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Stasis and Change in Environmental Law: The Past, Present and Future of the Fordham Environmental Law Review

Gerald S. Dickinson*

Shiela R. Foster†

*Fordham University School of Law

†Fordham University School of Law, sfoster@law.fordham.edu

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FOREWORD

STASIS AND CHANGE IN ENVIRONMENTAL LAW: THE PAST, PRESENT AND FUTURE OF THE FORDHAM ENVIRONMENTAL LAW REVIEW

Gerald S. Dickinson and Sheila R. Foster***

INTRODUCTION

The *Fordham Environmental Law Review* was officially recognized as a law journal in 1993, although it debuted in 1989 as the *Fordham Environmental Law Report*.¹ Professor Joseph Sweeney authored the Foreword to the new law review,² remarking that

* Editor-in-Chief, *Fordham Environmental Law Review*, Volume XXIV. I would like to thank the *Review* Editorial Board and staff for their hard work and dedication to the 20th Anniversary issue. Special thanks to Talia Metson, Managing Editor, Andreas Koudellou, Senior Notes & Articles Editor and the seven Notes & Articles Editors – Inessa Abayev, Kyu Hee Chu, Kari Kepple, Sara Kirby, Nicole Lodge, Jigar Patel and Steven Wrabel – for their research and editing assistance on the Foreword.

** Albert A. Walsh Professor of Law and Vice Dean, Fordham University School of Law.

1. The Report was renamed the *Fordham Environmental Law Journal* in 1993. In 2000, the students decided to rename the *Journal* as the *Fordham Environmental Law Review*. But the process of going from the *Report*, to the *Journal* to the *Review* started in 1987 with a group of student advocates who ardently fought for an environmental law publication at Fordham. See Joseph C. Sweeney, *Remarks on the Founding of the Environmental Law Journal*, 5 FORDHAM ENVTL. L.J. 1 (1993). In 1987, John Tsavaris, Derek Adler, Michael Guzzo, Julie Moran and Phil Hirschorn, advocated for a journal, however, the Fordham faculty was opposed at the time. However, in February 1989, the *Report* started publishing environmental material under Editor-in-Chief Bruce Aber. Three students – Brita Forsberg (1990), Cynthia Carney Johnson (1991), and Andrew Neuman (1992) – would serve as Editors-in-Chief over the next three years before the *Report* was granted Journal status.

2. *Id.* See also Joseph C. Sweeney, *Protection of the Environment in the United States*, 1 FORDHAM ENVTL. L. REP. 1 (1989). In order to jump-start the

“because the field of Environmental Law is still in its initial stages, your [students’] work is performed in the dawn of this intellectual discipline.”³ In many ways, Professor Sweeney was right. The *Review* came of age as the field of environmental law, and the scholarship shaping that field, was developing and extending in new directions.

As the articles and essays in this special anniversary issue of the *Review* reflect, the past twenty years of environmental law are marked as much by legislative *stasis* as by profound *change* in the way that lawyers, policymakers, and scholars interact with the field. Although no new federal legislation was passed over the past two decades, much has changed about the field of environmental law. This change is the result of a set of conceptual and legal challenges to the field posed by intellectual and policy movements that took root around the time that the *Review* came into being. The intellectual and policy movements that have most profoundly shaped the field of environmental law in the past 20 years are: the property rights movement, the environmental justice movement, and cost-benefit analysis. These movements and policy tools arose, in large part, as a response to the major legislative and policy successes of the 1960s and 1970s.

The *Review* has been an important forum for the development of each of these movements. This Foreword looks back at some of the key symposia and articles published during the last twenty years to illustrate the influence of the *Review* in the development of each of these areas. This influence stretches from the judiciary, where some of the articles have significantly shaped important parts of the doctrinal landscape, to some of the ongoing intellectual and policy debates among environmental scholars.

The essays and articles that follow the Foreword bring us from the *Review*’s past into its present, and towards its future. Entitled *The Current State of Environmental Law*, Volume 24 contains the intellectual musings of some of the most-distinguished scholars in the

process Professor Sweeney, the advisor at the time, turned a talk he had given on environmental protection into the *Report*’s first publication. The *Report*, however, did not have official journal status and the students had a difficult time convincing some skeptical Faculty members otherwise. Alas, in December 1993, after several false starts, the faculty voted and granted journal status, which included academic credits and financial stipends. Sweeney, *supra* note 1, at 1.

3. See Sweeney, *supra* note 1, at 2.

environmental law discipline – both rising and established academic giants – as they reflect on the current state of the field, as well as the issues that confront its future.⁴

I. STASIS AND DEVELOPMENT IN ENVIRONMENTAL LAW

The legislative and regulatory victories of the 1960s and 1970s created a federal framework that has proven remarkably effective in addressing what were, at the time, our most pressing environmental challenges. However, even with an abundance of laws, administrative regulations, and developed doctrine interpreting and applying those laws and regulations, there are new challenges yet to be fully confronted. The field of environmental law remains exciting because its boundaries have yet to be fully expanded to meet these challenges. Even as Congress has been relatively dormant over the years, courts and scholars have stepped into the void to craft solutions with the tools that Congress has already given us.

A. *Legislative Stasis*

The basic structure of federal environmental law has remained in place over the last two decades. As Victor Flatt explains in his contribution to this issue, the “watershed” legislation passed by Congress in the 1969 National Environmental Policy Act (“NEPA”), the 1970 Clean Air Act (“CAA”), and the 1972 Clean Water Act (“CWA”) was comprehensive in scope and especially effective at tackling our most pressing environmental problems.⁵ These Acts and the regulatory apparatus that accompany them have been remarkably

4. The Editorial Board of the *Review* was honored to have received an overwhelmingly positive response from so many scholars who wanted to join the book to reflect on the past twenty years of environmental law. Because of that response, the 20th Anniversary issue is spread across three editions – Part I & Part II in this book and Part III to appear at the end of 2013 in a second book. The distinguished list of scholars in this groundbreaking book include Professor Hope Babcock, Professor Ann Carlson, Professor Robin Kundis Craig, Professor David Dana, Professor Victor Flatt, Professor Alice Kaswan, Professor Alexandra Klass, Professor Thomas McGarity and Professor John Nolon. The book also includes a student Note by Inessa Abayev, Fordham Law School ‘13.

