Legal Imagination and Environmental Law: An Earth Day Special

Jon Christensen: [00:00:00] Welcome to Story+World: Changing Stories for a Changing Planet, the podcast of UCLA's Laboratory for Environmental Narrative Strategies. I'm Jon Christensen, the director of LENS, here with our producer, Liv Slaby, and our guest today, Alejandro Camacho, Professor of Law at UCLA and a member of the Board of Directors of the Center for Progressive Reform, a nonprofit research and advocacy organization that works in the service of responsive government climate justice mitigation and adaptation, and protecting against environmental harm.

When we think about the narrative of environmental law and policy in the United States, we often begin sometime in the 1960s. Perhaps with Rachel Carson's book *Silent Spring*, which was published in 1962 and is widely credited with helping to spur the modern environmental movement. Or in 1964, with passage of the Wilderness Act [00:01:00] to protect America's remaining untrammeled lands after more than three centuries of appropriation and exploitation.

The Wilderness Act was the first in a series of landmark environmental legislation that followed, including the Clean Air Act in 1970, a year that also saw the first Earth Day, the Clean Water Act in 1972 and the Endangered Species Act in 1973. But our guest today begins the narrative of environmental law and policy much earlier in his new book, *Lessons for a Warming Planet: A Vital History of US Environmental Law.*

Written with his colleague, Brigham Daniels, a professor of law and co-director of the Wallace Stegner Center for Land, Resources, and the Environment at the University of Utah. In fact, they trace the story of environmental law in the United States back to the colonial period before there even was a United States of America.

Welcome to Story+World, Alejandro.

Alejandro Camacho: Thank you for having me.

Jon Christensen: Let's start with the big [00:02:00] picture of the story you and Brigham Daniels wanted to tell in this book, and what inspired your desire to do that?

Alejandro Camacho: Well, there were a couple things that really inspired us. When I've been thinking about once the book is coming out to be published that it sort of started seven years ago, which is quite remarkable for me, to think back when we started it. But we were thinking about writing a book about environmental legal history and as like many would we sort of looked around and tried to see what books were out there and we were quite surprised actually by the complete absence of any sort of book that sort of looked at environmental law and tried to do what we're trying to do, which is really two different things.

First of all, there's really no prior book on the history of U. S. environmental law that is taking a generally broad view of the environment, meaning most, as you mentioned, focused on environmental protection laws starting from the 1960s and 70s. Some might look at the progressive era as also another point when the public lands legacy, [00:03:00] but they were missing centuries of the lessons from how legal history drove exploitation. I'm sorry, how the law drove exploitation.

So there's sort of a one side of the coin, namely environmental protection as environmental law, but did not look at law and its effect on the environment through exploitation, and we really thought that was an important piece to look at. We also were looking at this at a time seven years ago, as many as you might remember—it doesn't seem that long ago, at the same time, it does—when the first Trump administration was coming into power and we were thinking about what sort of practical lessons might be learned from the history of environmental law for today's current problems.

Jon Christensen: I also found it interesting, in a way, to use this legal history lens to tell a story of American environmental history. And I wanna run through each of the periods in your book at a high level because each one of them has key lessons about what shaped U.S. environmental law and policy, [00:04:00] as well as facts on the ground, and how those forces and factors are still at work in many ways, and what lessons they hold for the future.

Let's start with what you call the allocation era, which runs from colonial, even pre-colonial times to the end of the 19th century. From my perspective, the key insight here is that our environmental laws, as you mentioned, have been as much and often more about appropriation and exploitation than they have been about protecting the environment and people.

Alejandro Camacho: Yes, that is the era that we look at that is, in some ways, embarrassingly a long period of time—we're talking about pre-colonial to 1890. But it really is an era that is characterized, as you mentioned, by exploitation, by displacement, by destruction, and primarily for the benefit of European settlers and their industry. It really is environmental law, and it's not usually thought of as such, but it has affected the environment in fundamental ways. We're talking about property law, primarily the common law rule of capture, and how it dominates.

Basically the idea is whoever extracts first owns it and it really drove exploitation, in many cases including overexploitation of so many different resources: wildlife, fisheries, minerals, and even water. And also it was characterized by land disposal policies, a variety of different federal laws that were really about how do we privatize property, get it to be used and exploited on behalf of course of a certain group, namely European settlers. So it is environmental law in a fundamental way. It's just not the way that people typically have thought about it, because it really fundamentally shaped our—Americans'— relationship with the environment and who got to benefit from that.

