

## PORTAGE STRATEGIES FOR ADAPTING ENVIRONMENTAL LAW AND POLICY DURING A LOGJAM ERA

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The topic assigned to me was “How we got into the logjam, why it hurts the environment, business, and the public generally, and how to get out of it.”

I argue that there is indeed a “logjam” in federal environmental politics today, as majorities in both political parties have degenerated into a “blood feud” in which they would rather have an environmental issue than a compromise that results in legislation to solve environmental problems. I contrast recent events in Washington with those of a healthier time in the late 1980s and early 1990s when I served as General Counsel of the Environmental Protection Agency (EPA) during passage of the 1990 amendments to the Clean Air Act, one of the last pieces of significant environmental legislation that Congress has passed successfully.

Many are hopeful that the 2008 presidential election may change the current poisonous dynamic in Washington and restore bi-partisan compromise, and with it the renewed prospect of Congress taking an active role in making environmental policies. I too am hopeful, but I am also skeptical that either an Obama or McCain Administration can actually “break” the logjam, as its causes are deep in the nature of modern American politics. Therefore, I explore the possibilities of what I call “portage strategies” for going around the logjam in Congress on environmental policy-making. By “portage strategies” I mean law-making techniques for adapting environmental policy to new problems and changing realities without legislation in an era in which Congress is paralyzed. I argue that courts should give agencies increased leeway to adapt existing statutes to new

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challenges in recognition of the practical reality that Congress in our era is paralyzed by partisanship from enacting or modifying existing environmental legislation except in the unusual circumstances of a perceived crisis. As I explain near the end of the paper, among other things, courts should construe the *Chevron* doctrine functionally, rather than literally, to give agencies increased authority to interpret their statutes creatively to deal with new problems. Courts should sometimes preclude agencies from interpreting statutes creatively, *but only if* Congress has *actually* made a decision to preclude a possible interpretation. Courts should not stand in the way of agencies adapting their statutes creatively to emerging problems by seizing on bits and pieces of language or legislative history to preclude policies that Congress never considered one way or the other. *Chevron* vindicates Congress's power to decide issues in ways that bind both courts and agencies; the *Chevron* doctrine was never intended to preclude policies that Congress had not considered one way or another based on tortured readings by judges of language that is irrelevant to the current issue because Congress did not have it in mind.

Congressional paralysis and increasing literalism by the courts in applying the *Chevron* doctrine have created a dilemma in which administrative agencies are tasked with solving emerging problems without legislative guidance, but are simultaneously denied the tools of flexible statutory interpretation that they need to do the job. A paradigmatic example of the schizophrenic signals now coming out of the courts is the conflict between the *Massachusetts v. EPA*<sup>1</sup> decision by the Supreme Court and the *North Carolina* decision<sup>2</sup> by the D.C. Circuit on the Clean Air Interstate Rule (CAIR).<sup>3</sup> In *Massachusetts v. EPA*, the Supreme Court specifically rejected the Bush Administration's argument that

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<sup>1</sup> *Massachusetts v. U.S. Env'tl. Prot. Agency*, 549 U.S. 497 (2007).

<sup>2</sup> *North Carolina v. U.S. Env'tl. Prot. Agency*, 531 F.3d 896 (D.C. Cir. 2008) (invalidating the "Clean Air Interstate Rule," *infra* note 3). On September 25, 2008, EPA filed a Petition for Rehearing or Rehearing en Banc of the panel decision. *Government Files Petition for Rehearing in CAIR Case*, CLIMATE INTEL, Sept. 26, 2008, <http://climateintel.com/2008/09/26/government-files-petition-for-rehearing-in-cair-case/> (last visited Oct. 3, 2008). Congress is also considering legislation to overturn the decision and reinstate the rule.

<sup>3</sup> *The Clean Air Interstate Rule (CAIR)*, 70 Fed. Reg. 25,162 (May 12, 2005).

addressing global climate change should await new legislation.<sup>4</sup> But in the CAIR decision, the D.C. Circuit denied EPA the flexibility to interpret existing law to impose a “cap and trade” program, which is one of the principal tools for regulating greenhouse gases (GHGs).<sup>5</sup> The courts cannot have it both ways—unless perhaps their goal is to create such a crisis in environmental policy that Congress will be forced to step in to straighten out the mess. Instead, courts should allow agencies interpretive flexibility to adapt existing statutes to new problems except when Congress has actually focused on the issue and precluded the agency initiative in question.

The final “portage strategy” that I describe at the end of the paper, “expert consensus proposal systems,” is the one that I consider the most promising, for the reasons that I describe. “Expert consensus proposal systems” are promising for several different reasons but a principal one is their incentive structure inherently promotes compromise. Since they have no power but the power to persuade, expert consensus panels can only expect to exercise influence if they actually come together to reach agreement, unlike political officials who can gain political advantage by disagreeing publicly. In normal times when there is no perceived crisis that forces compromise, politicians often prefer to define the contrast between themselves and their opponents by adopting extreme positions that send symbolically satisfying signals to an external audience. This phenomenon becomes even more pronounced as an area of law matures, and the issues become more complicated and less susceptible to simple moralistic solutions that command bipartisan support, such as “beginning . . . to move on the problems of clean air and clean water and open

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<sup>4</sup> Massachusetts, 549 U.S. at 497.

<sup>5</sup> There is a voluminous literature on the design of “cap and trade” programs to regulate GHGs. See, e.g. Jonathan B. Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 Yale L. J. 677 (1999). EPA’s “advance notice of proposed rulemaking” on regulating GHGs under the existing Clean Air Act also discusses the pros and cons of “cap and trade” programs at length. U.S. Environmental Protection Agency, Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act, 73 Fed. Reg. 44353 (July 30, 2008). The point for present purposes is not whether “cap and trade” is or is not the optimal policy instrument, but rather that the D.C. Circuit opinion has at a minimum cast serious doubt on EPA’s authority to use one of the leading tools that had been thought available to regulate GHGs.

spaces for the future generations of America.”<sup>6</sup> In times of crisis (or perceived crisis), this normal political dynamic may change briefly as public attention is focused on the subject, but these “republican moments” are few and far between.<sup>7</sup> To counter-act the tendency of politicians to act like politicians when dealing with complex issues, many areas of law benefit from expert consensus proposal systems; two good examples are the non-binding *Restatements* issued by the American Law Institute, and the resolutions passed by the American Bar Association. Environmental law is conspicuous as one of the few complex but important bodies of law where no expert proposal system has yet emerged.

No one thinks that such “portage strategies” are a complete solution to everything that ails our environmental policies, but they can do a lot to adapt environmental law to meet new challenges in the absence of legislation.<sup>8</sup> In what follows, I first describe the “logjam,” and then describe how courts should give agencies more leeway to interpret statutes creatively during an era in which environmental legislation is more theoretical than practical, and finally turn to “expert consensus proposal systems” at the end.

### I. DESCRIBING THE “LOGJAM”

Let us turn first to describing the “logjam.” It is not entirely clear to me exactly what “logs” are supposedly “jammed.” Does

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<sup>6</sup> President Richard M. Nixon, Remarks on Signing the Clean Air Amendments of 1970 (Dec. 31, 1970), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2874>.

<sup>7</sup> See generally Bruce Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 Yale L. J. 1013 (1984).

