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Reinvigorating the Union of Wonder and Power

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It was a pleasure to read the stimulating papers contributed to this conference by Professors Freyfogle and Lazarus. I am going to abstract from them to two larger themes: one that has been implicit throughout this conference, and then to the explicit conference theme.

I. The Mid-Life Crisis of Environmental Law

The implicit theme is what Professor Lazarus has called elsewhere “the graying of the green.” That is more than an inevitable chronological phenomenon; it is a mood. To borrow a term from the 1970s, environmental law, like environmentalism generally, is in the throes of malaise. Environmental law is not dead, but it is going through a mid-life crisis.

Forty years ago, the possibilities must have seemed limitless. People like Joe Sax were just beginning to recognize ways that the law could protect environmental resources. The idea that law should play that role was beginning to resonate in a general way with the public. Environmental protection was about to become a basic element of social policy, not just an afterthought limited to a few special places and things, like national parks and bald eagles.
Thirty years ago, the triumph appeared almost complete. Politicians were falling all over themselves to impress voters with their environmental credentials. A suite of strong federal environmental statutes had been enacted. Congress declared that the air would be healthy and the waters unpolluted within a few years. Those promises were made more credible by citizen suit provisions and the apparent willingness of the federal courts to reconsider doctrines of standing and judicial review that had made it hard for ordinary people to hold the government to its promises.

But then things shifted dramatically. By the 1980s, the bloom was off the rose. The Reagan revolution presented government as the enemy and greed as the solution. Cost-benefit analysis was hot. Environmental protection for its own sake was not. Courts were pulling back from their generosity. Ten years ago things really started to look bad, when Republicans took over the House and the environment became a partisan issue. Environmentalists have been fighting a rear-guard action ever since, defending past gains rather than envisioning new ones.

The mid-life crisis theme connects squarely with the explicit theme of this conference. Getting through this midlife crisis will require a team approach, bringing a broad set of skills to bear on the environmental law project. The humanities are an essential, and under recognized, part of that team.

II. THE ENVIRONMENTAL LAW PROJECT

As Dan Tarlock aptly put it several years ago, "The central project of environmental law has been to marry wonder to power." Environmental law seeks to protect a different kind of interest, beyond human physical health, direct economic well-being, liberty, or dignity as traditionally recognized. It avoids the duality and the ambiguity that Bill Cronon reminded us lurk in the word "nature." The environment is not us. It is everything that surrounds us. The "law" part is important too. There are a lot of different kinds of power in the world. Environmental law focuses on formally enforceable rules, not just incentives or informal sanctions.

Professor Lazarus explains why the environmental law project is so challenging. The basic structure of our legal institutions was established long before we understood the nature of environmental problems, indeed long before we recognized such a category of

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problems. The design of those institutions is at best an awkward fit for environmental problems. The institutions are highly fragmented, while the problems they are supposed to solve cross boundaries almost gleefully, spilling from one parcel or one political jurisdiction to another, migrating from air to water to land, and infiltrating even the largest protected areas.

Legal doctrines are just as bad. When environmental disputes arrive in court, the proceedings are often surprisingly bloodless, because the environmental issues that inspire the fight are submerged under the legal technicalities that will decide it. Standing doctrine, for example, demands that injury be both particularized and imminent before a plaintiff can access the federal courts. That is a problem for plaintiffs seeking to prevent environmental harms that are slow to develop but catastrophic when they come. It is even worse for plaintiffs who seek to prevent injury to existence, rather than use, interests, even where Congress has given them that right.

Professor Lazarus concentrates on the role of the Supreme Court. Outsiders might be surprised to learn that the Supreme Court is the scene of relatively little direct environmental lawmaking. But what the Court says in the few environmental cases it takes is disproportionately important.

When the Supreme Court takes an environmental case today, environmentalists cringe, and with good reason. As Professor Lazarus says, the Court has actively retarded a necessary evolutionary process because it neither understands nor cares about environmental problems. Courts can incrementally adjust doctrines that turn out to have negative consequences. That is nothing new for law, which has always evolved in response to new conditions and new societal goals. But judges who do not understand the nature of environmental problems, do not care about the benefits of environmental protection, and are acutely aware of jurisdictional tensions and the potential costs of environmental regulation, can find a variety of doctrinal hooks to limit the reach of environmental law.