Jon Christensen: Can you talk us through the conceptual differences between common law, police powers, and administrative or regulatory laws and policies? I think it's important for us to have that understanding of the differences here and it sets up the [00:06:00] emerging role each played in environmental law, which would set the stage for the roles they play now and will play in the future.

Alejandro Camacho: Yes, of course. So there really wasn't any administrative law in the first era, right? The administrative era, this predates 1890 and everything before predates any sort of manifestation of what we might think of today as an administrative agency. There were federal government entities, et cetera, but very few that we would think of today as administrative law. It was really much more foundationally based on English common law, which is the law of the courts where most of the law that was adjudicated, was created, was through common law litigation. So between private parties, it's what we often refer to as private law with very limited space for public law, which we would today refer to as the law that involves the relationship between the state and its citizenry, the only exception being something like criminal law. So back then, really throughout that entire time, there really was very little space for the sort of [00:07:00] public law administrative law apparatus. And what did exist was primarily federal legislation that would be passed to sort of facilitate the development of private transactions, like disposal of property, overcoming or dealing with private disputes. And then of course, if there was some sort of criminal activity or accusing criminal activity, the public law would play a role. But not until the next era did public law ever take place.

Jon Christensen: But in my reading, there was also the foundation of what became the police powers that would later lead to some of the

Alejandro Camacho: Yes.

Jon Christensen: Public health protections.

Alejandro Camacho: That's right. You're right in the sense that the police power comes from a different but related sort of place in the sense that the police power was seen as the power of the sovereign to regulate for public health, safety, and general welfare. And the sovereign in our U.S. federal system was not the federal government, it was the states. And so the states generally did have the power, the police power, to regulate on behalf of the public. [00:08:00] That being said, for those first couple centuries that police power was primarily used to promote exploitation and disposal of property. Later on in subsequent eras, that police power then became understood as being some preparation and protection of public health, safety, and general welfare. It definitely took more of a public health or consumer protection lens.

Jon Christensen: I'm trying to set up some themes that I think will run through our conversation. And I think this is also a period where we see some innovation or what you come to call legal imagination. For instance, in how water law, inherited from England, adapts to the arid American West.

Alejandro Camacho: Sure. And I think there were definitely a number of small, incremental changes in U.S. law that sort of served as a sort of prologue for [00:09:00] much more fundamental changes. But you're certainly right that during that first era, there were a number of different sorts of laws that took place that were meant to deal with sanitation crises or any kinds of wildlife over exploitation or, I mentioned the book, the creation of Yellowstone, which is a national park. Again, a manifestation of the first institutionalization or preservation. So we did see the use of the police power and the common law in ways that tried to address some of the most egregious harms. One of the themes that comes up clearly in the book is that while each era had a primary overarching theme, like exploitation, in this era, there certainly was an undercurrent of preservation where we saw little moments like that. Or of course you certainly some of the transcendentalists and the leading thinkers that still permeate preservation and conservation today, like [00:10:00] Henry David Thoreau, where they were starting to think about the limitations of a sort of exploitative sort of mindset that was the dominant theme.

Jon Christensen: And some of that innovation I mentioned, you know, the water law actually was in service of exploitation and appropriation. In fact, it's called the prior appropriation.

Alejandro Camacho: No, of course. And so you're right. So I should have gotten to that directly. Certainly in U.S. water law, there's sort of two different legal regimes and certainly it was the English, the one that came driven out of English common law, and the one that was more driven out of sort of civil law system. And certainly in the West there was a combination of, because some of the Western states definitely came from more of a civil law background. But you're right, there was a attempt to adapt from a water regime which was primarily focused on a ecological baseline, if you will, a water baseline that was relatively plentiful to an area that was incredibly arid. They nonetheless adopted a rule that was fundamentally based on the concept of rule of capture of the first one there gets it, even if that later [00:11:00] uses, were considered to be more in keeping with the public interest and also, unfortunately, quite often they were based on a baseline that was often incredibly optimistic about what the water table had at the time. So that later on when times became even more arid, the prior appropriation became even more perverse.

Jon Christensen: Yeah. The Colorado River being the supreme example of a baseline based on very wet years.