5. Victor B. Flatt, *Frozen in Time: The Ossification of Environmental Statutory Change and the Theatre of the (Administrative) Absurd*, 24 FORDHAM ENVTL. L. REV. 125, 128 (2013).

successful in reducing major air pollution, improving water quality, stemming the loss of wetlands, and ensuring a close review of major development projects which threaten the environment.⁶ Yet, major environmental challenges remain, including non-point source pollution and climate change. Despite these contemporary environmental challenges, no significant changes have been made to these iconic statutes since Congress amended the CAA in 1990.⁷ As one scholar has recently remarked, “[t]he period of statutory inaction (1991-2012) now exceeds the period of statutory growth (1970-1990)” and no major federal statute appears on the horizon.⁸

What is difficult about many of our most pressing, contemporary environmental challenges is that the scale and diffuse nature of the problems make federal legislative action an unsatisfactory and incomplete response. As David Dana notes in his contribution to this issue, the “matching principle” in environmental federalism dictates that the legal response to an environmental problem should be matched to its physical scale.⁹ But, as he argues, we do not live in a simple world of the Matching Principle. It is difficult to draw hard

6. See e.g. William L. Andreen, *Success and Backlash: The Remarkable (Continuing) Story of the Clean Water Act*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 25, 26 (2013); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 117 (6th ed. 2009) (discussing how federal preemption of state law is used sparingly in environmental law, including in the Clean Air Act); See Henry A. Waxman, Gregory S. Wetstone and Philip S. Barnett, *Cars, Fuels, and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, ENVTL. L. 21 (1991); Bryan Lee, *Highlights of the Clean Air Act Amendments of 1990* 41 J. AIR & WASTE MAN. ASSOC. 1, 16-19 (1991). See Howard R. Marek, Note, *Inaction as Action Under Section 102(2)(C) of the National Environmental Policy Act of 1969*, 58 TEX. L. REV. 393 (1980). Thomas O. McGarity, *Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801 (1976).

7. The 1990 amendment to the Clean Air Act encouraged the use of market-based principles and other innovative approaches, like performance-based standards and emission banking and trading, to achieve pollution reduction goals. See Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C.A. §§ 7401-7671q (West Supp. 1991)).

8. Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. (forthcoming 2013) (noting that reasonable arguments can be made that emerging issues such as fracking, environmental estrogens, nanotechnology, non-point source pollution, and deepwater oil drilling would be better addressed with a major federal statute).

9. David A. Dana, *One Green America: Continuities and Discontinuities in Environmental Federalism in the United States*, 24 FORDHAM ENVTL. L. REV. 103, 105-106 (2013).

lines between localized and cross-state pollution, and it is not always possible to separate out federal and state interests regarding most environmental problems.

Climate change is an excellent example of these blurry lines. It is an issue of growing international, national and local concern. On an international level, climate change characterizes the kind of collective action problem that Garret Hardin wrote about in his famous and stylized *The Tragedy of the Commons*.¹⁰ The lack of consensus and a political bargain which would bring both the major developed and developing countries together to reduce greenhouse gas emissions has stymied efforts to meet binding international reduction targets for GHGs.¹¹ On a national level, despite the development of regional greenhouse gas trading programs,¹² Congress has yet to pass comprehensive legislation on climate change. The EPA, however, has developed traditional emissions limitations for motor vehicles, and is in the process of developing regulations for coal-fired power plants.¹³ Finally, local governments must now deal with climate change adaptation as the effects of global warming are beginning to manifest in more powerful storms capable of causing tremendous damage to urban infrastructure and residential communities.

As Alexandra Klass explains in her essay, the EPA's efforts to combat climate change through rules and regulations governing greenhouse gas emissions¹⁴ signals a growing convergence – prompted by climate change – between energy law and environmental law, which may lead to greater state initiated policies.¹⁵ Although states have some flexibility to take advantage of

10. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

11. See David G. Victor, *GLOBAL WARMING GRIDLOCK: CREATING MORE EFFECTIVE STRATEGIES FOR PROTECTING THE PLANET* (2011).

12. See Conservation Law Foundation, *Regional Greenhouse Gas Initiative*, available at <http://www.clf.org/programs/cases.asp?id=341> [hereinafter CLF, RGGI]; Conservation Law Foundation, *Regional Greenhouse Gas Initiative, Background*, <http://www.clf.org/programs/cases/asp?id=340> (last visited Feb. 26, 2007) [hereinafter CLF, Background]. The Regional Greenhouse Gas Initiative (RGGI) is a multi-state cooperative agreement establishing a cap-and-trade program that targets CO₂ emissions.

13. *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1443 (2007).

14. Alexandra B. Klass, *Climate Change and the Convergence of Environmental and Energy Law*, 24 FORDHAM ENVTL. L. REV. 180, 182 (2013).

15. *Id.*

the legislative gap left by federal inaction, few states have stepped out in front to do so. California is the notable exception to this statement, leading the legislative push to tackle greenhouse gas emissions on a state level.¹⁶ However, as Ann Carlson's contribution to this issue stresses, even a state like California can only be effective in taking the legislative leave if it has developed deep regulatory capacity and expertise to do so.¹⁷ The particular and unique role that California has played has not yet been replicated elsewhere and it remains to be seen whether other states will join California in taking the lead on some of our most pressing environmental problems.

Nevertheless, state and local governments are likely to be where the action is, given the federal legislative hiatus. State and local land use planning will have an increasingly important role to play, particularly for non-point source pollution and hydrofracking. As John Nolon's contribution points out, most environmental damage today is caused by non-point source pollution resulting from land uses that are the responsibility of municipal governments.¹⁸ One important trend among local governments has been the adoption of laws that protect natural resources and respond to environmental risks that pose a threat of harm local communities. Inessa Abayev's Note in this issue highlights the fact that the risks of hydrofracking are fairly localized, around certain regions of the country, and argues for a federal regulatory approach to fully address the risks of the wastewater that is a byproduct of that process.¹⁹ Given the legislative stasis, however, the more likely scenario is that the states where hydrofracking is occurring will take the lead on this issue.

