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# Environmental Law: The Role of Congress in Environmental Law

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## PANEL

### Environmental Law: The Role of Congress in Environmental Law<sup>1</sup>

#### Moderator:

Hon. Steven M. Colloton<sup>2</sup>

#### Speakers:

Prof. David Schoenbrod<sup>3</sup>

Prof. Eric R. Claeys<sup>4</sup>

Matt Leggett<sup>5</sup>

Prof. Nicholas A. Robinson<sup>6</sup>

**JUDGE STEVEN M. COLLOTON:** Thank you for joining us for this morning's panel. I've been asked to moderate. I'm Steve Colloton, Judge of the U.S. Court of Appeals for the Eighth Circuit, with chambers in Des Moines, Iowa, and I have been asked to moderate this morning's panel on the role of Congress and environmental law.

As you know, Congress enacted several major environmental statutes in the 1970s—the Clean Air Act, the Clean Water Act, the Endangered Species Act, the National Environmental Policy Act. Since then, those have been amended in the '80s and '90s, but there's been not a lot of major environmental legislation since then, and as a result, policymaking has shifted to other venues. The executive branch rulemaking has become prominent. States have legislated in the areas where Congress may have left a vacuum, and of course, lawsuits have been filed to compel regulatory action or to challenge agency rulemaking in an effort to define the scope of congressional policy.

So this panel has been assembled this morning to address the state of affairs and to discuss more generally the role of Congress in environment law. Is the absence of large-scale congressional activity good or bad? What are the reasons for the current state of affairs, and what might cause it to change? What are the advantages and

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<sup>1</sup> This panel discussion was part of The Federalist Society for Law & Public Policy Studies 2015 National Lawyers Convention held on Saturday, November 14, 2015 from 11:00 a.m. to 12:30 p.m. at The Mayflower Hotel in Washington, D.C.

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disadvantages of devolving environmental legislation to the states? Are there areas where Congress has enacted meaningful environmental legislation in recent years, and if so, what can be gleaned from those experiences?

To address these and other matters, we have a panel of experts whom I will now introduce to you. Starting on our right, we have David Schoenbrod. David is a visiting scholar at the American Enterprise Institute, where he's examining how Congress could restructure environmental statutes, so that their objectives could be achieved more efficiently and effectively. He teaches environmental law at New York Law School. Earlier in his career, David was a senior staff attorney at the Natural Resources Defense Council, where he led the charge to get lead out of gasoline. Since 2006, he's been co-leader of joint project of New York Law School and the NYU School of Law entitled "Breaking the Logjam and Environmental Law for the 21st Century," a topic apropos to our panel today.

To his left and my right is Nicholas Robinson, who is the University Professor for the Environment at Pace University and the Gilbert & Sarah Kerlin Distinguished Professor of Environmental Law *Emeritus* at Pace Law School. Since 2006, he also holds an appointment as a professor adjunct at the Yale University School of Forestry and Environmental Studies. He served from 1996 to 2004 as legal advisor of the International Union for the Conservation of Nature and Natural Resources and chaired its Commission on Environmental Law. In the '70s, he served on the President's Council on Environmental Quality's Legal Advisory Committee, and he was a pioneer in the early practice of environmental law in New York. He served as General Counsel of the New York State Department of Environmental Conservation for three years in the 1980s. He's chaired both the Environmental Law and International Environmental Law Committees of the New York City Bar.

To my left, we have Matt Leggett, who is a policy counsel at the U.S.—Matt is pinch-hitting, I'd like to add, and we're very grateful for that. Two of our panelists were unable to appear due to last-minute conflicts, but Matt is here ably substituting. He serves as policy counsel for the United States Senate Republican Policy Committee. His areas of work focus on energy, environment, and agricultural issues. He formerly served as a legislative counsel in the House of Representatives where he managed the Congressman's Energy and Commerce Committee assignment. He's a graduate of University of Virginia and the Vanderbilt Law School.

And then to my far left is Professor Eric Claeys. Eric is a professor of law at the George Mason University Law School. He's formerly an Eighth Circuit man, having taught for some years at the St. Louis University School of Law. He's written widely in the fields of property, private law, and constitutional law. His current research interests focus on flourishing and labor-based natural rights justifications for property,

in American property theory and intellectual property, and most applicable to our discussion, in contemporary regulation of shale gas exploration and hydraulic fracturing.

So, with that, we will hear from each of our panelists with an opening set of remarks. We'll then try to engage in some back-and-forth among the panelists as they hear and react to the comments of the others. I welcome your questions and comments as we get into the discussion. There is a microphone centered here, and so, at the appropriate time, we'd be happy to hear from you with any questions for the panel.

David, we'll begin with you.

**PROF. DAVID SCHOENBROD:** Thank you, Judge, for your kind introduction, and I feel very grateful to the Federalist Society for inviting me. This is my third time speaking here, and every time I come, I find I come away with lots of ideas for my scholarship. It's just a very rich, intellectual atmosphere. And, finally, I want to say that I am very glad to be sitting next to Nick Robinson. Nick and I were warriors on the pro-environmental side in the early '70s in New York City, and I have not seen Nick, I think—we've been trying to talk about it—for at least 20 years, so it's nice to be in the same room with you, Nick. Of course, now I am a member of the Federalist Society, but he's nice to me, anyway.

[Laughter.]

**PROF. DAVID SCHOENBROD:** The job that Congress is supposed to do is quite different from the job that Congress does do. The Constitution defines Congress's job. Honoring the Declaration of Independence premise that governments derive their just powers from the consent of the governed, the Constitution established a Congress composed of elected Members who must stand for reelection on the basis of having revealed their roll call votes on critical matters of policy and in particular regulation. So that meant Members of Congress would have to be personally responsible for the laws.

The Progressive Era had the unintended consequence of freeing Congress from such responsibility. Progressives actually did—or many of them actually did—believe in legislative responsibility, but they also actually believed that experts could use science to make correct policy choices. So they thought by setting up an agency, endowing it with power, and insulating it from politics, the legislature would have done its job.

This belief in scientific policymaking was falsified by experience, but the legislators decided to keep on legislating as if it was true because that freed them from responsibility, and that continued in many statutes down to the National

Environmental Policy Act of 1969, which was based on the idea "Let the experts figure it out. They'll know what to do."

The wake-up call, however, came only a few months after the passage of the National Environmental Policy Act. Three weeks after the first Earth Day in 1970, Ralph Nader published a study which in essence accused Members of Congress of manslaughter for broadly delegating. Nader said Congress had killed people by ducking the hard choices. Congress responded by passing the Clean Air Act of 1970, and it did so almost unanimously. Senator Muskie said the statute, "faces the air pollution crisis with urgency and in candor," it makes "hard choices." He said also all Americans in all parts of the country shall have clean air to breathe within the 1970s. Now, to back up these promises or at least seem to back up these promises, Congress enacted a right to healthy air, but it also delegated to an agency responsibility for imposing the duties necessary to fulfill their rights. Enact rights; delegate responsibility for the burdens. That's how it worked.

This allowed Members of Congress to claim credit and shift blame. They could claim credit for conferring the right to clean air but then shift blame to the agency for the burdens. Then when the agency came under intense fire from Members of Congress for imposing or threatening to impose burdens on constituents, that meant that the agency often backed off, didn't achieve the promise of clean air on schedule, and for that, too, Members of Congress blamed the agency. This is political heaven.

Congress has applied this method of shirking responsibility in most areas of environmental law. Whether the courts can stop Congress from doing this, it is dishonorable for Congress to do it.