Alejandro Camacho: Yes. Yes.

Jon Christensen: Okay. Let's move on to the progressive era, a period where you see emerging law and policy to fight excess in an age of excesses.

Alejandro Camacho: Yeah.

Jon Christensen: I kinda like that line. Between 1890 and 1920. It seems to me this is a period in which we really begin to see the modern shape of environmental law policy and administration begin to emerge.

Alejandro Camacho: Yes, definitely. It's definitely the first major shift from the first oscillation of our laws, as you mentioned, sort of a backlash against the excesses of [00:12:00] the allocation era. That's not to say this era was a bastion of, even though it was called the progressive era, what we would today call modern progressivism. But it definitely was fundamentally premised on the idea of government as a bullwark against those excesses, and it's really was based in many ways on what we today see as a somewhat naive idea of scientific expertise and government organization as a way to discipline unchecked market harms.

Certainly not naive in the sense of government having a key role in serving as that check, but naive in the sense of the capacity of individuals to, divine what was in the public interest on their own. That being said, it really was the first serious environmental movement. It led to a range of different public health legislation, most famously the Federal Meat Inspection Act, and following up on many familiar, you may be familiar with Upton Sinclair's *The Jungle*, this sort of famous book about the perhaps fanciful in many ways, taking certain journalistic [00:13:00] liberties, but nonetheless pointing out some of the horrific activities that were engaged in in the Chicago meat packing industry, but also natural resource protections.

This really is where we can point to in our history of public lands management, even though Yellowstone was first created decades earlier, this is where our national forest, our wildlife refuges, our monuments, and again, many national parks came into being. In fact, the National Park Service Act was passed in 1916, creating the National Park Service. So it really was a place where the government, federal government, but also state and local governments were playing a key role in recognizing that the public interest was something that was a key part of American law.

Jon Christensen: So I'm probably being a bit pollyannish here. When I think that if the narrative in environmental law had just taken a straight line from the progressive era today, we might be in better shape. [00:14:00] But, instead, we got what you call the modernization era or the great acceleration to the Anthropocene between 1920 and 1960. So here again, we see, as you write, legal strategies, processes, and institutions that helped underwrite and even accelerate development and consumption. Explain please.

Alejandro Camacho: Sure. Just quickly before that to respond to your first part—certainly, the progressive era had a lot of great things, but I would be remiss if I didn't point out a major dark shadow or blind spot of the progressive era, and that is its linkages with social Darwinism and eugenics. So there's certainly the explicit exclusion of non-Western European immigrants and people of color from those environmental benefits. So even in this era where we saw great environmental protection, we see certainly the full American promise not fulfilled.

Jon Christensen: Okay. I don't want a straight line from that.

Alejandro Camacho: Right. But that being said, you're right. The modernization era in many ways evokes the allocation era. It's different, very much so, in 1920 to 1960. And you look at that [00:15:00] period and students of environmental history will say, my goodness, that's an era that spans so many different things. You know, from the roaring twenties to Great Depression, New Deal, World War II, the post-war boom, that's a lot going on there.

But what really linked things together from an environmental law perspective was that the core thrust, the core current of that era was a legal system that really we like to say sort of underwrote the American dream, "American dream" in quotes, in the sense that it really was a place where— this is where America's fossil fuel dependency really took most hold.

Massive in invest investments in the federal interstate highway system in dams, federal dams, certainly the automobile became the paramount of transportation in that era. Coal power, oil extraction, were all key parts of this era. But in addition to that, this is also where we saw not just sort of the energy extraction becoming king, but also this is [00:16:00] when suburbanization and chemicalization, if you will, also became paramount.

The suburbs were really created through a variety of federal and state law policies. Certainly private actors played their significant role, but we had, you know, the Federal Housing Administration subsidizing mortgages, interstate highway system again, zoning was upheld by the Supreme Court and proliferated virtually every state, again, to the exclusion of certain communities, particularly African Americans and any non-whites.

And then you've got the chemical revolution and nuclear power. This is where DDT and plastics and synthetic chemicals, and of course nuclear fallout proliferated. So with all of that, in many ways, if you're gonna use the car metaphor, I mean the conservation got kicked out of the car with, of course, fossil fuels and suburban sprawl and of course, nuclear risk and chemical pollution. It is undoubtedly the case that the U.S. became the world's biggest superpower in this era. It also became the world's [00:17:00] biggest polluter.

