An Essay: An Aspirational Right to a Healthy Environment?

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ABSTRACT

A right to a healthy environment is neither novel nor extreme. As this Essay posits, this is a propitious moment for exploring why such a right is supported by this Nation's legal institutions. This Essay walks through those institutions – our Constitution, the common law, as well as Congressional and state efforts to embed a right to a healthy environment into our legal fabric. Those institutions collectively demonstrate how an aspirational right, such as a right to a healthy environment, enjoys sufficient legal currency and is capable of enforcement.

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I.
INTRODUCTION

"Do people have a constitutional right to freedom from air pollution and other environmental hazards and annoyances?," wrote New York Times journalist Gladwin Hill in September 1969.[1] Hill was reporting on a Warrenton, Virginia meeting that month at the famed Airlie House among top conservation advocates exploring avenues for advancing environmental protection. Some participants explored the possibility of using the Constitution.[2] So too, the American Civil Liberties Union

1. Gladwin Hill, *Conservation Lawyers Move to Defend the 'Quality of Living'*, N.Y TIMES, Sept. 14, 1969.

2. *See* E. F. Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue,* L. & THE ENV'T 134, 141, 249, 252-61 (Malcolm F. Baldwin & James K. Page, Jr. eds. 1970). Richard Lazarus notes how the participants "disagreed sharply about which legal responses were potentially the most effective," including possible constitutional claims. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 48 (2004). One participant, David Sive, observed that "[w]hether environmental rights may be granted constitutional status is currently the subject of very active debate." David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 642 (1970). Professor E.F. Roberts of Cornell urged that the Ninth Amendment be used to justify a "right to a decent environment." John C. Devlin, *Conservationists Urged to 'Plead 9th Amendment,'* N.Y. TIMES, Aug. 16, 1970. Donald Large shortly thereafter observed how "the thrust, in both lawsuits and law review articles, has been to develop substantive rights to preserve environmental integrity," with lawyers "stretch[ing] such diverse pigeon holes as the ninth amendment, the public trust doctrine, and the common law of nuisance into environmental weapons," and yet "before the courts can construct constitutional or other substantive theories that will be adequate to protect the environment, they must first establish the right of environmental plaintiffs to be in court." Donald W. Large, *Is Anybody Listening? The Problem of Access in Environmental Litigation*, WIS. L. REV. 62, 113 (1972).

(ACLU) recently had sought to persuade a court that citizens enjoy a "right to live in, and enjoy, an environment free from improvident destruction or pollution."[3] Signed into law on January 1, 1970, the National Environmental Policy Act (NEPA) even hinted that citizens enjoy a right to a healthy environment.[4] Soon thereafter, though, conversations about a fundamental right to a healthy environment dissipated but did

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3. *Beyond Property*, N.Y TIMES, July 15, 1969. *See* Santa Barbara Cnty. v. Hickel, 426 F.2d 164, 166 n.2 (9th Cir. 1970). The Airlie House participants noted the ACLU's 5th Amendment claim. Malcolm F. Baldwin, *The Santa Barbara Oil Spill*, 42 U. COLO. L. REV. 33, 67 (1970-71). In 1968, Congressman Richard Ottinger had David Sive draft a complaint (the case eventually languished) alleging that Penn Central Railroad had committed constitutional violations when polluting Harmon Yards though the dumping of oil. *See* ROBERT D. LIFSET, POWER ON THE HUDSON: STORM KING MOUNTAIN AND THE EMERGENCE OF MODERN AMERICAN ENVIRONMENTALISM 134 (2014). The Environmental Defense Fund, established only a few years earlier, similarly argued, in part, that an effort to dam the Cossatot River in Arkansas violated constitutional rights, including the Fifth, Fourteenth and Ninth Amendments. Envtl. Def. Fund, Inc. v. U.S. Corps of Eng'rs, 325 F. Supp. 728, 739 (1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972). Indeed, while rejecting the argument, the court observed:

> Those who would attempt to protect the environment through the courts are striving mightily to carve out a mandate from the existing provisions of our Constitution. Others have proposed amendments to our Constitution for this purpose.

See Toward Constitutional Recognition of the Environment, 56 A.B.A.J. 1061 Nov 1970). Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition. *Id.* In Bass Anglers Sportsman's Soc. of Am. v. U.S. Plywood-Champion Papers, Inc., 324 F. Supp. 302, 303 (S.D. Tex. 1971), for instance, the court noted that:

> "legal theories presented by the recent surge of environmental quality suits have been quite diverse, ranging from grandiose claims of the right of the general populace to enjoy a decent environment . . ., an embryonic concept which perhaps environmentalists the greatest promise."