16. Cal. A.B. 32, 2006 Cal. Stat., ch. 488 (California Global Warming Solutions Act of 2006, Cal. Health & Safety Code § 38550-38599 (West 2006)).

17. Ann E. Carlson, *Regulatory Capacity and State Environmental Leadership: California's Climate Policy*, 24 FORDHAM ENVTL. L. REV. 63, 64-65 (2013) (pointing out that California's capacity comes from federal law singling out California to lead on mobile source emissions, repeated past regulatory success which has won the confidence of public and elected officials, agency structure and revenue sources).

18. John R. Nolon, *Shifting Paradigms Transform Environmental and Land Use Law: The Emergence of the Law of Sustainable Development*, 24 FORDHAM ENVTL. L. REV. 242, 250, 270 (2013).

19. See generally Inessa Abayev, *Hydraulic Fracturing Wastewater: Making the Case for Treating the Environmentally Condemned*, 24 FORDHAM ENVTL. L. REV. 275 (2013).

B. Doctrinal Development

Even as Congress was in stasis, federal and state courts have continued to confront and develop the legislative and regulatory contours of federal environmental statutes. Important questions of statutory interpretation, the scope of administrative discretion and legislative delegation have kept federal and state courts very engaged during this period of legislative stasis. It is here where the *Review* has exerted a palpable influence on the developing doctrine of environmental law. A look back at some of the more impactful articles published in the *Review* reveals some of the ways in which these articles shaped the interpretation of important aspects of federal environmental law. One area of particular doctrinal importance over the last twenty years was the scope of civil and criminal liability under CERCLA, and Resource Conservation and Recovery Act (“RCRA”) and other federal environmental statutes.

Civil remedies were the primary avenue to protect the public, largely because environmental activities that affected others, such as pollution, had yet to engender the moral condemnation associated with criminal activity.²⁰ However, civil remedies were increasingly seen as insufficient to bring about desired progress in achieving more robust compliance, the result of which was an increase in the use of criminal provisions of federal environmental statutes.²¹ These changes were seen as important tools in the arsenal of enforcement mechanisms.²² Thus, courts were called upon to review the scope of both civil and, in particular, criminal liability dating back to the 1970s and particularly in the 1990s during the *Review*’s beginning stages.²³

20. Robert A. Milne, *Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFF. L. REV. 307, 308 (1989).

21. *Id.* at 308-09.

22. Robert G. Schwartz, Jr., Comment, *Criminalizing Occupational Safety Violations: The Use of “Knowing Endangerment” Statutes To Punish Employers Who Maintain Toxic Working Conditions*, 14 HARV. ENVTL. L. REV. 487, 488 (1990).

23. F. Henry Habicht, II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. 10478, 10479 (1987).

1. Developing Civil Liability

In a 1994 article on the CERCLA,²⁴ Eileen Eglin and Stephen Straus took on the developing area of environmental insurance law, which at the time would have had an impact on the liability coverage for potentially responsible parties (“PRPs”) for costs associated with the EPA’s investigation of contaminated sites.²⁵ The author’s main point was to show that under insurance policies where defense costs do not serve to impair the coverage limit, the insured will be incentivized to classify expenses acquired in legal actions as defense costs instead of indemnification.²⁶ Indeed, the cost-exclusive insurance policy at issue in the article – comprehensive general liability (“CGL”) – was quite different from other policies that entailed defense costs that counted towards the stated policy limit. Thus, any combination of settlements, judgments and defense costs which equals the stated coverage limit may exhaust such a policy, the authors argued.²⁷

In regards to its relationship to environmental law, the authors posited that the role of government-mandated remedial investigation/feasibility (“RI/FS”) studies in a waste facility clean-up pursuant to CERCLA weigh heavily in favor of classifying related costs as indemnification rather than defense under a policy of CGL insurance. This article helped to resolve a case before the New Jersey Supreme Court, *General Acc. Ins. Co. of America v. State, Dept. of Environmental Protection*, in which Judge Daniel J. O’Hern held that a remand was required so that the lower court could decide how to fairly allocate costs of the RI/FS between the policy’s indemnity and defense provisions.²⁸ The court did not waste any time in its analysis of the issue at hand and invoked the *Review*’s article in only the third paragraph of the opinion. The court said, “A recent law review article [the *Review*] summarizes the issues in this case. We cannot improve

24. Eileen B. Eglin & Stephen D. Straus, *Classifying RI/FS Costs Under a Policy of Comprehensive General Liability Insurance: Indemnity or Defense?*, 5 FORDHAM ENVTL. L.J. 385 (1994).

25. *Id.* at 386.

26. *Id.* at 387.

27. See Eglin and Straus, *supra* note 24, at 387.

28. *Gen. Accident Ins. Co. of America v. State, Dep’t. of Env’tl. Prot.*, 143 N.J. 462 (1996).

upon the presentation.”²⁹ The court cited six full paragraphs from the article in the opinion, which the court relied on, in part, in coming to a decision.³⁰ The article was later cited by the United States District Court of New Jersey in *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty and Surety Co.*³¹

Lemuel M. Srolovic and Pamela R. Esterman’s 1998 *Review* article³² helped to influence cost-shifting under CERCLA’s contribution provision. In *Kalamazoo River Study Group v. Menasha Corp.*,³³ the Sixth Circuit held that plaintiffs in a CERCLA contribution action were not required to show causation to establish a defendant’s liability.³⁴ The Court reasoned that another lower court’s decision in Massachusetts on the matter of CERCLA was “criticized by commentators as a deviation from prior CERCLA case law,” including the article by Esterman and Srolovic.³⁵ Esterman and Srolovic had argued – and the Court subsequently acknowledged – that “if followed by other courts, this amorphous threshold burden would establish a significant impediment to shifting costs under CERCLA. Such a rule shifts the focus of contribution actions from determining shared responsibility to conducting cost-benefit analyses of litigation.”³⁶

29. *Id.* at 464-465. The crucial part of the *Review*’s article that the court relied to summarize the main issue in the case was as follows:

There is no secret as to why an insured under a cost-exclusive policy would argue that RI/FS costs should be classified as part of the insurer’s duty to defend. To the extent [that] expenses associated with performing a waste site RI/FS can be attributed to the defense component of the policy, there would be more indemnity coverage potentially available to satisfy the policyholder’s liability for the clean-up. There would also be more indemnity coverage potentially available to satisfy liability associated with other claims.