Jon Christensen: Nevertheless, there were what you call countercurrents of health and safety regulations, moderation to protect the public interest and land and wildlife preservation. But they weren't the main current.

Alejandro Camacho: No, they were not. But you're right. In some ways it's an irony that you know that it's one of the big ones created during the New Deal was the modern administrative state. We talked about it earlier. This is when agencies came to the fore, with this bureaucratic infrastructure that was being created—in that era, primarily to build development, but later on it became the scaffolding that became the what helped proliferate modern environmental law.

But there certainly was some modest federal legislation, certainly federal, but also state and local environmental laws that were the first sort of air pollution and water pollution prevention laws. So there definitely was this undercurrent that was percolating in the background.

Jon Christensen: In the next period, however, which you [00:18:00] call the environmental era, we go from protest to protection from 1960 to 1980. This is, as we mentioned, usually where the story begins, but in your telling of the narrative of U.S. environmental law, we're kind of at the climax where what you call this astonishing environmental progress in law and on the ground. Progress on the ground. What were the forces that shaped that astonishing progress?

Alejandro Camacho: That's a great question. I think it was obviously so many different pieces that played a role. Certainly we had our fair share of disasters, quite a few different ones. Many people maybe familiar with the Santa Barbara oil spill in 1969, the famous Cuyahoga River in Ohio catching fire. These were two of the major flashpoints, Three Mile Island. We could point to quite a few different disasters that certainly served as flashpoints that brought things to the public [00:19:00] eye, but it's certainly another contributing factor.

Certainly like with any major transformative legislation and legal movement was the role of science. You mentioned earlier Rachel Carson. Certainly many people will point to her rightfully so, and her role, and she's one of many, but she certainly, her work brought the dangers of chemical pesticides like DDT to the public, to the average person's mind, and it really helps serve as the intellectual foundation for legal reform.

But you have to add into that, of course social movements. How do the social movements catch fire, if you will, along with the river. Science helped, but you have things like Earthrise. This very iconic picture from astronaut Bill Anders photographing Earth rising over the Moon and it was really the first time Americans—humans around the globe—saw the planet from the outside. And that symbol alone, it's hard to understate, overstate rather, [00:20:00] the value of that sort of galvanizing iconography.

And of course then you've got Earth Day to sort of epitomize the social movement. It was sort of, in many ways the apex of, or the crescendo of that social movement where 20 million Americans in one day stood up in a public demonstration. I've been hearing lately, actually, quite remarkably to me, that, to bring it to today's current events a little bit, that we've been told that just this past weekend, the No Kings protest movement of 8 million people was the largest protest in American history. And I hate to dispute that take, but Earth Day was 20 million people, one in 10.

Jon Christensen: Write letter to the New York Times.

Alejandro Camacho: Exactly. But not the knock, the latest movements but it's remarkable. One in 10 Americans.

Jon Christensen: But that was also remarkable about that period. It was a period when we actually had Republican environmentalists and conservationists. And you paint a very complicated picture of, of Richard Nixon. But who's often credited with—

Alejandro Camacho: [00:21:00] Sure.

Jon Christensen: You know, being a surprising environmentalist. He wasn't totally, but he—

Alejandro Camacho: No,

Jon Christensen: But he was actually a surprising environmentalist too.

Alejandro Camacho: Sure. You're right. It depends how we define environmentalist because I think clearly one of the other pieces of that cocktail of legal change is politics. You might call it political opportunity. You might call it political opportunism, but in Richard Nixon's case, it was this competition between him and Senator Ed Muskie of Maine, who was a Democrat who had been positioning himself as an environmental champion and was seen as a potential candidate for the presidency and Nixon, there was a direct line between, or a fairly direct line between him creating the EPA and various different landmark laws like the Clean Air Act and the Clean Water Act, not necessarily because he cared about the environment. Certainly the Nixon tape suggests that it wasn't the primary motivator, but because he didn't wanna be outflanked for the 1972 election, so. It does tell us a story. Whether strange bedfellows is the answer, there's no doubt that [00:22:00] coalition building and sometimes strange bedfellows and sometimes opportunism is what leads to some of the fundamental change. And I'm not sure the necessarily what the lesson is of that, other than that for those of us who care about taking lessons from the past, it's not necessarily to let any stone go unturned.

