As the most recent report from the Intergovernmental Panel on Climate Change makes clear, the negative impacts of climate change are now upon us, and we have a very limited amount of time to decarbonize global economies in order to reduce the risk of catastrophic impacts from climate change, impacts that might begin as soon as mid-century. Moreover, reducing and preventing extreme climate change will take long-term (decades and longer) commitments to restrict the extraction and combustion of fossil fuels, since any greenhouse gas emissions add to the stock of gases causing climate change in the global atmosphere. Yet at the same time, the Trump Administration is working as hard as it can to undo federal regulations that seek to reduce greenhouse gas emissions in the United States. The tension between these two dynamics makes clear a fundamental challenge in climate change policy specifically, and environmental law more broadly: society needs to make long-term commitments to prevent and undo significant environmental harms that take decades to play out, yet the political process moves in short-term cycles that can lead to undoing those commitments.

A key feature of resolving that tension has to be the development of environmental laws that are resilient to short-term political dynamics. That is where Sarah Light's most recent work, Regulatory Horcruxes, 67 Duke L.J. 1647 (2018), comes in. In her work, Light identifies horcruxes in environmental law and more broadly, and in so doing identifies a key tool to add resilience to environmental law.

Horcruxes, as Light defines them, spread regulatory power across multiple institutions (whether multiple federal agencies, federal and state agencies, or public and private actors), such that control over one institution does not give control over the entire regulatory program. (Light's terminology draws on the tool used by the evil Lord Voldemert in the Harry Potter books, a tool that allowed someone to cheat death by spreading bits of their soul across multiple inanimate objects.) That, in turn, can make the regulatory program resilient to political control over only one of the institutions, and therefore resilient to short-term political shifts. For instance, federal laws regulating the discharge of pollutants into waterways and the air (the Clean Water Act and the Clean Air Act) allow for states to take over the implementation of those permitting programs if they meet certain minimum requirements, including having their own state legislation providing for regulation of air and water pollution. Thus, if states do take over delegated permitting from the federal government, they will have enacted their own state-level regulatory program, one that is separate from the federal program. If a deregulatory federal administration comes into power, those state regulatory programs may remain in place regardless of any federal deregulation – a form of what Light calls vertical horcruxes (horcruxes that combine federal and state action).

Even within the federal government, horcruxes may prove useful to add resilience. For instance, clean water regulatory programs at the federal level are also split between the federal Environmental Protection Agency and the U.S. Department of Defense. Anti-regulatory control over only one agency will only have partial impact on the regulatory program, given the splitting of responsibility between the two agencies. Light calls these horizontal horcruxes. Of course, as Light acknowledges, these may be less effective than vertical horcruxes in providing resilience, since both agencies are part of the same executive branch that responds to the President. Nonetheless, differences in agency mission and staffing will likely provide some resilience to changes as regulation is spread across multiple agencies.

Finally, Light notes the possibility of private horcruxes, where regulatory programs are split between the government and private actors. As an example, Light identifies citizen-suit provisions that allow private actors to sue to enforce environmental laws, providing enforcement resilience even if the public enforcement entities are anti-regulatory.

Light's work provides an important starting point for understanding how we can add resilience to environmental law – a concept whose importance the Trump Administration's anti-regulatory push has emphasized. And as the intro to this blog post pointed out, resilience will be particularly important as we seek to address environmental harms like climate change that span decades or centuries, and require long-term commitments to prevent backsliding in terms of emissions, and also to provide clear signals to support investments that decarbonize the global economy.

As Light herself indicates in her piece, the identification of horcruxes is just a starting point, and there are important follow-up research questions around which kinds of horcurxes are more resilient to political pressures, and which kinds of regulatory agencies (or other institutional forms) are the best venues for horcruxes. I would add that Light's work encourages me to think more broadly around the topic of legal resilience in environmental law – are there tools besides horcruxes that can add resilience? For instance, might legal tools that encourage large investments by powerful economic and political actors in reliance on environmental law create interest groups that have a stake in resisting rollbacks of those environmental laws? Does instantiating environmental law in a wide range of legal areas besides public regulatory law, areas such as property, tort, and contract, add to resilience? Light's work is all the more important in helping start such a conversation, one that I think will be vital for our future.