) [hereinafter Lazarus, *Changing Conceptions*].

4 *See* Summa Corp. v. Cal. *ex rel.* State Lands Comm'n, 466 U.S. 198, 199 (1984).

5 Lazarus, *Changing Conceptions*, *supra* note 3, at 632.

6 *Id.* at 633, 655–56.

7 *Id.* at 632, 642, 650, 658.

8 *Id.* at 698–702.

9 *Id.* at 701–10.

10 *Id.* at 712–13.

11 *Id.* at 703–10.

12 *See* Matt Clifford, Comment, *Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine: An Underrated Solution*, 16 PUB. LAND & REOURCES L. REV. 117, 120–21 (1995) (cynical); Richard Delgado, *Our Better Natures: A Revisionist View of Joseph*

professor Michael Blumm, certainly did not think much of my argument. Blumm was one of the first to comment on my article in an article of his own. He characterized me as "hopelessly naïve."[13] A description to which, Blumm may recall, I gamely responded when we first met a few years later: "Naïve, perhaps! But how can you say 'hopelessly?' This is my first article!"

My favorite review was that written by former Lewis & Clark law professor, Erin Ryan.[14] No doubt I naturally gravitated towards Ryan's review because she was the most respectful of my own and best grasped my thesis in characterizing it as a "Green Dissent."[15] Unlike most, Ryan distinguished between the ends and the means.[16] My goals were okay even if most thought my conclusions were wrong-headed.

Ryan's assessment had remained my favorite until my research for this Essay came across a very different characterization. It is a critique based on a mix of legal realism and political economy theory, not crafted by a legal academic writing scholarly analysis in a published law review article. I instead discovered it in a most unlikely location: a legal brief filed by a clearly zealous attorney litigating a public trust doctrine case before the Iowa Supreme Court who sought in his brief to discredit my article:

> Imagine Professor Lazarus sitting in his office in Indiana, probably trying to attain tenure on the faculty, wondering what great academic debate he could create to satisfy the "publish or perish" requirements of law school faculty. The Public Trust Doctrine is certainly an issue which has not been totally circumscribed as to its parameters and has not been the subject of a great many Court decisions. Professor Lazarus would also have noted that Professor Sax, one of the founding fathers of environmental law, had written his article on the Public Trust Doctrine in 1970, before all of the federal environmental laws which are now a part of our legal pantheon were enacted. What better way for a law school professor to make a name for himself than to take on an acknowledged expert in the field and challenge a law review article over fifteen years old. None of this background, of course, was mentioned by the Iowa Supreme Court in *Sorensen*.[17]

Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform, 44 VAND. L. REV. 1209, 1213 (1991) (conservative).

13 Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 593 n.98 (1989).

14 Professor Ryan is currently a faculty member at Florida State University College of Law.

15 Erin Ryan, Comment, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 491 (2001).

16 *Id.* at 487.

17 *See* Brief and Argument for Appellants at 13, Magers-Fionof v. State, 555 N.W.2d 672 (Iowa 1996) (No. 95-1190), 1996 WL 34539972. The Iowa Supreme Court ultimately affirmed the lower court's dismissal of the plaintiffs–appellants' class action for monetary damages for losses caused by the State's permitting commercial harvesting of trees on state-owned property. *Magers-Fionof*, 555 N.W.2d at 674. The court declined to address the public trust issue because the plaintiffs–appellants had failed to preserve that issue on appeal. *Id.*

The advantage of tenure is that I could afford to be amused, while nonetheless somewhat baffled as to why counsel considered my law review article sufficiently important to warrant discrediting.

What did Joe Sax think of all of this? Perhaps, similarly, that I was a young academic trying to get tenure. If so, he too was respectful. He wrote a very nice letter in support of my tenure, which I greatly appreciated.[18] But I certainly do not think he ever embraced my view.

In one of our last conversations, not long before Joe passed away, during a wonderful evening I spent with Joe and Ellie Sax at Yosemite, he did ask me whether, in light of actual events since I wrote my 1986 article—in contrast to the legal trends I predicted—I still thought I was correct in my legal analysis.[19] It is a topic that many scholars have addressed, comparing my mid-1980s assumptions and predictions about trends in environmental and natural resources law to what in fact has since happened.[20] What I told Joe is the subject of this Essay.

To that end, this Essay is divided into three parts. First, what I got wrong in 1986. In particular, what I failed to anticipate in terms of how environmental and natural resources law would evolve. Second, how I would refine my thinking about the efficacy of the public trust doctrine in light of that new, unanticipated information. And, third, how I would not

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18 *See* Letter from Professor Joseph Sax, Washington University School of Law, to Associate Dean Ronald Levin, Washington University School of Law (on file with author) [hereinafter Sax Tenure Review Letter] (undated correspondence in response to "Lazarus's proposed promotion to tenure" suggesting that the article's conclusion, "of course, is utterly wrong" but "[n]onetheless the article is first rate and shows Lazarus as a very good scholar indeed").

19 Joe's query was similar in emphasis to the overarching theme he raised in my tenure review years earlier: "A good deal of one's judgment about the article turns on whether his optimism is well founded." *Id.* at 2.

20 *See, e.g.*, William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 732–34 (2012) (standards of judicial review developments); J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915, 919 (2012) (regulatory takings law developments); John D. Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351, 370 (1997) (regulatory takings law developments); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 653–54 nn.403–04 (1995) (Article III standing law developments); Sanne H. Knudsen, *Remedying the Misuse of Nature*, 2012 UTAH L. REV. 141, 182–83 (2012) (statutory and nuisance law developments); Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in A Pod?*, 45 U.C. DAVIS L. REV. 1075, 1084 (2012) (political developments); Dave Owen, *The* Mono Lake Case*, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1121–22, 1139–40 (2012) (administrative law developments); Marc R. Poirier, *Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources*, 15 SOUTHEASTERN ENVTL. L.J. 71, 114–16 (2006) (regulatory takings law and political developments); J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SOUTHEASTERN ENVTL. L.J. 223, 228 (2006) (statutory law developments); Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees' World*, 39 ECOLOGY L.Q. 123, 191 (2012) (state law developments); Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 VT. J. ENVTL. L. 189, 232 (2008).

change my thesis, thereby perhaps confirming, finally, Mike Blumm's original supposition that I am not only naïve, but "hopelessly" so after all.[21]

II. WHAT I GOT WRONG

Without question, and with the benefit of hindsight, I was overly optimistic about what I perceived back in the mid-1980s as certain positive trends in environmental law. In particular, I did not sufficiently anticipate the efforts by opponents of more demanding pollution control and natural resource conservation laws to resurrect a constitutional barrier to their full enforcement based on the Fifth Amendment's Just Compensation Clause.[22] I likewise failed to anticipate the virtual collapse of the U.S. Congress as an effective environmental lawmaker after 1990.