Congress excuses itself by claiming that it lacks expertise, yet in writing in 1938, Dean James Landis, who is the New Deal's guru of administrative law and then Dean of the Harvard Law School, showed how Congress could marry agency expertise with legislative responsibility. It could do so in two different ways. One way was the legislative veto. We know what happened to that. Yet, he had a second way of going at it, which is clearly constitutional, and that is to have the agencies propose the major regulations that would not go into effect until Congress enacts them, the Article I way. As Landis, the agency would be the technical agent in initiation of rules of conduct, yet at the same time have the elected legislators share in the responsibility for their adoption.

About 20 years ago, I was asked by some Members of Congress how we could deal with this legislation problem, this delegation problem, and I suggested Landis' approach, and the consequence was a bill called the Congressional Responsibility Act. It got a surprisingly widespread support, including from some Democrats. At this

point, some Members of Congress got scared, "We're going to have to be responsible. We don't want that." So what they did was they pulled a switcheroo. They came up with something called the Congressional Review Act, which gave them the option of being responsible. That's worth about as much as, well, what some people say the vice presidency is worth, which is just about nothing.

More recently, some Members of Congress resurrected the initial idea behind the Congressional Responsibility Act. They called their statute Regulations from the Executive in Need of Scrutiny, or REINS, as if statutes from Congress don't need scrutiny. Their bill minimizes the chance that it will ever be enacted into law for many reasons. One reason is their bill's title. It stakes out the partisan low ground of opposition to regulation and distrust of the executive rather than the moral high ground of the consent of the governed. And I just learned from Susan Dudley that people who rate these things say the current version of REINS has about a 4 percent chance of being enacted, which I think is excessive.

By sponsoring REINS but never having to enact it into law, the people who support REINS can claim credit for being for accountability but never have to be accountable. It's just as despicable, just as dishonorable for one side as the other. In other words, they don't have to vote against agency regulations that at least some of their constituents think may be necessary to protect the health of their children.

In sum, the REINS bill is a charade just the same way that environmental statutes, as we have them on the books now, are a charade. Now, I think there are problems with REINS in addition to the title. I think there are changes that ought to be made to involve the committees, to allow a little bit more flexibility on timing and so on, but we can talk about that later. The point I want to make right now, however, is that Congress having to vote on major regulations would improve environmental law, and here's why. The statutes are obsolete. The most recent major change was a quarter-century ago: that was the Clean Air Act, but that's the most recent of any of the statutes being changed. The structure of most of them dates back to the 1970s, when Nick and I were hanging out and I sometimes wore bell-bottoms.

Now, updating these statutes would bring more environmental protection at less cost, as shown in the "Breaking the Logjam" project that Judge Colloton mentioned (<http://www.breakingthelogjam.org/>). Members of Congress lack any personal incentive to update the statutes, because they shift all the blame for the burdens and the failures onto the agencies, so why do anything? That's their point of view. If, however, Members of Congress had to vote on the major regulations, they'd take blame for the burdens, they'd take blame for the failures to achieve environmental protection, and they would have a real, personal incentive to get more environmental bang for the buck.

In sum, Congress's failure to do its jobs gives us obsolete laws and denies us the consent of the governed. Shame on them.

[Applause.]

**JUDGE STEVEN M. COLLOTON:** Thank you, David. We'll hear now from Professor Robinson.

**PROF. NICHOLAS A. ROBINSON:** Thank you very much, Judge. It's great to be on this panel. I want to thank the Federalist Society for the invitation and for sponsoring this discussion, both about Congress and, in this panel about environmental law. Although David and I have not participated in the same conference settings for a while, I have enjoyed teaching with his *Remedies* book for about 10 years, so I have been intellectually advancing his thoughts on a number of these issues.

– May I take us back a little bit in time to put in perspective where Congress has evolved on these questions of energy, natural resources, and the natural environment? Let me take you back to 1818, which is not long after Congress was founded, about 8 years after the Senate began its work. James Madison, on May 12 of that year, delivered his famous address to the Agricultural Society of Albemarle. If you have not read this address, all members of the Federalist Society should read it, and it should be the text for our thinking about environmental law.<sup>7</sup> Madison had been elected president of this Society. He was a past President of the United States, but he was now president of the Society, and he was a leading exponent in his day of what we would consider today to be "scientific farming" or the science of agriculture. A young lawyer, Francis Walker Gilmer, recorded this address and, on behalf of the Society, published it in June of 1818. It has been in print ever since.

In 1836, in John Quincy Adams' eulogy for Madison, he said Madison had delivered an address "which the practical farmer and the classical scholar may read with equal profit and delight," and it is still great reading today. In his Address, Madison traces what we have come to call the Agricultural Revolution—its strengths, some of its problems—and he discusses concepts that are still with us in nature conservation and environmental science today: concepts which we now call biological diversity, explaining the importance of soil conservation and the maintenance of soil health. What Madison called "the economy of nature," we now think about as the science of ecology. He had a very focused discussion on the atmosphere. In his day, scientists were first discovering what is air; Joseph Priestly had recently discovered oxygen as a

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<sup>7</sup> James Madison, Address to the Agricultural Society of Albemarle (May 12, 1818), <http://founders.archives.gov/documents/Madison/04-01-02-0244>. Editorial annotation, <http://founders.archives.gov/documents/Madison/04-01-02-0243>.

gas. Of air pollution Madison said, "Were the atmosphere breathed in cities not diluted and displaced by fresh supplies from the surrounding country, the mortality would soon become general." What he basically was trying to do was talk about what is environmental health, what is environmental integrity in the society, and what do we do to maintain it. He ended it with a very long, detailed discussion, which was celebrated in his day, for how to be an environmentally sound farmer: how to make your farm productive, how to make the soil renew, how to do fertilizer in an effective way, and so on.

Now we fast-forward from his day. From coping with the early settlement and development of a new nation and the Agricultural Revolution, we jump to the Post-Industrial Revolution. And the Industrial Revolution came upon us with a great many benefits, but also a great many problems. We put off worrying about most of those problems. In Teddy Roosevelt's day, we were worried about the depletion of natural resources.<sup>8</sup> We mistakenly thought that we had cut down so many trees that we would not have wood anymore. Well, most of the trees in secondary-growth forest in New England, the Northeast, have grown back. The fear of losing a supply of timber was a serious concern of its day, but one that, if our citizens at the turnoff the century from the 1800s to the 1900s had a longer perspective, they might not have worried as much about. Thereafter, we put off dealing with the gradual growth of the externalities of the industrial revolution until after the Second World War. We had to win the war; we increased the pollution as part of the side effects of that. So, when President Richard Nixon decided to create the Environmental Protection Agency by Executive Order—it was not done by an Act of Congress—Nixon basically was trying to catch up with the fact that the citizenry were angry about the pollution all across the nation. That is the time when David Schoenbrod began to specialize in what became the field of environmental law. We too had to breathe the same air. It was not very clean in New York City then.

So a process began of creating environmental law, which four decades later the Congress has not been able to deal with effectively in its oversight system, for many of the reasons that David has articulated. We have had a number of studies and critiques about how to cope with the maze of regulations that has come about.<sup>9</sup> We have the very thoughtful research that David Schoenbrod and his colleagues produced, we also have the studies of the Property and Environmental Research Center in

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<sup>8</sup> See President Theodore Roosevelt, Opening Address at the Conference of Governors held in the White House (1908), <http://www.nga.org/files/live/sites/NGA/files/pdf/PS1908Roosevelt.pdf>.

<sup>9</sup> E.g. DOUGLAS A. KYASAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* (Yale University Press 2010), which seeks to reinvigorate environmental law and policy by offering novel theoretical insights on cost-benefit analysis, the precautionary principle, and sustainable development.



