



## CleanLaw 80

### The Making of Environmental Law, with Richard Lazarus and Carrie Jenks — April 10, 2023

Hannah Perls: Welcome to CleanLaw from the [Environmental and Energy Law Program at Harvard Law School](#). In this episode, our Executive Director Carrie Jenks speaks with Harvard Law School Professor Richard Lazarus about his recently released book, [The Making of Environmental Law, Second Edition](#). In this long-awaited update to the first edition, Professor Lazarus describes how environmental law has developed over the last two decades and explores new challenges for the field, including the shifting role of the judiciary, long overdue efforts to achieve environmental justice, and addressing climate change. We hope you enjoy this podcast.

[music]

Carrie Jenks: Welcome to CleanLaw. I am Carrie Jenks, the executive director of the Environmental and Energy Law Program, and I'm joined today by Professor Richard Lazarus. Welcome, Richard.

Richard Lazarus: Thanks, Carrie.

Carrie: So we're going to talk today about your new book, the second edition of *The Making of Environmental Law*, but I want to start by saying what a pleasure it is to have the opportunity to talk to you about this book. As I had the privilege of reading the draft chapters of the first edition when I was your research assistant, we were both a little bit younger, and I won't do the math, but maybe we start with that, and why are you writing the second edition now?

Richard: Well, when I wrote the first edition, I basically was done about 2000 or so. It took a few years for the University of Chicago Press to get it out, I think like 2004, but I had no plans of writing a second edition. I don't normally go back and redo things. There's always so much going on in environmental law and so much so pressing, that I'm well occupied with the present and no need to go revisit what I've done in the past.

But after Trump's election in 2016 and some subject developments right after that, I realized I need to go back and reflect upon it. That the sort of pathways I predicted for environmental law, some settling I thought was going to happen, my last chapter in the first issue was called *The Graying of the Green*, it just wasn't happening. I just hadn't really forecast a lot of the subsequent history of environmental law. I don't think many people did, I certainly was surprised by some developments politically in the United States, so I needed to go back and rethink it. And so I justified it, and the pandemic gave me an opportunity of 15 months in my basement. I deliberately, though, delayed



finishing the manuscript until after the 2020 election because I viewed that election as fairly pivotal in thinking about environmental law's future.

Carrie: You've also written another book about the Massachusetts versus EPA case. How do you go about writing a book?

Richard: That was a very different book. That was a fun book. Not that Making Environmental Law is not a fun book, but that was the first book I'd ever written for a popular audience. I had to develop a different voice. I basically just outline. I outline and outline, I have very detailed outlines. I start with a broad outline, I have a very detailed outline of the book, every chapter with a book, every section within the book, and then I dive in and do a lot of research. It's sort of scorched earth research, the way I used to write Supreme Court briefs and still sometimes do. Then I read everything and then I kind of build it over time in the outline. I write a draft, and then I do edits, and more edits, and more edits, and I like to involve students as well. Students really don't do writing, but they're wonderful reviewers and wonderful editors.

Carrie: One theme that runs throughout your book is the challenge of environmental law for policymakers. Given the complexity and the spatial and temporal timeframe of how environmental law evolves in the environmental problems, and the book provides a great history that those dynamics and how they've shifted over time. Can you talk a little bit about a successful environmental law and then what are some of the challenges or risks on this?

Richard: Yeah, I think the Clean Air Act is a pretty good success in many respects. To some extent, I think the Clean Water Act is as well, the Superfund Statute, the Comprehensive Environment Response Compensation and Liability Act, and also the Resource Conservation Recovery Act. I think we can look at a lot of those early laws in the 1970s, how they were amended in the 1980s, and view them as successes.

If you look at the bottom line compared to air pollution levels and water pollution levels and hazardous waste controls, they've all dramatically improved over the first 50 years of environmental law, and they've done that while our economy has exploded. It doesn't take much imagination to realize what this country would look like if we had tried to accompany that kind of growth without those laws; just look to other parts of the world and the kind of catastrophe that they've seen there. So I think there have been a lot of successes, notwithstanding the challenges. There are other places where we faltered.

Carrie: Can you talk a bit about that? You mentioned at the beginning of the Trump Administration and you call it a "swinging meat axe." So talk about what happened in that administration and what you sort of explored in the book.



Richard:

Yeah, so the title of the chapter, *Swinging the Meat Axe*, which I must say I enjoyed using that title. It was referring back to something that Senator John McCain had said in the early 2000s, that he preferred the scalpel of reform to "swinging the meat axe." Well, Trump was, as we know, the antithesis of John McCain in every way, and highly critical of him as well. And Trump was a believer in swinging the meat acts, not the scalpel of reform. So that's where actually I got the title from.