Eglin and Straus, *supra* note 24, at 388.

30. *See Gen. Accident Ins. Co.* at 464-66

31. *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.* 978 F. Supp. 589 at n. 6 (D.N.J. 1997).

32. Lemuel M. Srolovic & Pamela R. Esterman, *Fold or Fight: The Changing Settlement Calculus in CERCLA Enforcement Actions*, 9 FORDHAM ENVTL. L.J. 469 (1998).

33. *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 654 n.4 (6th Cir. 2000).

34. *Id.* at 656, 660.

35. *Id.* at 654.

36. *See Srolovic & Esterman, supra* note 32, at 481.

On another issue regarding contribution actions under CERCLA, the Seventh Circuit Court of Appeals relied upon a student Note in the *Review* examining the defense clause and judicial interpretations of common law tort defenses under CERCLA.³⁷ In the case, *Town of Munster, Ind. v. Sherwin-Williams Co., Inc.*, the Court held that CERCLA did not permit the assertion of equitable defense of laches to bar recovery in the Town of Munster's claim for contribution.³⁸ In the Note, a new interpretation was posited that would not "strain the language of the statute, and resolve[d] the question of whether the enumerated defenses are exclusive."³⁹ In its analysis of the language in the defense clause, the Court references the Note saying, "though we need not (and do not) decide the matter, we doubt seriously that *res judicata*, collateral estoppel, accord and satisfaction, and statutes of limitation are 'defenses' as CERCLA employs that term."⁴⁰

2. Expanding Criminal Liability

The advent of criminal liability under federal statutes in environmental law originated from what the Supreme Court in *Morissette v. United States* noted was the genesis of public welfare offenses from the Industrial Revolution.⁴¹ An increase in regulations followed from this period which constrained certain activities that affect public health, safety or welfare.⁴² Courts have looked to these public welfare statutes to delineate the scope of criminal liability for polluters who knowingly violate federal environmental laws.⁴³

The rise of criminal liability in environmental law forced courts to review issues concerning corporate officers' intent or knowledge of statutory violations under the new felony provisions that were part of

37. *Town of Munster, In. v. Sherwin-Williams Co., Inc.*, 27 F.3d 1268, 1272 (1994) (citing Jonathan T. Uejio, Note, *Common Law Tort Defenses Under CERCLA*, 1 *FORDHAM ENVTL. L. REP.* 81, 84 (1989)).

38. *Id.* at 1273.

39. *See* Uejio, *supra* note 37, at 84.

40. *See* *Town of Munster*, *supra* note 37, at 1272.

41. 342 U.S. 246 at 254 (1952).

42. *Id.*

43. *See e.g.* *U.S. v. Weitzenhoff*, 35 F.3d 1275, 1296 (1993).

the reauthorizations of some of the environmental statutes in the 1980s and 1990s.⁴⁴

For example, litigants increasingly pushed, under these laws, to hold officers liable pursuant to the responsible corporate officer (“RCO”) doctrine. The doctrine did not require a responsible corporate officer to have malicious intent, or any intent at all, which meant that it was possible for the corporate officer – of say, a company that engaged in high-pollutant activity – to be held liable under the RCO even if the officer was unaware of the bad act.⁴⁵

A 1996 article by Barbara DiTata, influenced the Ninth Circuit Court of Appeals decision in *U.S. v. Iverson*.⁴⁶ The Court held that, under the CWA and state and local law, a defendant is a RCO if the “person has authority to exercise control over the corporation’s activity that is causing discharge.”⁴⁷ DiTata’s article examined Section 6928(d) of RCRA, which imposed criminal liability on “Any person who...knowingly treats, stores, or disposes of any hazardous waste identified or listed” without a permit or in violation of any existing RCRA permit condition.⁴⁸ DiTata argued, however, that the vague language in the statute left doubts as to the meaning of “knowingly” and questioned whether the knowledge requirement is required for all elements of the crime and whether the knowledge may be proven by reliance on the RCO doctrine.⁴⁹ The Court, in its recitation of the history of doctrine, cited the article to make its point that a corporate officer may be held criminally liable if – by virtue of his or her position and authority within the company – the officer had the power to prevent or correct the conduct which gave rise to the violation.⁵⁰

A 1995 *Review* article by John Gibson argued that criminal punishment may be more likely to deter individuals, such as

44. See also Judson W. Starr and Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come...and It is Hard Time*, 20 ENVTL. L. REP. 10096, 10097 n.7 (1990).

45. *Id.*

46. DiTata, *Proof of Knowledge Under RCRA and Use of the Responsible Corporate Officer Doctrine*, 7 FORDHAM ENVTL. L.J. 795 (1996), cited in *Iverson* 162 F.3d 1015, 1023.

47. *Iverson*, 162 F.3d at 1025.

48. DiTata, *supra* note 46, at 795 (quoting 42 U.S.C. § 6928(d)).

49. See DiTata, *supra* note 46, at 796.

50. See *United States v. Dotterweich*, 320 U.S. 277 at 281 (1943). See also *Iverson*, 162 F.3d at 1023.

corporate officers, rather than legal entities such as a corporation.⁵¹ In the article, Gibson explains that the deterrent effect of prosecuting a manager or lower-level corporate employee of a plant on the corporation “would be minimal unless a corporate officer or other senior manager, whose policies or direct orders led to the criminal environmental conduct, is also held accountable.”⁵²

Professor Richard Lazarus notably expressed concerns about the developing scope of criminal liability in environmental law in his 1996 article on *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, published as part of the *Review's* Symposium that year.⁵³ In his essay, Professor Lazarus commented on *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, noting that the case was undoubtedly the “most significant recent Supreme Court environmental case.”⁵⁴ The questions posed by the Supreme Court in oral arguments in *Sweet Home*, Professor Lazarus argued, “reflected considerable concern that, absent a meaningful mens rea element, a broad construction of the jurisdictional reach of the Endangered Species Act could criminalize conduct lacking the normal indicia of culpability necessary for criminal prosecution.”⁵⁵

Professor Lazarus then foreshadowed that the *Sweet Home* “colloquy may represent the dawning of a debate likely to occur in the near future regarding mens rea in environmental crime.”⁵⁶ Indeed, his argument was that “the confrontation over mens rea in the Supreme Court is instead most likely to arise in a felony prosecution brought pursuant to the Clean Water Act, Resource Conservation and

51. See John Gibson, *The Crime of “Knowing Endangerment” Under the Clean Air Act Amendments of 1990: Is It More “Bark Than Bite” as a Watchdog to Help Safeguard a Workplace Free From Life-Threatening Hazardous Air Pollutant Releases*, 6 *FORDHAM ENVTL. L.J.* 197, 206 (1995).