Bozeman, Montana.<sup>10</sup> These and other studies seek to distill out of the past 40 years of experience with environmental law insights to guide law reform. If we take the longer view, well before the past 40 years, we must think all the way back to Madison and thinking about the role of governance and the environment. On this 800<sup>th</sup> anniversary of Magna Carta,<sup>11</sup> you will find a reference to the Forest Charter of 1217.<sup>12</sup> This is the first environmental statute. It sets a series of standards which William Blackstone said was equally important to everything in Magna Carta.<sup>13</sup> The Forest Charter set forth the liberties of the forest, and the rights of the people to use resources as part of their economic life. What we need to do is distill insights from arguably an 800-year experiment with the rule of law and the environment, in order to come up with some basic principles that can guide both administrative decision-making and corporate and social economic activity.

There are such principles, but as long as today's Congress is divided there is no capacity to distill these principles from experience. This 2015 National Lawyers Convention had a very fine opening panel discussion about the dysfunctions in Congress this morning. For all the reasons that were laid out in that panel, there appears to be no end the gridlock, so we would do well to examine the consequences of the gridlock in the short term, and maybe the short term is another 10 or 20 years.

It is prudent, then, to look at compensatory action to deal with the fact that Congress may not get its act together soon. One of the consequences is that we are shifting the economic impact of the failure of Congress to address questions, not just from the agency, over to the states and onto the public. Asthma rates are increasing in a number of places around America. Part of that may be due to, perhaps, we now discover, the strange behavior of Volkswagen and the discharges from its diesel automobiles and the concentration of those automobiles. However that may be, it is noteworthy that there is measurable economic shift of burdens. Ambient air pollution affects all of us who have to breathe the air, and shift the costs from the polluter into the hospitals and into the medical care system.

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<sup>10</sup> THE PROPERTY AND ENVIRONMENT RESEARCH CENTER, <http://www.perc.org>.

<sup>11</sup> *Magna Carta: Enduring Legacy, 1215-2015*, The Federalist Society for Law and Public Policy Studies, AMERICAN BAR Association, [http://www.americanbar.org/groups/public\\_services/law\\_library\\_congress/magna\\_carta/federalist\\_society\\_dc.html](http://www.americanbar.org/groups/public_services/law_library_congress/magna_carta/federalist_society_dc.html) (See the American Bar Association's Traveling Exhibit on Magna Carta, which was featured during the Federalist Society's 2015 National Lawyers Convention).

<sup>12</sup> NICHOLAS A. ROBINSON, THE CHARTER OF THE FOREST: EVOLVING HUMAN RIGHTS IN NATURE 311-77 (Daniel Barstow Magraw, et al. eds., 2014).

<sup>13</sup> WILLIAM BLACKSTONE, THE GREAT CHARTER AND THE CHARTER OF THE FOREST, WITH OTHER AUTHENTIC INSTRUMENTS (Oxford 1759).

We need not wait for a more function Congress. Some reforms are not much disputed; there is many-low hanging fruit that could be harvested, such as in trying to clean up the Code of Federal Regulations. We can acknowledge that there is a great deal of obsolete regulatory verbiage in our voluminous regulations. We need a law reform commission that can simply walk went through the code, not just the code for the EPA but the entire code of federal regulations since most federal agencies now have a large section on the environment in their own regulations. It is not unlikely that a bipartisan and professional review could probably reach agreement that a great deal of the regulatory verbiage that is obsolete and simply needs to be sunset. The process of agreeing to this exercise could rebuild confidence in legislative decision-making. It would be worthwhile to put aside the contentious issues, which people want to fight about. We could do a great deal to clean up the thicket of regulations that we labor under.

Moreover, we need to assess how to professional manage the implementation of our laws. Congress provides budgets, and it has not considered the consequences of its cuts. As the EPA budget has been reduced substantially—it is today about 25 percent less than what it was a decade ago—we have seen the authority for environmental regulation unavoidably and necessarily shift to the states. Today much of the debate and in Congress and the courts is about new regulations, whether they are good or bad, or what we should do about them. This focus has left untouched the backlog of rules some of which date from the 1970s. The states are required by most of the federal statutes to amend their state statutes and bring them into line with the federal system, in order to maintain a pattern of nationwide stewardship for the economy and the environment. Lack updates from Congress, the states are now trying to make sense of what the law requires of them, because they do not receive guidance from EPA. Lacking staff, EPA is slow to act on matters that come before it.

EPA faces a big backlog in both administering existing regulations as well as considering new ones mandated by Congress. This not only has delayed dealing with issues such as ambient air quality deterioration in parts of the nation, but it has also been problematic for companies that have a national economic footprint. Most large corporations have environmental health and safety offices, or sustainable development offices. These offices work to maintain corporate compliance with all of these regulations, through environmental management systems that work fairly well. But when a company's system has to comply with 50 different states' policies, or regional differences that are now coming into effect because the states are doing things differently in the absence of EPA, the companies experience extra costs. This consequence is a drag on the economic recovery. The stagnation of our economy should be a high concern and maintaining stable and predictable environmental rules is good for the economy. The converse is equally a problem.

So it appears that the nation is going to experience a long period of seeking to figure out what can be done to arrive at the basic principles that Madison knew so well, and translate them into modern environmental regulations. There is probably more consensus today about how to manage and simplify the environmental regulatory system at the state and local level than there is at the federal level. Since much of the burden to manage the environment *de facto* is being devolved to the states, maybe the time has come to take a long look at how the states can advance the reform system in the wake of congressional inactivity.

Thank you very much.

[Applause.]

**JUDGE STEVEN M. COLLOTON:** Thank you, Professor Robinson. Mr. Leggett, we'll hear from you.

**MATT LEGGETT:** Interstate pipelines. Hydraulic fracturing. Clean coal systems. Photovoltaic cells. Nuclear reactors. America's energy power and technology. But in 1789, it all came down to the power of a horse to move a wagonload. Horsepower, the initial measurement used to compare the capabilities of a steam engine to the capabilities of a horse. To be precise, 33,000 pounds moved one foot in one minute. Today we have additional terms: BTUs, barrels per day, megawatt hours. Like other policy areas we now wrestle with, the Founding Fathers were masterful in crafting a constitutional framework which provided for the future without actually knowing what it would be or what they should call it or what technologies might be invented. As we all know, the Constitution set up a system of checks and balances, and within those checks and balances, it is Congress's job to pass laws and to oversee their implementation. It does so on a coequal basis with the other two branches, the executive and the judiciary. One of the great things about Congress is that it is the most representative and the most directly accountable branch of government. A wrong vote has consequences come November. This self-regulating mechanism we call "elections" helps to ensure that Congress and the federal government strikes the appropriate balance when establishing national policies.

Since the passage of the Clean Air Act, Congress has played a central role in crafting well-balanced policies that protect America's air, water, and land. Just to mention a few: the Clean Water Act, the Resource Conservation and Recovery Act, Superfund. The nation has grown cleaner. But today, when it comes to energy policy, Congress's contributions are blocked. The administration has taken unilateral executive action and ignored Congress's role. In 2013, President Obama declared in his State of the Union address, "If Congress won't act" on his preferred environmental policies, "I will." President Obama's liberal use of the veto, executive agencies' stretching the

bounds of statutory interpretation, State Department's slow-walking of infrastructure permit decisions, EPA's power grabs—the results are clear and disappointing.

**Keystone XL Pipeline:** The State Department said it would be the safest and most environmentally-responsible form of crude oil transportation, resulting in 28 to 42 percent fewer greenhouse gas emissions than alternative forms of transportation. The Senate approved it by a bipartisan vote of 62 to 36, including nine Democrats. The house passed it, too. President Obama vetoed it and recently rejected it again.