See also Envtl. Def. Fund, Inc. v. Hoerner-Waldorf Corp., 1 E.R.C. 1640 (D. Mont. 1970). More recently, a court observed that:

> "[s]ince there is not yet a constitutional right to a healthful environment, . . . there is not yet any constitutional right under the fifth, ninth, or fourteenth amendments to be free of the allegedly toxic chemicals involved in this litigation."

In re Agent Orange Product Liability Litig., 475 F. Supp. 928, 934 (1979), *rev'd on other grounds*, 635 F.2d 987 (2nd Cir. 1980).

4. *See infra* note 78 and accompanying text.

not entirely disappear.[5] At the close of 2013, the Pennsylvania Supreme Court garnered attention by enforcing a dormant state environmental right constitutional provision.[6] At COP21 in Paris near the close of 2015, many in the legal academy and the United States Special Rapporteur on Human Rights encouraged recognizing how protecting against the threat of climate change poses one of the most significant human rights issues affecting modern society.[7] More recently, lawyers in Norway have been attempting to enforce their country's constitutional provision for

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5. *See, e.g.*, Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173 (1993) (arguing for state-based constitutional right to healthy environment); Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L. J. 107 (1997) (tracing efforts to promote an environmental right); Daveed Gartenstein-Ross, *An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation*, 14 DUKE ENVTL. L. & POL'Y F. 185, 188 (2003) (arguing that, even assuming there is a rights-based justification for a federal environmental right, "it fits poorly with the present regulatory system"); Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L. J. 203, 206 (1974) (suggesting that "the courts and the Constitution can provide some answers to the right to a habitable environment"); Bruce Ledewitz, *Establishing a Federal Constitutional Right to A Healthy Environment in Us and in Our Posterity*, 68 MISS. L. J. 565 (1998) (presenting a detailed history and justification for championing a constitutional environmental right); Rutherford H. Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A. J. 1061 (1970) (discussing proposals for an environmental right); Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for Constitutional Amendment*, 8 TUL. ENVTL. L. J. 181 (1994) (the then President of Defenders of Wildlife arguing for a constitutional environmental right); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970) (exploring theories for a constitutional environmental right). The idea of an environmental constitutional right appears to be gaining more interest, as reflected by a recent symposium edition of the *Widener Law Review*. In one of the articles, for instance, Black Hudson aptly explores the structural issues posed by any such right, "by detailing its relationship with fundamental environmental constitutional textual provisions, and by describing some of the environmental ramifications of constitutional designs that do not optimally allocate regulatory authority across scales of government." Blake Hudson, *Structural Environmental Constitutionalism*, 21 WIDENER L. REV. 201, 203 (2015).

6. *See infra* notes 102-03 and accompanying text.

7. *See, e.g.*, *COP21: "States' Human Rights Obligations Encompass Climate Change"*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM'R (Dec. 3, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16836&LangID=E.

intergenerational environmental equity against drilling oil in the Arctic.[8]

As the world confronts the human dimensions occasioned by the effects of greenhouse gas emissions, perhaps this is an auspicious moment for once again testing the idea of solidifying a right—aspirational or otherwise—to a healthy environment. If, as many anthropologists tell us, we are now in a new Anthropocene era when human society directs, rather than responds, to nature, it seems reasonable to engage in a meaningful conversation about an environmental right.[9] To be sure, post World War II liberalism and legal process scholars erected weighty barriers for advancing some higher, fundamental right.[10] Yet some form of transcendent "right" has been the soul of modern environmentalism, from Aldo Leopold, to Christopher Stone, as well as Mark Sagoff and others.[11] Famed political scientist Lynton Caldwell wrote about how a stewardship ethic effectively collided with the assumption that

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8. *See* Atle Staalesen, *Lawyers Sue State Over Arctic Oil Drilling*, INDEP. BARENTS OBSERVER (Jan. 18, 2016), http://www.thebarentsobserver.com/ecology/2016/01/lawyers-sue-state-over-arctic-oil-drilling.