<sup>8</sup> At the Breaking the Logjam Symposium, David Buente rightly pointed out that bringing China into an international regime to regulate greenhouse gases could be seen as one of the leading environmental problems of the day, and he wondered aloud how “portage approaches” could address that issue. An Executive Agreement, rather than a treaty, would be a “portage approach” as I have defined the term for reaching an international agreement on GHGs in that, unlike a treaty, it does not require approval by super-majorities in Congress. See generally BRUCE ACKERMAN & DAVID GOLOVE, *IS NAFTA CONSTITUTIONAL?* (Harvard Univ. Press 1995). In that same way the partisan paralysis has made it more difficult to ratify treaties, and that reality has in turn led to the rise of Executive Agreements, I argue that other institutions of lawmaking, such as administrative creative interpretation of statutes must take up the slack for a Congress that is paralyzed by a partisan logjam.

this metaphor refer to the fact that we have not passed any major new environmental legislation at the federal level in the eighteen years since the 1990 amendments to the Clean Air Act? Or is merely a reflection of the frustration that many feel about the Bush Administration's policies on climate change? Or is it a broader concern that we have lost our "lead" to the Europeans,<sup>9</sup> who with their new REACH program as well as the Kyoto Protocol, arguably now have more stringent and costly environmental legislation that we do? It is not intuitively apparent to me that the government that governs *most* necessarily governs best, nor that the burden and expense that environmental law imposes on the economy is necessarily the best measure of who is "ahead."<sup>10</sup>

But certainly some things are very wrong with the way that politics, including environmental politics, is conducted in Washington today. Two examples from my personal experience are symptomatic of the most significant major trend in my judgment, which is for good policy to take a back seat to posturing for political advantage on both sides of the aisle.

The first example of policy considerations getting lost in the political shuffle is EPA cabinet status. I have testified on several separate occasions in support of elevating EPA to cabinet status.<sup>11</sup> When the Republicans are in the White House, the Democrats oppose it; when the Democrats are in the White House, the Republicans oppose it. Neither side actually appears to care much about the merits of the issue. Both are simply determined not to allow a President of the opposite political party to get "credit" for

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<sup>9</sup> See Jonathan B. Wiener, *A Pattern of Parity and Particularity*, THE ENVTL FORUM 52 (2006).

<sup>10</sup> Ortwin Renn & E. Donald Elliott, *Precautionary Regulation of Chemicals in the US and EU*, in THE REALITY OF PRECAUTION: COMPARING RISK REGULATION IN THE US AND EUROPE (Jonathan Wiener, Michael Rogers, Jim Hammitt & Peter Sand eds., forthcoming) (arguing that performance in restricting dangerous substances should be the measure of policy and questioning whether there are actually significant differences in the degree to which European and U.S. systems of chemical regulation have allowed dangerous substances onto the market).

<sup>11</sup> See *A Bill to Elevate the EPA to a Cabinet Level Department: Hearing Before the S. Comm. on Governmental Affairs*, S. 159, 107th Cong. (2001) (testimony of E. Donald Elliott); *EPA Cabinet Elevation: Hearing on H.R. 37 and H.R. 2138 Before the H. Subcomm. On Energy Policy, Natural Resources and Regulatory Affairs Comm. On Government Reform*, 108th Cong. (2003) (testimony of E. Donald Elliott).

elevating EPA to cabinet status. One could make arguments that elevating EPA to cabinet status is bad policy, or that it will not matter much either way. My point, however, is that the merits of the argument have become entirely irrelevant. It is all just about politics.

A second example involves proposed legislation to implement the Stockholm Convention on Persistent Organic Pollutants (POPs), the Long-range Transboundary Air Pollution (LRTAP) POPs Protocol, and the Rotterdam Convention on Prior Informed Consent. After years of being criticized as an international outlaw for not ratifying the international treaties banning POPs—all of which are already banned under U.S. law anyway—the Bush Administration finally submitted the Stockholm treaty on POPs for ratification. Congress refused to pass the necessary implementing legislation, however. The “issue” that proved intractable for the politicians and their staffs was whether the standard for judicial review for hypothetically adding new chemicals to the list at some point in the future should be “capricious and arbitrary” or “substantial evidence.”

Among others, I carefully explained to the leading staffers for both the Democrats and the Republicans<sup>12</sup> that according to Justice Scalia, most administrative law treatises, and my own experience over 30 years as a litigator and Administrative Law professor, there is really little or no practical difference between these two linguistic formulas.<sup>13</sup>

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<sup>12</sup> Interestingly, the conversations that I had with the leading Republican and Democratic staffers to try to broker a deal took place individually with me on opposite sides of the room. I had known both the staffers for 15 years, and had previously worked successfully with both of them. They had known one another for almost as long, but their personal relationship was obviously strained and each of them preferred to speak to me separately. The frayed personal relationship between them was a vestige of past battles between the two on other issues. The strained personal relationship between the two of them did not help, but that was not really the fundamental problem. It became increasingly clear that neither of them—nor their nominal bosses, members of Congress—actually wanted to compromise. Both of them preferred to have an *issue* of how unreasonable the other was being as opposed to a *deal*.

<sup>13</sup> See *Legislation to Implement the POPs, PIC, and LRTAP POPs Agreements: Hearing Before the Subcomm. on Environment and Hazardous Materials of the Comm. on Energy and Commerce*, 109th Cong. 120–21 ((2006) (statement of E. Donald Elliott):

3. ‘Based on your experience as General Counsel of the Environmental Protection Agency (EPA), including your work defending EPA’s

During my testimony, I remember sitting next to Dr. Lynn Goldman, a professor at the Johns Hopkins School of Public Health, who served as the Assistant Administrator for the Pesticides and Toxics program at EPA during the Clinton Administration, whereas I served as General Counsel of EPA during the first Bush Administration. Lynn and I have known one another for over a decade and during that time, we have agreed and disagreed with one another on various issues of public policy but we have always had a cordial and professional relationship, and I believe one of mutual respect, even when we disagreed. I remember distinctly that Lynn and I looked at one another incredulously as the members and their staffs argued about this peripheral technicality as if the future of the republic turned on it. We whispered to one another: “We could work out a compromise

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attempt to regulate asbestos under Section 6 of TSCA, would it be better to use an “arbitrary and capricious” standard of judicial review, the standard that is used for most other environmental rulemakings?”

Along with most courts and commentators, I think there is no real difference in practice between the arbitrary and capricious standard and the substantial evidence standard. William Fox, Dean of Catholic University Law School, explains it this way in his administrative law treatise:

‘In 1984, one of the newer members of the D.C. Circuit (now a Supreme Court Justice), Antonin Scalia, took the bull by the horns and decided there simply was no difference between the substantial evidence test and the arbitrary/capricious test. Writing for the court in *Assn. of Data Processing Service Orgs. v. Bd. of Governors, Federal Reserve Sys.*, [745 F.2d 677 (D.C. Cir. 1984)] then-Judge Scalia . . . put it: “[Substantial evidence] is only a specific application of [arbitrary/capricious] separately recited in the APA not to establish a more rigorous standard of factual support but to emphasize that in the case of formal proceedings, the factual support must be found in the closed [hearing] record as opposed to elsewhere” In Scalia’s opinion, the distinction is mainly one of semantics. The touchstone for both tests is reasonableness. The differences between the two are differences of analytical technique rather than analytical substance. While not all courts of appeals have adopted Justice Scalia’s language, most courts appear to accept his reasoning. At present, there seems not to be much agonizing over the distinction between arbitrary/capricious and substantial evidence.’

*Id.* See also WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 334 (4th ed. 2000).

Congress would simply be fooling itself if it thought that it would make any real difference in practice to substitute one form of words for the other. Today most courts equate the two standards, and my experience is that there is little if any difference in their practical effect.

on this in about five minutes.” But that was really the point: no one in the hearing room other than Lynn and I *wanted* to work out a compromise. Neither Lynn nor I was being paid by anyone; we were both just trying to get something sensible and reasonable done for the environment, but the politicians and their staffs on both sides of the aisle were having none of it. They wanted an issue, not a deal.

In response to my vain attempts to broker a compromise, both Republican and Democratic staffers patiently explained to me that while my compromise formulas might work, it really was not about this particular issue. It was really retaliation for the other’s unreasonable behavior on the last issue that they had had to deal with together. Here in microcosm we have the logic of the classic “blood feud”<sup>14</sup>—the Hatfields and the McCoys—where both sides lose perspective because over time it has become “about” something larger than the immediate issue. Both sides preferred to have an “issue” that they could use with their constituency to portray the other side as unreasonable rather than a compromise.