**Waters of the U.S. rule:** A bipartisan group of 69 senators believe the EPA's new rule is not well-balanced environmental policy and needs to be rewritten. Fifty-seven of those senators voted for common-sense legislation introduced by Sen. John Barrasso to require EPA to revise the rule. Eleven of those senators voted to filibuster that bill, then turned around and wrote a letter to EPA complaining about the rule and asking the agency to rewrite it. President Obama threatened to veto the bill, ignoring everyone's concerns, and unilaterally preserved the flawed rule.

**Coal-Fired Power Plant rule:** The rule violates federal law and will raise energy prices, threaten electric reliability, eliminate jobs, and destroy economic growth, all for little environmental benefit. Even Professor Laurence Tribe, who taught both President Obama and Chief Justice Roberts at Harvard Law, said that this executive action was the equivalent of “burning the Constitution.” The Senate will vote on bipartisan resolutions of disapproval to block the rule as early as this week. President Obama is expected to veto them.

In addition to blocking Congress's bipartisan actions, President Obama has aggressively pursued executive actions to wage a war on fossil fuels and natural resources development in other ways. In 2011, he retroactively vetoed a permit for a coal mining project in West Virginia that had been approved four years earlier. In 2014, he preemptively vetoed a permit for a copper and gold mining project in Alaska, before mine developers even submitted an application. In fiscal year 2015, he leased a mere 2.8 percent of onshore and offshore federal lands for energy production. He has slow-walked permits for liquefied natural gas export facilities. He has utilized his designation authorities under the national wilderness preservation system, the national wild and scenic river system, the antiquities act, the endangered species act, and other programs and laws to block energy production on federal lands. His administration currently brags about its attempts to circumvent Congress during international climate negotiations in Paris next month.

Congress is joined by other governmental bodies in protesting the executive branch's overreach. Twenty-seven states with whom the federal government is supposed to enter into cooperative federalism have filed lawsuits against the Obama

administration's coal-fired power plant rule. Over 30 states have filed suit against its Waters of the U.S. rule.

The judicial branch appears concerned about the legality of the Obama administration's executive actions also. In 2014, the Supreme Court warned in *Utility Air Group v. EPA* that the EPA must not exceed its statutory authority in rulemaking's. Justice Scalia, writing for the majority, stated: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decision of vast 'economic and political significance.'" This summer, the Supreme Court cited that passage in *King v. Burwell* when electing to base its ruling on its own reading of the statutory language instead of deferring to the IRS's interpretation of an Obamacare provision. The court demonstrated its willingness to narrow its deference to agency interpretations of federal statutes in the future.

Also this summer, the Supreme Court ruled in *Michigan v. EPA* that the EPA acted unreasonably when it wrote its Mercury and Air Toxics Standards Rule because it failed to consider cost as a factor at the appropriate time. The court painted a target on the reasonableness of the EPA's cost-benefit analyses. Last month, the sixth circuit issued a nationwide stay against the Waters of the U.S. rule, just after the U.S. District Court in North Dakota issued a preliminary injunction against the rule in 13 states. Last week, the Fifth Circuit enjoined the president's illegal immigration program. It explained that the administration relied on an obscure provision in the immigration laws that cannot be the basis for authorizing "decisions of vast 'economic and political significance' ... to an agency." It noted that Congress had refused to enact bills similar to the President's immigration plan. It noted that "the President explicitly stated that 'it was the failure of Congress to enact such a program that prompted him to 'change the law.'" It found that "congressional silence" cannot confer on agency "the power to act."

Despite the executive branch's overreach, I am hopeful President Obama will accept one bipartisan environmental priority working its way through Congress: Toxic Substances Control Act reform. After years of struggling to find a pathway, Congress is finally on the verge of passing legislation to reform TSCA. The Senate bill has 57 co-sponsors, including 22 Democrats. The Obama administration's singular focus on carbon emissions makes it easy to overlook other environmental problems like protecting Americans from exposure to dangerous chemicals. It also makes it easy to overlook ideas such as Professor Robinson mentioned, going through the Code and just cleaning up outdated environmental laws.

Thank you to the Federalist Society for having me today and for your attention. I look forward to putting some horsepower into the discussion.

[Applause.]

**JUDGE STEVEN M. COLLOTON:** Thank you, Mr. Leggett. Professor Claeys, we'll hear from you.

**PROF. ERIC R. CLAEYS:** Thank you very much to Judge Colloton for moderating so moderately, thank you all for coming, and thank you to the Federalist Society for having me.

Professor Robinson gave us a panorama survey of where environmental law has been, and Professor Schoenbrod and Mr. Leggett gave two different perspectives on where environmental law is now. My contribution is to talk a little bit about where environmental law is not really yet but might be soon. And to see what that trajectory has to show us about where environmental law is now.

I will use my time to talk about hydraulic fracturing, for three reasons. First, hydraulic fracturing presents a counterexample to the theme of this panel—the role of Congress in environmental law. It's an activity that's not really regulated significantly by the federal government yet. Now, that may change later. For the time being, however, if one compares fracturing regulation now to other environmental regulation now, the comparison might expand our imagination about the pros and cons of other current federal environmental regulations.

Second, this low regulatory profile wasn't an accident—it's the product of a deliberate choice by Congress. A decade ago, Congress chose to get out of federal regulation of fracturing on a major regulatory topic. We should inquire why Congress deliberately chose to take a hands-off role on one environmental topic.

And last, Congress's decision to stay out of an important environmental topic offers some important lessons about the political process. Even when it's good policy for the federal government to take a low profile on a regulatory topic, we should wonder: How exactly is that Congress comes to agree—and decides to precommit the federal government to staying out of a field? The answer has to do with the legislative process. In my case study, energy producers probably used the momentum and political support behind an energy bill to institute important limits on environmental policy-making on one topic. Although this dynamic probably can't be repeated very often, I still want to bring the dynamic out and discuss it.

My talk will proceed as follows. First, I'll assume you know little or nothing about hydraulic fracturing, and give a quick and dirty overview of this process. Second, I'll explain why hydraulic fracturing has been an economic and a political success. Third, I'll explain how that success is related in large part to the absence of a really strong public law and federal presence toward fracturing. Finally, I'll spend most of my time talking about the legislative process by which Congress deliberately chose to keep the federal government largely out of the regulation of hydraulic fracturing—and ask what lessons (if any) might be learned.

So first: What's hydraulic fracturing? Shale exploration refers to the process by which energy companies produce oil and natural gas from sandstones, shales, and other rocks that are “tight,” or fairly impermeable. Shale exploration is also called “unconventional” exploration, and it contrasts with “conventional” exploration of “conventional” hydrocarbon reservoirs. A conventional reservoir holds liquid oil or liquid or gaseous natural gas. The oil and/or gas are stored underground in a self-contained unit, separate from the rock encasing the reservoir. In conventional exploration, a drill punctures the reservoir, and the exploring company directs the hydrocarbons that escape into a well pipe. Geothermal pressures already in or around the reservoir underground do most of the work to force the oil or gas up to the surface. Now, when a conventional well starts to get depleted, the energy company working that well can stimulate further oil or gas production by injecting fluid down into the well. The injected fluids create a source of pressure separate from geothermal forces, to help the conventional oil or gas come up.

But there's a lot of oil and natural gas that's trapped in tight rocks, and not stored separate from rocks in big underground reservoirs. By some estimates, there's as much, or maybe twice as much, oil or natural gas trapped in shales and other tight rocks as there is in conventional reservoirs. But these hydrocarbons are a lot harder and more expensive to recover than hydrocarbons in conventional reservoirs.

It took energy companies 20 years to learn how best to recover oil and gas from tight rocks. To do so, these companies brought together three technologies. The first is hydraulic injection or fracturing. Companies figured out how to use hydraulic pressure, not just to create liquid pressure at the bottom of the reservoir, but to press on the rock, to break up or fracture the rock, and to release the oil or the gas embedded in the rock.

