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MIKE LIVERMORE: Welcome to the *Free Range Podcast*. I'm your host, Mike Livermore. The episode today is sponsored by the Program on Law Communities and the Environment at the University of Virginia School of Law. With me today is Richard Lazarus, a professor at Harvard Law School and author of the book, *The Making of Environmental Law*, which is recently out in its second edition.

Hi, Richard. Thanks for joining me today.

RICHARD J. LAZARUS: Delighted to be here. Thanks for the invitation.

MIKE LIVERMORE: So one of the big takeaways that I've always gotten from *The Making of Environmental Law*, both the first and the second edition, is your view that kind of environmental law is hard. It's a particularly hard area of law and policy. First, just get us started, do you think that's a fair reading? Is it an accurate characterization of the view that you have in the book?

RICHARD J. LAZARUS: Yeah. I mean, absolutely. And I try to tease out the reasons why. It's something I thought a lot about when I started teaching, actually, now 40 years ago.

And I thought a lot of people just think it's hard because there are good guys and bad guys. And I think it's much more complicated than that. And I think they're just endemic reasons, structural reasons for why it's hard, rooted in the nature of environmental science and environmental economics, and how they collide with our law-making systems.

MIKE LIVERMORE: And so you talk in the book about the spatial dimensions and the temporal dimensions. So maybe we could just get on the table what some of the kind of particular complexities of environmental of, let's say, of the environmental domain as a subject of law and policy.

RICHARD J. LAZARUS: Yeah. Well, I think when it comes down to it, it's sort of pretty simple. And that is that our ecosystem, by its nature, spreads out cause and effect over time and space. So what that means is you have activities in one place at one time that have consequences in another place in another time.

And that can be fairly simple. Like you have a power plant, which is discharging pollutants into a waterway which flows into other neighborhoods. It can be a power plant or any kind of a manufacturing facility, which puts emissions up into the air. And it has impacts in other places from where the activity is located.

It can be picking up hazardous waste or solid waste and taking a truck from one place to another place. And if you look at the history of environmental law, you often see that it's not coincidence. That a lot of activities happen at borders.

A lot of polluting facilities are in one jurisdiction, and they cause pollution in another jurisdiction. And so there's this temporal and spatial separation, which makes it hard to make law because you're regulating some people at one place in time for the benefit of another group of people at another place in time.

And that can be a few feet. It can be miles. It can be thousands of miles. It can be a few days. Or it can be, as we see with climate change, it can be hundreds of years.

And it's hard for any law-making system to deal with that because you're basically imposing the cost of regulation on one group for the benefit of another group. And that means environmental law is inherently redistributive. And that's hard.

And when you add major separation of retirement space, and that's just what the ecosystem requires. You can't work your way around it. And that's really hard because it's also separate in time and space means there's a lot of scientific uncertainty and what's going to happen over time and space as well. And so you put those ingredients together, it makes it hard to pass the laws and hard to administer them over time.

**MIKE
LIVERMORE:**

Yeah. It's really interesting because all this is true. But from my own personal story, part of what attracted me to environmental law, the environmental domain was, at least my first impression, that there was something actually easy about it, at least theoretically, that environmental law is super well justified. There's kind of classic externalities.

Almost any moral theory is going to have a place for-- even extreme libertarians likely will have a place for at least some environmental law. When I was first kind of engaged in environmental law and politics, I was attracted to the fact that there was at least some degree of seeming social consensus that we cared about the environment, that we wanted to protect it.

As I learned more, it seemed that there were some clear tools that we could use that would be very effective. But of course, in reality, there's a lot of space. So all of that may be true that some things about environmental law that is easy. But of course, there's a huge amount of space between those theoretical points and the practice of environmental law.

And do you see that as mostly a result of the distributional consequences of environmental policy that tends to have important distributional consequences?

**RICHARD J.
LAZARUS:**

Yeah, I do. I think for the first 20 years or so, I tend to think more about macro issues. And that is what's the right level of pollution. Look at the cost look at the benefits and figure out what the right level should be.

And then you had to deal with these problems of whether you have a common denominator to compare the costs and benefits and whether some uncertainties which made it hard to measure the value. And then it was over time, I started focusing more on the distributional side.

And the fact is the environmental law doesn't just have to deal with the hard issue of how do you compare the costs and benefits and figure out the right level of pollution. It has to deal with the more fundamental question of the costs go to some, the benefits go to others. And that's really hard for any kind of law-making system to deal with.

And then it turns out it's really hard for our law-making system to deal with it. There's a fundamental challenge to Democratic institutions to small national government built into our Constitution, larger state and local governments to deal with these kinds of redistributions over time and space. And it's something I began to focus on in the '90s a lot when I thought more about environmental justice. And then climate change just blows the whole thing apart. It's sort of the worst nightmare for environmental law making.

MIKE LIVERMORE: Yeah. It's all of the problems just amplified, absolutely. So just in terms-- that's an interesting personal history of first thinking about, as you said, the macro questions or maybe the aggregate kind of questions. What's right from the perspective of society as a whole. And then over time, getting attracted to and recognizing the importance of distributional questions.

So would you say that you were kind of equally attracted to all of this or that you actually find the hardness of environmental law-- it might be frustrating sometimes-- but intellectually interesting? Or is it just, from your own motivation to continue working in the field. And obviously, you've had a wonderful career over many years.

Do you find the difficulty motivating? Or is it just like, look, darn it, we need to fix these problems. And it might be hard, but we have to plow through. And the difficulties are just something we have to figure out how to manage as best we can?

RICHARD J. LAZARUS: Yeah, I find it really motivating. I'm an academic. I'm a scholar. I find it very motivating. And I think teaching about it so people are more sophisticated. And thinking about what makes it hard makes them better environmental lawyers as well and better policymakers.