The key dynamic comes down to politicians and their staffs gravitating to extreme positions to define the contrast between them in symbolic terms for an external audience that is not well-informed about the specifics of complicated issues, rather than moving to the center to achieve a compromise. This has been true for environmental issues large and small for many years now in Washington. A decade ago two experienced and insightful players in the Washington environmental policy scene described this political dynamic on environmental issues as “the politics of the extremes”:

Given the crying need for reform, why did . . . Superfund reform fail once again? An examination of some of the major issues addressed in the legislation suggests that the politics of the extremes killed the bill. On the left, critics charged that the Republican-sponsored bill would “let polluters off the hook.” On the right, there were complaints that the bill “didn’t go far enough” to remedy the core deficiencies in the law to warrant reinstating the taxes that provide the monies for Superfund

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<sup>14</sup> For a review of the voluminous literature on “blood feuds” in general, and Max Weber’s and Émile Durkheim’s theories on blood feuds in particular, see Jonas Grutzpalk, *Blood Feud and Modernity*, 2 J. CLASSICAL SOCIOLOGY 115 (2002).



which lapsed in 1995. Both sets of critics argued that we would be better off with no legislation.<sup>15</sup>

While Klee and Rosenberg in 1999 focused on the then-recent failure of Superfund reform efforts in the 105<sup>th</sup> Congress as “a good case study on legislative impasse,”<sup>16</sup> they were also describing a broader phenomenon: “For the past seven years, Congress has tried, and failed, to move major pieces of environmental legislation to overhaul the Resource Conservation and Recovery Act, the Clean Water Act, the Endangered Species Act, and the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA or Superfund).”<sup>17</sup> Unfortunately, except in times of perceived crisis in a particular area of policy, “the politics of the extremes” often are the norm. It comes down to both sides deciding that they prefer having an issue to having a bill.

Another good example of politicians preferring an issue to a compromise relates to the several “multi-pollutant” bills that were pending before Congress to amend the Clean Air Act from 2003 to 2005. There clearly was a compromise to be had, if people on both sides of the aisle had wanted one. The Republican version (The Clear Skies Act) proposed a trading system to get 70% reductions in three pollutants; the Democratic version (The Clean Power Act) proposed a trading system to get 90% reductions in four pollutants.<sup>18</sup> The compromise possibilities were obvious: perhaps an 80% reduction plus a study or other modest first steps on the fourth pollutant (CO<sub>2</sub>) where there was a real lack of agreement.

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<sup>15</sup> Ann R. Klee & Ernie Rosenberg, *The Moribund State of CERCLA Reauthorization*, 13 NATURAL RES. & ENV'T 451 (1999). At the time the article appeared, Klee was chief counsel to the Senate Committee on Environment and Public Works. She went on to serve as EPA General Counsel under President George W. Bush, and is now Vice President of Corporate Environmental Programs at General Electric. Rosenberg previously served in several staff positions at EPA, and was Vice President for Health, Environment and Safety of Occidental International at the time that the article appeared. He is now President of the Soap and Detergent Association.

<sup>16</sup> *Id.* at 451.

<sup>17</sup> *Id.*

<sup>18</sup> The various bills are summarized in C.V. Mathai and E. Donald Elliott, *The Clear Skies Initiative: Multipollutant Legislation for the Electric Power Generation Industry*, EM, 25 (2002) (EM is the Air & Waste Management Association's Magazine for Environmental Managers).

This was the kind of deal that Senator Edmund Muskie, the primary architect of many of our environmental laws, always made.<sup>19</sup> Get what you can get enacted now, he would say, and then come back two years later for the rest, which he did successfully again and again. I spoke to many environmentalists about the possibility of a compromise deal at the time, and they did not deny that compromise legislation was doable. They simply decided that they did not want to compromise for what was attainable at the time. They preferred to have the “issue” for the next election, rather than a compromise statute that could be enacted. And some of them admitted as much publicly.

Another indicator of how “dug in” both sides have become is the rhetoric. The politicization of environmental issues has gotten so bad that when a Republican Administration *tightens* air pollution rules set by its predecessors it is roundly criticized for *weakening* them on the grounds that it could have tightened them even more,<sup>20</sup> a linguistic feat that would make George Orwell proud!

Moreover, it is now routine in Washington in my experience that arguments like those that Lynn Goldman and I were making at the hearing on implementing the POPs and PICs treaties are dismissed as “good government arguments.” This is not praise, but a pejorative term, by which is meant that these arguments are naive, academic, inadmissible, and irrelevant, i.e., ones that serious political actors should not even bother to consider. In fact, arguments about good policy and those who advance them are sometimes dismissed as “goo goos,”<sup>21</sup> a term whose juvenile overtones suggest that those who care about good public policy are terminally jejune. There was a time within my memory when good policy was viewed as the primary goal and politics as the constraint. But today in Washington it is all about “environmental

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<sup>19</sup> For a review of Senator Muskie’s career that emphasizes his willingness to compromise when necessary to get legislation passed, see THEO LIPPMAN AND DONALD HANSEN, *MUSKIE* (W. W. Norton and Company 1971).

<sup>20</sup> Juliet Eilperin, *Ozone Rules Weakened at Bush’s Behest: EPA Scrambles To Justify Action*, WASH. POST, Mar. 14, 2008, at A1 (reporting on an EPA proposal to *lower* the ozone standard, set at 80 parts per billion in 1997 during the Clinton Administration, to 75 parts per billion).

<sup>21</sup> WIKIPEDIA, *GOO-GOOS*, <http://en.wikipedia.org/wiki/Goo-goos> (last visited Sept. 9, 2008) (“In American politics, the term is still used occasionally as a mildly derisive label for highminded citizens or reformers.”).

politics,” not “environmental policy.”

For perspective, contrast the situation that I have described above with the speech delivered by the first President Bush on July 21, 1989, when he invited environmentalists as well as prominent Democrats to the Rose Garden to announce the proposals that ultimately became the Clean Air Act Amendments of 1990:

Welcome to the steamy Rose Garden, Mr. Speaker and distinguished Members of the Congress.

Something that was truly striking during my recent travels in Europe was this genuine excitement and enthusiasm spreading about the environmental issues. And the economic summit in Paris was largely devoted to the environment and what it means for the quality of life on our planet. Our neighbors abroad feel a sense of shared commitment. They're cooperating to find solutions, and we're working very closely with them.

Around the world, in efforts to clean up the environment, we, the United States of America, are taking the lead. And the next step now is congressional action. And let me make one thing very, very clear: Clean air is too important to be a partisan issue. Anyone who allows political bickering to weaken our progress against pollution does a tragic disservice to every city in America and to every American in this country who wants and deserves clean air. And we've worked very hard on both sides of the aisle to craft a proposal that, for the first time in two decades, makes new progress for clean air.

The Clean Air Act that I'm sending to Congress today has been made possible thanks to the outstanding efforts and the bipartisan support of Republicans and Democrats alike. Protecting the world's shared natural heritage must be a global, universal priority. Just as environmental problems respect no borders, our solutions must transcend political boundaries. And that's why we're here today, and that's why this legislation is such good news: It brings us one step closer towards clean air.

The reforms we're proposing to the Clean Air Act represent thousands of hours of careful analysis, negotiation, and cooperation. . . . In drafting this legislation, we've reached out. We've heard from groups all across the spectrum, and we've listened to, appreciated, and certainly benefited from their comments. Environmentalists, industry leaders, Members of Congress, experts from the science and academic area—leaders from every quarter have all shown the wisdom and will to make clean air the birthright of every American.