The second technology consists of “proppants,” which are mixed into the fracturing fluids. After an energy company stops injecting hydraulic fluids into a tight rock formation, once the liquid leaves, gravity collapses the fractured rocks and eliminates the fissures opened by fracturing. So energy companies needed to figure out how to mix sand or specialized industrial ceramic beads in the fracturing fluids, and to keep

those fractures open after the fluid left. Sand and ceramic beads are called “proppants”; they “prop” open fracturing fissures so that the gas or the oil can keep escaping up the well stem.

The last technology consists of horizontal drilling. It turns out that the best way to conduct fracturing and recovery is not to have a single drill pipe going down, but instead to insert six to eight pipes to “arc” horizontally away from a vertical stem. Multiple horizontal arms maximize the volume of rock being fractured in a shale formation. They also minimize the “footprint” of the exploration operation on the surface—and the inconvenience to neighboring land owners.

It took American energy companies a lot of trial and error with hydraulic fracturing and the other ingredients of shale exploration before they got the right combination of technologies. Companies started experimenting with shale exploration in the late '70s. They really didn't get it right till the late '90s, and so it was really only around 2000 that shale fracturing became a profitable, cost-effective activity.

So much for the technology of fracturing; on to my second point: The shale boom has been a major American success story. Some say that the '90s was the decade of the Internet and the rise of the digital economy. The 2000s, or the decade from 2005 to 2015, might be called the decade of the shale boom. I'm not sure that hydraulic fracturing has created as much wealth as the Internet did, but it's still a significant success story. Many think that the recession that started in 2007 wasn't quite as bad as it could've been because shale exploration was creating new prosperity and commerce. By the late '80s, only about 0.6 percent of the US workforce was working in energy exploration. In the mid-'90s, that figure had tripled. About \$50 billion a year is created in net wealth thanks to the production of new shale gas. As for oil, prices at the gas pump are almost half as low as prices a year ago. Increased American tight oil production made a lot of Arab oil-producing countries increase production, to drive oil prices so low that American unconventional competitors couldn't continue to operate unconventional wells profitably. And low prices then let people have cheaper gasoline. Cheaper access to gasoline frees consumers to drive places they couldn't have afforded to drive before. Cheaper natural gas means lower energy bills for home for heating. Also, cheap natural gas indirectly contributes to agricultural production and to the production of a lot of things made with plastics.

So third: Hydraulic fracturing succeeded in the U.S. in the absence of strong federal oversight. American energy companies are producing natural gas from shales and oil from tight rocks in large part due to the working out, without interference, of the American common-law system. In the rest of the world, there are only four countries that produce any significant commercial quantities of shale gas or tight oil. They are Canada, the U.S., Argentina, and China. Canada and the U.S. are two countries in a



very small handful of countries in which the mineral estate, and hydrocarbons in the mineral estate, are owned by the surface land owner unless he assigns them away. To put it another way, in background American (and Canadian) common law, the mineral estate is private property. In most of the rest of the world, either the mineral estate is owned by the government, or the mineral estate is private property but general laws have established public ownership over hydrocarbons. In such countries, for any kind of energy exploration to go forward, somebody needs to get a permit from a government actor or several government actors. And so, in the rest the world, somebody has to persuade the government, and conventional energy companies, and environmental-conservation groups, and landowners, and “Not in My Backyard” (or “NIMBY”) forces, that it's good public policy to grant the permit. In the US and in Canada, the energy company needs to ask only the permission of the surface owners (or mineral assignees) and get them to enter into leases. This rule doesn't apply to public lands in the United States held by the federal government or state governments, and it doesn't apply in Canada for lands for which the granting province reserved the mineral estate from the land grant. Even so, this common law rule does govern in large parts of both countries, and more so in the United States.

On to my last point: This light regulatory presence stems not only from the common law but also from a deliberate choice by Congress. Congress has a low profile in energy regulation generally. In large part, that low federal profile is a consequence of American federalism. There is a lot of regulation of energy production by state oil and gas or railroad or mining commissions.

But this low federal profile exists in part also due to a conscious choice by Congress in the early 2000s. Under the Safe Drinking Water Act, Congress requires the EPA to enact regulations. These EPA regulations in turn require states to have different permitting or other regulatory systems for different kinds of in-state activity. Both the EPA regulations and the state regulatory systems are meant to protect fresh drinking water sources in states. It was understood, when the Safe Drinking Water Act was enacted in 1974, that the Safe Drinking Water Act wasn't meant to cover the regulation of hydraulic injections during the course of energy production. But if you look at the relevant text of the Safe Drinking Water Act, it's tricky; the text could easily be read to suggest that the EPA could or needed to regulate hydraulic injections along with other possible contaminants of fresh-water sources. If you know the case *Food and Drug Administration v. Brown and Williamson Tobacco Company*, the issue is similar. If you look at the statutory definitions of “drug” and “device” under the Food, Drug and Cosmetic Act, and you look at a cigarette, the statutory definitions seem on their faces to cover tobacco and cigarettes. The U.S. Supreme Court held that the FDA was precluded from asserting this jurisdiction in part because the FDA had for decades insisted that it lacked jurisdiction over tobacco, and in part because Congress had relied on those insistences to enact several tobacco-specific regulatory schemes.

There was an argument like that to be made about hydraulic injections. Under this argument, the kind of injections that were going on in hydraulic fracturing might be covered by the express terms of the Safe Drinking Water Act, even if the parties involved in enacting the Act hadn't expected it to be applied to such injections. From the enactment of the Safe Drinking Water Act to the late '90s, the EPA stated that it didn't have jurisdiction to cover hydraulic fracturing. The EPA refused to include in its regulations special requirements for hydraulic fracturing.

In the late '90s, however, an environmental group sued the EPA, asking a court to make the EPA withdraw approval of an Alabama program regulating underground injections. The environmental group (Legal Environmental Assistance Foundation, or "LEAF") argued that the Alabama program was deficient because it didn't regulate adequately hydraulic fracturing for coal-bed methane. The EPA had rejected LEAF's petition to have the approval withdrawn by citing its understanding of the scope of the Safe Water Drinking Act. The Eleventh Circuit granted LEAF's petition for review and remanded for the EPA to take another look at the petition under the Circuit's interpretation of the statutory language. The circuit court said, looking at the text of the Safe Drinking Water Act, we think that the EPA has no discretion other than to change its regulations to cover hydraulic fracturing.

In the Energy Policy Act of 2005, however, Congress made the background understanding cited by the EPA an express exemption from the Safe Drinking Water Act. Congress took account of how the Safe Drinking Water Act had been understood for, at that point, 25 or 30 years. The EPA also did a study of hydraulic injections in coalbed methane production (published in 2004) and found that they didn't pose a significant threat to fresh water. Taking account of that study and of its own understanding of the act, Congress instituted a provision of the Energy Policy Act saying that the rules that the EPA issues for safe drinking water, and specifically for injections, aren't meant to cover hydraulic fracturing, except when hydraulic fracturing uses diesel fuel. Legally, this exclusion had the effect of codifying what might have been probably an implicit understanding in the agency and in practice and in Congress before then. Politically, however, the exclusion had the effect of sending a strong signal that the EPA should stay out of state regulation of hydraulic fracturing, at least when fracturing raises questions about fresh-water sources.

For the purposes of this panel, that provision of the Energy Policy Act raises some interesting questions. Here is one example where Congress actually did make its will known—and its will was that the federal government have a very limited role.

Is this model replicable? In some ways "yes," in some ways, "no." Probably "no" in more ways than "yes." Let me explain some of the circumstances that came together

for Congress to play an active role in federal-state fresh-water policy—and ask how often these circumstances will arise in other cases.