A. Judicial Missteps in Regulatory Takings

In March 1986, when the *Iowa Law Review* published my public trust doctrine article,[23] the federal judiciary was very different from today. Regulatory takings claims did not seriously threaten full and effective enforcement of strict environmental protection requirements in the mid-1980s. The new conservative on the U.S. Supreme Court was Justice Sandra Day O'Connor—a relative moderate.[24] Justice Antonin Scalia had not yet joined the Court and when he took his seat on the bench six months later, in September 1986, there was no widespread appreciation for the transformative role he would seek to play with regard to environmental law.[25] The Senate vote in favor of his nomination was ninety-eight to zero;[26]

21 *See supra* note 13 and accompanying text.

22 U.S. CONST. amend. V. I also failed to anticipate the federal courts' resurrection of Article III barriers to citizen standing to enforce environmental protection requirements, which Justice Antonin Scalia has also championed on the Court with some success. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (ruling that "some day intentions" to visit an area allegedly affected by an agency action were insufficient to establish standing), *and* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 886–89 (1990) (concluding that environmental plaintiffs lacked Article III standing requirements because their general allegations of use of unspecified lands "in the vicinity of" immense areas of land failed to allege with sufficient specificity the injury that would be caused to them by the actions of the federal government that they were challenging as unlawful), *with* Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 525–26 (2007) (holding that Massachusetts had standing to challenge EPA's decision that greenhouse gases did not constitute "air pollutants" within the meaning of the Clean Air Act notwithstanding attenuated chains of causation and redressability), *and* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 184–85 (2000) (ruling that environmental plaintiffs' reasonable apprehension of using a water body due to the defendant's violation of a Clean Water Act permit requirement could establish injury for standing purposes, even in the absence of demonstrable harm to the environment from the permit violation).

23 Lazarus, *supra* note 3.

24 *See* U.S. Supreme Court, *Members of the Supreme Court of the United States*, http://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 21, 2015).

25 *See id.*

26 132 CONG. REC. 23,813 (1986).

the Senate report on his nomination was only seventy-six words long,[27] and neither that report nor the confirmation hearings included a single reference to environmental law.[28] It was a nonissue, even though there was in fact reason in then-Judge Scalia's record for concern.[29]

Yet it did not take long for now-Justice Scalia's skepticism, if not outright disdain, for much of the legal architecture of modern environmental law to become clear and to influence the Court's rulings in ways wholly opposed to what I had perceived as positive legal trends rendering the public trust doctrine less useful.[30] Within a few weeks of Justice Scalia joining the Court, the Court granted review in *Nollan v. California Coastal Commission*,[31] which led to the Justice's first salvo in June 1987.[32] In an opinion by Justice Scalia, the Court struck down a restriction on development on the beach side of Highway One along the Pacific Coast as an unconstitutional taking of private property absent payment of just compensation.[33] The Coastal Commission permitted a homeowner to build a second story on his home only if he granted an easement for public access alongside the beach bordering the home and the ocean.[34] The Court held that such a condition would be constitutionally permissible if the public easement furthered the same governmental purposes that would have justified denying the permit in the first instance, but here it did not.[35]

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27 S. EXEC. REP. NO. 99-19 (1986).

28 *See* 132 CONG. REC. at 23,803–13; *see also Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 1 (1986).

29 *See* Richard J. Lazarus, *Environmental Law at the Crossroads: Looking Back 25, Looking Forward 25*, 2 MICH. J. ENVTL. & ADMIN. L. 267, 277 (2013) [hereinafter Lazarus, *Environmental Law at the Crossroads*].

30 *See* Richard J. Lazarus, *Restoring What's Environmental about Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 727–28 (2000) (discussing Justice Scalia's votes in environmental cases).

31 483 U.S. 825 (1987). The Court noted probable jurisdiction in October 1986. *See* Nollan v. Cal. Coastal Comm'n, 479 U.S. 913 (1986).

32 By happenstance, I was then an Assistant to the Solicitor General at the U.S. Department of Justice and in that capacity responsible for drafting the amicus brief for the United States in the case. Brief for the United States as Amicus Curiae Supporting Reversal, *Nollan*, 483 U.S. 825 (No. 86-133), 1986 WL 720594. It was quite a challenge because I had to satisfy both political appointees in the Justice Department under President Reagan, who cared tremendously about protecting private property rights, and career government attorneys, who were appropriately concerned about challenges brought against federal environmental protection programs. The drafting of the brief, accordingly, required the brief-writing equivalent of threading a needle. That is why the final amicus brief recommended "reversal," which favored the property owners but surrounded that recommendation with legal reasoning favorable to environmental regulators over the longer term. *See id.* at *25–30. But that is standard operating procedure in the Office of the Solicitor General, where longer-term career government interests regularly clash with the interests of political appointees. It happens under politically conservative presidents, as in the Reagan years, and under more liberal presidents, as in the current Administration. There too, the priorities of political appointees may clash with those of career government employees.

33 *Nollan*, 483 U.S. at 841–42.

34 *Id.* at 825.

35 *Id.* at 837, 841–42.

The high-water mark of Justice Scalia's influence on the Court's regulatory taking precedent occurred four years later, in *Lucas v. South Carolina Coastal Council*.[36] Writing for a five-Justice majority, Justice Scalia's opinion declared that a restriction on the use of land that deprived the landowner of all economically viable use of the property was the equivalent of a physical appropriation of the property by the government and therefore amounted to a per se taking of the property requiring the payment of just compensation.[37] Only if such a restriction barred uses of land that "were not part of [the owner's] title to begin with"—for example, uses that were already limited by "background principles of the State's law of property and nuisance"[38]—would the presumption of a taking be defeated and the payment of just compensation not be required.[39]

For the purposes of thinking about the public trust doctrine and regulatory takings, what is especially fascinating about Justice Scalia's first takings opinion for the Court in *Nollan* is the back story revealed only years after the ruling when the papers of Justices Thurgood Marshall and Harry Blackmun became publicly available.[40] That is when those like myself studying those papers discovered that the public trust doctrine, which had received only scant attention in the published opinions, had in fact played a nontrivial role in several of the Justices' actual deliberations and draft opinions. In particular, Justice Brennan's dissent initially included a lengthy discussion of the public trust doctrine in support of the view that the doctrine independently defeated any possible takings claim based on a private property right to exclude the public from the beach in front of the landowner's home.[41] Justice Blackmun's chambers objected to Justice Brennan's inclusion of that discussion—not because of any substantive disagreement, but instead on purely tactical grounds. Justice Blackmun's clerk believed that any such discussion in Justice Brennan's dissent was ill-advised because it increased the odds that Justice Scalia might add language to the majority opinion expressly rejecting the doctrine or, even absent such a direct majority response, his opinion for the Court might more likely be

36 505 U.S. 1003 (1992).

37 *Id.* at 1005, 1030.

38 *Id.* at 1027, 1029.

39 *Id.* at 1031–32.