I am pleased and proud to see that many of you have decided to cosponsor this bill. and I can't thank you all enough, because clean air, once again, is a bipartisan issue. I've requested Senators Burdick [D] and Chafee [R] and Congressmen Dingell [D] and Lent [R]—Norm—to be the bill's prime sponsors, and if this bill becomes law, all of you will have earned the gratitude and respect of generations to come.<sup>22</sup>

The bipartisan tone of the President's remarks in 1989 is conspicuous by its absence from more recent public statements about the environment on both sides of the aisle. It is also remarkable, and more than merely symbolic, that the Administration bill was introduced by a leading Democrat as well as a Republican in each house of Congress. Susan L. Mayer of the Congressional Research Service, credits this statement by the first President Bush with "breaking the stalemate"<sup>23</sup> that had prevented clean air legislation during the 1980s. That's close enough to "breaking the *logjam*" to be of interest, but she also goes on to note that significant "negotiations" and "revisions"<sup>24</sup> (i.e., compromise) occurred between President's Bush initial proposal in July 1989 and final enactment more than a year later in November 1990.

There is no question that presidential leadership is very important in securing the enactment of environmental legislation. But presidential leadership alone is clearly not sufficient, or we would have had revisions to the Clean Air Act under the second President Bush, when the Administration had its own proposals for amending the Clean Air Act, the so-called "Clear Skies Act of 2003,"<sup>25</sup> as well as Republican majorities in both houses of

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<sup>22</sup> PRESIDENT GEORGE H.W. BUSH, REMARKS ON TRANSMITTING TO THE CONGRESS PROPOSED LEGISLATION TO AMEND THE CLEAN AIR ACT (July 21, 1989), *available at* [http://bushlibrary.tamu.edu/research/public\\_papers.php?id=718&year=1989&month=7](http://bushlibrary.tamu.edu/research/public_papers.php?id=718&year=1989&month=7).

<sup>23</sup> Susan L. Mayer, CRS Report: 95-234 *Implementing the Clean Air Act Amendments of 1990: Where Are We Now?* 3 (1995), *available at* <http://www.ncseonline.org/NLE/CRSreports/Air/air-9.cfm> ("During the 1980s, no further amendments were enacted despite many proposals both to strengthen the Act . . . and to reduce its regulatory burden by curtailing requirements or extending deadlines. This stalemate was broken on July 21, 1989, when President Bush proposed comprehensive amendments to the CAA. Following extended debates, negotiations, and revisions of language, P.L. 101-549 was signed on November 15, 1990.") (emphasis added).

<sup>24</sup> *Id.*

<sup>25</sup> Introduced, in February 2003 as S. 485 and H.R. 999 in March 2005, the bill died in committee on a deadlocked 9-9 vote. Seven Democrats, plus James

Congress for a portion of his term. Successful environmental legislation also requires the kind of negotiations and compromise that occurred over the fifteen months after the first President Bush announced his proposals in the summer of 1989, and that is what has been lacking over the last decade.

While there is some casual evidence that compromise legislation may be less frequent today than in the past,<sup>26</sup> the poisonous political climate in Washington is not totally preventing Congress from passing compromise legislation in other areas. Since September 11, 2001, Congress has passed no less than eight major statutes dealing with terrorism and homeland security,<sup>27</sup> and it recently enacted the \$700 billion economic Rescue Package. What is clear, however, is that Congress is passing fewer *environmental* laws in recent years than in the 1970s and 1980s.

Environmental law was in its formative period in the 1970s and 1980s as the basic design of the system was put in place, and the goals and institutions of environmental law were gradually worked out. Many prominent environmental lawyers and academics grew up in that period and it somehow seems unfortunate to us that environmental law is no longer center stage in the Congress. We yearn for a return of the glory days of 1990, when we tied up the Congress for the better part of a year working out the details of the Clean Air Act Amendments of 1990.

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Jeffords (I) of Vermont, and Lincoln Chafee (R) of Rhode Island voted against the bill; nine Republicans supported it. *See also* U.S. ENVTL. PROT. AGENCY, CLEAR SKIES ACT OF 2003 (2006), <http://www.epa.gov/air/clearskies/fact2003.html> (last visited Sept. 30, 2008).

<sup>26</sup> Peter Baker & Jonathan Weisman, *Deal Spotlights Rarity of Bipartisan Action: Some See Chance for More of the Same*, WASH. POST, Jan. 25, 2008, at A10.

<sup>27</sup> Implementing Recommendations of the 9/11 Commission Report Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (2007); Post Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1355 (2006) (part of an Omnibus spending bill; based on S. 3721); Security and Accountability For Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006); USA PATRIOT Improvement And Reauthorization Act Of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-408, 118 Stat. 3638 (2004); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002); Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (2002); Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001); USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

However, frequent legislation is not desirable in and of itself. We should think of legislation as we do amendments to the Constitution. Legislation indicates that something major has gone wrong with the existing system of laws and needs to be fixed, or that circumstances have changed and that we need to adapt the system to new realities that the framers did not anticipate.

When things are running badly, but tolerably badly, legal change may happen but legislation does not. Legislation is a last resort because it requires compromise. Or as the late Israeli foreign minister, Abba Eban, put it somewhat more pungently, “History teaches us that men and nations behave wisely once they have exhausted all other alternatives.”<sup>28</sup> In an article that I co-authored with Bruce Ackerman and John Millian some years ago, we pointed out that passing environmental legislation requires that a majority of the players abandon their first-best preferences and settle for their second- or third-best.<sup>29</sup> This generally requires an actual or perceived crisis that changes the dynamic of “politics as usual” by focusing public attention on the issue and temporarily forcing members of Congress to put aside their usual political motivations.

In a sense, then, environmental law has been a victim of its own success. *Our* area is no longer in a crisis (or perceived crisis) that causes it to take priority over other more pressing national problems such as terrorism and the financial crisis—as it once was when the Cuyahoga River caught fire, Kepone poisoned the James River, children in the inner city suffered retardation from lead in gasoline, and we believed that PCBs and other chlorinated organics were causing wide-spread sterility in the animal kingdom and otherwise destroying nature.

Climate change is the arena of environmental policy today that comes closest to a crisis that engages public attention. It is not surprising, therefore, that it is also the area in which new environmental legislation seems most likely. But much to the

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<sup>28</sup> WIKIPEDIA, ABBA EBAN, [http://en.wikiquote.org/wiki/Abba\\_Eban](http://en.wikiquote.org/wiki/Abba_Eban) (last visited Sept. 30, 2008). See also another aphorism attributed to Abba Eban, “It’s not that Governments are constitutionally incapable of making the right decision, it’s that they only do so as a matter of last resort.” *Id.*

<sup>29</sup> E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. LAW, ECON. & ORG. 313 (1985).

chagrin of many environmental specialists, according to the polls, even climate change is far down the priority list on the public's agenda.<sup>30</sup> And even if some legislation to address climate change is enacted in the next Administration (as it probably will be), I am skeptical about how broadly the "radiative forcing" of climate change legislation will extend to other environmental programs.<sup>31</sup> So I do not believe that "the logjam" will be broken any time soon, or that we can count on new legislation to reform environmental law or adapt it to new conditions.

## II. WHAT IF WE CANNOT "BREAK" THE LOGJAM?

Here I want to make a classic Yale Law School move to meta-analysis. I have a long-standing interest in the relationship between naturalistic metaphors and environmental law.<sup>32</sup> So I want to take seriously the metaphor that today there is a political "logjam" in Washington, and to ask what those of us who are serious about good and sensible policies to protect the environment should do about it. As a nature lover and canoeist, I do know from personal experience what one actually does when confronted with a real logjam. As in many other situations, how nature works can teach us something about how law should work.<sup>33</sup>

The preferred solution when the river is blocked by an actual

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<sup>30</sup> Andrew Freedman, *Freedman: Climate Change Low on Public Agenda*, WASHINGTONPOST.COM, Mar. 31, 2008, [http://voices.washingtonpost.com/capitalweathergang/2008/03/freedman\\_climate\\_change\\_low\\_on.html](http://voices.washingtonpost.com/capitalweathergang/2008/03/freedman_climate_change_low_on.html).