And Trump basically looked at all environmental law and EPA and the agencies, and start to basically get rid of them. Uproot them, turn EPA, as they put it at one point, into itty bitty pieces. I mean, it was a complete frontal attack. And what was interesting to me about it was one, someone with that kind of view could be elected President of the United States, but two, if you looked at how Trump played this politically, he took all of the theoretical weaknesses and challenges of our law-making, which I describe in the first part of the book, he exploited them politically. He ran on environmental issues.

I don't think there was a President of the United States at that point in 2016 who ran on the environment as much as Donald Trump ran on the environment. Now, he may have run on the environment in a way that environmentalists might not applaud and would condemn, but he ran on environmental issues. And then once he was in office, he basically tried to fulfill his campaign pledges with obviously him hugging coal among other things. But I thought Trump's election actually underscored the kind of challenges, which I outlined in the first book, the theoretical challenges, and you could see it how he campaigned.

Carrie:

And what do you think is most concerning about the legacy that he leaves us with now?

Richard:

Well, I think the legacy is this: he won an election. I never would've thought that somebody could win the election with those views. He almost won the second election. I think that's extraordinary, and that was after he made quite clear what he wanted to do. And even during just the four years he was President of the United States, he set us back, I think more than four years in office for climate. And when it comes to many issues, it may make not a huge difference whether you have a setback of four years. When it comes to climate, you have a setback of four or six years, that's huge because time is not costless when it comes to climate change. The longer it takes, as we all know, the longer it takes to address climate change, then the exponentially harder it is to do so effectively.

Carrie:

One point, just to pull out a little bit more, if you look at the history, you said it makes more sense than non-sense of how we've gotten to where we've gotten to, but the Trump administration, maybe that's a little bit different. What was most surprising to you as you sort of wrote this book or outlined it?

Richard:

For the second?



Carrie: Yeah, for the second edition.

Richard: For the second edition, one, I was surprised when I looked at the first edition, how I'd not spent as much time on climate change as I would've thought I would've. I knew about climate change. I studied it in the 1970s in college, but I obviously didn't focus on it that much. Even a book coming out in 2000, it was not a main part of the book. It was there, it was discussed in the future of environmental law, it was discussed in the challenges, it wasn't a main focus.

Even environmental justice, I didn't spend as much time on it when I took a look back as I would've thought I would've. But what really distinguishes, I think the second edition, was the discussion of the sort of whiplashing presidential administrations, which I didn't anticipate. Going back and forth and back and forth from Clinton to Bush to Obama, to Trump, to Biden.

We had some of that before, but we did not have that coupled with absolute paralysis of Congress. The first edition talked about the paralysis of Congress, what I referred to as the dissent of Congress in environmental law-making, but I certainly didn't anticipate in 2000 that 20 years later we would still have congressional paralysis. And that has had an awful effect on the future and the evolution of environmental law, the inability of Congress to address these issues, which has left the agencies out there on a limb.

The agencies are trying to deal with new problems, new information, new priorities, climate change is being obviously one of the most important, with old language. And that's hard. And I didn't anticipate that there would be such paralysis for so long. And coupled with that, this is like the worst combination possible, I did not anticipate we'd have an increasingly conservative US Supreme Court.

In the United States Supreme Court, it seems on the edge of jettisoning the basic framework of administrative lawmaking including environmental lawmaking in the United States by agencies, which is they get deference for certain kinds of issues, and Congress can delegate them lawmaking and power to address these important issues. The Supreme Court is questioning that, and you put those two together, and you've got the absence of congressional action, the increasing need for the executive branch agents to take these issues on an old language, a US Supreme Court which seems to be saying, "You can't do that." You actually have to have more specific congressional authorization. It's hard to imagine how we're going to achieve the kind of lawmaking we need.

Carrie: So what does that mean? You and I keep working on this, so obviously, you think there's something to keep working on. It's somewhat depressing, but at the same time with the first edition, we thought private sector actors would give cover, or the administration would move forward, and then Congress would act in response to that because it'd be cover for Congress act to the administration. I think you're right that we kept having this



whipsaw back and forth, so do you think there are pathways now given the current state of our government?

Richard:

Yes, I do, but I tend to be an optimist. I always joke though, that you can always tell the office of an environmental law professor because you look right next to their chair and the wall there's a dent there, and that's because they've been banging their head against that wall for the past 30 years because we've all known about it, climate change, how important it was to act quickly on it, and then watch frustratingly, even during the Clinton administration with Al Gore as vice president, we did basically nothing.