40 *See generally* MANUSCRIPT DIV., LIBRARY OF CONG., HARRY A. BLACKMUN PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS (2003), *available at* http://rs5.loc.gov/service/mss/eadxmlmss/eadpdfmss/2003/ms003030.pdf; *see generally* MANUSCRIPT DIV., LIBRARY OF CONG., THURGOOD MARSHALL: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS (2001) *available at* http://memory.loc.gov/service/mss/eadxmlmss/eadpdfmss/uploaded_pdf/ead_pdf_batch_27_December_2004/2001/ms001047.pdf.

41 *See* William J. Brennan, Jr., Draft Dissent, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), No. 86-133, (draft. June 3, 1987) (on file with the Library of Congress, Manuscript Division, Papers of Harry A. Blackmun). The draft dissent included references to both Joe Sax's public trust doctrine article as well as my own. *See id.* at 4 n.1, 10 n.8 ("At least one commentator regards reliance on public trust's property principles as having outlived its usefulness, in view of the modern expansive interpretation of state police power.").

read by the lower courts as implicitly doing so.[42] Justice Brennan did ultimately remove the lengthy public trust doctrine discussion from his dissent.[43] And, out of an apparent abundance of caution, Justice Blackmun's separate dissent stressed that he did "not understand the Court's opinion in this case to implicate in any way the public-trust doctrine."[44]

Without question, Scalia's influence on the Supreme Court's regulatory takings precedent, including in both *Nollan* and *Lucas*, is inconsistent with what I projected in 1986 to be the direction of the case law. *Nollan* made clear that a majority of the Justices favored constitutional limits on what they perceived to be excessive and unreasonable environmental land-use regulation.[45] And *Lucas*, by embracing a static view of private property rights in land protected by the Fifth Amendment's Just Compensation Clause—defined by "background principles"—cast serious doubt on a central assumption in my 1986 public trust doctrine article: that private property rights in land were evolving in recognition of greater public concerns with environmental protection and could do so constitutionally.[46]

B. Legislative Dysfunction

The second shift in environmental law that I no less clearly failed to anticipate was the total demise of Congress as an effective environmental lawmaking body. At the time of the publication of my public trust doctrine

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42 *See* Memorandum from Judicial Clerk, Supreme Court of the U.S., to Harry A. Blackmun, Assoc. Justice, Supreme Court of the United States 1 (June 9, 1987) (on file with the Manuscript Division, Library of Congress, Papers of Harry A. Blackmun) ("By featuring it so exhaustively in the dissent, JUSTICE BRENNAN in effect incorporates the public trust doctrine into the position rejected by the majority. I regard this as unnecessary and most unfortunate. The public trust doctrine would support a majority affirming the California Court, and hence it is not extraneous to the case, but the dissent can certainly stand without it. . . . The best course, I think, would be to ask JUSTICE BRENNAN to eliminate the first portion of the opinion and then join the rest. I do not know if there is any hope of getting him to do this."); Memorandum from Judicial Clerk, Supreme Court of the U.S., to Harry A. Blackmun, Assoc. Justice, Supreme Court of the U.S. 1–2 (June 15, 1987) (on file with the Manuscript Division, Library of Congress, Papers of Harry A. Blackmun) [hereinafter June 15, 1987 Clerk Memorandum] ("I suppose that the major goal is to prevent JUSTICE SCALIA from adding something to the majority that repudiates the public trust doctrine.").

43 *See Nollan*, 483 U.S. at 842–64 (1987) (Brennan, J., dissenting) (final published version of the Brennan dissent omits lengthy discussion of the public trust doctrine that had been included in the draft dissent); *see also* June 15, 1987 Clerk Memorandum, *supra* note 42, at 1 ("Justice Brennan did remove the major section with the exposition of the public trust doctrine.").

44 *Nollan*, 483 U.S. at 865 (Blackmun, J., dissenting).

45 *Id.* at 837.

46 *See* Lazarus, *Changing Conceptions*, *supra* note 3, at 673–74. In Joe's letter reviewing my scholarship as part of my tenure review at Washington University, he pointed out that "some of the things Lazarus says in his article look a bit less convincing today than they did when he wrote." Sax Tenure Review Letter, *supra* note 18. In support, he referred to the fact that the "new Supreme Court" had "just granted review of the S. Carolina coastal protection case," which made "shaky at best" my optimism about the direction of the Supreme Court's regulatory takings precedent. *Id.* Of course, that "S. Carolina" case became *Lucas v. South Carolina Coastal Council*.

article, Congress's record was no less than extraordinary. Its laws of the 1970s were truly transformative, and not just in terms of their immediate rewriting of federal environmental law.[47] Rather, federal environmental statutory enactments helped trigger related shifts in state law as well. (That is why it is always a mistake to focus just on federal law in thinking about U.S. environmental law. Environmental law is very much the sum of both federal and state statutes and regulations.)

Nor, as I have previously described, did Congress shy away during the 1980s from building upon that record of achievement.[48] In the face of major efforts to cut back on the laws of the 1970s, Congress did just the opposite. It made those laws even stronger. In the 1980s, Congress enacted two of the furthest-reaching pollution control and natural resources laws ever: the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[49] and the Alaska National Interest Lands Conservation Act.[50] And during the remainder of that decade, Congress passed a series of ever-more-demanding and prescriptive amendments to federal air, hazardous waste, and water pollution laws, which in turn triggered ever-more-comprehensive state environmental laws in response to the federal statutory amendments.[51]

But, after congressional enactment of the Clean Air Act Amendments of 1990,[52] Congress became effectively moribund. The once-vibrant, enormously creative congressional authorizations committees became plagued by increasing partisan conflict.[53] And the only congressional pathway open for business became the special interest riders attached to appropriations bills.[54] Those riders invariably reflect the worst of legislative priorities: short-term profit motives at the expense of longer-term concern for public welfare.[55] Congressional passage during the mid-1990s of the notorious Timber Salvage Rider was the poster child of environmental lawmaking gone awry.[56] Leveraging the nation's need to enact emergency appropriations legislation addressing the imminent needs of the victims of the Oklahoma City bombing, that rider effectively overrode court injunctions

47 *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

48 *See* Lazarus, *Environmental Law at the Crossroads*, *supra* note 29, at 270.

49 42 U.S.C. §§ 9601–9675 (2012).

50 16 U.S.C. §§ 3101–3233 (2012).

51 Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 626–28 (2006) [hereinafter Lazarus, *Congressional Descent*].

52 Pub. L. No. 101-549, 104 Stat. 2399 (1900) (codified as amended at 42 U.S.C. §§7401–7671q (2012)).

53 *See* Lazarus, *Congressional Descent*, *supra* note 51, at 638, 652.

54 *See id.* at 638, 677.

55 *See id.* at 642, 672, 677.