52. *Id.*

53. Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 *FORDHAM ENVTL. L.J.* 861 (1996).

54. *Id.*

55. *Id.* at 862. See also *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* 515 U.S. 687 (1995). However, the issue at hand in *Sweet Home* was the validity of the Secretary of the Interior’s expansive reading of the scope of Section 9 of the ESA to include significant habitat modification that kills or injures wildlife by impairing its essential behavioral patterns, “including breeding, feeding, or sheltering.” See 50 C.F.R. § 17.3 (1994).

56. *Id.* at 878.

Recovery Act, or perhaps even the Clean Air Act,” not the Endangered Species Act (“ESA”).⁵⁷ He was right.

II. CHANGING ENVIRONMENTAL LAW

Perhaps what most characterizes the past twenty years of the field of environmental law are the challenges posed to the field by three powerful intellectual and policy movements. Each of these movements was sparked, arguably in part, by the remarkable legislative and regulatory progress that characterized the twenty year period from 1970 to 1990. The rise of the property rights movement, the environmental justice movement and cost-benefit analysis might be seen as an attempt to reorient environmental law towards a set of broader concerns. The *Review's* contribution to the development and critiques of these movements is evident in the symposia and articles that it published by prominent scholars who were staking out new conceptual terrain designed to challenge existing legislative and policy frameworks.

A. *The Property Rights Movement*

Although federal environmental regulations are not the only subject of “regulatory takings,” they are the most prominent. Because laws like the Endangered Species Act (“ESA”) and Section 404 of the Clean Water Act, concerning the preservation of wetlands, impose regulatory constraints on developers, private property proponents have pushed long and hard against the coercive weight of land use regulation aimed at achieving environmental protection. As Jonathan Adler, explains, the “[T]he real impetus for the property-rights movement is outrage at specific cases of government abuse of landowners.”⁵⁸ The modern day property rights movement is in response to these cases, which proponents believe represent an attack on private property. As Justice Holmes eloquently stated in *Mahon*, the “general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁵⁹ The jurisprudence on regulatory takings has proven quite

57. *Id.* at 879.

58. Jonathan H. Adler, *Takings Cause*, NAT'L L. REV., Dec. 19, 1994, at 32, 35.

59. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (reasoning that “when it [regulation] reaches a certain magnitude, in most if not in all cases there

murky and has not materialized the way proponents such as Richard Epstein expected, leaving the basic structure of the legislative landscape intact.⁶⁰

Since *Mahon*, regulatory cases such as *Nollan* and *Dolan*, have turned on different tests, requiring an “essential nexus”⁶¹ and “rough proportionality” when the state approves a development based on its dedication for the public purpose (or public use).⁶² In those cases, the landowners were barred from developing the land in the service of a broader public purpose. Courts, essentially, have remained wedded to making the regulatory takings determination based on what proportion of the value of the land has been devalued as a result of the regulatory taking’s challenge. The determination of the extent of devaluation of the property, not the person, has long been the standing practice of the Court.

The *Review’s* 1995 Symposium, entitled *Perspectives on Regulatory Takings*, brought together prominent property law scholars to discuss these challenges. The lead author in that Symposium issue was Professor Frank Michelman, the Bacon/Kilkenney Distinguished Visiting Professor at Fordham Law that year and whose contribution to the *Review* came in the face of a burgeoning property rights movement, which attracted criticism by

must be an exercise of eminent domain.” *Id.* The *Mahon* opinion, however, explains that a regulation is a taking when it denies the landowner all economically viable, beneficial, productive, or feasible use of their land. *Id.* The regulation must also have significant impact on the landowner’s investment-backed expectations and must substantially advance legitimate state interests. However, scholars have criticized the decision and questioned whether *Mahon* should be interpreted as our modern day precedent for regulatory takings. See William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO L. J. 813, 861 (1998).

60. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mahon*, 260 U.S. 393; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1982); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *First English Evangelical Lutheran Church v. County of Los Angeles* (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825, *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lingle v. Chevron*, 544 U.S. 528 (2005).

61. *Nollan*, 483, U.S. at 837.

62. *Dolan*, 512 U.S. at 391.

property scholars.⁶³ Professor Michelman's article convincingly argued that proposed federal property rights legislation at the time – H.R. 925 of the 104th Congress, § 2 (the “Private Property Protection Act of 1995”) and the S. 605 of the 104th Congress (the “Omnibus Property Rights Act of 1995”) – was problematic in two ways.⁶⁴ The former law, passed by the House of Representatives, would have compensated property owners if a specific government activity devalued the property by 20%.⁶⁵ The latter legislation, which awaited vote at the Senate, would have compensated property owners if the state action devalued the property by 33% or more.⁶⁶

On one hand, Professor Michelman argued, the legislation was narrow in that it provided compensation – or in other words, protections – for specific property, such as owners of *land*, but not personal property, which failed to affect the “deserving constituency” and instead benefited a small segment of the population.⁶⁷ Second, the legislation violated the “constitutional culture” which embraces an ancient law of property tradition that is “functionally oriented to contemporary community goals, as well as to protection of private advantage, and that relies on the police powers of legislatures, alongside common law adjudication by courts, to negotiate and mediate between the two.”⁶⁸ Indeed, the legislative protections were not extended to all property as affected by all regulation.⁶⁹ The taxpayers' money, Professor Michelman argued, was to be used for a select few private property owners as forms of compensation.⁷⁰ Congress, therefore, chose the property rights of a select few owners over the public interest obligations of government.⁷¹

Professor Michelman's presentation at Fordham Law became the central focus of his testimonial appearance in front of the very Congress he was castigating in his article, and later erupted into an

63. William M. Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1152 (1997).

64. Frank I. Michelman, *A Skeptical View of “Property Rights” Legislation*, 6 FORDHAM ENVTL. L.J. 409 (1995).

65. *Id.* at 410.