The American public does not view global climate change as a top tier problem facing the country today, according to a recent Gallup poll. The poll found that "the economy in general" topped the list, followed by the Iraq War and about two dozen other issues . . . Only one percent out of the 1,012 American adults surveyed said that the environment/pollution is the country's most important problem.

<sup>31</sup> Jonathan Weiner, *Radiative Forcing: Climate Policy to Break the Logjam in Environmental Law*, 17 N.Y.U. ENVTL. L.J. 210 (2008).

<sup>32</sup> See generally E. Donald Elliott, *Toward Ecological Law and Policy*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENV'T POL'Y 170 (Marian Chertow and Daniel Esty eds., Yale Univ. Press, 1997); E. Donald Elliott, *The Tragi-Comedy of the Commons: Evolutionary Biology, Economics and Environmental Law*, 20 VA. ENVTL. L. J. 17 (2001); E. Donald Elliott, *Foreword: A New Style of Ecological Thinking in Environmental Law*, 26 WAKE FOREST L. REV. 1 (1991).

<sup>33</sup> Elsewhere I call this the "biomimetic" approach when law mimics nature. E. Donald Elliott, *Law and Biology: The New Synthesis?*, 41 ST. LOUIS U. L.J. 595, 600 (1997).

logjam made of real logs is actually not to try to “break” it in most instances. That only works if the logjam consists merely of a few puny branches that have gotten tangled up in the current. The logjam in Washington is a lot more substantial and fundamental than that. If everyone who attended the Symposium agreed on exactly how to “break the logjam”—and the chances of that are, of course, non-existent—and if we all devoted all of our energy and power to doing so, we would be incapable of reforming our politics in the environmental area so that politicians care more about getting the issues right than posturing and embarrassing the other side to “energize their base.”

We cannot break the logjam in environmental politics because the logjam is caused by forces in our politics that are larger and more fundamental than disagreements about what constitutes good environmental policy. They have to do with historical forces like the disputed election of 2000, the war in Iraq, the Clinton impeachment, the Robert Bork and Clarence Thomas hearings, as well as important structural changes such as exempting independent issue groups like the Swift Boat Veterans from campaign financing limits, the rise of “single issue” interest groups that have little incentive to compromise on “their” issue,<sup>34</sup> and the increasing frequency of filibusters in the U.S. Senate, so that today 60 votes are required to pass ordinary legislation.<sup>35</sup>

I do not believe that the dysfunctional dynamic between the two parties is likely to be “broken” any time soon. Those who really believe that a Barack Obama or a John McCain is going to become a transformative leader who can win the support of an aroused American public to change the way that business is done

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<sup>34</sup> ROBERT A. HEINEMAN, STEVEN A. PETERSON & THOMAS H. RASMUSSEN, *AMERICAN GOVERNMENT* 145 (1995) (“Single-issue interest groups . . . make compromise on issues more difficult.”). See generally Gloria Toivola Oberstar, *Strategies of Single-Issue Interest Groups*, 11 *POL’Y STUDIES JOURNAL* 616 (1983).

<sup>35</sup> David Herszenhorn, *How the Filibuster Became the Rule*, *N.Y. TIMES*, Dec. 2, 2007, available at <http://www.nytimes.com/2007/12/02/weekinreview/02herszenhorn.html>. (“So far in this first year of the 110th Congress, there have been 72 motions to stop filibusters, most on the Iraq war but also on routine issues like reauthorizing Amtrak funding. There were sixty-eight such motions in the full two years of the previous Congress, fifty-three in 1987–1988 and twenty-three in 1977–1978. In 1967–1968, there were five such votes, one of them on a plan to amend cloture itself, which failed. For policy making, this is the legislative equivalent of gum on a shoe.”)



in Washington may have a different approach. But I am skeptical that even a charismatic president who means well can break the logjam in Washington.

So I propose that a different strategy is required now than during the formative period of environmental law. In the “good old days” of the 1970s, a political competition between the two parties fueled a process of ambitious, aspirational environmental legislation.<sup>36</sup> I do not see that dynamic returning any time soon, in part because Republicans have concluded (rightly or wrongly) that they cannot win the support of environmentalists no matter what they do, so they have stopped trying to “compete” politically. Correct or not, this was the lesson that the current President Bush and his closest advisers drew from the fact that environmentalists uniformly opposed his father’s re-election in 1992, despite his support of strong environmental policies such as the 1990 Clean Air Act (the most expensive piece of environmental legislation in our history) and a policy of no net loss of wetlands. George W. Bush and Karl Rove concluded that the environment is just not an issue that Republicans can ever win, so why keep trying? The fact that a strong advocate for the environment such as John McCain, who broke with his party to co-sponsor climate change legislation, has a 2007 rating of “zero” on environmental issues (and a lifetime rating of only 24 on a scale of 100) by the League of Conservation Voters<sup>37</sup> does not bode well for a return to bipartisanship in environmental politics.

So we are like the canoeist who is confronted with a really big logjam. Imagine that it spans the entire river in front of you, as far as the eye can see, and is composed of a tangled mass of huge tree trunks from the logging operation just upstream, like this:

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<sup>36</sup> See RICHARD J. LAZARUS, *THE MAKING OF ENVTL. LAW* 53–54 (2004) (“[A]lmost immediately after the 1968 presidential election both parties seized upon environmental protection as a source for political opportunism. . . . [B]y late 1969 and early 1970, both the Nixon White House and the Democratic-controlled Congress were competing for the environmental mantle.”); Elliott et al., *supra* note 29, at 327–28 (1985) (describing “the context of competitive credit-claiming” among politicians as “the matrix generating the basic structure of environmental institutions of the present day.”).

<sup>37</sup> LEAGUE OF CONSERVATION VOTERS, JOHN MCCAIN – POSITION SUMMARY, <http://lcv.org/obama/mccain-facts.html> (last visited Sept. 24, 2008).



What do you do? A logjam on this scale dwarfs the personal strength of any human being. No individual or small group can possibly hope to break it.

There is only one sensible solution: portage; pick up the canoe, go around the logjam, and put the canoe back in the water.<sup>38</sup>

### III. PORTAGE STRATEGIES IN ENVIRONMENTAL LAW

Like carrying the canoe around the logjam, “portage strategies” in environmental law and policy go around the politicians rather than through them. There are essentially four ways that I can think of to do this:

#### 1. *Address Environmental Issues More on the State and Local Level*

We certainly have been doing that with climate change.<sup>39</sup> And some thoughtful people think that more of U.S. environmental law should be conducted at the local and regional level, as it is in many other countries.<sup>40</sup>

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<sup>38</sup> WIKIPEDIA, PORTAGE, <http://en.wikipedia.org/wiki/Portage> (last visited Sept. 9, 2008) (“Portage refers to the practice of carrying a canoe or other boat over land to avoid an obstacle on the water route (such as rapids or a waterfall in a river), or between two bodies of water.”).

<sup>39</sup> See BARRY G. RABE, GREENHOUSE & STATEHOUSE: THE EVOLVING STATE GOVERNMENT ROLE IN CLIMATE CHANGE (2002); Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 54–55 (2005).