56 *See* Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, §§ 2001–2002, 109 Stat. 194, 240–47.

barring clear-cutting of old-growth forest found to be in violation of a host of federal environmental laws.[57]

Congressional paralysis continues today unabated, twenty-five years since the Clean Air Amendments of 1990, effectively forcing federal agencies to try to address today's pressing problems with statutory language often ill-suited to that task.[58] Congress has proven unable to pass climate legislation notwithstanding the compelling need for such legislation.[59] And not even the nation's greatest environmental catastrophe to date—the 2010 Gulf oil spill—could jumpstart Congress into enacting any legislation designed to reduce the risks of future spills.[60] The absence of legislative environmental lawmaking, which I assumed in 1986 would continue to thrive, also plainly calls into question my assertion that reliance on common law concepts such as the public trust doctrine would become increasingly unnecessary to address environmental protection concerns.

III. HOW I WOULD REFINE MY THINKING

So, in light of these clear lapses in my predictive ability, how would I now modify my 1986 public trust doctrine thesis? The most obvious way is that I wholeheartedly endorse the invocation of the public trust doctrine when the doctrine can fairly be said to apply and thereby diminish the strength of private property rights claims of a Fifth Amendment regulatory taking. Although Justice Scalia's effort to establish powerful regulatory takings precedent has—happily—mostly faltered,[61] his modicum of success does warrant a public trust doctrine response.

Not surprisingly, my own view is that the Supreme Court's decision in *Lucas* was seriously misguided. And not just because as co-counsel to respondent South Carolina Coastal Council in that case, I was on the losing side of that litigation.[62] The *Lucas* holding—that a land use restriction that deprives a landowner of all economically viable use constitutes a per se taking, absent a showing that the restriction did no more than proscribe what limits "background principles of the State's law of property and nuisance already place upon land ownership"[63]—rests on legal reasoning that

57 *See id.* (including the Emergency Salvage Timber Sale Program as a rider to the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act).

58 *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PENN. L. REV. 1, 63–79 (2014) (discussing the implications of congressional dysfunction for regulatory policymaking).

59 Richard J. Lazarus, *Environmental Law without Congress*, 30 J. LAND USE & ENVTL. L. 15, 30–31 (2014).

60 *Id.* at 30–33.

61 *See* Richard J. Lazarus, *The Measure of a Justice: The Faltering of the Property Rights Movement Within the U.S. Supreme Court*, 57 HASTINGS L.J. 759, 819 (2006); Richard J. Lazarus, Lucas *Unspun*, 16 SOUTHEASTERN ENVTL. L.J. 13, 25–29 (2007).

62 *Lucas*, 505 U.S. 1003, 1005, 1032 (1992).

63 *Id.* at 1029.

is ultimately incoherent, which is why I have long suggested its formal overruling.[64]

Justice Scalia's majority opinion for the Court in *Lucas* is rooted in nonsensical static notions of property law, beyond which legislation may not constitutionally go without triggering the Fifth Amendment's Just Compensation requirement.[65] The *Lucas* majority view of the Fifth Amendment is ahistorical in terms of how property law has always, and properly, evolved over time. And it is incoherent because even as the *Lucas* opinion relies on static notions of property law, it simultaneously recognizes the role of nuisance law—which is dynamic in nature—as a background principle of property law capable of defeating a takings claim based on a complete deprivation of all economic value.[66] It is further nonsensical because modern environmental protection and regulatory limits that are challenged as takings are often nothing more than a formal codification of the common law doctrine of nuisance.[67]

Lucas was, accordingly, a serious step backward in terms of proper legal evolution. *Lucas* rests on an absolutist notion of property rights that is wholly antithetical to my view of how private property expectations are best understood: namely, that they are entitled to protection but also subject to legitimate governmental exercises of police power authority. But, precisely because *Lucas* constitutes just such an analytic step backward, it does clearly invite a public trust doctrine response, as some commentators, including Professor Michael Blumm, have effectively suggested.[68]

In other words, one backward step in this context does warrant another. To the extent that the Court in *Lucas* invites a defense to a per se taking based on the application of background principles of property law, it is only sensible to invoke the public trust doctrine as just such a background principle to defeat the takings claims. I would have preferred to have avoided this kind of analytic framework for resolving takings claims altogether, but having lost that threshold battle in *Lucas*, it would be foolhardy to stand on principle in matters involving *Lucas*'s application.[69] In short, it is sensible to respond to a misguided framework of analysis with what otherwise would be a misguided argument.

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64 *See* Videotape: An AALS Debate—Resolved: Lucas Should Be Overruled (arguing for the Affirmative, Richard J. Lazarus; Arguing for the Negative, Robert C. Ellickson; Moderated by Eric T. Freyfogle) (American Association of Law Schools 1997).

65 *Lucas*, 505 U.S. at 1014–16.

66 *See* Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1419 (1993).

67 *See* Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 335–39 (2005) ("Several post-*Lucas* decisions have embraced the background principles defense, rejecting takings claims because they were precluded by state common law nuisance doctrine.")

68 *See id.* at 341–44 ("[J]udges have increasingly found footholds for public trust arguments in state constitutions, state statutes, and in the common law.").

69 *See Lucas*, 505 U.S. at 1029–32 ("South Carolina must identify background principles of nuisance and property law.").

For that same reason, I readily applaud the efforts of state environmental regulators to invoke the public trust doctrine as a weighty defense to takings challenges brought against governmental restrictions on those exercises of private property rights that would harm public rights in land and water resources. Many state environmental regulators have appropriately responded to the Supreme Court's precedent by doing just that. And successfully so in a wide variety of contexts involving both land and water—including in Hawaii,[70] Louisiana,[71] North Carolina,[72] Rhode Island,[73] South Carolina,[74] and Wisconsin,[75] while less successfully in Texas.[76] A recent U.S. Supreme Court ruling similarly suggests the utility of public trust doctrine-based property arguments in defeating takings claims against the government.[77]

70 *See In re* Water Use Permit Applications, 9 P.3d 409, 494–95 (Haw. 2000) (rejecting takings challenge brought against state agency denial of water use permits and ruling that "the original limitation of the public trust" defeated plaintiffs' claim of absolute right to water "contrary to public trust purposes"); *see also id.* at 497 ("The state is not 'taking' something belonging to an owner, but is asserting a right it always held as a servitude burdening owners of water rights.") (quoting Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 280 (1990)).

71 *See* Avenal v. State, 886 So. 2d 1085, 1088 (La. 2004) (rejecting oyster fishermen's takings challenge brought against state agency freshwater-diversion programs aimed at erosion reduction); *see also id.* at 1102 ("[T]he redistribution of existing productive oyster beds to other areas must be tolerated under the public trust doctrine . . . .").

72 *See* Fisher v. Town of Nags Head, 725 S.E.2d 99, 105–06 (N.C. App. 2012) (upholding town condemnation of oceanfront land as easement for beach renourishment project without payment of just compensation; town was validly asserting public trust doctrine rights of state "bequeathed to it by [the] state legislature," and benefit provided by beach nourishment provided more than sufficient compensation).

73 *See* Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974, at *15 (R.I. Super. July 5, 2005) (rejecting landowner's taking challenge brought against state agency denial of permit to develop in coastal wetlands); *see also id.* at *7 (public trust doctrine defeated plaintiff's claim of reasonable investment-backed expectations to "fill or develop that portion of the site which is below mean high water").