It is certainly part of what I find fascinating. And it explains things to me. And I think it makes me a better teacher, I hope. Because as you know, if you look at the statutes and the regulations, they're just a mess.

It's incredibly complicated. It's very dense, very technical. And if you provide the students and lawyers with some framework for understanding why it's such a riddle, why there are so many anomalies to it, I think a lot of it has to do with the challenge of environmental law making itself, which make more sense of the Clean Air Act, make more sense to the Clean Water Act, make more sense of laws like Superfund laws.

I think if people understand why it's hard, then it's easier to understand why it looks the way it does. And it makes it easier then to figure out, well, what do we need to do to try to change it over time? But for me as an academic, I find it incredibly intellectually interesting.

And I focus a lot, as a result, on sort of fairness issues. I think what a lot of environmentalists don't do is grapple with the fact that there is some fairness issues here. And you need to address them and not ignore them.

Because if you don't, we're not going to get the progress we need if we ignore the fact that these distributional consequences do mean, that while societies as a whole may be much better off, there are people who are hit by the failure to address these issues and people who are hit when we address them. And if you don't take those fairness distributional issues into account, environmental law is not going to make the progress it needs to make.

MIKE LIVERMORE: Yeah. And just reflecting on a point you made earlier, is that the kind of mismatch between our Democratic institutions, maybe especially that we have in the US, but generally political institutions broadly, the spatial dimensions, the temporal dimensions? Our particular system of federalism of very difficult lawmaking checks and balances, judicial oversight of the administrative state and so on, that these are very tricky institutional-- it's a tricky institutional environment to construct environmental law in particular.

Now, after you've been at it for a while, and you've just completed this the second edition of broad overview of environmental law in the States, is your sense optimistic? As you know, we've managed. It's not perfect, but we've done reasonably well at addressing many different environmental problems. Obviously, progress to be made, except for climate change, which is the biggest environmental threat of our time and then obviously other global threats.

Non-point source pollution for water has been a huge challenge that we haven't made a ton of progress on. So are you optimistic that we can still kind of work within the existing apparatus of institutions that we have in the US and continue to make progress? Or do you think at some level that we've gotten as far as we can with the institutions that we have, and that deeper environmental change is going to require some structural change in our system of government? Which isn't good news, because that would be hard--

**RICHARD J.
LAZARUS:**

Pretty hard to pull off. Let me put it this way. I tend to be optimistic and hopeful by nature. Some people may think sort of naively so. But I do.

I can't say I'm as optimistic now as I was when I published the first edition. It came out in 2004, but I really completed writing it about 2000 or 2001. And that's partly why I wrote the second edition. I

Had no plans to write a second edition. And then things happened after the second edition, after 2000, which surprised me. And it made me want to rethink things.

If you went back to the first edition, I really thought that as we entered the New Millennium in 2000, I thought that things were settling in a very positive way, that you actually had the environmental laws and protection laws of the first three decades '70s, '80s, and '90s, which were very disruptive of economic interest and investment-backed expectations and property rights.

I thought by the time we hit 2000, things had settled in legal landscape. And actually efforts to take those laws out were more disruptive than efforts to keep them in. And the laws have been enormously successful.

So I thought things were sort of settling in a positive direction, even on the climate issue. It struck me there was enormous potential for coherence and harmony. You had the Bush administration which comes in just when I'm publishing this book.

I mean, George Bush ran in 2000, saying he would regulate greenhouse gases. You had John McCain holding the first real Senate hearings on climate change, a major climate hawk. You had people joining the Bush administration who believed strongly in the climate issue.

Christine Todd Whitman, former Governor of New Jersey, took the job at EPA because she believed in it. You had Paul O'Neill, Secretary of Treasury, who was a climate hawk. So as Secretary of State Colin Powell and Secretary-- sorry, the National Security Advisor Condoleezza Rice.

There was a real movement. And I thought it was pretty confident that we were going to have Republican Democrats come together. Not long after that, Newt Gingrich and Nancy Pelosi did a joint ad on television, but they disagreed about many things. But they agree about the importance of addressing climate change.

So I really saw then in the early 2000s a settling of the issue. And that blew apart. It blew apart quickly, first during the first two years of the Obama administration, when they tried to really push the issue in Congress. And the Tea Party explosion response, which was focused on climate issues among others. It blew apart that coalition made impossible any kind of national legislation when we all thought it was going to happen.

And then election of Trump, who campaigned on climate change. He campaigned more on environmental issues than any president candidate ever had before. He campaigned on it. And he won, in part, because of it.

And so that made me think, all right. I need to rethink this. So it was in 2016 that I decided that I needed to think about doing a new edition of the book because a lot of my thinking turned out to be sort of too naive about where our country was and where consensus was.

So I can't say I'm as optimistic now as I was then. I tend by my nature to be pretty optimistic. But certainly, the climate issue has been a major wake up call in terms of how hard these issues are to address politically in our country.

And I think they ultimately have to be addressed politically. I don't think we can assume the courts are going to save us, as many people think they can. I don't think they will. We have to do it politically.

MIKE LIVERMORE: Yeah, I think folks who think the courts are going to save us are probably not paying very close attention to the courts that we actually have.

RICHARD J. LAZARUS: Exactly. They're back in the 1960s. They're back to the Warren court. They're back to Thurgood Marshall. They all think they're going to be Thurgood Marshall.

And there's going to be some extraordinary ruling, which is going to write us. The courts aren't even remotely there right now. Certainly, the US Supreme Court.

Even then, right? It was a good catalyst, *Brown v. Board of Education*. But it's not like we got rid of racial discrimination through one judicial decision either. It's taken a lot of legislation over time.

MIKE LIVERMORE: Yeah, absolutely. Yeah, thinking about that change, casting our minds back to 2000 or to even 2008 election, where you had both candidates, both major party candidates were serious about climate change. I sometimes think about what would have happened if John McCain had been president.