66. *Id.* at 417, n. 36.

67. *Id.* at 410, n. 9.

68. *Id.* at 416.

69. *Id.* at 417.

70. *Id.* at 413.

71. *Id.* at 411-413.

intellectual jostle with Epstein.⁷² Professor Michelman, only four months after presenting his article at the *Review's* Symposium on February 27th, 1995,⁷³ was in Washington D.C. on June 27th giving his testimony before the Senate Committee on Environment and Public Works criticizing the legislatures proposed property rights legislation.⁷⁴ He was, to be mild, onto something groundbreaking and its origins can be traced back to the *Review*.

Thanks to Professor Michelman, the *Review* was cited in another court opinion in the case, *In re Realen Valley Forge Greenes Associates*, at the Supreme Court of Pennsylvania in 2003.⁷⁵ The opinion, by former Justice William Lamb, held that agricultural zoning, designed to prevent the development of property and to “freeze” its substantially undeveloped state to serve the public interest constituted unlawful reverse spot zoning,⁷⁶ which was beyond the municipality’s proper powers.⁷⁷

While engaging in a discussion of balancing public and private property interests, Judge Lamb cited language from Professor Michelman’s article that said, “The American way, as the Court describes it, is to treat the bulk of events as belonging to the normal give-and-take of a progressive and democratic society; it is to treat regulation as an ordinary part of background risk and opportunity, against which we all take our chances in our roles as investors in

72. See generally Richard A. Epstein, *Whose Democratic Vision of the Takings Clause? A Comment on Frank Michelman’s Testimony on Senate Bill 605*, 49 WASH. U. J. URB. & CONTEMP. L. 17 (1996) (criticizing Michelman’s condemnation of the property rights movement and legislation). See also Frank I. Michelman, *A Brief Response to Richard Epstein*, 49 WASH. U. J. URB. & CONTEMP. L. 25 (1996).

73. See John D. Feerick, Welcoming Remarks at the Fordham University Environmental Law Review Symposium: Perspectives on Regulatory Takings (February 27, 1995) in 6 *FORDHAM ENVTL. L.J.* 407 (1995).

74. Frank I. Michelman, *Testimony Before the Senate Committee on Environment and Public Works, June 27, 1995*, 49 WASH. U. J. URB. & CONTEMP. L. 1 (1996) (discussing the “property rights” legislation as “rest[ing] on a mistakenly oversimplified, a mistakenly purist, view of the place of private property rights, basic and important as those certainly are, in our full constitutional scheme.”).

75. *In re Realen Valley Forge Greenes Assocs.*, 576 Pa. 115, 838 A.2d 718 (2003).

76. See *id.* at 721.

77. See *id.* at 120.

property.”⁷⁸ The court – in reference to Professor Michelman and other scholars – said “it is important to maintain the perspective that land use regulation is a traditional, legislative tool implemented in furtherance of broader public concerns – compliance with non-arbitrary regulation is generally an accepted incident to land ownership and investment.”⁷⁹ The court presumably was aware that Professor Michelman’s concerns for property rights had already been tried and tested in front of Congress eight years prior.

Professor William Fischel’s essay for the *Review’s* 1995 Symposium was a short preview of two major themes – fairness and the capacity for judicial review – in his book, *Regulatory Takings: Law, Economics and Politics*.⁸⁰ Fischel eloquently explained that takings are not about economic efficiency, but fairness.⁸¹ In particular, he used the dual issue of rent control and historic preservation to make his point that exit – the ability to withhold resources or to remove them from the threat of regulation – cannot work “where the asset being regulated is immovable or otherwise inelastic in supply...[t]he paradigm of that, of course, is land.”⁸² Voice – the general ability to participate in and influence political processes – is another protection from excessive regulation.⁸³ Hence, he argued that where historical preservation regulations impose land use restrictions similar to rent control, courts may deject voluntary preservation. Rent control, he argued, diminishes the value of apartment buildings and “landlords will begin hiring mediocre architects or asking good architects to design mediocre buildings that will not be landmarked.”⁸⁴

The issue of regulatory takings is ongoing in environmental law, even as recent as this term in the U.S. Supreme Court.⁸⁵ In *Koontz v.*

78. See Michelman, *supra* note 64, at 415.

79. See *In re Realen Valley Forge*, *supra* note 75.

80. See Villiam A. Fischel, *Lead Us Not into Penn Station: Takings, Historic Preservation, and Rent Control*, 6 *FORDHAM ENVTL. L.J.* 749 (1995).

81. *Id.*

82. *Id.* at 751.

83. *Id.*

84. *Id.* at 754.

85. *Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 420 (No. 11–1447) (2013) (determining whether an agency can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the landowner did not give consent to a specific permit condition, such as off-site mitigation, and whether, if applied, the denial of the permit violates the essential nexus and rough

St. Johns River Water Management Dist., the Court, at oral arguments, was faced with the question of whether a land use agency can deny a landowner a land use permit to develop wetlands if the landowner did not give consent to a specific condition in the permit, including the performance of off-site mitigation. Indeed, the *Nollan/Dolan* tests hang in the balance. As the doctrine and theory continue to develop, the *Review* will continue to invite scholarship that explores and analyzes both the usefulness and limitations of regulatory takings analysis on environmental regulation.

B. The Environmental Justice Movement

The *Review* was also at the forefront of the emerging environmental justice movement that was in a formative stage in legal scholarship. As Professor Alice Kaswan's essay for the 20th Anniversary issue indicates, environmental justice scholars emphasized the role of "place" – the places where the environmental impacts occur – as an organizing principle for getting regulators and policymakers to attend to the unequal distribution of pollution.⁸⁶ As Kaswan argues, the effort to address race and class disparities in pollution distribution are made quite difficult by the relative powerlessness of impacted groups, as opposed to energy companies and the agricultural lobby. Kaswan's piece in this issue illustrates both the tensions created by the rise of the environmental justice movement and the opportunities that it created to shape environmental policy in new directions, as well as to broaden the movement to those not historically aligned with the mainstream environmental movement

Although the environmental justice movement has its roots in grassroots organizing, the legal field of environmental justice developed by deploying Civil Rights law and doctrine to challenge the lack of attention to racial disparities in pollution exposure. The *Review's* 1999 Symposium on environmental justice explored the efficacy of these strategies. As Melva J. Hayden posed the question,

proportionality tests set out in *Nollan* and *Dolan*. The court also entertained the question of whether the nexus and proportionality tests apply to a land-use exaction that is substantially the same as a government demanding that a permit applicant dedicate personal property to a public use).