74 *See* McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 120 (S.C. 2003) (rejecting landowner's takings challenge brought against state denial of permit for bulkhead and backfilling on coastal property; no compensatory taking because property had reverted to tidelands and therefore was public trust property on which such activity was forbidden).

75 *See* R.W. Docks & Slips v. State, 628 N.W.2d 781, 791 (Wis. 2001) (rejecting marina developer's taking challenge following state denial of a dredging permit on the ground that the permit denial did not result in severe interference with reasonable investment-backed expectations, and it affected the developer's riparian rights, which are rights inferior to the public trust doctrine).

76 *See* Severance v. Patterson, 370 S.W.3d 705, 723 (Tex. 2012) ("[W]hile losing property to the public trust as it becomes part of the wet beach or submerged under the ocean is an ordinary hazard of ownership for coastal property owners, it is far less reasonable, and unsupported by ancient common law precepts, to hold that a public easement can suddenly encumber an entirely new portion of a landowner's property or a different landowner's property that was not previously subject to that right of use.").

77 *See* Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419, 2432 (2015) (distinguishing claims based on governmental takings of raisins from takings of oysters on the ground that "oysters, unlike raisins, [are] 'feræ naturæ' that belong to the State under state law").

The Rhode Island court's reasoning underscores how effective the public trust defense to takings claims can be in the wake of the U.S. Supreme Court's misstep in takings analysis in *Lucas*. In the Rhode Island case, the landowner who brought the takings challenge had acquired the property as a result of a sale by a prior owner who, knowing about the public trust doctrine's application to the coastal wetlands, "simply wanted out of a bad investment" once the land's "primary beneficial use (the six lots on upland) had already been realized."[78] As the Rhode Island court aptly explained in rejecting the new landowner's takings claim, "[c]onstitutional takings law does not compensate bad business decisions."[79]

IV. HOW I WOULD NOT REFINE MY THINKING

Apart from the regulatory taking issue, however, I continue to worry that it is a serious mistake to take the public trust doctrine far beyond its historic moorings. Purporting to glean from the doctrine legal obligations enforceable by the judiciary could shortcut the democratic processes for lawmaking that are central to our nation's values and system of government. That is why, although I also failed to anticipate the demise of Congress in environmental lawmaking, that failing, unlike the regulatory taking issue, does not similarly change my thinking about the role of the public trust doctrine. In the absence of constitutional limitations or requirements, the nation's courts remain at most secondary players in environmental lawmaking.

Courts can, as in *Massachusetts v. U.S. Environmental Protection Agency*,[80] properly cajole and push executive branch agency recalcitrance in the face of statutory commands. But the courts possess neither the competency nor the legitimacy necessary to play a far greater role and should avoid substituting their policy judgment regarding the proper level of environmental protection for that of the legislature or executive branch agencies acting pursuant to legislative charges of such lawmaking responsibility. For this reason, I think it is a strategic mistake to delude oneself—let alone the law students we teach—by suggesting otherwise. Far better to accept the true difficulty of the lawmaking challenge we face, and to undertake the necessary hard work at the national—and no less important at the retail—level, than to pretend that the courts can provide quick fixes to rescue us from ourselves.

Fortunately, many determined attorneys worried about the nation's environmental future are doing just that necessary hard work, trying to influence actors ranging from federal lawmakers to local public utility commissions. There are attorneys in the national environmental groups who

78 *Palazzolo*, 2005 WL 1645974, at *13.

79 *Id.*

80 549 U.S. 497, 532–35 (2007). Disclosure: I served as co-counsel for the petitioner Commonwealth of Massachusetts at the jurisdictional stage of this case. *See* Reply Brief of Petitioners, Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 1491257.

are increasingly mastering the complexity of energy technology and regulation. There are attorneys in local and regional organizations who are doing the same, encouraging state regulators to lift existing regulatory obstacles to cleaner energy technologies. The same is true throughout both federal and state environmental and energy regulatory agencies. These are the attorneys who are doing the creative and heavy lifting most needed right now. In the world of environmental law, they are performing the most important and the most challenging work.

The good news is that massive reductions in greenhouse gas emissions should be achievable based on existing and future technological innovation if we can adjust the necessary statutes and regulations. But it will not come easily, as should already be obvious. It will not be easy to reform the nation's electricity grid. It will not be easy to transition from fossil fuels to renewable sources of energy. There are powerful economic and political forces that will naturally resist any such shift, including both the enactment of the necessary law reforms in the first instance and then their strict implementation over time.[81] More than federal legislation and rulemakings will be needed. Success will require law reform state by state, local government by local government, often in tandem with business leaders.

To overcome those obstacles will require the best of lawyering.[82] Advocates must push for reforms that address the specifics in a manner that converges energy and environmental law. The Clean Water Act[83] can proudly announce a goal to eliminate all discharges of pollutants into navigable waters,[84] but then administrators must apply their expertise to come up with a regulatory system that reflects all the very real complexities presented both by the workings of our natural environment and our social and economic activities. That complexity cannot be ignored, which makes working out all those precise details fundamentally and unavoidably hard. There is a reason for environmental law's complexity—one rooted in the complexity of both the ecosystem itself and those human activities that affect it.[85]

To overcome those obstacles will also require the best of lawyering to address the huge challenges presented by such a profound social and economic transformation in the way electricity is produced, distributed, and used. The necessary transition will be hard, and the very real needs of those who will be adversely affected must be considered and fairly addressed.

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81 *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1193–95 (2009) (discussing future legal strategies).

82 *See* Lazarus, *Climate Change Law in and over Time*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 29, at 34 (2010) (discussing the need for new legal framework that would be flexible yet remain steadfast); Lazarus, *Environmental Law at the Crossroads*, *supra* note 29, at 284 (discussing the need for coordination and cooperation).

83 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

84 *See id.* § 1251(a)(1) ("[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated . . . .").

85 *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 16–19 (2004) (discussing the challenges of making environmental laws).

That too requires great precision and nuance in how our laws are fashioned and administered. And that, too, is the stuff of creative lawyering.

President Obama's final Clean Power Plan is a wonderful example of what can be achieved by applying such expertise with careful attention to the need for transition and cost-effectiveness, as well as to our own nation's institutional design for lawmaking.[86] Spanning over 300 printed pages, the Plan is extraordinarily complex and ambitious.[87] It establishes carbon dioxide emission performance rates representing the best system of emission reduction for existing fossil fuel-fired electric generating units; state-specific goals reflecting carbon dioxide emission performance rates; and guidelines for developing, submitting, and implementing state plans capable of meeting carbon dioxide emission performance rates.[88] The Environmental Protection Agency (EPA) simultaneously published a proposed Federal Plan to implement greenhouse gas emission guidelines for the existing fossil fuel-fired power plants, which offers two alternatives for states and other jurisdictions that do not submit an approvable plan to EPA.[89] The proposed Federal Plan, which includes a "Model Trading Rule" for states that would like to adopt a cap–and–trade program, is more than 750 pages in length.[90]

The entire Clean Power Plan represents a massive regulatory undertaking, rich in both its technical detail and its innovation. It is simultaneously attentive to the need to account for the real, short-term economic costs of transitioning to a new energy mix, to maximize cost effectiveness, and to respect the expertise of state and local governments.[91] The Plan is also creatively responsive to those in the business community who appreciate the seriousness of climate change and the need to reform fundamentally the way electricity is produced and consumed in the United States.[92] The Plan necessarily covers hundreds of pages of detail, supported by an abundance of lengthy technical documents and data analysis.[93] But

86 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (describing how the Plan follows through on EPA's commitment to "devise a strategy" that is fair, flexible, and relies on a transition to cleaner power that is also reliable and affordable to consumers).