This is useful to know: If there is an organic statute that needs to be overhauled or tuned up regularly, Congress can make its wishes known on a specific topic by including a rider in the provisions of the tune-up act. But that model doesn't seem likely to work so well as a general model, I think. Or, to be more precise, the Energy Policy Act doesn't provide a great model to apply to a lot of the topics talked about by the panelists who have already spoken. In the Energy Policy Act, environmental policy was being made on one specific environmental topic in a big energy bill. Most of the topics that the other speakers have talked about raise big questions of environmental policy, and need to be addressed in an environmental statute.

The Safe Drinking Water Act illustrates another important phenomenon: Many modern federal environmental statutes and regulations apply in practice in ways that leave federal administrators with discretion. That discretion seems the rule, and the fact that Congress narrowed the discretion in the case of the Safe Drinking Water Act seems an unusual and lucky exception. The Safe Drinking Water Act sets very strict standards, to make sure that the quality of fresh water is assured. But these standards reach further on paper than legislators expected in practice. In the details of the EPA's regulations, and in implicit understanding, it was understood that the strict, low-tolerance standard didn't apply to some activities. This tension in the Safe Drinking Water Act fairly represents what often happens in many other contemporary federal environmental regulatory programs. In other programs, there are often tough standards, strict standards, but either they're not meant to apply to all activities, or the EPA issues regulations that exempt some activities. Regulated companies and environmental groups spend lots of effort in politics and administrative processes arguing and settling which activities are covered by strict standards and which are exempt.

Here, I'm not so sure that the Safe Drinking Water Act model can be applied to a lot of other environmental statutes. Congress was able to clarify the federal role toward hydraulic fracturing and fresh-water quality because hardly anyone was paying attention to fracturing in 2005. In 2005, I think there weren't a lot of people paying attention to hydraulic fracturing, and those that were people who were seeing its economic success and its economic potential. In 2015, *Gasland* and other movies critical of hydraulic fracturing are now part of the discussion, and there's a very active grassroots movement to critique or criticize or delegitimize shale exploration. In many states, towns are trying to ban fracturing. One state, New York, has issued a moratorium on fracturing. The exemption I've discussed here is now called by critics the "Halliburton loophole," and some members of Congress introduce bills each

Congress to repeal that exemption. In short, fracturing wasn't a polarizing topic 10 years ago. It might be now.

Even so, the Energy Policy Act/Safe Drinking Water episode does offer at least one example where Congress has been able to make its will known. That example should challenge us to ask a couple of questions about environmental policy more at the core of this panel. And one question is the question that Professor Robinson asked. The Energy Policy Act was legislated because members of the energy committees in the House and Senate thought that energy statutes were overdue for a tune-up. Is it the case that enough environmental statutes like the landmark ones enacted in the early '70s—are they due for a tune-up? Maybe it's the case that the obsolescence in these statutes will force Congress to act.

One last thought: Maybe the lesson from the Energy Policy Act has to do with partisan political coalitions. Today, the discussion on this panel, and among federal policy-makers today, assumes that Congress won't be able to make its will known when Congress is controlled by one political party and the Presidency by the other party. In the Energy Policy Act, Congress made its will known when Congress and the President were controlled by the same political party. Maybe Congress seems least able to stake out its role when there's divided government. I wonder whether the model of a split presidency and Congress is the only way to think about things. Maybe what has to happen is that Congress establishes a clear role best when one party controls the House, Senate, and President, and that combination of House, Senate, and President then institutes an overhaul of the environmental laws.

Thank you very much.

[Applause.]

**JUDGE STEVEN M. COLLOTON:** Well, thank you, Professor Claeys. Why don't we have some discussion, and then if any members of the audience wish to speak, I'll keep an eye on the line that starts to form there. But let me first open it up to the panel. David, maybe you'd like to take a crack at the questions that Professor Claeys just raised. Are you optimistic that obsolescence by itself will prompt Congress to act?

**PROF. DAVID SCHOENBROD:** Well, I would like to trump Professor Claeys optimism with experience.

[Laughter.]

**PROF. DAVID SCHOENBROD:** The "Breaking the Logjam" project involved 50-some environmental law experts from across the political spectrum. We had this

report, we had a book published by Yale University Press. We went down to Congress. Dick Stewart, former chairman of the Environmental Defense Fund, also Assistant Attorney General under Bush I, and I went down, and we talked to lots of Members of Congress, and what we got was basically this response: "We think what you're suggesting is terrific, but you know Congress won't to vote on that. They won't want to do anything with it because they are not responsible right now, so it's better for them, from their point of view, to do nothing." And you know, that's exactly what happened. I had one subcommittee chairman say, "I really believe in this. Let's work together to figure out how to do it." We had a meeting with a couple of Senators and a couple of congressmen, but they preferred to wash their hands of responsibility. It's a problem of incentives. I agree with Mr. Leggett that Obama's been terrible in many ways, but the fundamental problem lies in the incentives of Congress. Until they have to vote on the regulations, they're not going to do much.

**JUDGE STEVEN M. COLLOTON:** Well, if the public really shared Mr. Leggett's view, or does share Mr. Leggett's view, do you feel the electorate is not likely to hold Congress accountable, knowing that Congress could, by its actions, override executive regulations?

**PROF. DAVID SCHOENBROD:** Well, we know what the public thinks about Congress. I mean, the polls show that it's doing terrible. We had a panel earlier where Professor Mayhew showed data showing the bulk of the electorate thinks Congress should be responsible. But the problem is, we don't vote for Congress. We vote for Members of Congress, and they always take the sound-bite position such as "I'm against pollution killing children" or "I'm against regulation killing jobs." They get reelected on that basis. Until they have to vote on the regulations, they're going to keep doing the same old thing.

**PROF. NICHOLAS ROBINSON:** I don't disagree with that. I think that's been the consensus that I've been hearing through this meeting, but obviously that's not sufficient. We've got to find a way around that, and one of the pragmatic ways around that would be to take—each of the 50 states has associations of their own environmental managers or regulators in water quality, sewage treatment plant systems, not your hot button topic, but something we all have to work with and make work. So if these folk, if the societies that exist and have representation here on the Hill, were to argue that "we think this part of the regulatory system and all the regs that go with it is obsolete, let's sunset them," Congress can take a pass. They don't have to act then. They can just say, "Oh, well, if this is what the professionals think is appropriate, we'll just approve it." And then we could actually make some progress and move on and build the confidence that we can do that. So we might want to take a look at alternative ways of skinning the cat, so to speak.

**JUDGE STEVEN M. COLLOTON:** Mr. Leggett, do you have any reaction to that suggestion from Professor Robinson?

**MATT LEGGETT:** Well, with all due respect to the professors, I don't know what Congress they're watching. This Congress, ever since 2015, has been voting on these issues, many times over. On the Keystone Pipeline bill alone, we voted on 42 amendments, which was more amendment votes than Harry Reid held the entire year before, on one bill, in two weeks. And many of those votes were on environmental issues. On the budget, we voted on many budget amendments expressing the sense of the Senate as to what they thought on the Waters of the U.S. rule, for example. We just, within the past few weeks, processed a bill on the Waters of the U.S. and also a CRA. We'll be voting on CRAs most likely this week, on the Clean Power Plan. There is a possibility of a CRA at some point on ozone.

Congress has been very active in these issues this year, and we have been very insistent on attempting to build as much bipartisan support as possible for these pieces of legislation. We have certainly made our views clear to the administration that way and in many other ways. And, furthermore, I would say that Members have been held accountable for their votes in the past. I think the 2014 election can partly be explained by the votes of many Democrats in energy-rich states. And so I just have a fundamental disagreement, I guess, with your portrayal of where Congress is today.