9. *See* Chris Mooney, *Scientists Say Humans Have Now Brought on an Entirely New Geologic Epoch*, WASH. POST, Jan. 7, 2016; Adam Vaughan, *Human Impact Has Pushed Earth Into the Anthropocene, Scientists Say*, GUARDIAN, Jan. 7, 2016; *Welcome,* WELCOME TO THE ANTHROPOCENE, http://www.anthropocene.info (last visited Apr. 8, 2016). Scientists are actively engaging in lively dialogues about defining planetary boundaries and whether we have pushed the planet too far—to a tipping point. *See, e.g.,* Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 347 SCIENCE 736 (Feb. 2015) (addressing potential tipping points for the earth).

10. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 45 (1956) ("the assumptions that made the idea of natural rights intellectually defensible have tended to dissolve in modern times"). In the early 1980s, Professor David Smith aptly noted that "[a] good many liberals . . . probably feel more comfortable with a process-based theory than with a jurisprudence of fundamental rights." David G. Smith, *Liberalism in Judicial Review,* LIBERAL DEMOCRACY: NOMOS XXV 208, 221 (J. Rowland Pennock & John W. Chapman eds., 1983).

11. *See* ALDO LEOPOLD, A SAND COUNTY ALMANAC 204 (1949); CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? 17 (1974); MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (1988). *See also* BOB PEPPERMAN TAYLOR, OUR LIMITS TRANSGRESSED: ENVIRONMENTAL POLITICAL THOUGHT IN AMERICA 54-78 (1992) (discussing Leopold, Stone, and Sagoff).

society's function is promoting economic value.[12] "Environmental rights," he observed, "are inherently social rights, yet they have hitherto run a poor second to civil and human rights."[13]

This Essay furthers that dialogue by suggesting how environmental rights envelop the fabric of our legal institutions, casting a shadow for an aspirational right that warrants acknowledging. An aspirational right might, for instance, contextualize appeals to employ the public trust doctrine as an enveloping principle to protect our resources for current and future generations.[14] Mary Wood, after all, spearheaded the idea of establishing a children's trust premised upon a capacious appreciation for the importance of both state and federal public trust doctrines.[15] To be sure, this short inquiry does not mine, in measureable detail, all of the issues surrounding the right to a healthy environment; instead, it provides a framework for how a necessary dialogue can unfold, positing that we should consider the jurisprudential and pragmatic issues surrounding an aspirational right to a healthy environment. As this Essay illustrates, an aspirational environmental right has become part of an international dialogue, and our legal institutions and history demonstrate how our society has slowly gravitated toward recognizing some form of such a right.

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12. Lynton Keith Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 ILL. L. REV. 319, 333-34 (1986).

13. *Id.* at 330.

14. *See, e.g.*, Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J. OF L. & POL'Y 281, 284 (2014) ("The public trust doctrine instructs our government to protect and preserve for both present and future generations the right of all citizens to enjoy natural resources free from substantial impairment or depletion.").

15. *See* MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2013); Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENVTL. L. 259 (2015). Others focus on re-examining certain foundational constitutional principles to support broader environmental statutory programs. *See* ALYSON C. FLOURNOY & DAVID M. DRIESEN, BEYOND ENVIRONMENTAL LAW: POLICY PROPOSALS FOR A BETTER ENVIRONMENTAL FUTURE 3, 146-47 (2010) (idea of a National Environmental Legacy Act and adopting a broader understanding of the Constitution to justify passing such an act).

II.
THE CASE FOR AN ENVIRONMENTAL RIGHT

A fundamental, or universally transcendent, right to a clean, healthy, and safe environment seems elemental. The 1972 Stockholm Declaration on the Human Environment recognized how human dignity and freedom can only occur if our natural surroundings afford an ability to live—for both present and future generations.[16] Twenty years later, the Rio Declaration on Environment and Development "emphasize[d] the need to integrate environment and development in order to achieve sustainable development and allow for a healthy and productive life in harmony with nature."[17] Many countries include some form of an environmental right in their governing constitutions.[18] The same is true with the European Arahus

16. *See* UNITED NATIONS, REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT (1972). *See also* SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT 3 (2008) (discussing the Stockholm Convention in the context of the environmental movement). As the late Professor Kravchenko and John Bonine note, "[i]n addition to clearly stated *environmental* rights, all international human rights instruments proclaim a right to 'life' in various manners." *Id.* at 5. *See generally* THOUGHT, LAW, RIGHTS AND ACTION IN THE AGE OF ENVIRONMENTAL CRISIS (Anna Grear & Evadne Grant eds., 2015) (exploring intersection of human rights, the environment, and philosophy); Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L. J. 65 (2002) (exploring human right to a healthy environment).