87 *See id.* at 64, 964 (final page of rule).

88 *Id.* at 64, 663–64.

89 *See* U.S. Envtl. Prot. Agency, *Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014*, at 16, *available at* http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants (prepublication version effective on Aug. 3, 2015) (to be codified at 40 C.F.R. pt. 62) (discussing alternatives).

90 *See id.* at 39 (discussing the model trading rule).

91 *See id.* at 62 (discussing the Plan's opportunity for cost-effective implementation), 383–84 (discussing the importance of Plan flexibility).

92 *See* Jody Freeman & Kate Konschnik, *A Climate Plan Businesses Can Like*, N.Y. TIMES, Aug. 3, 2015, http://www.nytimes.com/2015/08/04/opinion/a-climate-plan-businesses-can-like.html (last visited Nov. 21, 2015) (discussing how the Plan allows for increased efficiency).

93 EPA maintains a website at which the Clean Power Plan and all the supporting documentation can be found. *See* U.S. ENVTL. PROT. AGENCY, *Clean Power Plan for Existing*

that is the kind of lawyering and technical detail that is required to have a meaningful chance to move the law as needed. Environmental lawyers will have to follow up by delving into the functional equivalent of the trenches: working in individual states and before public utility regulators. That is what will be ultimately needed to break down the legal obstacles that currently impede the shift to an energy mix responsive to climate change and to replace those obstacles with incentives that more fairly reflect their true social value. There are no legal shortcuts.

To be sure, I understand the natural appeal of the notion that a handful of lawyers will replicate through the courts the environmental equivalent of the accomplishments of Charles Hamilton Houston and his young protégée, Thurgood Marshall, who together crafted a brilliant litigation strategy culminating in *Brown v. Board of Education*.[94] And I similarly appreciate the obvious parallels between civil rights law and environmental law, especially in the context of climate change.[95] Not unlike racial minorities who served as the plaintiffs in pathbreaking civil rights litigation in the 1940s, 1950s, and 1960s,[96] future generations are hard pressed to find effective champions of their environmental interests in legislatures. The origins of each group's lack of legislative influence are quite different—slavery and raw racial animus excluded racial minorities from the political process, while future generations' interests are overlooked because of the outsized influence of industry and the natural tendency of current generations to emphasize their own wellbeing. The much-celebrated Judge Skelly Wright of the U.S. Court of Appeals for the D.C. Circuit, however, understood in the 1970s the clear relationship between civil rights law and environmental law, and was one of the rare jurists who served as a judicial champion of both while serving on the federal bench.[97]

But there remain profound differences between environmental law and civil rights law. At the threshold, unlike the equal protection requirements for which Houston and Marshall sought judicial support in their historic litigation, environmental protection requirements are not constitutional in character.[98] They are exclusively the product of the common law and statutory law.[99] There is no constitutional analogue and therefore far less

Power Plants, http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants (last visited Nov. 21, 2015).

94 347 U.S. 483 (1954). For accounts of this legal strategy, see generally MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT (2007); RICHARD KLUGER, SIMPLE JUSTICE (1975); MARK TUSHNET, MAKING CIVIL RIGHTS LAW (1994).

95 *See* Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 3, 7 (2002).

96 *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948); *Brown*, 347 U.S. 483; Loving v. Virginia, 388 U.S. 1 (1967).

97 *See* Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201, 204–11 (2004) (discussing Judge Skelly Wright and his role in the development of federal environmental law).

98 *See* U.S. CONST. amend. XIV, § 1 (Equal Protection Clause).

99 *See* CRAIG N. JOHNSTON ET AL., LEGAL PROTECTION OF THE ENVIRONMENT 3–5 (3rd ed. 2010) (describing the history of pollution control and how legal doctrines have developed from common law and statutory law).

force to the premise that courts can legitimately supplant the lawmaking prerogatives of the legislative and executive branches.

The courts' inability to fashion appropriate remedies on their own to address climate change also throws a lot of cold water on the venture. Not that remedial relief in *Brown* itself proved easy. The courts have struggled for more than sixty years to implement *Brown's* holding with "all deliberate speed."[100]

But imagine what would be required for climate change in light of its extraordinary temporal and spatial scope of cause and effect, and the corresponding complexity of the technological, economic, and social judgments that must be made in determining how to address the climate issue. The courts would be asked to embrace a judicial role that assigns them the primary responsibility of deciding the appropriate levels of greenhouse gas emissions in the United States. They would be asked to set legal rules governing how those emissions should then be allocated and when different levels would need to be achieved. The courts would have to develop the equivalent of the President's proposed Clean Power Plan.

As evidenced by the plan itself, consider the sweep of activities that would be affected over both time and space. Consider, too, the fundamental social and economic policy judgments that courts would have to make. The courts do not remotely possess the necessary competence or lawmaking legitimacy to answer those kinds of questions. And they will decline to do so, especially in the absence of any kind of clear constitutional command. Conservative judges would not favor it. And one would be hard pressed to find many liberal judges who would, no matter how much they agreed climate change was an enormous problem.[101] And, even if one finds an

100 *Brown*, 349 U.S. at 301.

101 The fate of one recent atmospheric trust complaint exemplifies the challenges such arguments face on the merits. *See* Alec L. v. Jackson, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom.* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014), *cert denied*, 135 S. Ct. 774 (2014). The plaintiffs in *Alec L.* argued that the public trust doctrine provided a federal cause of action based on the existence of an atmospheric trust arising under the Constitution and laws of the United States and that the federal government had abdicated its public trust duty to protect the atmosphere from public harm. *Id.* at 13, 15. The court of appeals held that "the district court correctly dismissed the plaintiffs' suit for lack of subject matter jurisdiction" because there was no support for their contention that the public trust doctrine, whatever its scope, is anything but a matter of state, rather than federal, law. Alec L. ex rel. Loorz v. McCarthy, 561 F. App'x at 8. The lower courts' shared judgment that the federal claim of an atmospheric trust clearly lacked threshold merit cannot be easily dismissed as the work of "conservative" jurists ignoring obvious precedent favorable to the environmental plaintiffs. The district court judge, Robert Wilkins, was an Obama appointee to that court and former public defender who was subsequently confirmed to the D.C. Circuit after a closely divided partisan vote, notwithstanding a filibuster launched against his nomination based on his liberal views. *See* Ed O'Keefe, *Senate Confirms Obama's Final Pick to Serve on Key Federal Court*, WASH. POST, Jan. 13, 2014, http://www.washingtonpost.com/news/post-politics/wp/2014/01/13/senate-confirms-obamas-final-pick-to-serve-on-key-federal-court/ (last visited Nov. 21, 2015) ("Senators voted 55–43 . . . ."). And although one of the three judges on the D.C. Circuit panel is considered more conservative, the other two, Chief Judge Merrick Garland and Judge Sri Srinivasan, are certainly not. They would be considered two federal appellate judges potentially more sympathetic to environmental plaintiffs and certainly harboring no judicial bias of any sort to

isolated judge or two so exceedingly frustrated by the lack of governmental action to address climate change, the half-life of their ruling will likely be limited upon further view. The bottom line is that this is just not how we make laws of this nature under our constitutional framework.