Professor Lazarus offers several examples. Others come readily to mind. Recent examples from the Supreme Court include Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers3 (holding that the Clean Water Act does not authorize regulation of discharges to some "isolated" waters) and Norton v.
Southern Utah Wilderness Alliance⁴ (refusing to allow environmental group to challenge failure to regulate ORV use on wilderness study areas). In the lower courts, just the last few months have brought Massachusetts v. EPA⁵ (holding that EPA need not regulate CO₂ emissions under the Clean Air Act, notwithstanding statutory language seemingly requiring regulation) and Connecticut v. American Electric Power⁶ (ruling that whether major electric utilities committed public nuisance by spewing CO₂ into the air is a non-justiciable political question).

In sum, it is hard to make progress in the legislature, and even when favorable statutes are passed, it is hard to get the courts to enforce them aggressively. The difficulties spill over even into the core judicial function of resolving traditional common-law claims. Environmentalists could surely be forgiven if they gave up on law, choosing instead to raise money for The Nature Conservancy, lobby for a tax dedicated to acquisition of conservation lands, or rally against the consumption culture.

Abandoning the environmental law project for those other tasks would be a mistake. They are all useful, but they cannot substitute for the search for law. Environmental law is essential because, as Professor Lazarus points out, human nature is ill-suited to the task of environmental protection. People are inherently short-sighted and foolishly optimistic. We tend not to recognize problems until they are well-advanced and therefore difficult to solve. We are terminally addicted to the status quo. Law, more than other methods for altering human behavior, can tie us to the mast. Notwithstanding considerable “slippage,” environmental law provides more certainty that we will achieve specific goals than can informal sanctioning in an impersonal world or economic incentives in a world of unpredictable economic change. Furthermore, although people are certainly capable of cooperating to accomplish goals that require collective action, they do not do so absent a level of trust that rarely exists in the polarized atmosphere of environmental disputes. By helping to prevent free-riding, law builds trust that others will do their part.

⁵ 415 F.3d 50 (D.C. Cir. 2005).
III. IT TAKES A VILLAGE

In order to accomplish the essential task of joining wonder and power, and the equally vital task of keeping them together in the face of temptations that would stress the strongest relationship, we need to put together several sets of skills. We need a heart (or, if you prefer, a soul); a brain; and a mouth and a pair of hands. We need to care about the world beyond ourselves and our kind; to communicate that caring and the reasons for it to others; to understand what steps are necessary to save the world we care about; and to be able to construct the institutions needed to assure (insofar as we can) that those steps are taken.

Those skills are likely to be found in different people. The team needs to include need dreamers who care deeply about the outside world; communicators, who will explain the dream to various audiences in a way that inspires new emotional connections or gives form and solidity to existing ones; thinkers, whose studies of the natural, social, and cultural worlds identify threats to the wonders we care about and highlight the root causes of the human behaviors that underlie those threats; and engineers, who can use the tools at hand or craft new ones in the form of institutions, doctrines, laws, and regulations to address the threats.

If that seems a bit abstract, consider a specific example. Lake Tahoe is unusually large for an alpine lake—twenty-two miles by twelve miles—and unusually deep—an average of nearly 1000 feet. What makes it really striking is its distinctive deep blue color, a product of its unusually clear waters.

Lake Tahoe has been an object of human wonder at least from the earliest days of European exploration of the continent. Mark Twain gushed over it in the 1860s, and many others have done so since. Dreamers and communicators failed to persuade the government to create a national park at Lake Tahoe in the early 20th century, but convinced both local and national political constituents that the lake is a treasure worth saving.

The thinkers in this story have been scientists. They discovered in the 1960s that Lake Tahoe’s clarity was falling at an alarming rate. They tied the loss of clarity to inputs of nitrogen and phosphorous, and in turn related those to soil erosion, treated sewage discharge, and run-off from the impervious surfaces that accompany urbanization. More recently, scientists added atmospheric deposition to the list of threats, finding that rain washes nitrogen...

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7 See Mark Twain, Roughing It 135 (Signet Classics 1994) (1872).
from automobile exhaust down into the lake. Today, scientists also know that the lake's waters are warming, and are struggling to understand what consequences that might have for clarity.