<sup>40</sup> DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE 8, 124–43, 181–89 (2005); see generally Henry N. Butler &

## 2. *Policy-Making by Default by the Courts*

After over a decade of failed administrative and legislative efforts to define the scope of wetlands that are subject to federal permitting requirements, the issue is finally being resolved by the Supreme Court, albeit in a way that is not generally to the liking of many environmentalists.<sup>41</sup> This has been an issue on the national scene for over 15 years since then Vice-President Dan Quayle famously delivered himself of the common sense view in 1990 that in order to be considered a wetland, something ought to have to be wet.<sup>42</sup> In an earlier era, without a logjam, one might have anticipated that an issue of this nature could have been the subject of a compromise statutory solution somewhere along the way, balancing the interests of developers and environmentalists in some sort of accommodation. And, in fact, there were numerous attempts to reach a compromise, including sending the issue to the National Academy of Sciences, and drafting legislative language, which President Clinton threatened to veto. The history is told in the following footnote. The passage is also notable for its sadly too typical “blood feud” rhetoric in which those on the other side are portrayed as “ignorant,” “corrupt” “hatchet men” intent only on “gutting” environmental protection with “bogus” proposals at the behest of “developers.”<sup>43</sup>

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Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL’Y REV. 23 (1996) (discussing possibility of improving environmental regulations by reallocating authority from the federal to state governments); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (arguing that claims that federal environmental laws are required to avoid a state competition-based “race to the bottom” are unfounded, as state regulations will ultimately provide more desirable results than federal regulations); Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2083–84 (1993).

<sup>41</sup> See *United States v. Rapanos*, 547 U.S. 715, 739 (2006); *Solid Waste Agency of North Cook County v. U. S. Army Corps of Eng’rs*, 531 U.S. 159, 171–74 (2001).

<sup>42</sup> John Katko, *Wetland Hydrology*, FRIENDS OF WETLANDS HIGHLIGHTS, 27 (1993), available at <http://www.fowl.org/PDF/bestof.pdf> (including a history of the controversy, including Quayle’s statement).

<sup>43</sup>

It is understandable that persons ignorant of wetland ecology and science (such as the members of the now—happily—defunct Quayle Council who so blindly and simplistically sought to impose upon public

conservation agencies the interests of the developers) would be confounded by this hydrological criterion. What is reprehensible is the tactic the developers used: they tried to take advantage of the general public's ignorance when they attempted to run roughshod over these valid scientific criteria with their scientifically bankrupt or corrupt alternative proposals and their statements such as the former Vice-President's that "a wetland should be wet!" Either they couldn't understand the scientists or they refused to listen when, in 1991 and 1992, they mounted an unconscionable effort to gut scientific wetland criteria and replace them with expedient but bogus (and therefore environmentally disastrous) rules of their own concoction. They wanted to define saturation as being to the surface of the soil, and to set the time parameter to 21 consecutive days during the growing season! This would have defined many or most remaining U.S. wetlands out of existence. It is difficult to believe they didn't know what they were doing; they just didn't care—despite their insistence that they are "as concerned as the next guy about protecting wetlands." The Quayle Council (a.k.a. the President's Council on Competitiveness) forced these bogus proposals for revisions in the 1989 Wetlands Manual on government agencies in 1990 by claiming that these agencies did not provide for public input (i.e. did not allow developers to make their case) during the process whereby the 1989 Manual technical hydrological criteria were adopted. An earlier version of the Federal Wetlands Manual (the 1987 version) has criteria (water must be saturated to within 12" of the surface, for a minimum of consecutive days that constitute 5% of the growing season) which protect fewer areas as jurisdictional wetlands than do the 1989 criteria but are far more sound than the Quayle Council revision proposals. At that time the US EPA and Army Corps of Engineers decided to use these earlier criteria to delineate wetlands until such time as the issue was resolved by Congress. In 1993 Congress deferred this decision until the National Academy of Sciences did further study and reported its conclusions. This report was issued in 1995 during the debate on the renewal of the Clean Water Act, and it basically upheld the protective criteria of the 1989 Manual and severely criticized the political interference by the developers and their hatchet men in the Quayle Council and other porcine sties in the adoption of scientific criteria (for instance, Dr. William Sipple, the head EPA representative on the wetlands review board, decided to resign from the board rather than participate in the charade of what he called "bad science"). But by then the 1994 elections had given the Republicans (whose pavement-and-money reality is blissfully and determinedly innocent of scientific knowledge) control of the Legislature, and they chose to ignore the findings of the NAS. President Clinton threatened to veto any version of the Clean Water Act that gutted wetland protection, and negotiations have been proceeding ever since. The 1996 budget bill (HR 3019), which included the CWA reauthorization, was finally approved in May, 1996, with most of the damaging provisions removed. But the reauthorized version of the CWA, although passed in the House, is lying dormant in the Senate; it may see action in 1997.

*Id.*

With some justification, Justice Scalia in *Rapanos* accuses Justice Kennedy of “writing a new statute” to deal with the problem by holding that adjacent wetlands can be regulated if a “significant nexus” can be shown to pollution of navigable waters. The point for the moment is not whether Justice Kennedy does or does not go beyond a legitimate act of interpretation into the realm of law creation. Rather, the point for the moment is merely that when a “logjam” precludes Congress from addressing controversial issues through compromise legislation, the courts are the default mode for supplying an answer.

Some might even argue that this is also what happened in *Mass. v. EPA*.<sup>44</sup> With a logjam preventing the political branches from reaching a compromise on legislation to address global climate change, Justice Stevens famously begins his opinion by proclaiming for a 5-4 majority that:

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. . . . Calling global warming ‘the most pressing environmental challenge of our time’<sup>45</sup>

I suspect that Justice Stevens chose those opening words with great care, and that from the standpoint of history, they will be regarded as far more important than any of the various legal holdings that follow.

Again, my point at the moment is *not* to suggest that the Supreme Court in either *Mass. v. EPA* or in *Rapanos* went beyond its proper judicial role, but rather to make the more modest point that the “legal system” is in fact a system. When one portion of it is not functioning as effectively as it once did due to a “logjam,” other portions of the system of necessity have a tendency to take up the slack by adapting and supplying answers to pressing legal questions that might formerly have come through legislation.

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<sup>44</sup> See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>45</sup> *Id.* at 497.

### 3. *Use the Chevron Doctrine to Develop Innovative Policies Under Existing Statutes*

Elsewhere I have argued at length, and so will not repeat here, that the *Chevron* doctrine has made environmental legislation somewhat less necessary:

*Chevron* rendered the legal system more adaptable and more capable of undergoing substantial policy changes without the benefit of legislation. One might even speculate that the increased ability of the law-making system to adapt to new conditions without legislation may in turn help to account for the relative paucity of significant environmental legislation since 1990.<sup>46</sup>

Although there has not been much significant environmental legislation since 1990, environmental policies have continued to develop and change. Emboldened by the *Chevron* doctrine,<sup>47</sup> administrative decision-makers have been able to adapt the system by making significant policy changes that previously would have been thought to require legislation. Two examples are the “brownfields” reform of the Superfund program under the Clinton Administration in the 1990s, and the development of a multi-state trading system for the oxides of nitrogen (NO<sub>x</sub>) to supplement (and in fact “amend”) the trading system for sulfur oxides created by the 1990 amendments to the Clean Air Act.<sup>48</sup> Interestingly, in both instances, those involved first thought that legislation would be required, but then, when it proved difficult to reach legislative consensus, EPA proceeded to act administratively. (Admittedly, legislation was later enacted on brownfields but it largely codified policies that had already been developed at the administrative level,<sup>49</sup> and an ill-advised D.C. Circuit decision struck down EPA’s attempt to “enact” the President’s “Clear Skies” proposal by administrative interpretation when Congress refused to pass

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<sup>46</sup> E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 4–5 (2005).

<sup>47</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984).

<sup>48</sup> See Clean Air Interstate Rule, 70 Fed. Reg. 25162 (May 12, 2005).