That is why, although I greatly admire the motives and overarching goals of those who are trying to address climate change through lawsuits based on the legal theory that there is an "atmospheric trust" that courts can enforce against government and industry,[102] I believe those lawsuits are best understood as part of an overall *political* strategy rather than as a viable, standalone *litigation* strategy. The filing of such lawsuits can serve a useful political purpose: they provide an opportunity for potentially effective political organizing and publicity with the ultimate goal of prompting legislatures to enact the laws we need. Those lawsuits are not destined to yield significant judicial remedies based on the atmospheric trust doctrine itself. Fortunately, many of those who are championing the atmospheric trust litigation are very much focused on the positive political potential of their efforts in terms of influencing law- and policy-makers in both the legislative and administrative arenas, and wisely do not focus exclusively on litigation.[103]

Unfortunately, however, some of the leading advocacy in favor of a judicially enforceable atmospheric trust doctrine has embraced a polarizing thesis that will make the necessary law reform even harder to accomplish.[104] Such advocacy couples positive promotion of the atmospheric trust doctrine with a condemnation of existing environmental law, extending even to the good faith efforts of public servants in federal, state, and local governments who have sought to administer those laws. The gist of the argument is that courts must embrace and enforce an atmospheric public trust doctrine because of the failings of the legislative and executive branches.

The rhetoric is surprisingly harsh. Environmental law becomes merely an "illusion" that purports to protect the environment but instead only perpetuates harm.[105] Our environmental laws are described as having failed "[a]cross the board."[106] "To be sure, there are small successes in each case,

plaintiffs' detriment. Finally, neither the claim of a circuit conflict nor the filing of an amicus brief signed by 53 law professors in support of Supreme Court review made an apparent dent on any of the Justices. *See* Amicus Curiae Brief of Law Professors in Support of Granting Writ of Certiorari, Alec L. *ex rel.* Loorz v. McCarthy, 135 S. Ct. 774 (No. 14-405).

102 *See, e.g.*, Chernaik v. Kitzhaber, 328 P.3d 799, 802 (Or. Ct. App. 2014) (atmospheric trust case); Butler *ex rel.* Peshlakai v. Brewer, No. 1 CA–CV 12–0347, 2013 WL 1091209 (Ariz. Ct. App. Mar. 14, 2013) (same); Kanuk *ex rel.* Kanuk v. State, 335 P.3d 1088 (Alaska 2014) (same).

103 *See, e.g.*, Our Children's Trust, *Public Education and Film*, http://ourchildrenstrust.org/PublicEducation-Film (last visited Nov. 21, 2015) (discussing public education campaign encouraging legislative and legal solutions aimed at implementing science-based climate recovery plans).

104 *See, e.g.*, MARY C. WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 7, 9 (2014) (criticizing "the illusion of environmental law" and asserting that "[a]gency discretion drives the demise of Nature").

105 *Id.* at 9.

106 Mary C. Wood, *"You Can't Negotiate with a Beetle": Environmental Law for a New Ecological Age*, 50 NAT. RESOURCES J. 167, 182 (2010).

but the successes are in the nature of one step forward, one hundred steps back."[107] Environmental statutes and regulations are faulted for being the reason why the "venerable" atmospheric trust doctrine—which under this view offers apparently the only viable basis for rescue from environmental harm—"has been largely overlooked. . . . Similarly to how an invasive species chokes out and conceals the presence of native vegetation, so these statutes and regulations obfuscate the public trust."[108]

Such advocacy singles out for criticism the public servants who work for the agencies charged with the administration of the nation's environmental laws. Those administrators "have become perpetrators of legalized destruction, using permit provisions contained in nearly every statute to subvert the purposes Congress and state legislatures intended."[109] Indeed, according to this view, "[w]hereas Congress passed environmental statutes with the overriding goal of *protecting* the environment, the environmental agencies now use the statutes to legalize *destruction* of the environment."[110]

The root of the problem is allegedly the administrative agency discretion exercised by those government employees, which "breeds dysfunction across environmental agencies."[111] Once armed with such discretion, environmental agencies "operate in a tight alliance with industry and private interests."[112] Captive to industry, public servants who administer environmental laws become the functional equivalent of a gerbil in a cage, and "[e]veryone knows what a gerbil cage looks like."[113] "The gerbil spends most of its time running in a wheel that spins around and around. No real progress occurs by spinning the wheel, but the gerbil stays occupied."[114]

Such rhetoric is unfortunate. Of course, there are individual political appointees in environmental agencies who have sought to undermine the laws, and no one, including career public servants in environmental agencies, is immune from making serious mistakes notwithstanding the best of efforts.[115] The former warrant pointed critique and the latter the kind of crucial oversight dedicated environmentalists have provided for decades, often working in close, positive relationships with those same government employees. Neither is advanced by criticism that fails to distinguish between the two and instead loosely describes it all as environmental law's failure. The negative characterization of environmental law is also unpersuasive because it fails to account for the very real and significant challenges of fashioning environmental protection law, how much environmental law has achieved notwithstanding those challenges, the major positive role that

107 *Id.*

108 WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE, *supra* note 104, at xix.

109 *Id.* at xvi.

110 *Id.* at 9.

111 *Id.* at 83.

112 *Id.* at 32, 50, 52.

113 *Id.* at 33.

114 *Id.*

115 *See, e.g.*, *id.* at 22, 26 (discussing appointees with industry operatives).

many dedicated and immensely talented career public servants in environmental agencies have played for decades in creatively administering the nation's environmental protection laws, and how much existing environmental law can in fact still achieve to address climate change in meaningful ways.