Finally, lawyers, legislators, and regulators have been the primary engineers, constructing institutions better targeted at the lake's problems. Creation of institutions with enough power to address the threats to the lake's clarity is still a work in progress. It requires both strong political support and strong information about the threats. The first challenge was to cross state boundaries. Lake Tahoe straddles the border of California and Nevada; pollution from either side of the lake reduces its clarity throughout. A compact between the two states, approved by Congress, created the Tahoe Regional Planning Agency (TRPA) in 1969.\(^8\) TRPA's powers over land use in the Lake Tahoe basin were increased when it became clear that greater control was needed.\(^9\)

Not surprisingly, TRPA has run up against some of the established legal doctrines that complicate response to environmental problems. Takings doctrine presents the most serious challenge. Lake Tahoe cannot be kept blue without firm limits on the amount of impervious cover on its borders. That worries property owners in the basin, who fear that they may not be able to build their dream house or realize the very high profits that a home near the lake can generate. Property rights advocates well beyond the basin also closely track events at Lake Tahoe because they fear that any inroads on property rights in that basin could be exported broadly. Takings claims have not been limited to land regulation; at one point personal watercraft owners and concessionaires asserted (unsuccessfully) that TRPA had taken their property by prohibiting the use of personal watercraft on the lake.\(^10\)

So far, takings claims have slowed but not stopped TRPA's regulatory work. It has managed to survive or put off resolution of several claims that its regulations amount to facial takings of property.\(^11\) A lot of effort has gone into litigation without producing any definitive result. In 1997, the Supreme Court held that a takings claim at Tahoe was ripe for review, but did not address the

On remand, TRPA settled, buying the lot for $600,000. In 2002, the Supreme Court ruled that a temporary development moratorium imposed by TRPA did not work a categorical taking. Because the landowners had not appealed a lower court's determination that there was no taking under the multi-factor Penn Central balancing test, the Supreme Court did not review that question.

It remains to be seen whether TRPA can ultimately enforce firm limits on development around the lake. Lawyers as "engineers" are working on that question from many different angles. First, TRPA itself is trying very hard to fit its regulations within existing doctrine. It has developed an elaborate point system for development suitability; the formulas seek to reassure both the local public and judges that the agency is not unfairly singling out a few landowners for harsh regulatory treatment. A similarly elaborate system allows landowners who cannot build to sell development rights to others, so they at least realize some financial return on their property. The system would require only a small evolutionary nudge to pass takings review. Second, numerous legal commentators are writing about the need to regulate uses of sensitive lands, how the takings clause could be interpreted in a more environmentally sensitive way, and why such an interpretation should be adopted. Third, the agency is seeking to minimize the need for regulation by buying sensitive lots where possible.

The communicators are still working, employing every possible medium, from web sites to bumper stickers, to alert the public, legislators, and courts to the special beauty of Lake Tahoe. The thinkers are also still hard at work. They now believe that slowing development is not enough to protect the lake's clarity. State

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water quality officials are working on a Total Maximum Daily Load, a device designed to help cross the institutional boundary between point source and non-point source pollution by identifying all sources of pollution.\textsuperscript{17}

None of this guarantees that Lake Tahoe's clarity will persist. But because all the needed skills are at work, progress is being made.

IV. \textsc{The Role of Lawyers and the Humanities}

Using different terminology, Professor Freyfogle essentially describes lawyers as the prototypical "engineers" of my story. Lawyers (and legal scholars), like engineers, are fundamentally detailed problem solvers rather than visionaries. Law exists in order to achieve societal goals, not to define them. The professional role of the lawyer (or for that matter the judge) is not to define problems but to find ways to resolve problems identified by others. In Professor Freyfogle's paper that comes across as a criticism, but I see it as a neutral description. Lawyers are skilled at identifying means to reach exogenously determined goals. Rather than demanding that they take on the added task of identifying goals, environmentalists should encourage lawyers to partner with others having complementary skills.

That brings us to the role of the humanities.\textsuperscript{18} The malaise among environmental lawyers is obviously not a simple thing. But surely one part of it is that we no longer feel sure of the inevitable triumph of our central project. We are looking at a world that in many ways needs saving right away. We know our predecessors accomplished a great deal, but we also know not enough has been done. We are frustrated that we are not moving forward quickly enough.

At the dawn of environmental law, the limiting factor was power. Lawyers and scientists had the needed skills to change that

\textsuperscript{17} For a lucid explanation of Total Maximum Daily Loads and their legal consequences, see \textsc{Oliver A. Houck, The Clean Water Act TMDL Program: Law, Policy, and Implementation} (2002).

\textsuperscript{18} When I was invited to this conference, I wasn't sure I knew what the humanities were. Luckily for the lawyer in me, there turns out to be a federal statutory definition in the law that created the National Endowment for the Humanities. It's a non-definition that only a lawyer could love, a long list devoid of any unifying principles. 20 U.S.C. § 952(a) (2000). A dictionary is a bit more helpful. It says that the humanities investigate human constructs and concerns as opposed to natural processes and social relations. I couldn't draw a firm boundary between human concerns and social relations, but it's not hard to see that both have a role in the environmental law project.
and formed an effective partnership to do so. Now the limiting ingredient is wonder. Professor Freyfogle describes the shortcoming as the lack of a single environmental message to convey to the public. That is part of it, but it runs deeper than the message. We have a failure of vision.