And it's just an interesting thing to consider. You'd have a Republican president who was a climate hawk. You'd have a Democratic Congress. Maybe it's not worth thinking too hard about that.

But it is interesting. Back then, you had what seemed to be much more, at least elite census. Now obviously, we've seen this the polarization that we have now is part of a process. I don't if you see it's the end of a process, but the process goes back some time.

And so the story broadly is there was a great deal of bipartisan agreement about environmental issues. As you note in the book, that can be overstated, especially Nixon's commitment to environmental issues. But there was. I mean, within the Republican Party, the party there at that time and for years afterwards. There were many folks who were strongly committed to environmental issues, both elites and within the base. And that's really changed.

So what do you think of are the main drivers, if we think of polarization on environmental issues as one of the defining factors features of this issue these days. How did that come about? What are the factors that you see as driving that kind of almost hydraulic increase in polarization over time?

**RICHARD J.
LAZARUS:**

Yeah. And it's very frustrating. But I think one of the drivers are really the distributional issues and the fact that some very powerful economic forces on the mining industry and sometimes in the fossil fuel industry at large. They took advantage of quite effectively of those distributional differences to focus on people in communities across the country to convince them this was a major problem.

Certainly, if you look at the 2000 election itself, people always think Florida made the difference. I always say West Virginia made the difference. West Virginia went Republican for the first time in decades in 2000.

And the coal industry is why they did. They viewed Al Gore as a threat. The day after the House finally passed a climate legislation in June 2009, I have to be traveling back in my home area of Central Illinois and Central Indiana. And that next day, I heard all these commentaries on the local radios as I drove about how that was going to increase people's utility electric rates, and what are we going to do to farming communities and rural communities across the country and employment.

I think that worked. I think it had worked effectively. And it really helped create this notion that environmental laws and climate in particular was hurting individuals. I think there was a lot of powerful short-term economic interests which fueled that. I think there was a lot of acceptance of it by government.

And sorry, not by government, by local people, local communities. And acting in good faith, they believed it, and they worried about it. And I felt the Democrats in part for how they tried to sell the climate issue about smart versus dumb, good versus bad and not taking into account the fact that there really are serious distributional consequences.

And when you try to do something that's significant, disruptive for people in their lives or their jobs, you need to make that part of the package in the first entrance. The classic example I always give of just a complete misstep was inconvenient truth.

That documentary came out, I walked out furious. And everyone else was cheering. I hated that documentary. It began with showing the Florida election dispute and showed that counting votes in Florida.

So they immediately equated climate change with Al Gore and politics. And then the next scene is Al Gore standing on a stage. And what's he doing? He's standing on the stage lecturing the American people about the truth.

And he's telling them about what he first learned about this where? At Harvard University, Harvard College. It's like a disaster. It's a complete disaster.

It's all making it about Al Gore. It's making it about what he learned at Harvard and how he's going to tell the American people the truth. That's just not how you sell something.

Make it about opportunity. Make it about dealing with people in their lives in local communities across the country, the distributional consequences they're going to feel because of climate change. And make it about things that can be done to address their needs as you transition out of such a carbon-intensive economy. And environmentalists stumbled on that. The same way they stumbled on environmental justice for a long time, they stumbled on the real fairness issues that good environmental protection laws implicate.

And climate change, I think, we failed on that. And we let it be captured by the Tea Party. Folks funded by just short-term economic interests in the fossil fuel industry who just saw a political opportunity, and they very effectively exploited it to the detriment.

So they've made environmental law. They've helped make it a very polarized issue. That existed before, right? Existed in the 1990s when the polarization happened. But it's gone in a very viral way and malignant ever since then.

**MIKE
LIVERMORE:**

Yeah. It's really gone through the roof. It's very interesting perspective on inconvenient truth. I mean, it is very, in retrospect, almost obvious that-- let's just say a non-ideal messenger for the cause of building social consensus on any issue is a failed presidential candidate. It's just not because that person is associated with one particular political party, and everything is just going to read as part of a campaign after that. So that's particularly tricky.

When we talk about polarization, what we're kind of speaking about specifically is the differences between the parties, inter-party difference on environmental issues. There was, oh-- there's always been disagreement, right? I think some people can be confused about the difference between those things.

We don't agree on lots of things. But then certain particular issues become very polarized, which is to say they line up with partisan affiliation. So we might say-- there's just something interesting about the story because within the Democratic party, there was-- if we kind of rewind a little bit, there was a lot of contestation about environmental issues. And within the Republican Party, there was contestation.

So what we had was kind of intra-party disagreement. So in the Democratic party, you spoke about West Virginia, the coal miners unions. They were never going to be huge fans of stringent environmental controls. Automobile workers and unions have lined up in a serious way against environmental organizations in the past.

Generally, working class voters who care about pocketbook issues. And when you talk about electricity prices, it's going to resonate with them. And traditionally, these were constituencies of the Democratic Party.

And on the Republican side, you had the kind of patrician folks who care internationalist, globally-oriented folks, folks who cared about-- they had big summer homes up in the Adirondacks or whatever. But also people that live in rural areas, and then you had the industrialists and folks who we're worried about regulatory costs. And over time, that difference within the parties really translated into differences between the parties.

And you mentioned a couple of actors out there. There's fossil fuel interests. There's the environmental groups. And you mentioned them stumbling.

I mean, I wonder-- I'm curious about what you think about one theory that I've heard about polarization, which is that the leaders of the Republican Party eventually decided that they were never going to get the environmental vote, that after, say, George H.W Bush who had done a fair amount on environmental issues was very good for a Republican, let's just say that.

And then the environmental community basically endorsed and went strong behind Bill Clinton, who was really not well known. And then of course, as an environmentalist--

RICHARD J. LAZARUS: That was an environmental disaster.