<sup>49</sup> Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107–18, 115 Stat. 2356 (codified at 42 U.S.C. §§ 9601–9675 (2000)).

it.)<sup>50</sup>

Other examples of significant policy developments without the benefit of legislation include: (1) the development of trading—first in the “bubble” and “emissions offset interpretative ruling” policies at EPA and only thereafter in the “acid rain trading” program in the 1990 Clean Air Act amendments; (2) risk-based priority setting and risk assessment as symbolized by the 1987 “Unfinished Business” Report; (3) the EPA report on second-hand tobacco smoke, which led to the single most important public health improvement of our times—the change in our culture to discourage smoking generally and particularly in public places; (4) the reform of the Superfund program to encourage voluntary clean-ups and “brownfields re-development”; (5) environmental justice under the Clinton Administration; (6) the development over the last three Administrations of *Energy Star*, performance track, and other environmental programs that rely on positive incentives in addition to punitive threats; and (7) the *in silico* revolution currently in progress in which computer simulations, structure activity relationships, and understanding of the biology of “toxicity pathways” replace whole body testing in animals as the basis for most decisions about the safety of chemicals.<sup>51</sup>

All of these fundamental changes—significant improvements, I would contend—in environmental policy were accomplished without the “benefit” of statutory amendments. The idea that policy innovations in environmental law take shape first in the minds of members of Congress, who then “write laws” requiring administrators to “implement” far-seeing policy choices, is simply a myth, at least in the modern environmental era in the United States.

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<sup>50</sup> See *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

<sup>51</sup> COMMITTEE ON TOXICITY TESTING AND ASSESSMENT OF ENVIRONMENTAL AGENTS, NATIONAL RESEARCH COUNCIL, TOXICITY TESTING IN THE 21<sup>ST</sup> CENTURY: A VISION AND A STRATEGY – REPORT IN BRIEF 2 (2007), available at [http://dels.nas.edu/dels/rpt\\_briefs/Toxicity\\_Testing\\_final.pdf](http://dels.nas.edu/dels/rpt_briefs/Toxicity_Testing_final.pdf) (“The report envisions a new toxicity-testing system that relies mainly on understanding ‘toxicity pathways’—the cellular response pathways that can result in adverse health effects when sufficiently perturbed. Such a system would evaluate biologically significant alterations without relying on studies of whole animals.”); see also Bret C. Cohen et al., *Toxicity Testing in the 21st Century: Better Results, Less Use of Animals*, 25 ENVTL. FORUM 46 (2008) (discussing the viability of the National Academy of Science’s report with regards to replacing animal testing).

The *Chevron* decision<sup>52</sup> in 1984 brought a welcome, if not long-overdue, note of realism to American legal theory by recognizing that administrative agencies appropriately *make* law in the interstices where Congress has not addressed a particular issue:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>53</sup>

There are, however, two separate "tests" at war with one another in this crucial passage in the *Chevron* opinion. The broader, more "functional" test is whether Congress focused on and decided "the precise question at issue." The other, which is the more literal, traditional and narrower reading, is whether the statutory language is "ambiguous."

As some wise observers predicted long ago,<sup>54</sup> the rising tide of "textualism" among judges has led some courts to confuse the question of whether there is language in the statute that arguably bears peripherally on the issue with the correct question under *Chevron* of whether Congress actually "has directly spoken to the precise question at issue." The underlying purposes behind *Chevron* are to vindicate policy choices that Congress has actually made while restricting lower courts from imposing their "own construction" on the statute in the guise of interpreting a fictive Congressional "intent" when Congress actually had no "intent" on the "precise question at issue."<sup>55</sup> From this standpoint, it is fatuous to assert (as does the D.C. Circuit in its recent decision striking

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<sup>52</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>53</sup> *Id.* at 843–44 (emphasis added) (citation omitted).

<sup>54</sup> Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351, 357–58 (1994).

<sup>55</sup> Elliott, *supra* note 46, at 7–8.



down the CAIR rule) that Congress has “spoken directly” to the “precise question” of whether EPA may implement a “cap and trade” system for the oxides of nitrogen. On the contrary, this is a classic instance of an issue on which the statute is really “silent.” The fact that Congress included language in the statute providing that a plant in one state could be forced to reduce its emissions if it could be traced to causing a significant violation of air quality standards in another other state<sup>56</sup> does not in any realistic sense mean that Congress “intended” to preclude a NO<sub>x</sub> trading system. Congress in 1990 simply did not envision that EPA (both under Clinton in 1998 and under Bush in 2005) might promulgate a trading system for NO<sub>x</sub> to address region-wide nonattainment, as opposed to non-attainment caused by an identifiable polluter.

For the “portage strategy” of administrative interpretation to work effectively, courts have to give administrative agencies flexibility to adapt statutes creatively to address questions that Congress did not actually envision when enacting the statute. EPA’s recent Advanced Notice of Proposed Rulemaking on how to address climate change under the existing Clean Air Act provides numerous examples of creative interpretations that the agency might adopt to regulate GHGs under the existing statute,<sup>57</sup> as it was encouraged to do by the *Mass. v. EPA* decision. But decisions like the D.C. Circuit’s ill-advised *North Carolina* opinion striking down the CAIR rule merely get in the way without actually vindicating Congressional authority or enforcing any policy decisions that Congress actually made.

It would be hard to imagine any environmental issue on which there is a broader bipartisan consensus than that we need a national trading system for NO<sub>x</sub>, as well as SO<sub>2</sub>. Not only was such a system promulgated by both the democratic Clinton Administration in 1998 and the republican second Bush Administration in 2005, but a trading system for NO<sub>x</sub> was also a common feature of *all* the multi-pollutant bills pending in Congress in the first half of the present decade. Those bills were not enacted because the Republicans and Democrats could not agree (or compromise) on whether the reductions under a NO<sub>x</sub>

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<sup>56</sup> 42 U.S.C. § 7410(a)(2)(D) (2000).

<sup>57</sup> Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,353, 44,407–14 (July 30, 2008).

trading system should be 70% or 90%. But no one (with the possible exception of three judges of the D.C. Circuit) believes that the reductions should be 0%.

To make “portage strategies” work, judges should be less intrusive on agency interpretations where Congress has been inactive or unable to pass legislation, and judges should be reluctant to find that Congress has “spoken directly to the precise question at issue” based on scraps of statutory wording that were never understood at the time to determine the issues now before the court.

#### 4. *Develop Expert Consensus Recommendations and Present the Politicians with a Pre-Packaged Compromise*

The final option for “portage strategies” is to make political compromises by politicians on legislation less central to policy development by developing a consensus among experts that already includes the key compromises *before* taking the issue to Congress for political action. I will explore this option in more detail at the end of this paper.

I should not be misunderstood as suggesting that any of these first three “portage strategies” is ideal. On the contrary, all of them are second or third best ways of making policy in an era in which compromise legislation in the environmental field is not easily attainable. The first three (local legislation, decisions by courts, and creative interpretations of existing law by agencies) all suffer from the common feature that only a small subset of the policy options that would be available through legislation are available in a “portage” solution that is a substitute for legislation. For example, while EPA might be able to create a trading system for carbon dioxide and other greenhouse gases under the existing Clean Air Act if judges would back off and give the agency its proper interpretative discretion under *Chevron*,<sup>58</sup> EPA almost

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<sup>58</sup> See *Is CO<sub>2</sub> a Pollutant and Does EPA Have the Power to Regulate It?: Joint Hearing Before the Subcomm. on Nat'l Econ. Growth, Nat. Resources, and Reg. Affairs of the House Comm. on Gov't Reform and the Subcomm. on Energy and Env't of the House Comm. on Sci.*, 106th Cong. 14–20 (1999) (testimony of Gary S. Guzy, General Counsel, EPA) (concluding that EPA had existing authority to address climate change under the Clean Air Act); Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1967 n.20 (2007); Steven D. Cook, *EPA Can Use Clean Air Act Authority To Establish Carbon Dioxide Program*, BNA DAILY ENV'T

certainly cannot auction off allowances, which many economists consider the preferable option. Its authority is also constrained in numerous other ways that make policy designed to address climate change under existing law possible but less than optimal.