86. See generally Alice Kaswan, *Environmental Justice and Environmental Law*, 24 *FORDHAM ENVTL. L. REV.* 149 (2013).

the issue that scholars were compelled to address was whether the EPA has done enough to protect racial minorities from environmental hazards and whether Title VI is a useful legal tool to be used instead of, or alongside, existing environmental statutory provisions.⁸⁷ But, as Fordham Professor Nicholas Johnson argued, there are hard questions underlying the environmental justice challenge to the field. These include: “what is the base line against which we measure disparate impact,” “what we mean by environmental justice,” and “is...distributional justice environmentally sound[?]”⁸⁸

Professor Sheila Foster,⁸⁹ then an Associate Professor at Rutgers, offered her assessment of why civil rights strategies were so essential to the nascent environmental justice movement. In an essay on the use of Title VI of the Civil Rights Act of 1963 in the environmental context, Foster argued that “[e]nvironmental permitting processes too often favor the interests of the facility developer.”⁹⁰ The claims against federal rules designed to protect low-income minority communities have been viewed as paternalistic. However, as Foster explains, this assumes a level of “community self-determination that simply does not exist in low-income minority communities, particularly in the decision-making process to site hazardous facilities.”⁹¹ This was due to communities being historically left out of the decision making process.⁹²

Foster’s essay was cited in a United States District Court of New Jersey case, *South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection*, involving a community organization’s Title VI action against a state environmental protection agency for its pattern of permitting air pollution permits disproportionately in communities of color.⁹³ In using Title VI to vacate the air permit in

87. See generally Melva J. Hayden, *A Perspective on the Environmental Protection Agency’s Title VI and Environmental Justice Programs*, 10 FORDHAM ENVTL. L.J. 359 (1999).

88. Nicholas Johnson, Panel Discussion, *The Past, Present and Future of Title VI of the Civil Rights Act as a Tool of Environmental Justice*, 10 FORDHAM ENVTL. L.J. 393, 394-95 (1999).

89. Sheila Foster, *Piercing the Veil of Economic Arguments Against Title VI Enforcement*, 10 FORDHAM ENVTL. L.J. 331 (1999).

90. See *id.* at 343.

91. *Id.*

92. *Id.*

93. *South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection* 145 F.Supp.2d 446, 484. (D. N.J. 2001).

that case, the court highlighted “that the application of a Title VI analysis to environmental permitting decisions has been the subject of extensive debate among legal scholars.”⁹⁴

The issue of environmental justice remains a vexing and difficult one for policymakers and decision-makers. As Michael Gerrard argued during the panel discussion, the key challenge for environmental law (and to some extent land use law) is how we balance the need for a community’s self-determination with the need for some of these “indisputable facilities?”⁹⁵ Gerrard also asked, “Is there any other alternative to cramming these facilities [facilities that emit wastes] down the throats of unwanted communities? What is the alternative?”⁹⁶

Indeed, in looking at the current state of environmental law and the future of environmental law, Professor Kaswan fittingly suggests that the environmental justice movement and environmental sustainability offer the environmental law movement “offer visionary, comprehensive, and inclusive paths forward that could increase the environmental movement’s breadth and political strength.”⁹⁷ The *Review* hopes to continue producing such work in the future.

C. *Cost-Benefit Analysis*

Even as the *Review* was at the forefront of pressing environmental law issues that confronted the courts, in some ways judicial review has, as Richard Stewart argues, undermined attempts to promote greater cost/benefit and risk analyses in the regulatory process.⁹⁸ Cost-benefit analysis in environmental regulation has provided the basis for estimating the environmental benefits that may or could be realized from regulatory policies.⁹⁹ Indeed, the rise of CBA has forced the executive to require federal administrative agencies, such as the EPA, to conduct regulatory cost-benefit analyses.¹⁰⁰ These

94. *Id.* at 484.

95. Michael Gerrard, Panel Discussion, *The Past, Present and Future of Title VI of the Civil Rights Act as a Tool of Environmental Justice*, *FORDHAM ENVTL. L.J.* 393, 398 (1999).

96. *Id.* at 400.

97. See Kaswan, *supra* note 86, at 150.

98. Richard Stewart, *A New Generation of Environmental Regulation?* 29 *CAP. U. L. REV.* 21, 170 (2001).

99. *Id.* at 170.

100. *Id.* at 40.

analyses have been supervised and reviewed under the Office of Management and Budget (OMB), which has provided its own brand of feedback to improve the process.¹⁰¹ It is quite clear, by following some of the literature produced in the *Review* on CBA, that even fairly constrained cost-benefit analysis can be useful in disciplining the regulatory process but requires “judgment and considerations of practicality in design and application.”¹⁰² However, it is also clear that CBA contains the real danger of undermining environmental protection when applied to environmental regulations.

Daniel Cole’s 1996 essay in the *Review* offered that cost-benefit analysis has its usefulness, but also suffers from significant methodological limitations.¹⁰³ As he argued, the costs of environmental regulations are comparatively easy to estimate because they are mostly born by market participants (industry and consumers), and thus are commonly denominated in dollars. On the other hand, the benefits of environmental regulations, which include breathing cleaner air and water, are not easily converted into dollar signs. Consequently, cost-benefit analyses tend to be biased against regulatory policies aimed at pollution prevention and resource conservation.¹⁰⁴ The only, and perhaps best, way to remove that bias is to “adjust the analyses to better reflect the actual (though difficult to quantify) welfare benefits of regulation.”¹⁰⁵

In her essay published in the *Review* in 1997, *Reductionist Regulatory Reform*, Professor Lisa Heinzerling contended that the goal of environmental law is not – as reductionist’s one-dimensional critiques concluded – solely to protect human health and such

101. *Id.*

102. See Stewart, *supra* note 98, at 42.

103. Daniel H. Cole, *Accounting for Sustainable Development*, 8 FORDHAM ENVTL. L.J. 123, 126 (1996) (saying that “the same problem of the failure to account for pollution costs and (regulatory) prevention benefits pervades standard cost-benefit analyses, which increasingly influence policy, particularly in the United States.”).