MIKE LIVERMORE: Right. Exactly. Exactly. And of course, Al Gore was on the ticket, but he was the vice president. And nobody really focuses on the vice president.

So yeah, I'm curious if you think there were strategic missteps or if this is, again, just part and parcel of a broader social processes that no one really could have done anything differently about.

RICHARD J. LAZARUS: Yeah. I think it's a little of both. Part of it is we did lose, generally, Southern Democrats in the Northeast Republicans. And that wasn't just environmental.

We used to have more conservative Democratic senators in the South. We had more Liberal Republican senators from the Northeast. And both of those have become sort of endangered, if not almost extinct species.

So you would see in the 1970s, these Republicans playing huge roles in maintaining and passing the environmental laws of those times. It's Stafford, Chafee from New Hampshire and Vermont and from Rhode Island.

You had Howard Baker right from Tennessee, a Republican being a champion at a lot of these issues. You had conservative Democratic members of the House and the Senate. Jamie Whitten, I think he was from Alabama and the South who were fairly skeptical of these laws.

So you had much more give and take and debate within the parties. And then because the Civil Rights to the rest of LBJ sort of said when he signed the Civil Rights Act of 1964, he famously said, there goes the Democratic South forever as a result. So you did have these, I think, more general trends beyond environmental law which happened in this country.

But I do think the unwillingness of environmentalists and their embrace of the Democrats and their embrace of all liberal issues sort of coming together played a contributing role here. It's why Richard Nixon, after 1970, basically says it didn't work.

It's just not a good political issue. I'm getting nothing. I got nothing for it. I did NEPA. I did the Clean Air Act of 1970. I gave this incredible environmental message in February of 1970. I got nothing for this issue, right?

That's what the Nixon papers show him saying to his chief-of-staff and advisor, Ehrlichman and Haldeman. He says, I got nothing for this. We need to get off of this issue. It's not a good issue. It's not a good political issue.

People don't run on sort of-- people can't win by convincing American people to do less. They win on freedom from government. And then Bush, who I think was an honest environmental president, again, Northeast Republican from Texas, but he grew up in Northeast Republican. He vacationed in Maine.

This is George HW Bush. He runs to be the environmental president. He's the first one who does. He campaigns against Michael Dukakis with ads showing how dirty Boston Harbor was.

He appoints his head of EPA Bill Riley, a complete Northeast Republican environmentalist, who had been president of the Conservation Foundation foundation in DC, ardent environmentalist. And they championed the Clean Air Act of 1990, this amazing law. And they push hard. They work together with EDF to get that law passed. It's a fabulous Law.

About 300 pages long compared to the Clean Air Act of 1970, which is about 30 pages long. And what does Bush get for it? Nothing. He gets no political payback for it from liberals and from environmentalists. So he pivots. He pivots away from it.

He pivots back to the industry base. When the Democrats nominated Bill Clinton to be president of United States, the Sierra Club chapter in Arkansas resigned to the National Sierra Club in protest. The Sierra Club endorsed Bill Clinton because he didn't have an environmental bone in his body as governor of Arkansas.

That's one reason he picked Al Gore to sort of give himself a little bit of credibility on environmental issues. But the early '90s, both the Democrats and Republicans sort of went to their opposite sides. And they've been there ever since. And it's a disaster. It's really been a disaster for the country because these issues, as you know and I know, they shouldn't be red and blue.

Sometimes they should be downstream and upstream or downwind and upwind as the wind blows and the water flows. With their distributional concerns, they've all become political ever since. And they undermined honest discourse. And even we thought we'd have it in 2008, 2009 with climate, it ultimately couldn't survive, and it helped to elect one of the most incompetent and threatening presidents the United States, Donald Trump, in 2016. Environmental law played a role in that.

**MICHAEL
LIVERMORE:**

Yeah. Yeah, no it is dispiriting, but it is also-- it's interesting to reflect on both as you kind of noted just the big structural changes in American politics over this period of time and also some of the-- yeah, also some of the strategic decisions. So at the same kind of timeline that we've been talking about, '70s, '80s, '90s that at least set the seeds for the current dynamic that we've seen in the subsequent or in the past 20 years, you mentioned it-- as I mentioned a couple of times, I want to dig into it is the role of environmental justice.

So that's changed a lot. So going back to the early days of the environmental movement as you note in the book-- and I think is always a fascinating thing to bring up in class is there was actually a-- it wasn't obvious that the civil rights movement and the environmental movement were heading for friendship, let's just say. There was real tension.

There was concern that environmental advocacy concern over environmental issues was drawing attention away from concerns of Black people, concerns about social justice, concerns about poverty in cities. There's something maybe troubling about certain elements of the environmental movement, how they frame issues of clean versus not clean, the kinds of issues that we're focused on the emphasis on kind of the suburbs and that kind of pristine environment. Obviously, there's a lot of weird discourse around Native Americans at this period of time. So yeah.

So it was-- there was from the very beginning kind of tensions. And again, this is kind of within the reformulated if we think of the Democratic Party as the party of civil rights. So that's obviously post LBJ kind of version of the Democratic Party. So there was a great deal of tension there.

I mean, how do you thumbnail that story of how we get from there through a long period of back and forth to kind of-- I think is fair to say of as really a rise in the prominence of environmental justice, the working pretty closely together of the big greens. The Biden administration has really placed environmental justice at the center of its environmental approach.

**RICHARD J.
LAZARUS:**

Yeah. So this is interesting. And it's not something discussed in much detail in my book as I wish because it's not an autobiography. But for me, sort of-- I think it was fall of '89, spring of 1990. I was in the law school faculty at WashU, and I had a complete wake-up call, complete wake-up call on these issues of environmental justice.

I mean, I was sort of like your classic person and young environmentalist. I went to undergrad University of Illinois. I decided I wanted to be an environmental lawyer. So I actually got a bachelor's of science degree in chemistry, a bachelor's of arts degree in economics, two different degrees all to do it.