**JUDGE STEVEN M. COLLOTON:** Professor Claeys, jump in, and then we'll come back, and then I know we have some people lined up, so we'll get to the audience quickly here. Eric?

**PROF. ERIC R. CLAEYS:** Professor Robinson mentioned one thing that I had been thinking about before preparing my remarks, and I'm really glad he brought it up. It's the idea of sunset provisions. I think one way in which environmental law might be made better is if environmental laws were to sunset, and so the deadline of an expiring organic statute were to clear everybody's mind and make them realize we need to update the statute and the way it's administered.

And Professor Schoenbrod wanted to trump my sweet story with experience. I want to say first, he said "trump. "

[Laughter.]

**PROF. ERIC R. CLAEYS:** I've got experts, and I'm going to have my experts talk to his expert. No.

[Laughter.]

**PROF. ERIC R. CLAEYS:** He's right that I have just one case study here, and also he knows far more about environmental law than I do. So I'd believe his experience over my datum, too. But on the other hand, we had to have something to talk about for an hour and a half, and I think that thinking about an example like the Energy Policy Act is worthwhile, because it shows that there are some cases where I think Mr. Leggett's right and I think there are some cases where Professor Schoenbrod is right. And if one thinks through the institutional forces driving each of the different cases, one gets a better sense of when things work and when they don't. So the Energy Policy Act, what was driving that was a sense that a lot of provisions of energy law, like the organic statutes for FERC, were out of date, and these needed overhauling because everybody, Democrat or Republican, thought that we needed to have a better energy grid and a better system for regulating energy. So if that bill is passing, and there are things in environmental policy that are germane to an energy bill, the costs drop at least in that context.

So then Professor Schoenbrod's right that if you're talking about a lot of core issues about clean water and clean air, the politics in those subcommittees are definitely not the same, and they're much more partisan. But even there, then, what came out of a lot of the discussion among the four of us, I think, is the question to ask. If the Clean Air Act was last amended in a big way in 1990, and it was first enacted in '74, and a lot of the other environmental statutes really haven't changed that much since the early '70s, they're getting obsolete. And an administration can try to circumvent that by trying to make policy by informal means—not informal rulemaking, but by press statements or hints to industry about what's going to happen. It can also try to make policy by doing a rule and trying to litigate for 10 to 12 years and hoping the industry will fall into line. But neither of those is perfect. Both can be circumvented, and the EPA has been losing a lot of challenges in federal courts recently. It could be that after enough pent-up frustration with making the law by not legal, informal means and making rules that get voided, even environmentalists might decide they want to come to the table and see an overhaul of the statute, just to get a set of statutes that's more understandable and more likely to be where we are now. Maybe.

**PROF. DAVID SCHOENBROD:** Let me just—go ahead.

**JUDGE STEVEN M. COLLOTON:** Go ahead, and then I want to go to our audience.

**PROF. DAVID SCHOENBROD:** Right. Eric, let me just give you a couple of other experiences. When Dick Stewart and I were trying to sell the "Breaking the Logjam" proposals, we also met with environmental groups as well as counsels for big corporations, and they both said basically the same thing. The environmental groups said, "We're for the reforms you're proposing, as long as you prove to us that the

environment will get better as a result." The corporation counsels were saying, basically, "We're all for it, as long as it costs us less." And actually, that wasn't so bad, if somebody was willing to take responsibility, because actually there is room for more bang for the buck here. But the point is that it's just so much easier to avoid responsibility by doing nothing. Given that, how are you ever going to sell a sunset provision on the Clean Air Act? You just can't do it, because everybody wants their guarantee it's going to come out right. And even if you did to get the sunset provision, the incentives would still be to do exactly what they did the last time, which was to be for giving everybody their rights and imposing no burdens. And yes, there are a few issues like Keystone where one party will be willing to take a position, but probably, given divided government, it won't pass anyway. So I think until Members of Congress actually have to take responsibility for choices like, "Do you cut pollution 58 percent versus 63 percent?"—that's the level at which trade-offs are possible. That's where politics work. But as long as the issue is health versus jobs, there's no compromise, and that's how we got to be where we are today.

**JUDGE STEVEN M. COLLOTON:** Gentlemen, you've been waiting patiently, so why don't I recognize our audience members. If you wouldn't mind identifying yourselves, and then you are welcome to address the panel.

**ILYA SOMIN:** Ilya Somin, George Mason University School of Law. I'm a colleague of Eric Claeys there. So it seems like if there is one thing that all of the panel was to agree on, it's that Congress should take a more active role in managing environmental policy, but I wonder if that's actually going to be feasible to any great extent given the current structure and scope of the federal government, when the federal government controls so many different areas—not just in environmental policy, but many others. It seems almost inevitable that Congress is not going to have the time and expertise to closely manage more than a small fraction of that, so they're going to delegate a lot of power to executive branch agencies and the like. And it also seems almost inevitable that the voters are not going to hold Congress accountable for doing this, to a large extent, because the voters themselves have no idea of most of what's going on because there is so much of it and it's so large and complicated. So my question to the panel is, if you really want Congress to manage all of this environmental policy and other regulatory policy as well, perhaps what we need to do is to reduce the amount of policy for them to manage—that they can't closely control all these things if there's so much of it. That may mean making hard choices about which stuff really should be controlled at the federal government level and which can be left to the private sector or to the states, but if you want congressional control may be there should be less activity that they have to oversee in the first place. Thank you.

**JUDGE STEVEN M. COLLOTON:** Thank you. Professor Robinson, your reaction to the comment?



**PROF. NICHOLAS A. ROBINSON:** Well, I think we already are outsourcing areas of environmental management which are not very controversial sometimes. For instance, the Department of Defense and particularly the Department of the Army is one of the best environmental agencies in the nation. They have a very good internal accounting system. They are very careful about it. Of course there are mistakes, but they learn from their mistakes. The military is a self-learning institution. There is not much controversy about how the Army complies with, or even innovates in its compliance with, environmental law.

Another example is the Great Lakes Compact.<sup>14</sup> You may not know the Great Lakes Compact, but all the states that are in the water basin of the Great Lakes did this extraordinary thing. They adopted exactly the same piece of state legislation to regulate the ecological integrity and water volume of the Great Lakes. The two Canadian provinces were invited to do the same thing and did. A compact was drafted and sent to the Congress. It was adopted by the Congress and signed by President George W. Bush. It was adopted unanimously in the Congress. It was adopted throughout the state legislatures. And that of course is a self-management system in which, with everyone's consent, the power devolved great back to the Great Lakes states basin jurisdictions to manage the Great Lakes. Now that is a pretty remarkable result. The fact that there was unanimity in Congress on the Compact shows that some bottom-up systems do work well. Perhaps it makes sense to outsource the Congressional regulatory role to the regions of states. We would then experience the environment being managed in the place where the environment exists. So I do think there are ways we are managing human impacts on the shared environment effectively, and our society may wish to learn from some of those ways.

**JUDGE STEVEN M. COLLOTON:** Any other comment on that?

**PROF. ERIC R. CLAEYS:** I'm broadly sympathetic. I think one of the best ways to do that environmental policy is to take a page from what was said by one of the four governors who spoke at the Gala Dinner last night. I think it was Governor Ricketts, from Nebraska. Whoever it was, one of the governors said that the federal government should follow in environmental policy principles of subsidiarity, and local problems should be dealt with through the common-law property and tort system. More complex problems, local governments can address with local land-use regulation, and even more complex ones can be dealt with by states with comprehensive state programs. I think the federal government would be more successful in environmental policy if it did fewer things.

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<sup>14</sup> THE GREAT LAKES COMPACT, <http://www.greatlakes.org/compact>.