17. CTR. FOR INT'L ENVTL. LAW, UNEP COMPENDIUM ON HUMAN RIGHTS AND THE ENVIRONMENT: SELECTED INTERNATIONAL LEGAL MATERIALS AND CASES 1 (2004), *available at* http://www.unep.org/environmentalgovernance/Portals/8/publications/UNEP-compendium-human-rights-2014.pdf. The 1982 World Charter for Nature acknowledged rights of nature as separate from the rights of humans. Atapattu, *supra* note 16, at 75. The 1989 Hague Declaration on the Environment "recognizes the link between human rights and the environment and explicitly endorses the right to live in dignity in a viable environment." *Id.* at 76-77; *see* Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308.

18. *See* Mariana T. Acevedo, *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights*, 8 N.Y.U. ENVTL. L. J. 437 (2000) (discussing interpretation of the European Convention potentially implicating environmental rights); Carol Bruch, *et al.*, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 132-33 (2001); James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113,

Convention and other institutional bodies.[19] And today, it seems almost axiomatic that a right to enjoy access to a sustainable level of our natural surroundings is firmly imbued within human rights, whether for clean air, a climate not so disrupted by greenhouse gas emissions, access to clean and sufficient water supplies, or enjoyment of native fish, fauna, and unimpaired landscapes. Indeed, the European Convention on Human Rights recognizes how environmental threats interfere with the most basic of society's obligations: protecting the right to life.[20] And courts in Pakistan and the Netherlands have held in favor of

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114 (2006); Armin Rosencranz & Kathleen D. Urchak, *Progress on the Environmental Front: The Regulation of Industry and Development in India*, 19 HASTINGS INT'L & COMP. L. REV. 489 (1996). *See also* Office of the High Comm'r, *Special Rapporteur on Human Rights and the Environment (Former Independent Expert on Human Rights on the Environment)*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx (last visited Apr. 19, 2016) ("[m]any States now incorporate a right to a healthy environment in their constitutions"). In his thoughtful article on global environmental constitutionalism, Professor Klaus Bosselmann from the University of Auckland writes that "global environmental constitutionalism should aim for shifting the environment from the periphery to the center of constitutions—a shift that could be termed 'eco-constitutionalism.'" Klaus Bosselmann, *Global Environmental Constitutionalism: Mapping the Terrain*, 21 WIDENER L. REV. 171, 185 (2015).

19. *See* Svitlana Kravchenko, *Right to Carbon or Right to Life: Human Approaches to Climate Change*, 9 VT. J. ENVT'L L. 513, 529-541 (2008); KRAVCHENKO & BONINE, *supra* note 16, at 9.

20. *See generally* JUSTICE & ENV'T, HUMAN RIGHTS AND ENVIRONMENT: THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN ENVIRONMENTAL CASES (Nov. 2011), http://www.justiceandenvironment.org/_files/file/2011%20ECHR.pdf. *See also, e.g.,* Oneryildiz v. Turkey, Appl. 48939/99, Eur. Ct. H.R. (2002) (involving loss of life occasioned by failure to avert methane explosion at landfill site). In March 2015, various international experts adopted the Oslo Principles, and those principles announced the obligation of nation-states to protect our climate from such threats as greenhouse gas emissions. *See* EXPERT GROUP ON GLOBAL CLIMATE OBLIGATIONS, OSLO PRINCIPLES ON GLOBAL CLIMATE CHANGE OBLIGATIONS (Mar. 1, 2015), *available at* http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf. One Australian Justice commented that such principles might "offer judges clear and well-supported legal criteria" for resolving legal claims. Press Release, Thomas Pogge et al., Legal Experts Release Oslo Principles on Global Climate Change Obligations (Mar. 30, 2015), *available at* http://web.law.columbia.edu/sites/default/files/microsites/climate-change/climate_principles_launch_-_press_release_final_150323.pdf.

recognizing rights threatened by climate change.[21]

The collage of secular rules surrounding our society justifies recognizing some facet of an environmental right here in the United States. These rules range from our living Constitution, to common law principles, as well as to contemporary lex legis. To begin with, that the U.S. Constitution embodies a belief in, and appreciation for, fundamental precepts (often informed by foreign jurisprudence) is well-recognized.[22] After all, natural law provided a moral foundation that allowed reason, and correspondingly morality, to serve as the touchstone for civil authority rather than simply force, pedigree, or religion.[23] In