All I did was environmental law in college. What I did in law school at Harvard was environmental law. And then I was an academic. I did environmental law.

I knew everything about environmental law. I mean, everything about it. I was completely immersed in it as a practitioner and as a scholar and teacher.

And then a guy named Kevin Brown walked into my hazardous waste class in 1989 at WashU, African American from Northwestern University undergrad. Kevin walked in my office. It was at a seminar I was teaching on hazardous waste law. At the end of class, he walked up to me, and he wanted to talk about what paper he was thinking of writing for the seminar.

And I said, what are you thinking about, Kevin? He said, well, I'm really interested in the idea that maybe hazardous waste sites and toxic issues are more in Black neighborhoods than White neighborhoods. Oh.

And I looked at him, and I thought to myself, huh, I've never thought about that. I've never thought about it. And I done the first Superfund joint and several liability case at DOJ, the [INAUDIBLE] case. I was immersed in those issues. And I thought, I've never thought about that.

Kevin, why don't you go see what you can find? I ran to Kevin a week later during the weekend at the library, which is where our offices were. And I said, what did you find? He said, I couldn't find anything at all. I said, Kevin, where are you looking?

He said, here in the law library. I said, Kevin if there was a law library, I'd know about it. Go to the main library. Go to Olin, the main library at WashU.

I ran into him a few days later with a pile of books, right? It was Bob Bullard's book that just came out. It was Charles Lee's toxic waste and race. The sociologists had just put publishing on it. And it was so fascinating to me, and I wrote an article on environmental justice.

I think I was the first law professor to write an article on it called "The Distributional Side of Environmental Law, Promoting Environmental Justice" at *Northwestern Law Review*. He said, I always hear classic sort of White male liberal, right? Interested in these issues. And I had never thought about it. And I knew my peers [INAUDIBLE] as well.

So it made me dive into it for the first time, and it made me rethink how I thought about environmental law. Generally, about distributional issues. It made me discover what you were just talking about that in the early 1970s, late '60s, the civil rights leaders, Hatcher, mayor of Gary, Indiana [INAUDIBLE] Mayor Hatcher. I remember his first name offhand.

Mayor of Gary, Indiana said, environmentalism has done what George Wallace, the segregationist, was never able to do, distract the American people from the needs of the Black communities across this country. And so at the same time, a lot of the Black civil rights leaders were seeing this as a distraction and as something taken away from their needs, and they're compelling. The environmentalists were adopting like the civil rights group tactics.

A lot of the early environmentalists had marched in civil rights, marches in the '60s. Then they went to law school. And what did they create? The Natural Resource Defense Council, their own defense fund. Then the Sierra Club Legal Defense Fund.

That was no happenstance, right? It was the NAACP Legal Defense Fund. They were adopting the rhetoric, the language, the tactics of Thurgood Marshall using courts. And it never occurred to them or to me that there was something they were doing, which actually was not just ignoring the environmental issues, the human health, public health issues of Black communities, but actually making things worse for them by not addressing their needs, by not focusing on their concerns, by not having citizen suits brought to address the environmental issues of those neighborhoods.

So it's a huge wake-up call to me when Kevin Brown walked into my off-- actually, it was in my seminar in 1989. And it made me rethink ever since not just environmental justice issues but fairness issues and environmental law. That could be fairness issues not just the EJ communities which I care tremendously about but also about communities which are sometimes adversely affected because of environmental restrictions by the loss of their jobs and their economies. Environmental law needs to take those things into account.

If we don't, then we do it at our peril. And that's what's happened, both on the right and on the left.

**MICHAEL
LIVERMORE:**

Yeah, it's interesting as we're kind of talking this through. It's really interesting story, kind of personal history there. Well, actually, I have maybe a quick question. And then I wanted to integrate this a little bit with some of the other issues that we've been talking about.

So at that time when you were first kind of had this experience of really thinking through the kind of racialized dimensions of environmental harm and environmental policy, was class something that would have already been on your mind? And it was kind of the racial dimensions that was kind of just coming up, not just with you, but within the whole field obviously. Was class something that was already on people's mind, or was it really folks just weren't thinking about this from a distributional kind of group level, race, class?

Maybe gender is in there too kind of perspective.

**RICHARD J.
LAZARUS:**

Yeah, I don't think they were thinking of it. And actually, this is what happened early on environmental justice. And that is when you start writing and thinking about it, there was a huge effort to say there's no race here. This is just class.

And so the debate became whether or not this was just another class-based issue or whether it's a racial issue too. And so the class dimension of it, which obviously does exist, because it's both, that became the response of people to say, no, you're wrong. There's no racial dimension to it. It's just a class base. It's just an economic-based issue.

And that really angered the environmental justice movement to say there was no race associated with it. I pretty quickly took the side there was a racial dimension to it as well. And I think a lot of the statistical analysis since then have shown that obviously is a class-based issue. But there's a racial civil rights dimension to it as well, which can't be ignored.

But interestingly, that became sort of the way to diminish the EJ movement early on to say, well, of course, there is. That's just an econ class-based issue. I think it was really important to establish that it was both, but it did make me think about the issue from both a racial and also a class-based issue.

I wrote an article fairly early on after that called "Fairness in Environmental Law," which was about distribution writ large. It was about EJ and race, but it was also about the takings issue. That's my one area of litigation. I've litigated a lot of takings issues in the Supreme Court. I always take the side of government.

That's something not a regulatory takings. The very first brief I wrote was a regulatory takings case, *Agins v. City of Tiburon*, that a lot of Supreme Court briefs and arguments-- the last case I argued a few years ago was *Murphy v. Wisconsin*, again, on behalf of government. Happy to say we won that case, which gets harder to do these days. But I wrote separately about the fact-- the fact that I don't think something is a taking as a matter of law doesn't mean I think there's no fairness issues there and that legislatures as a matter of legislative grace should find ways to compensate people for these disruptive measures, which we now need.