The fourth “portage strategy,” expert consensus recommendations to the legislature, does not, however, suffer from that deficiency, but makes available the full panoply of options that would otherwise be available to the legislature. It merely reduces the potential for demagoguery and political posturing by striking reasonable compromises *before* an issue is presented to the legislature. For this reason, and also because this “portage strategy” is less familiar to American lawyers than the other three, I devote the balance of this paper to exploring it.

#### IV. EXPERT CONSENSUS PROPOSAL SYSTEMS

Most environmental problems are too complex and nuanced to be addressed effectively by a politicized and generalist Congress. Congress’s function is not to devise solutions to complex technocratic problems, but to provide democratic guidance and legitimacy. Members of Congress quite properly spend most of their time running for re-election, and addressing other pressing issues such as the war on terrorism, medical care and social security, whether the Bush tax cuts should be allowed to lapse, and whether there is anything to be done to keep the economy from slipping further into recession. Most members of Congress simply do not have the time or inclination to understand the details of complex environmental policy. Their staffs have a somewhat deeper understanding of environmental issues, but still in my experience not always at the same level of understanding as the experts in the agencies or academia who have spent their professional lives working on environmental issues, whereas many staffers leave after two or three years for more lucrative jobs elsewhere.

Complex and difficult environmental issues such as how to define a wetland tend to get reduced to whether one is “for or

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REPORT, Feb. 8, 2008, at A-5; Anthony Lacey, *EPA Eyes NSR Rules for Greenhouse Gas Emissions from Stationary Sources*, InsideEPA.com, Aug. 13, 2007. This was of course the view of EPA’s authority that was ultimately upheld in *Mass v. EPA*.

against” preserving wetlands; whether to make a 70% reduction in mercury emissions from power plants via a trading system or via 95% technological controls gets translated into whether one is “for or against” “tough controls” on mercury.

The United States Congress stands out internationally as one of the few places where the task of developing and proposing legislation on complex technical subjects is left to the legislators. The situation is somewhat less problematic when an activist executive branch is actively drafting and proposing legislation and can call on the resources and expertise of the agencies.

One option for going around the Congressional “logjam” is to build an ancillary institution with the time and expertise to hammer out policy changes and present them to Congress for ratification, rejection or fine-tuning. There are numerous examples of this model in which a diverse group of experts puts together consensus recommendations to legislatures.

For instance, some states have what they call Law Revision Commissions<sup>59</sup> that make recommendations for legislation to the legislature. The model was also used successfully in the U.S. at the federal level in the form of the Defense Base Realignment Closure Commission, when Congress intentionally tied its own hands to demagogue issues by setting up an expert panel to make recommendations to close bases and providing that the recommendations, if approved by the President, would go into effect unless Congress passed a joint resolution of disapproval.<sup>60</sup>

The European Commission serves a somewhat similar function in the European Union. The Commission experts have a monopoly on the right to propose new legislation, but once a package is proposed, the European Parliament and the Council must ratify or amend it.<sup>61</sup> This is not too different from the

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<sup>59</sup> See, e.g., CAL. GOV'T CODE §§ 8280–8298 (Deering 2008); CONN. GEN. STAT. § 2-85 to -88 (2008); N.J. STAT. ANN §§ 1:12A-1 to -15 (2008).

<sup>60</sup> The Defense Base Closure and Realignment Commission was authorized by Congress through the Defense Base Closure and Realignment Act of 1990. Pub. L. No. 101-510, §§ 2901–2914, 104 Stat. 1485, 1808–19 (1990).

<sup>61</sup> KLAUS-DIETER BORCHARDT, *THE ABC OF COMMUNITY LAW* 45 (5th ed. 2000), available at [http://ec.europa.eu/publications/booklets/eu\\_documentation/02/txt\\_en.pdf](http://ec.europa.eu/publications/booklets/eu_documentation/02/txt_en.pdf) (“The Commission is first of all the ‘driving force’ behind Community policy. It is the starting point for every Community action, as it is the Commission that has to present proposals and drafts for Community legislation to the Council (this is termed the Commission’s right of initiative).”).

Standing Committee on Practice and Procedure under the federal Rules Enabling Act<sup>62</sup> (except that the ratifying bodies are both the Supreme Court and Congress), or the idea behind the American Law Institute's "Restatements" of the common law in various areas, or the Administrative Conference of the United States, which, until its abolition in 1995, made expert recommendations to Congress for improving the administrative process.<sup>63</sup>

In each of these "expert consensus proposal systems," managing change in a complex and highly-technical legal system is facilitated by expert advice and guidance in developing policy packages that already contain the key compromises built into them. Most of the important and difficult issues are worked out in advance by a diverse group of experts who represent a diversity of the interests, and then consensus proposals are presented on a relatively non-controversial basis to the politicians for symbolic ratification and perhaps a few modest tweaks. For example, after almost five years of developing the REACH program at the expert level, the European Commission transmitted its recommendation to the European Parliament and the Council. These bodies debated, deliberated and made a few changes, mainly to signal symbolically that they favored economic development as well as strong protection against chemicals. But the basic design of the program was already hammered out and the crucial compromises made before the program was presented to the legislature. This is not too different from the American concept of "Negotiated Rulemaking" in which a representative group of experts hammers out a consensus proposal, which is then presented to the agency, the public, and the courts for review and possible revisions, but is usually adopted with few if any changes.<sup>64</sup>

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<sup>62</sup> 28 U.S.C. § 2073(b) (2000). *See generally* JAMES C. DUFF, THE RULEMAKING PROCESS: A SUMMARY FOR THE BENCH AND BAR (2007), available at <http://www.uscourts.gov/rules/proceduresum.htm>.

<sup>63</sup> The Administrative Conference of the United States (ACUS) was a federal advisory agency that existed from 1968 to 1995. ACUS made over 300 recommendations on administrative procedure issues; over 200 of which were enacted either by agencies or by Congress. The funding for ACUS was eliminated by a House-Senate conference in 1995. *See* FLORIDA STATE UNIVERSITY COLLEGE OF LAW, ABA ADMINISTRATIVE PROCEDURE DATABASE: RECOMMENDATIONS FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, <http://www.law.fsu.edu/library/admin/acus/acustoc.html> (last visited Sept. 8, 2008).

<sup>64</sup> Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570 (2000); DAVID

It is not always necessary that an expert consensus policy proposal system must be created by statute or imbued with exclusive statutory authority to make proposals. More informal groups, such as the U.S. Climate Action Partnership (USCAP), have been influential precisely because they bring together a diverse group of expert stakeholders to agree on a consensus proposal or set of principles.<sup>65</sup>

The key feature that all these expert consensus policy proposal systems have in common is that none of them relies primarily on politicians to initiate the changes needed to adapt a complex legal system to changing conditions. Rather, all these systems recognize, at least implicitly, that politicians are too busy doing what politicians do to master the complex details of policy or to work out sensible compromises. Rather, politicians in elective democracies will understandably be tempted to send simple high-level signals to their constituencies that they are in favor of economic development as well as tough regulation of chemicals, or that they think wetlands are good and should be protected, or that mercury from power plants is bad.

Perhaps one way around the logjam in Congress is for environmental experts to reach consensus among themselves about what policies make good sense and to present them as a package to Congress.

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M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 1-17, 173-83 (1990). See generally Phillip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) (arguing for the adoption of negotiated rulemaking procedures and outlining how the process would work). For a skeptical assessment, see Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (arguing that “[n]egotiated rulemaking has long lacked systematic evidence showing that it yields superior results over conventional rulemaking.”).

<sup>65</sup> “USCAP is an expanding alliance of major businesses and leading climate and environmental groups that have come together to call on the federal government to enact legislation requiring significant reductions of greenhouse gas emissions. After a year of dialogue and collaboration, the group produced a set of principles and recommendations to guide the formulation of a regulated economy-wide, market-driven approach to climate protection.” UNITED STATES CLIMATE ACTION PARTNERSHIP, ABOUT US, <http://www.us-cap.org/about/index.asp> (last visited Sept. 9, 2008).