104. See *id.* Cole gives an interesting example of the likelihood that toxic dumping will increase production in a variety of industries such as health care or those that must clean-up the toxins. He argues the increase in production will increase national income and therefore “as far as national income statistics are concerned, toxic waste discharges paradoxically provide net economic benefits for society.” *Id.* at 124.

105. *Id.* at 126-127.

reductionism undermines laws that are meant to protect humans.¹⁰⁶ Quantifying lives saved, Professor Heinzerling argued, should not be the sole measurement for environmental regulations and such “estimates expressly exclude any consideration other than saving human lives in judging the wisdom of regulation.”¹⁰⁷ Heinzerling’s work on cost-benefit analysis, particularly its pitfalls, has been a mainstay of the debate on the issue among environmental law scholars in the United States.¹⁰⁸ In fact, Heinzerling’s *Review* article became the catalyst for her oft-cited and groundbreaking book, *Priceless: On Knowing the Price of Everything and the Value of Nothing*. The themes that appeared in the *Review*’s article are elaborated in depth and breadth in Heinzerling’s book (co-authored with Frank Ackerman). One the many powerful points made in the book is that “[P]utting a price on human life...is clearly unacceptable to virtually all religions and moral philosophies.”¹⁰⁹

Stephen Clowney, however, offered a quite different perspective on cost-benefit analysis that seemingly satisfies both economists and conservationists. He argued, in his *Review* article, that the traditional unthinking cost-benefit process is largely compatible with the main tenets of environmental movement. If “[u]sed correctly, cost-benefit analysis not only promotes the practical goals of environmental activists but also bolsters the values that underlie the entire

106. Lisa Heinzerling, *Reductionist Regulatory Reform*, 8 FORDHAM ENVTL. L.J. 459, 461 (1997).

107. *Id.* at 463.

108. See e.g. Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 943 at n. 3 (1999); See Stewart, *supra* note 98, at n. 94; Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 at n. 4 (1999); J.B. Ruhl and James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 807 at n. 165 (2002); Douglas Kysar, *Climate Change, Cultural Transformation, and Comprehensive Rationality*, 31 B.C. ENVTL. AFF. L. REV. 555, 558 at n. 15 (2004); Fred Bosselman, *What Lawmakers Can Learn From Large-Scale Ecology*, 17 J. LAND USE & ENVTL. L. 207, 300 at n. 594 (2001); Douglas Kysar, *Some Realism About Environmental Skepticism: The Implications of Bjorn Lomborg’s The Skeptical Environmentalist for Environmental Law and Policy*, 30 ECOLOGY L. Q. 223, 261 at n. 217 (2003).

109. FRANK ACKERMAN AND LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* I, 71 (2004).

progressive agenda.”¹¹⁰ Clowney concludes that “Lasting and effective policy will only emerge when both diehard economists and militant conservationists agree upon a framework for making decisions about the natural world...”¹¹¹

CONCLUSION

As Professor Sweeney said in 1993, “we cannot rest on these past achievements. Our job for the future includes the hard work of study, analysis and writing to produce a Journal that can be relied on as being fair and accurate.”¹¹²

When the Volume 24 Editorial Board took over the helm of the *Review*, they decided to make a concerted effort to go above and beyond what the *Review* has ever done in the past, while also recognizing the solid foundation that the journal was standing on. That strong foundation served as a platform for which the Editorial Board could embark on ambitious projects, such as the 20th Anniversary issue. Finally, after nearly a year of hard work and dedication from the entire *Review* staff and the authors, we have arrived at a milestone

The goal for the *Review* this year was to attempt to scale some heights that would serve as a catalyst for future scholarly contributions that are the hallmark of premier legal scholarship in the ever-changing American legal academia. Indeed, the *Review* has begun to adapt to the changing nature of environmental law and to American legal scholarship generally, but it concededly still has some ways to go to catch up with, what is, a fast-moving and transformative legal academia that is churning out contributions in “law and interdisciplinary” work, legal theory and empirical studies of the law.

The momentum surrounding this issue will perhaps generate future contributions that expand the *Review*'s content to empirical studies of environmental law's impact on society, environmental law *and*

110. See Stephen Clowney, *Environmental Ethics and Cost-Benefit Analysis*, 18 FORDHAM ENVTL. L. REV. 105, 109 (2006) (acknowledging that “[a] new generation of scholars, working primarily through the lens of environmental law, is casting fresh doubts on the basic desirability of CBA as a policy-making tool.”). *Id.* at 108.

111. *Id.*

112. See Sweeney, *supra* note 1, at 1.

interdisciplinary scholarship and environmental legal theory. There is all the reason to believe the *Review* is on its way to becoming a primary source for future scholarship in the abovementioned discipline areas, while in keeping with its success in informing jurists and practitioners with important doctrinal scholarship and legislative and regulatory analysis.

The discipline of environmental law has come a long way since its humble beginnings. As Professor Sweeney once said, “Thus, our celebration...rests on the shoulders of many nameless men and women – zealots for Environmental Law.”¹¹³ Today, we salute the staff members, the Editors-in-Chief and faculty – just as Professor Sweeney did 20 years ago – for their hard work and dedication to the *Review*. Without you, this celebration would not be possible. We hope that the *Review* continues to rise in the legal world as an eminent source of creative, innovative and novel contributions on the past, present and future state of environmental law.

To advance what Professor Sweeney said 20 years ago: because the field of environmental law is now in its *mature* stages, our work as students of the law, practitioners of the law and professors of the law is performed at the *height* of this intellectual discipline.¹¹⁴

113. See Sweeney, *supra* note 1, at 2.

114. See Sweeney, *supra* note 1. (saying “because the field of Environmental Law is still in its initial stages, your work is performed in the dawn of this intellectual discipline.”).