It's one thing to say it's not constitutionally compelled. It's another thing to say that it's not as a matter of legislative grace how you should treat people, how you should think about these transition issues. And one of the issues I wrote about back then in that issue and that article called "Fairness in Environmental Law" has come home to roost a really unpleasant way because they also wrote about criminal law.

And I wrote about my worry that the failure to take account of the fact that the mens rea issues for some of the environmental statutes-- I later wrote an article about this-- how there was some potential unfairness in applying in a very sort of undisciplined way all our environmental statutes to make them felonies without a mens rea, which required that level of criminal culpability associated with it, put those statutes at risk for being applied in an unfair way. And I wrote about it then that I wrote a big article about my worry, not that the law shouldn't have a criminal dimension.

They should. But you need to make sure the person who is convicted of it had a criminal culpability associated which warranted a felony conviction. And something about the nature of environmental law made that hard to do.

And we've seen that come back to hurt us just right a couple of weeks ago in the Sager case, where the court uses the criminal dimension of the Clean Water Act, which is a good thing. But they use that as an excuse to cut back on the scope of the statute dramatically throughout. So I think these fairness issues that again, if you don't pay attention to them, you let them go by, they come back to hurt you. They come back to hurt us politically.

And now with the Supreme Court decision, which is devastating to the Clean Water Act, they've come back to hurt us environmentally as well.

**MICHAEL
LIVERMORE:**

Yeah. Yeah, it's really interesting. And as you note that-- I kind of just go back to something we were saying a little bit earlier that the response of many in the environmental community was to kind of substitute or to argue that it was all about class and it wasn't about race.

And folks are just-- some folks anyway are more comfortable, I think, talking about class than race. But I think the conversation has come a long way since then. One of the-- as we're talking through this, one of the dynamics that maybe-- I'd be curious to your thoughts on is in our political system in a way, where we are right now is much more focused on the distributional consequences of environmental policy than it had been in the past.

And one way of articulating that or one way of kind of interpreting our current moment is the parties have just kind of adopted different constituencies that are differentially impacted by environmental policies. And so the Democratic Party has become much more oriented and the environmental movement within the-- which really frankly these days is mostly within the Democratic party, much more oriented around justice issues, environmental justice and is also trying in some sense, I think, to do things like build community with unions and other traditional constituencies within the Democratic party that they had been somewhat oppositional to in the past.

But the Republican Party is really focused on the distributional consequences on the other side of the distribution of the cost of environmental protection. And so Trump making a big deal about coal, the so-called war on coal, fundraising a bunch from fossil fuel companies, emphasizing electricity prices and the like. So I'm curious what you think of that read of the situation.

I mean, is there a sense? This would be very optimistic that-- actually, this is just the natural way that our system deals with when it's focusing on distribution, which is a key thing in environmental policy, is that parties are going to pick different actors out there and they're going to kind of advocate for their interests. So the Republican Party is advocating for the interests of the payors of the costs, and the Democratic Party is advocating for the interests of the folks who bear undue environmental burdens. And that's just like our system right now.

And maybe that's so-- so I'm curious if we're going to-- maybe the question is to try to articulate this is, if we're kind of in a mode of recognizing and focusing on the reality that environmental policy and law has very substantial distributional element, both on the harm of environmental pollution side and on the cost side, can we anticipate anything other than just straight polarization over that, I guess, where the parties are kind of picking people? Like, how do we do both things-- I guess, is the question-- focus on distribution and not be overly polarized?

**RICHARD J.
LAZARUS:**

Yeah. I think there is a pathway out of this, whether we can reach it in all the sort of noise that everyone makes. The pathway, I think, is twofold restricted distribution. And one is that the costs of pollution and climate change aren't just on some communities. They're also on a lot of red communities. There are a lot of local towns around the place who need drinking water and the rest.

A lot of them are going to suffer from climate change, not just in the long term in the near term. So I think it's making those communities realize that the consequences aren't just on other people. They are actually on their own rural communities. And we have a big rural urban divide in the United States.

There is a need they have for Clean Air. There's a need they have for clean water. There are real consequences to them in their lives. If they're in the fishing industry, if they're in the tourism industry, in the recreational industry, there's real value to that to having climate change address, water pollution address, nonpoint source pollution-- you alluded to earlier-- address and that they feel near term.

It's got to be that people don't pay attention to long term, and they never will, right? It's not built in their cognitive behavior that there really is a near-term cost to them and benefit to them of these laws. We just have to do a better job of selling it. That's one side of the equation.

The other side of the equation, which is just ripe for the picking, is that if you have this kind of shift in the economy necessary to address these issues. There are enormous economic opportunities that if we're going to establish sort of things other than dependence on fossil fuel and coal, the number of business opportunities out there, there's a private sector. And our colleague who you know very well, Michael Vandenberg at Vanderbilt has written a lot about this very effectively.

There are huge business opportunities to address these issues. The businesses and services that can produce electricity energy source with less carbon, they're going to make a gazillion dollars, the ones who can do solar and wind and hydrogen fuel. There are enormous economic opportunities out there. And those will-- if you spread out those economic opportunities and with those climate disruptors as opposed to the fossil fuel incumbents, there's a way here to have our cake and eat it too.

We just have to make sure we can distribute the benefits of that as broadly as possible and make those communities aware of those benefits. There are a lot of national law firms now which don't represent the fossil fuel industry. They represent the disruptors.

That's why you saw the power industry file in support of the Clean Power Plan in the West Virginia case. It's why when you turn on your Super Bowl ads, right? What do you see? Ad after ad after ad about electric cars because the auto manufacturers realize, we can make money with this. We can do this.