I do tend to be an optimist because I see how quickly things can swing in the United States with the electorate. We went from Barack Obama to Donald Trump in just eight years. A phenomenal flip. I think we can flip again, I'm hopeful we can. I think that people are much more aware of the scope of the climate change challenge than they were before, and I think, and this goes back to the private sector point you made before, and that is the private sector is well aware of it, the military is well aware of it. There are different parts of our world and our sort of law-making influencers who don't fictionalize science. They take it very seriously.

Politicians can fictionalize science, but the military doesn't, and the private sector doesn't, and the private sector realizes the climate is changing, and that's going to affect their assessment of risks, and more importantly it's going to affect their assessment of opportunities. There is a gazillion-dollar private sector business opportunity here for products and services that address adaptation needs we're going to have right away, and mitigation opportunities. The private sector spots that. And my expectation is we're going to see the private sector leading here. There's lots of evidence they're doing that, even in the face of government paralysis, at least at the national level, not at the state level. There are several states doing very creative things to address climate change. For the private sector, I think it's enormous potential, and we've already seen a lot of transformation of our nation's sort of facilities producing electricity come from the private sector, without the need for government regulation.

Carrie:

Yeah. Going back to your prior point about environmental justice and how that wasn't a theme necessarily as much in your first book, and it is something that runs throughout the second edition. You have a section talking about the Deepwater Horizon accident and the Flint, Michigan water crisis. Two events, very different in terms of environmental risk, but you tie them together, despite the fact that they're under the same administration, I wondered if you could talk a bit about that.

Richard:

Yeah, I wanted to talk about that, and partly because they happened even during one of the most sort of favorable environmental administrations we ever had, during the Obama Administration, and you still had this catastrophic oil spill, and this equally but more localized catastrophic episode in Flint, Michigan, and now more recently we see in Jackson, Mississippi.



What these two instances portray is, I think, the cost of congressional intention, the cost of having Congress drop out of the law-making world for the past now 50 years. So when it comes to the oil spill, you had technology, the deep water drilling technology dramatically expand and develop during the 1990s. It's a pretty amazing technology, which reaped a lot of benefits for this country, but it wasn't followed by any kind of corresponding regulatory scheme. Congress passed absolutely nothing to try to let the agencies keep up with the oversight necessary, so it was very little regulation of that. It was a problem waiting to happen.

Flint, Michigan, I think very similarly, and that is the drinking water part of environmental law. They stopped funding it, they stopped paying attention to it. It's not a coincidence that you saw it explode to the surface or the drinking water supply in an African American community. That's going to be always the frontline, we've learned. But both of them are aspects of congressional inattention, even during one of the most pro-environmental administrations, and that was the Obama Administration.

Carrie: So you mentioned Congress' inaction and that crisis is happening because we don't have a Congress that can act. Congress did just act with the Inflation Reduction Act, that obviously happened after you wrote the book, but it's not Congress putting in requirements. What do you think about that tension between the carrots versus the sticks?

Richard: Yeah, I think it's fascinating. Actually, I did sneak the IRA in. I got a last-second opportunity on August 22 to stick in both the IRA, just a few sentences, must've screwed up my publisher, and also the *West Virginia v. EPA* case. So I got them both in, just barely. The IRA I think is a really interesting historical phenomenon for environmental law.

Because environmental law-making was being done I think for the first two decades, exactly the right way. And that was the authorization committees, and that was committees like the Senate Committee for Environment and Public Works. They had this wonderful iterative process during the first 20 years where Congress would pass a law with fairly broad stripes. The agencies like EPA would try to fill in the details, and we'd see what worked and what didn't work, we'd see what worked with the states, we'd see what worked with the courts, we'd see what worked with industry, they'd come back and do a little bit more detail, and then Congress would come in and mend the law, learning from the agency with increasing detail, all the way up to the Clean Air Act of 1990.

The original Clean Air Act amendments of 1970, about 30 pages long. The Clean Act amendments of 1990 were over 300 pages long. It's exactly how it should have been, back and forth with the substantive authorization committees doing the work. In the 1990s, it all shut down, and environmental law-making switched, I think, to the wrong side of Congress. And that was the appropriation side. The only side of Congress that



could pass anything, because they had to pass something every year at budget. So the authorization committees were no longer sort of in charge, the appropriation committees were in charge, and they're much more focused on short-term interests and short-term economic concerns.