Jon Christensen: Yeah. And I think to understand the political moment and what might be possible, what might not be with the different actors and with the power that different actors have.

Alejandro Camacho: I think that's right and that sort of hits on one of the other themes that we definitely saw as a cross-cutting theme in this book, and that is this tension within environmentalism. So certainly there was this tension in what many people would speak to as to development and protection, or exploitation and protection. But there is also this tension within environmentalism, if you will, between pragmatists and idealists, and that this tension existed in the progressive era between people like John Muir, who was an idealist, and Gifford Pinchot, who was a pragmatist.

And [00:23:00] then, as you said, in the environmental era, every era had its idealists and pragmatists. And the question is, which of these different sort of impulses does the movement follow? Because what I came to learn in this project was that it's a bit overly simplistic even to refer to some as idealists and some as pragmatists. Because quite often each one of us is a pragmatist and idealist. We've got one on each of our shoulders. And the question is, which of these impulses do we follow? Because we don't want the great to be the enemy of the good, but we also wanna shoot for actually addressing a problem. And in each of these eras, when we saw a major environmental change, definitely some things were left on the plate that were not touched on.

Jon Christensen: Yeah, and as you acknowledge that progress of the environmental era was incomplete and, as you write, unprecedented environmental risks were left largely un- or

under-addressed. In the next era, [00:24:00] the one we're in now, which you call the contested era, we don't have a resolution or a denouement as in a traditional kind of simple narrative, but instead a period of backlash and gridlock mixed with some pragmatism from 1980 to the present.

That too is a long time as I was thinking about it, and one in which it has become more and more clear that we also face existential threats from climate change, species loss, and pollution from plastics and other sources that are being woven into the very fabric of life on the planet without us understanding the consequences. Not a great time to have so much contestation. What happened?

Alejandro Camacho: Right. So as you mentioned, this is a book that has a long arc and of course as a result, in some ways it's quite remarkable to us as well that you're talking about an era that started in 1980 and we consider to be still ongoing. I think what demarcates this [00:25:00] era, which makes it different than every other era, is that as we mentioned, as I mentioned before, each era had a primary current and undercurrent.

I think this era can best be characterized as turbulence. It's an era where there's initially backlash—the Reagan revolution, if you will—but then backlash from that backlash and you end up with quite a bit of turbulence. It's an era of incremental ebbs and flows where one branch of government engages in a bold action in one direction that then gets contested in another venue—across administrations, across courts, across legislatures. You have red states suing blue states or blue administrations, and blue states suing red administrations.

Most of the evolution environmental law in this era isn't characterized by legislation, it's mostly agencies and judicial interpretation. That's not to say that there aren't meaningful legal innovations occurring either at the legislative level or at the judicial or regulatory level. It just means it's an era that is really— [00:26:00] certainly nobody alive today would not recognize that this is a contested era, but the seeds of it really started in the eighties, but what we've seen is increasingly turbulent eras.

Certainly the eighties there was definitely backlash, whipsaw back and forth and gridlock, but quite remarkably, that partisan divide has hardened from a spectrum into a wall, and so it continues today in our view. It's hard to prognosticate. This is a story that's still being written, but it seems like from supercharged turbulence, it looks like if we were to divine the next steps, it certainly seems like a new era might be dawning what that era will look like, though we don't, we shudder to—

Jon Christensen: Well, but I wanna ask you that. So, because it's become painfully clear over the last decade that history does not always move in a progressive direction.

Alejandro Camacho: Sure.

Jon Christensen: You conclude your book [00:27:00] by looking back and moving forward as you write. How do you see us moving forward in what are pretty dark times for environmental law and policy?

We had Trump one, which was bad enough, taking the United States out of the Paris Climate Agreement, and then we had Biden's landmark infrastructure bills, the biggest investments in the climate and energy transition as well as other green infrastructure in history in the United States, but many of these investments didn't get out before Trump came roaring back and shut them down or clawed them back. We're really being whipsawed by history here.

How do you think about this moment and what needs to be done now? And how we should prepare for the future in a warming world?