And this is where the future is. It's why the lending industry isn't going to ignore climate change when they're setting-- doing investments while the insurance industry isn't going to ignore climate risks. If we can have the marketplace be let loose and send the right signals and the signals both in terms of disincentives and incentives, positive incentives, there is a way out of this if we can sort of avoid some of the noise of the politicians on either side who keep wanting to pitch this as good versus evil as opposed to a pathway to the future.

So it's going to be hard to the extent that people tend to see this as like, these are good people. These are bad people. But I tend to be hopeful. With that said, Michael, if you came to my office and looked at the wall next to my desk, you would see what I think you see on the wall next to the desk of every environmental law professor in the country. And that is there's kind of a dent in our walls because we feel like we've been banging our head against that wall for about 30 years, trying to get this message across.

I hope it's finally getting across. I hope we see a sea change. Obviously, if Donald Trump wins a reelection, that could be a disaster. And people need to do better about electing people who are less partisan on that. It's hard with a political system with gerrymandering, but I think that's the only way out of this, is through elections, and not through the courts.

**MICHAEL
LIVERMORE:**

Well, that I certainly agree about. I can't imagine any situation. And maybe we could just spend a few minutes talking about the courts just to clarify exactly the degree to which that's going to be the case.

So you mentioned the Sager decision. And there's an interesting arc of the courts that you describe in the making of environmental law. Obviously, in the early days of US environmental law, you had judicial champions. Environmental Protection really saw the role of courts in this transform-- not exactly transformative in the sense of we're going to use the constitution and courts to transform society, but at least playing a productive pro-environmental role, ensuring that administrative agencies are advancing the goals that were adopted in the major environmental statutes and so on.

And in any case, that's changed over time, especially at the Supreme Court. And we've had a couple of really huge decisions in the last couple of years on the Clean Water Act and the Clean Air Act that are going to reverberate for some time. So you've litigated before the Supreme Court. You've been a Supreme Court watcher for many years.

One question I had-- and it was a bit of a-- kind of comes out of the arguments in the book is, I'm curious about your views about the court these days, basically. Like, I think you have some-- there's a sense in which-- like, for example, you talk about I think mass-- sorry, *West Virginia v. EPA*. And maybe there's two ways of reading that.

So one way of reading that is it's kind of cynical. It is just anti-environmental or anti-EPA or anti-administrative state. It's pro-fossil fuel and ends-oriented way of stripping away the ability of government, basically, to address climate change. That'd be one reading.

Another reading would be that it's a legitimate expression of concern about separation of powers, of Democratic legitimacy, of agency decision-making, and the like, right? Those would be two different readings. The Sager decision could be read similarly. It's kind of a cynical way of undermining the Clean Water Act and reducing-- just generally kind of doing favors for rural communities who are interested in getting easier access-- getting out of a particular kind of regime of environmental quality, having to do with wetlands management.

Or you could read it, as you were mentioning even a little earlier, as addressing genuine fairness concerns with respect to the application of the criminal law. So I'm curious about your general read of the court these days. Are you more-- yeah, what is your general reading of the court these days? What can we expect? And what do you think of the court's motivations?

Are you as cynical as the cynics might be, or do you still see principled decision-making there?

**RICHARD J.
LAZARUS:**

Yeah, I tend to-- again, maybe I'm naive. I tend to be a fan of the court. They're making that hard to be. Here's what I would say.

And I view the *West Virginia v. EPA* case and the Sager case differently. I'm not a fan of either one. I think both of them are decisions where the court should have gone the other way. I view the *West Virginia versus EPA* case where the court upheld the Trump administration's repeal of the Clean Power Plan as irresponsible.

I can't say that it's like out of bounds in terms of legal reasoning. I think it's irresponsible. And I'll tell you why.

The Sager case I think is far worse than the Clean Power Plan case. So in the Clean Power Plan case-- the West Virginia case, the court agreed that EPA had no authority to issue the Clean Power Plan and the first instance. And I wish they hadn't, but that ruling by itself, I can't say, is crazy, right?

I mean, I defended the Clean Power Plan. I filed a brief in the DC Circuit, but I never thought the legal issue was a slam dunk. I always thought it was hard. And I thought it was legitimately a hard question, whether you could take the word system that congress passed in 1970 and allow EPA to do a fabulous thing, the Clean Power Plan fabulous right?

From economic perspective, environmental perspective, political perspective, wonderful way to try to jump-start us and get us to reduce greenhouse gas emissions from our largest sources, existing coal fired power plants. But whether or not it actually fit the statute, that was legitimately harder issue, whether you could say, I thought the court should have and could have very responsibly upheld it. But I couldn't say it was compelled to do so.

So the fact they ruled against the Clean Power Plan, in that case, upholding the repeal, I think that ruling by itself, as disappointed as I was, I thought it was defensible from an intellectual perspective. I thought, however, that it was irresponsible because it failed to take account of political realities of where we are. And that is to require congress to have actually what the court requires clear congressional authorization.

I thought its test was too demanding and especially too demanding in light of the reality of where we are. And that is if congress doesn't pass anything. And I thought it was close enough that courts should have upheld the Clean Power Plan and change the default principle. Make the other side have legislation to show the EPA doesn't have this authority, rather than require clear congressional authorization in support of the Clean Power Plan.

So while I couldn't say it was intellectually dishonest, I thought it was very poor judging in terms of the role of the courts and the standard they imposed under the major question doctrine to require this clear congressional authorization when we know we're never going to get it. So I really criticized the decision, but I can understand as a matter of abstract principle where those justices were coming from. Even I thought they were misguided in their application to climate change.

The Sager case, though-- the Sager is far different. In Sager, the court has taken a pretty settled view of the Clean Water Act for five decades about how you have to go beyond traditional navigable waters and go beyond this notion of a dictionary definition of waters to protect the waters of the United States as congress dictated, to protect the-- preserve the physical, chemical, biological integrity of the waters, to define navigable waters in the statute as waters of the United States, legislative history, making clear why they did that.