So we saw a series of appropriation bill riders, which would cut back what the agencies could do in a very non-deliberative and impulsive fashion. Now, what's incredibly interesting about the IRA is, now you have the environmentalists using the appropriation side. It's not the best way to do it, but it's the only way to get anything passed. So they've learned the lesson of those people using appropriations, the 90s, 2000s to cut back on environmental law, to now use the appropriation side to sort of promote environmental law.

And the Inflation Reduction Act is probably the most significant law we've had passed by Congress by far since the Clean Act of 1990. Now it's different, right? It does a tremendous amount, but now it's using money, it's using carrots, and there's a few little sticks thrown in there, but it's mostly using carrots, and it's using that in conjunction with the private sector, and trying to jumpstart the private sector in ways that will, I think achieve enormous gains in reducing greenhouse gas emissions in the United States while having lots of gains there as well from adaptation, the climate change which is going to happen. And to show how the two can be married, it's got like \$40 to 60 billion to help the environmental justice communities both in efforts they can do to mitigate, but also to adapt to climate change because climate change is going to disproportionately hurt upon environmental justice communities here in the United States.

Carrie: So if you were to write another chapter, would you call it the Inflation Reduction Act? I know it's a statute, but would it be environmental law? Is it making environmental law, or is it enabling the environmental laws we have in the book to work better?

Richard: I think it's making environmental law by enabling it, but there's a lot of substance in there. It's what issues they've chosen to address, what priorities they've chosen to address, and it's going to allow, I think both directly and indirectly the states, federal government, and local government and the private sector to make enormous progress. It's not enough by itself.

We actually need a new Clean Air Act, we need a new Clean Water Act, we need a new Safe Drinking Water Act. We need all kinds of new laws to accompany those expenditures, there are limits on what they can do through the appropriations process. There are some nice provisions that they wanted in which were either struck down formally, is not germane under the Senate rules, or they were quietly retreated from in anticipation of that possibility. I don't want to take anything away from it, it's enormous progress in a time when we've had almost none from Congress, that is something to celebrate, but we need to do more, and that's why I'm hoping we'll see that kind of



settled transformation. Needless to say, I'm looking for the next election, and I'm hoping that we come to a point when that Trump period becomes sort of an anomaly in our political history.

Carrie: So one last question, because I think you're ending on a really positive note, and I want to make sure we end on a positive note. What do you say to students when they're sort of looking at environmental law and feeling discouraged? When you go through the whole history of it, how do you sort of keep them to keep positive and keep working on this?

Richard: Yeah, it's interesting you asked that question. I think about that a lot, and we have a lot of students who come to law school here at Harvard wanting to do environmental law, I'm sure the same is true at a lot of schools, and they care deeply about environmental law and about climate change. Here's what I tell them. I think they can do a lot. I think we need their best minds, we need their attention. That they can come up with creative solutions to break some of these log jams that some of us have not successfully done in the past and that there's real potential out here and they can see what can happen in the United States, both politically and through the private sector. I also emphasize to them that they can play a very positive role in this area, not just being Clean Air Act lawyers and lawyers with Earth Justice or the Environmental Defense Fund or National Resource Defense Council or lawyers at EPA or in states.

People can do very important work there. But the challenge of transforming this nation's economy here in the United States and then in the rest of the world is not just going to be done by experts on the Clean Act and experts on environmental law. That kind of transformation, wholesale transformation of economy, it will require lawyers in all kinds of settings. It's going to require lawyers at FERC, the Federal Energy Regulatory Commission, or experts in electricity regulation. It's going to require lawyers working in the private sector who know corporate transactional law. Require lawyers who are experts in securities regulation, experts in risk regulation at the Federal Reserve. Requires lawyers at the Treasury Department and Department of Defense who know about national security law. Department of Agriculture, which has huge potential here to address the climate change issues through our agricultural laws and our food laws, the Food and Drug Administration, Department of the Interior.

So actually this semester I'm teaching a really fun class for the first time which is based on that premise, and it's called Climate Lawyering, it's not just called climate law, and it's designed to show these students, they can play a really important constructive role as lawyers in all kinds of facets in the private sector as well as the public sector, as well as the nonprofit sector. And there's nothing more important, and nothing more urgent. It's a frustrating, troubling time, but what an opportunity to be a Harvard lawyer, because what a difference you can make.





Carrie:

Well, I think we have to stop there. I really appreciate you joining us on CleanLaw, I appreciate you writing the book, I enjoyed reading it for the second edition, and thanks so much, Richard.

Richard:

Well, Carrie, it's been great, I mean we worked together on the first edition, we worked together now on the second edition, we'll see where we are on the third edition. If it's another 20 years from now, you may have to take the lion's share of the work.

Carrie:

Sounds good. Thank you.