Alejandro Camacho: That's a great question, and I do think a big part of the motivation for this book was indeed that, and I didn't want to pre-judge our conclusions, but I definitely think that— I thought then, at the beginning of writing this book, and I certainly think now [00:28:00] that there are reasons for cautious hope, while also reasons for pragmatism and reality checks.

One thing I will point to, to promote cautious hope is that the legal system has produced some remarkable environmental gains. We've definitely seen remarkable gains in clean air and clean water, protected species, preserved land. I think another piece that I take some hope from is that every major evulsion—well the two primary ones, progressive era and environmental era—was proceeded by a moment where progress to those who were in deep in it seemed impossible.

And I think if we think of history as a roadmap, and of course history may not be prologue and we don't always know that, of course, this combination of what we refer to as legal imagination combined with this mix of science and social movements and political opportunity and opportunism and unfortunately disasters, can serve as a wake up [00:29:00] call. And so I do think that there are reasons even today. Certainly it changes, it seems on a daily, if not hourly basis, with what's the latest going on in our world. I think there are lots of things to look at in our history to see that there are a number of ways that the law has created the problems we're in, but it also has helped get us out of it.

Jon Christensen: I'm in love with this term, legal imagination, and you also talk about policy experimentation, and I'd like to dive into our very present moment right now and ask you what you think about whether it might be time to rethink some of our landmark foundational environmental laws to produce the goods we need, such as clean transportation and housing.

Here in California where we are, the California Environmental Quality Act is being scaled back to exempt some transportation and housing projects. New York is contemplating doing [00:30:00] similar reforms to its state Environmental Quality Review Act. I've had an interesting experience of my own with a program in California's Department of Fish and Wildlife called Cutting the Green Tape. I'm working with a tribe to restore a meadow in the Southern Sierra Nevada and return it to the tribe's use. I was able to go to the Cutting the Green Tape team in Sacramento to get guidance on regulatory permitting pathways that

would make it easier and faster for us because we are producing something that state wants, restoring Sierra meadows, rather than having to go through the same kind of regulatory permitting process that we would go through if we were building a highway through the wetland, for instance. I think the Cutting the Green Tape approach could perhaps be applied to other good things we wanna produce—renewable energy, climate, transportation, green infrastructure, housing. But I'd be curious to hear your thoughts.

Alejandro Camacho: Yeah, so. I'd be remiss if I didn't start by saying, if I were to think about how we could address the current moment, [00:31:00] the first place I wouldn't look for is permitting reform with NEPA and CEQA. I'm not trying to deviate from the question 'cause I definitely think that is something I'm happy to talk about. But I definitely think the fundamental place we need to start is a climate legislation. That is, you know, bringing back things that were offered in the Inflation Reduction Act and in the infrastructure bill, as well as real regulatory schemes that promote climate mitigation and adaptation activities like we are seeing in California. So I'd start with that.

Jon Christensen: I agree with you there.

Alejandro Camacho: Yeah. And I also think that if I'm thinking about another sort of major problem we're having, when I think about the unaddressed environmental justice concerns, those are changes to our civil rights laws that I would be making that would allow us to address the problems.

And that does hit on one of the themes of the book that we haven't really touched upon. And that is, it's not just that we should be looking at the arc of environmental law history as being long, but also that it's wide. When we actually look at each of the different [00:32:00] moments of environmental legal history, in the 1920s, the 1960s, the idea of environmental law wasn't an idea, right? There were civil rights laws, there were property laws, there were corporate laws or consumer protection laws, maybe, administrative law and environmental law became a thing.

I think having that wider aperture beyond even thinking about climate regulation and climate subsidy, there might be, you know, changes to a corporate law, changes to administrative law or civil rights law that might be what needs to happen, and that's where legal imagination plays a role. That being said, when we're talking about NEPA, CEQA permitting reform and other sort of mini NEPA's like New York's CEQR, the Environmental Impact Assessment.

I am a big fan of NEPA, not just because I am a proceduralist. NEPA did two different things that were incredibly important for the environmental movement of the seventies and even today. It instantiated environmental impact assessment. Now, that sounds wonky, but what is that doing? [00:33:00] It's injecting science and data into democracy, something that was before the seventies very limited. And then secondly, it required consideration of issues, namely environmental issues that were so easily discounted in decision making processes. And so what this law does in the state versions of it is its primary goal was to make sure

that democracy, was sort of greased the wheels of democracy. And to make sure that decisions were more effective now—

Jon Christensen: But it also gave citizens standing—

Alejandro Camacho: Yes.