In this case, they took an existing very important program that's persisted for decades, and they completely gutted it, going back to dictionaries. A view which really doesn't pay attention to the purpose of the statute and the language of statute and the legislative history of the statute. So I found that result very disturbing.

If the court had done the narrow viewing in favor of the *Sage* per se that Brett Kavanaugh supported, that Justices Sotomayor and Jackson supported, that Justice Kagan supported, that would have been a loss, which I would have not applauded, but I would have understood. But instead, the court basically completely upended a law which has been very successful. And it's going to make it really hard to make the law successful.

And that's because as the court recognized unanimously in 1986-- and they said congress said water moves in hydrologic cycles. It moves from here to there over time and space. And you can't even protect the waters that they say they care about unless you regulate discharges into the waters for which they have a significant hydrologic nexus too. So it actually makes the law really hard to do its purposes.

And there's no awareness of it. And that's just the majority. If you take a look at Clarence Thomas and Neil Gorsuch's separate concurring opinion, it is, I would say, with all generosity intended, it is crazy. And it's either incompetent lawyering or maybe dishonest lawyering.

I don't say that lightly because according to that separate occurrence which no opinion takes issue with or addresses at all, that separate occurrence provides that the Clean Water Act of 1972 basically does little more than the Rivers and Harbors Act of 1899, '97, and '92. It provides that it only applies traditional navigable waters that are, in fact, navigable. And it only regulates discharges to the extent they affect navigability.

Not pollution and water quality but navigability. That is insane. And they come to that conclusion based upon a reading that *Daniel Ball*, which is remarkably unpersuasive, by saying the Supreme Court long ago said navigable waters and waters of the United States means the same thing. And that's how you decide that's all that Congress intended was no big change in the jurisdictional scope in 1972.

When congress made it absolutely clear they intended to change the jurisdictional scope and the Supreme Court opinion upon which they rely for their, say, the two were used interchangeably and they mean the same thing, if you look back the *Daniel Ball* case, how many times do you think they used the words waters of the United States in the *Daniel Ball* case, which is a mid-19th century case? Five? Four? Actually, none.

The term waters of the United States does not appear once in the *Daniel Ball* case. What appears is the term navigable waters of the United States. Well, that's not the same thing.

So you can say navigable waters mean the same thing to navigable waters of the United States. You can't say navigable waters means the same thing as waters of the United States. And what worries me is that the majority doesn't address that issue at all and neither does Kavanaugh concurrence with three other justices joined or Kagan, Sotomayor, and Jackson separate concurrence. So it's just out there as an invitation to lower courts.

So I think the *Sage* case is far more troubling because it threatens to destroy an existing very important fundamental program rather than West Virginia, which prevented like a really ambitious wonderful future move. And its reasoning, I think, is very unpersuasive.

MICHAEL LIVERMORE: Yeah. So maybe just looking-- and with the final question which is, so given the state of the court's-- and the reality that we're likely to look at a court with a similar composition for some time now, possibly decades, if we do build the political will necessary to pass substantial climate legislation-- and obviously there's the Inflation Reduction Act but, say, even a regulatory approach-- do you think the courts will at least get out of the way, or do you think that the courts are going to continue to be a-- even in the face of congressional action would be a substantial obstacle?

They're clearly going to be an obstacle to administrative action.

RICHARD J. LAZARUS: Yeah. I think if congressional action, I think they won't be. It's why we need legislation. I don't think they will. If we can get that language in the statute, then I think as conservative as they are, for some of them like Justice Alito, who votes basically against whatever the environmental favorite result is in every single case-- in the last 15 such cases, he's voted in the affirmative side one time.

That's not true for anybody else, right? But you look at a case like the *County of Maui versus the Hawaii Wildlife Fund* case recently, where the court ruled-- I think it was 7 to 2 in favor of the environmentally preferred position. There is give there among the justices if you can convince them of the language and convince them of the result and how untoward the other result is.

So I haven't given up at all with this court, but it's made me realize they're not going to do us any favors. We're going to have to have language from congress or from states. I think on state laws, there's a chance because Justice Gorsuch has such a thing for states' rights.

And I think that we'll see some positive things. The National Pork Producers case, just dormant Commerce Clause case, animal cruelty law out of California. Right? Split the court all over the place.

But they ultimately upheld the California law there. So I think there's give. There are justice we can work with. I think we'll need, for federal law, better statutory language.

For states, I think actually the courts have initiatives on these issues. There are several opinions out there in different environmental cases where it's state law, where we actually see the court reach a different result. And even the Clean Water Act and the County of Maui case.

We've got a really favorable result in that case. But we can't assume they're going to do us some favors. We have to be smart in how we present records and litigation to try to get it done.

MICHAEL LIVERMORE: Great. All right. Well, thanks for the perspectives. It's a wonderful book. You've obviously made huge contributions to the field over the years, so thanks for that as well. And it's been a super fascinating conversation.

I appreciate you joining me.

RICHARD J. LAZARUS: Yeah, it's a real pleasure, Michael. I appreciate it a lot. I've read a lot of your work, and I'm a big fan of it. And, of course, we're both a fan of Ricky Rivez at OMB. That's pretty exciting.

MICHAEL LIVERMORE: It's exciting. It's exciting times, for sure.

RICHARD J. LAZARUS: It's exciting to see him there and to see his work coming out of there. He's the perfect person and the perfect place at the right time.

MICHAEL LIVERMORE: Yeah, I couldn't agree more with that, so we'll see. We'll see how that all unfolds.

RICHARD J. LAZARUS: All right. Well, take care. Thanks very much.

MICHAEL LIVERMORE: And listeners, if you enjoyed this episode, let us know. You can give us a like, a rating, subscribe to the podcast, and follow us on social media. It'd be great to hear from you. Till next time.

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