And then the only other thing I'd say is, in the long term, sensible allocations of authority won't be drawn until we get rid of the political ignorance about which Professor Somin has written so ably. Check his website for copies of his book

[Laughter.]

**PROF. ERIC R. CLAEYS:** We're good colleagues, like he said. And in the short term, one of the ways to do that is to look at examples where the EPA hasn't done things so well, like the water spill in Colorado this summer. Political actors should try to use examples like that to make vivid to the otherwise politically-ignorant voter that, if the EPA's not doing well the core things that it should do best, here's what needs to change so that the EPA has more time and capital to focus on its most central priorities.

**JUDGE STEVEN M. COLLOTON:** Mr. Leggett.

**MATT LEGGETT:** I think it's an interesting question to ponder what might be on the horizon in terms of environmental statutory reform. There are clearly a lot of environmental statutes that are probably obsolete and need to be reformed. I guess one question I would have in general for people to think about is, to what extent have some of those statutes become obsolete because of their reinterpretation by the current administration. A lot of their parameters have been pushed very hard over the past eight years, and I just wonder to what extent the executive branch's activities with these statutes has actually potentially made them obsolete. It's just a question to think about.

**JUDGE STEVEN M. COLLOTON:** Next question, sir.

**ROMAN BUHLER:** YES. Roman Buhler with Madison Coalition. I was a committee counsel for Congress for 14 years, and I came in thinking we could change the world, and we discovered that it takes 60 votes in the Senate, and limited-government folks haven't had that in a long time. So I share, I think it was Professor Robinson's view—no, maybe it was Professor Schoenbrod's view, that the REINS Act is a charade, because it's not going to happen.

But there is an effort out there that I mentioned in the previous panel to do what States did when they forced Congress to propose the Bill of Rights, that if two thirds of states agree on an amendment, three times in American history, the states have been able to force Congress to propose a specific amendment. And there's this amendment out there called the Regulation Freedom Amendment, which says that if a quarter of the Members of the House or the Senate object in writing to a proposed federal regulation, then Congress has to approve it before it goes into effect. There are 500

legislators who supported, 15 state legislative chambers, including both houses of the Wyoming legislature that have passed resolutions urging Congress to propose it, and the General Counsel of the RNC, for past general councils, the American Farm Bureau, a number of Chambers of Commerce around the country, have backed it and it may be that breaking the deadlock in Washington can't be done in Washington—that it's going to take the states, who hate federal regulators even more than Members of Congress and don't care if Congress has to take positions. That might be the answer, and I'd be interested in your reaction, and particularly Matt, because you're boss, John Barrasso has been a leader on this, would he be interested in talking to people in Wyoming and us about being a leader on this Regulation Freedom Amendment effort.

**MATT LEGGETT:** Well, I'm not going to make any commitments for my boss today, but—

[Laughter.]

**MATT LEGGETT:** —we will certainly take it into account. I think that's a very interesting proposal. I can't agree with you more that states are becoming more and more critical to checking the power of the federal government, and in particular federal agencies. We in the Congress often view that through the lens of lawsuits, and it sends a pretty powerful message to us that a majority of states are actually spending resources and time many of them don't have in order to bring federal lawsuits against, in particular, EPA actions, but others as well. So I think this is an emerging trend that will be interesting to watch as we see a cooperative federalism sort of go into the future.

**JUDGE STEVEN M. COLLOTON:** David, what do you think? Do you think the regulation freedom amendment could break the logjam?

**PROF. DAVID SCHOENBROD:** Well, I think that there was fair movement on the congressional responsibility act in the 1990s, and if REINS was reformulated, renamed, some poison pills put in there to ensure that it never gets enacted were taken out, I think there's a fair chance it could be passed. I think the constitutional route you're talking about—I'm not optimistic we're going to get what we need to get it through, but it certainly would put some extra pressure on Congress, so go for it, please.

**JUDGE STEVEN M. COLLOTON:** Yes, sir.

**JOE COSBY:** Joe Cosby from Washington. It strikes me that an awful lot of the discussion in the panel and the questions have been about what States can do, and I'm

struck in particular with Professor Robinson saying that regulators are all very concerned about these obsolete statutes, but his prescription is to have them lobby more in Washington to try to get things changed. I'm wondering, particularly with Professor Clay's presentation on fracking, and how the federal government just simply not being involved has been beneficial, is there an opportunity, rather than to come to Washington and ask Washington to change things, is there an opportunity there or elsewhere for the states simply to take the lead? And in particular, is there a workable model of competition among state governments to try to address some of these things that may actually work.

**JUDGE STEVEN M. COLLOTON:** All right. Very good. Thank you for the question. Professor Robinson, what about the states taking the lead, laboratories of experiment, and so forth?

**PROF. NICHOLAS ROBINSON:** Well, I think this is a very good question and a thoughtful one. Under the Supremacy Clause, Congress has exercised its power, and the EPA or another federal agency issue regulations, the opportunity for creative federalism is constrained by those actions. So when I was suggesting that the state regulators might like to suggest areas where the regulations could be dropped back, and everyone agreed, you might even get the agencies doing it because the pressure would be on. In the areas where there is no regulation, then I think states do innovate. We have a very interesting pattern of states learning from each other—the better management of state park systems, for instance, learning how to deal with protected area management. We have some very interesting innovations going on with one of the great problems in suburbia, which is the deer. With the suburbs, some people do not want other people to hunt deer, so as deer populations increase and hunting is banned, the major predator of the deer is the automobile, and then people are harmed in automobile crashes with deer and they do not like what happens to their automobiles or lives. Local governments and states are obliged to experiment with some very interesting innovations to deal with wildlife management, which is not, in that case, a federal question.

So, yes, it would be useful to promote innovation in state environmental governance regimes. But the real problem is that when the EPA drops the ball because it cannot presently function, the states have to then administratively fill in the gaps, because companies and the public are legally obliged to apply for permits. Industry is not going to wait for Congress or the EPA. So the state agencies are taking up that slack, and they are doing it often in an, *ad hoc* fashion. Often there is no consensus about how to do fill the gaps around the nation. The result is —instead of an integrated federalism -- a mosaic, a patchwork quilt of inconsistencies, which is the hardest thing for a nationwide company or regional company to cope with.

**JUDGE STEVEN M. COLLOTON:** We have two minutes until lunch. We have one more question from the audience—

**PANELIST:** No pressure.

**JUDGE STEVEN M. COLLOTON:** —so for an answer, the question will have to be quick.

**JOHN HAYS:** I'll make it as quick as I can. I'm John Hays from Texas. I happen to be both a practicing energy lawyer, heavy in oil and gas, and also I teach a course called Energy Law and Policy at the University of Texas Law School. Picking up on the issue of the states, is not one of the lessons from the way the Energy Policy Act handled fracking, namely that the states can do the job and that federalism can work, and would not we be better off if perhaps the courts were a bit more aggressive in entertaining claims that we do not need federal or national regulation, that it's truly a local matter—as is fracking, largely? If there is any injury to groundwater from fracking, it's localized; it's not a national problem. And perhaps could not the courts take a more active role? Thank you.

**JUDGE STEVEN M. COLLOTON:** Professor Claeys, any thoughts on that fracking question?

**PROF. ERIC R. CLAEYS:** I'm sympathetic to everything you said. I'm not optimistic that, like, *NFIB v. Sebelius* or *Wickard v. Filburn* is going to be reconsidered any time soon. See *NFIB v. Sebelius*, whatever it means.

[Laughter.]

**JUDGE STEVEN M. COLLOTON:** Well, thank you very much for your attendance here today. Why don't you join me in thanking our panel of experts.

[Applause.]

**JUDGE STEVEN M. COLLOTON:** We're adjourned. Have a great lunch.