Jon Christensen: To sue in court if they believe that the project proponents were not following the law.

Alejandro Camacho: Certainly, it's another piece of the, one of the major innovations of environmental law. In fact, some would point to it as one of, if not one of the top few that environmental law offered to the rest of law in the United States was the citizen suit.

In most other, even other administrative law areas, [00:34:00] private parties could sue the government, namely the federal agency or state agency for failing to follow the law. But you couldn't sue another private party. What the citizen suit in environmental law did, it was this innovation that said private parties could sue in public law against other private parties for failing to follow the law.

And of course, the federal government or the state agency could take over the case if they wanted to on behalf of the public. But if they didn't, that citizen group could bring it on behalf of the public. So, I'm a fan of that. That being said, you're not wrong that it does have some, there are potentially some concerns about it.

I would say in our current political moment, I think the common framing of it as the primary impediment to important development is a bit overstated. I think certainly there are problems with the environmental impact assessment process and permitting in general. Certainly there are ways to make it more effective and perhaps to link the opportunities for [00:35:00] participation to when decisions are actually being made. So make participation more meaningful rather than more. And often the argument is more participation is better. Well, no, actually more meaningful participation is better.

But I think at the empirical evidence that's out there suggests certainly at the federal level that the primary impediments to project development is not permitting. It's primarily funding for agencies. Just they don't have enough money to engage in the permit analysis, but also funding of projects. Now, the Inflation Reduction Act helped deal with a lot of that for certain kinds of projects. I would say at the state level, I would pick less at CEQA and pick more the fact that it's the localized decision making that is the primary impediment. It's not that CEQA requires this analysis of the impacts, it's that who gets to decide is often the local decision maker who doesn't have the interest of the broader region or the state primarily at the forefront.

Jon Christensen: All right, well that's [00:36:00] a good radical idea to leave us to ponder as we think about policy experimentation and innovation and legal imagination. The only thing I would add to your ambitious framing of this at the beginning of the broader climate and

environmental justice innovations that you would like to see is I would like to see us be prepared for the moment to get those things done in four years in a way that can't be clawed back.

Alejandro Camacho: And that is the challenge of representative democracy. Especially with dealing with long latent rolling harms. Climate change is clearly the biggest challenge to Democratic decision making that we've seen in our nation's sort of democratic experiment because of how long the problems take, how the initial decision maker has to take the hit for some of the initial costs that might occur politically and even economically for the benefit of future generations. My [00:37:00] hope is that many of us care enough about our future generations to do what's best for them to sort of pass on a nation that is as bountiful as it is—a globe that's as bountiful as it is, at least in the shape that we received it in.

Jon Christensen: So, I'd like to try to end this on a positive note and ask if you have a few other areas where you'd like to see some more legal imagination, as you call it, put to good use.

Alejandro Camacho: Yeah, I would say this is still in the realm of environmental, but it's at the intersection of environmental protection and environmental harm and technology. That is, as we see biotechnology increasingly having the capacity to help have humans shape the environment in not just on the macro level, but also on the micro level. But also of course the specter of artificial intelligence. It's really thinking about how can the law deal with new forms of [00:38:00] technology in a way that is forward-looking enough and public-facing and public-regarding enough, I do think we are up for the task.

I do think when you look at our past, the some of the technologies that were there were quite revolutionary, and the law imperfectly addressed them. Sometimes late, sometimes incompletely, but still did address them. And I do think these are unique problems that we're facing today, but we have unique opportunities and capacities and technologies, and so I'm hopeful that we'll address those as well.

Jon Christensen: Thank you for leaving us on that hopeful note and for also the good history that leaves us with many ideas and tools to work with. I'd like to thank our producer of Story+World, Liv Slaby. Alejandro Camacho, thank you for joining us and for your book *Lessons for a Warming Planet,* which is indeed a vital history of U.S. environmental law.

Alejandro Camacho: Thank you. [00:39:00]

Liv Slaby: This has been Story+World: Changing Stories for a Changing Planet, where we explore environmental art, activism, policy, and imagination in California and beyond. It's the podcast of the Laboratory for Environmental Narrative Strategies, or LENS, at UCLA. Thank you for listening, and we hope you'll join us in our next story world.