The question today is not whether we will have environmental law. No one is openly arguing that we should do away with that, and it is sufficiently deeply embedded in our social fabric that it would be difficult to erase. The question is, rather, what environmental law will mean. Our vision so far has not been sharp enough, closely focused enough, small-scale enough. It hasn’t come from the right source. We have counted on scientists to develop goals for environmental law. That is fine for some parts of the project, but it turns out to give us an incomplete view.

One vision we do not have, or at least do not have clearly enough, is the one Bill Cronon described in his keynote address: a vision of how people can be part of nature and at the same time outside it, both exploiter and steward. As a practical matter, we did not need to know that in the early days of environmental law. We were focused on gaining the power that would ensure some consideration of nature and the preservation of some wild places and wild creatures.

In order to make those early gains, we spent a lot of time telling the story of the importance of the environment to our material well-being. I do not have a quarrel with that discussion, except that it does not go nearly far enough. I will not be happy living in a world that provides only palatable food, breathable air, and drinkable water. I bet most people, not just most environmentalists, would agree. What we have not brought clearly enough into environmental law is the way that nature outside parks and wilderness preserves and nurtures our souls; the way that a relationship with nature in our daily lives is part of a fully realized and satisfying human life; and the way that we can have a dual relationship with nature, exploiting and protecting it. We have actually erected barriers to seeing those things clearly by framing our laws in ways that emphasize the expertise of natural science to the exclusion of almost all else.

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19 There are other things we need to see more clearly too, such as the nature of a satisfying and sustainable human community.
The humanities have an important, perhaps even a primary, role in clearing up our vision. At the macro-level, by speaking to society rather than directly to policymakers, practitioners of the humanities can help us understand how nature and our interactions with it have affected and continue to affect who we are as individuals and as communities. At the micro-level, with a direct eye to influencing policy, they can help us bring a "right" relationship with nature into better focus at a closer level. Is it important to have wild salmon in Pacific coastal rivers, or will hatchery salmon do? Does it matter if we have wolves in Utah or Oregon, or is it enough that they persist in Idaho and Montana? What responsibility ought farmers, ranchers, and developers in California's central valley bear for protecting vernal pools and their inhabitants? Should off-road vehicles be allowed in the slick-rock country of the Southwest, and if so where? We face hundreds of these "little" questions; answering them persuasively requires a normative vision of our relationship to nature and to one another that we do not yet have.

The humanities can help us both develop the needed vision and call on the stories that will help us communicate that vision. I leave it to those with training and experience in the humanities to determine substantively what they can contribute. From the perspective of an observer of multidisciplinary efforts, though, I can offer two suggestions about the attitude to bring to the task.

First, all participants need to have a problem-solving mindset that will help them communicate with each other. Problem orientation in this sense is not the same as "applied" research. You can do the most basic theoretical work in your field from a problem orientation. What is different is that you start by asking how your project will contribute to solving the problem as you identify it, not just how intellectually interesting it will be. That mindset comes readily to lawyers—we would not have chosen our professional role if problem solving did not appeal to us, and our profession rewards us for that orientation. But it can be a struggle for those in other fields, especially academics. Natural scientists have been working on this mindset for a while now, and interested humanists might learn from them. Entire fields of problem-oriented research have been born, notably conservation biology. In other fields, a

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20 I emphasize this role because I see it as crucial, not currently adequately provided, and peculiarly within the expertise of the humanities. I do not mean to imply that it is exclusive. I am confident that the humanities can also help communicate the nature of the problem and understand threats.
role in public policy debates has become acceptable, if not necessarily advantageous to one’s career. Problem orientation is not easy—conservation-minded scientists continue to struggle with issues of intellectual honesty and the boundaries of their professional roles. But it is possible.

Second, all the participants in the environmental law project need to peek out of their own boxes far enough to see the boxes that confine others. It is important to understand at least roughly what boundaries others experience. It takes some understanding of the underlying science, for example, to dream the problem properly or communicate it effectively. Similarly, it takes some understanding of the challenges to dreaming to do a good job as an engineer.

V. THE BOTTOM LINE

The relationship between environmental letters and environmental law can be simply expressed with respect to the environmental law project. The humanities can help people see, feel, and communicate the wonder of nature. Lawyers can help turn that vision into power. Together, and with the addition of the skills of natural and social scientists, lawyers and humanists can make more progress toward their environmental preservation goals than either would separately.