Even more fundamentally, the proposed solution—judicial recognition of an atmospheric trust—will not solve the supposed evil of administrative discretion. Of course, modern environmental law involves the exercise of much administrative discretion. But such agency discretion is not itself necessarily or inherently the cause of environmental destruction. Nor, ultimately, is it avoidable. Yes, in the wrong hands, discretion may be and certainly has been exercised in environmentally destructive ways. But so too may it be exercised in environmentally friendly ways, reflecting extraordinary administrative skill and creativity. Recent examples include EPA's Cross-State Air Pollution Rule,[116] regulating interstate air pollution; Mercury Rule,[117] regulating emissions of hazardous air pollutants from electric generating units; Coal Ash Rule,[118] regulating the disposal of coal combustion residuals; and the Clean Power Plan, promulgated this past August[119] and regulating greenhouse gas emissions from coal fired power plants. The problem is not the existence of administrative discretion per se, but the identity of those sometimes exercising that discretion, which is decided ultimately by elections wholly unaffected by judicial invocations of a "trust doctrine."

I worry about distracting those who care deeply about environmental protection with an elusive promise that our courts can rescue us from our inability to elect representatives willing and able to enact and ensure the administration of environmental protection laws that address compelling problems like climate change. There are no lawmaking bypasses here, and there is certainly no reason to suppose that a political system incapable of passing the environmental laws and appointing the environmental agency officials we need will somehow nonetheless supply us with judges willing, let alone remotely competent, to take their place as lawmakers and fill in the environmental lawmaking gaps. Indeed, that was one of my major criticisms of the public trust doctrine back in the 1980s—that it mistakenly assumed the persistence of a highly activist, pro-environmental-protection judiciary.[120] I argued that there was no reason to suppose the judiciary would reliably

116 Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (codified at 40 C.F.R. pts. 51, 52, 72, 78 and 97).

117 National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9,304 (Feb. 16, 2012) (codified at 40 C.F.R. pts. 60 and 63).

118 Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (codified at 40 C.F.R. pts. 257 and 261).

119 *See supra* note 86 and accompanying text.

120 Lazarus, *Changing Conceptions*, *supra* note 3, at 712–13.

play that role in the future as it had during the 1970s.[121] Nothing that has occurred during the past three decades suggests I was incorrect in that assessment. Just the opposite.

Nor is it obvious to me that Joe Sax, who was an extraordinary scholar and careful lawyer, would have disagreed with my current analysis, at least privately. He was probably too kind a person to disagree publicly with those who shared his environmental vision and in their unbridled enthusiasm took his ideas even further than was strategically wise. Sax was more than just a phenomenal legal scholar. He was also an outstanding and careful lawyer who understood the difference between strong and weak legal arguments and the risks associated with pressing the latter.

That is why, even while trumpeting the public trust doctrine's potential, Sax's 1970 public trust doctrine article cautioned lawyers in litigation against making "extreme and doctrinaire" public trust doctrine arguments too far afield from the doctrine's historical precedent.[122] The upshot of such arguments, he made clear, would be adverse precedent harmful to the public trust doctrine.[123] According to Sax, "[a] litigation theory which begins with a sophisticated analysis of public trust principles . . . is likely to obtain a far more sympathetic response from the bench than is one which takes a rigorous legal principle and squeezes it to death."[124]

Sax also left no doubt that courts could play only a limited role and could not supplant legislatures on the major issues of environmental and natural resource policy. He stressed that "democratization is essentially the function which the courts perceive themselves as performing, and that even those courts which are the most active and interventionist in the public trust area are not interested in displacing legislative bodies as the final authorities in setting resource policies."[125] Sax wrote:

> It should be emphasized that the judicial function is properly invoked principally to deal with issues which, while very important, tend to be made at low-visibility levels, even though they may be endorsed by very highly placed officials. Conversely, when there is high public visibility on an issue, when it is dealt with as a central matter of state or national policy, and when account has been taken of open and widespread public opinion from all quarters, the judiciary does not ordinarily have a role to play as a perfector of the political process.[126]

To be sure, Sax understood that—as regularly arises with environmental lawmaking—the democratic process can sometimes work poorly because majority interests are diffuse, and accordingly "self-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause

121 *Id.* at 712.
122 Sax, *supra* note 1, at 552.
123 *Id.* at 552–53.
124 *Id.* at 553.
125 *Id.* at 559.
126 *Id.* at 559 n.268.

those bodies to ignore broadly based public interests."[127] But even then, Sax plainly understood that the courts ultimately could do only so much. They could not supplant the legislatures or expert agencies and their ability to exercise discretion. They could at most remand for lawmaking by a representative body "with a constituency broad enough to be responsive to the whole range of significant potential users."[128] But they could never require the necessary lawmaking. The courts could promote "democratization" in the public trust area but lacked the legitimacy or expertise to supplant the other branches.[129] Only "[i]f lawyers and their clients are willing to ask for less than the impossible," could the courts "be expected to play an increasingly important and fruitful role in safeguarding the public trust."[130]

V. CONCLUSION

Joe asked me during our last visit together in Yosemite whether actual events since the mid-1980s had changed my views on the efficacy of the public trust doctrine. My answer is somewhat elusively the classic legal scholar's response: yes and no. Yes, I clearly got some things wrong in 1986 and some of my related conclusions are just as plainly no longer valid. But, no, my bottom line view that the public trust doctrine has limited value in solving our most pressing and challenging environmental problems remains the same. To be sure, the public trust doctrine will and should continue to play a meaningful role in helping environmental plaintiffs in discrete contexts to tilt the scales of justice in their favor.[131] But addressing sweeping problems like climate change will require our most creative thinking to craft political strategies and lawmaking institutions capable of breaking the logjam that has paralyzed our ability to make and maintain the laws necessary for the viability of future generations. Such complex lawmaking challenges are not going to be overcome in the first instance in any truly significant and long-lasting way by the judiciary relying on the public trust doctrine. Instead, as expressed in the closing sentence of my 1986 public trust doctrine article, I continue to worry that public trust doctrine nostalgia and undue reliance on the courts will distract us from the hard work that needs to be done: "[L]ittle, if any, room is left in these tasks ahead for the mythopoeism of the public trust doctrine."[132]

127 *Id.* at 560.

128 *Id.* at 561.

129 *Id.* at 566.

130 *Id.*

131 *See, e.g.*, Friends of the Parks v. Chicago Park District, No. 14-cv-09096, 2015 WL 1188615, at *4–7 (N.D. Ill., Mar. 12, 2015) (denying motion to dismiss claim that the City of Chicago had violated the public trust doctrine by entering into a memorandum of understanding with a nonprofit corporation regarding the proposed construction of an art museum on land recovered from the navigable waters of Lake Michigan).

132 Lazarus, *Changing Conceptions*, *supra* note 3, at 716.

Joe helped us all appreciate the extraordinary gifts of our natural environment and our corresponding responsibility to safeguard it. For those of us in the environmental law academy who had the good fortune of having our lives cross with Joe's, that too was no less a gift. He was the environmental law scholar's scholar. He wrote with passion and purpose about pollution control and natural resource management and the need for effective environmental protection law. He did not mince words. And, beginning with his magnificent 1970 article on the public trust doctrine, he always remained a careful and persuasive lawyer, fully able to expose the weaknesses in the arguments of others while appreciating the limitations in his own. Our natural world is better off because of Joe's work, as are our own lives because of his company.