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21. *See* Rechtsbank's-Gravenhage 24 juni 2015, NL:RBDHA:2015:7196 (Urgenda Found./State of Netherlands), *available at* http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf; Malini Mehra, *Pakistan Ordered to Enforce Climate Law by Lahore Court*, CLIMATE HOME (Sept. 20, 2015, 2:00 AM), http://www.climatechangenews.com/2015/09/20/pakistan-ordered-to-enforce-climate-law-by-lahore-court/. Roger Cox, the author of *Revolution Justified*, advocates for judicial involvement in protecting against the effects of climate change. *See* ROGER COX, REVOLUTION JUSTIFIED (2012). He urges that "[c]itizens should launch lawsuits against governments that shirk their climate change responsibilities." *See* Chris Arsenault, *Time to Sue Governments For Climate Inaction? Dutch Lawyer Thinks So*, REUTERS (Sept. 16, 2015, 12:28 PM), http://www.reuters.com/article/climatechange-court-europe-idUSL5N11L4SS20150916.

22. What developing a written constitution meant to the colonists is explored in Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Law Eighteenth Century, in* CONCEPTUAL CHANGE AND THE CONSTITUTION 35 (Terrance Ball & J.G.A. Pocock eds. 1988). *See also* Cecelia M. Kenyon, *Constitutionalism in Revolutionary America, in* CONSTITUTIONALISM: NOMOS XX 84 (J. Roland Pennock and & John W. Chapman eds. 1979) (illustrating the fundamental principles embodied in the U.S. Constitution). For how Americans subsequently perceived the Constitution, see MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986).

23. Roscoe Pound observed how "the lawyers and judges and teachers of the formative era found their creating and organizing idea in the theory of natural law." ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 12 (1938). The "law of nature school looked at natural law from a moral standpoint. They thought of a moral duty to do what the moral ideal indicated and of the precept of the political lawgivers as an attempt to realize that ideal." *Id.* at 17; *see also* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 15-19 (1954 ed.). Natural right and natural law folded into English constitutional customs, which became "woven . . . into the fabric of our American constitutional system." BURLEIGH C. RODICK, AMERICAN CONSTITUTIONAL CUSTOM: A FORGOTTEN FACTOR IN THE FOUNDING 21 (1953). Governmental institutions, after all, could

unprecedented numbers, the American founding citizenry read Thomas Paine's exposition on the Rights of Man, and how both "reason" and "the universal order of things" warranted separating from England.[24] The Declaration of Independence exuded the principles of the dominant "American mind" and the importance of superintending inalienable "sacred" rights and privileges.[25] It extended beyond America to the French 1789 Declaration of Rights as well.[26] An accepted and recurrent theme surrounding the Bill of Rights is how James Madison, a principal architect of the Constitution, initially treated such Amendments as unnecessary because of the nature of a written Constitution.[27]

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not contravene the natural order—or science. As Bernard Cohen observes,

> the founders believed that sound systems of government and of the organization of society should display some analogy, some set of similarities in both values and actual forms, with the systems of nature. All of the framers of the Constitution would have agreed that no system of government or of society could be sound and stable if it contravened any of the fundamental principles of nature revealed by science.

I. BERNARD COHEN, SCIENCE AND THE FOUNDING FATHERS: SCIENCE IN THE POLITICAL THOUGHT OF JEFFERSON, FRANKLIN, ADAMS, AND MADISON 280 (1995).

24. THOMAS PAINE, COMMON SENSE 89 (Isaac Kramnick ed. 1976) (1776). *See also id.* at 68 ("I draw my idea of the form of government from a principle in nature"); *id.* at 72, 76 (when rejecting the notion of kings, observing how "exalting one man so greatly above the rest cannot be justified on the equal rights of nature"). G. Edward White observes how natural rights became the "first issue" confronting the delegates to the First Continental Congress. *See* G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 127, 129 (2012)

25. *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE xvii, 3 (1997). Of course, states already acknowledged inherent, inalienable rights. *Id.* at 163-67.

26. *See* JÜRGEN HABERMAS, THEORY AND PRACTICE 86-88 (1974) (noting similarities and differences between the French and American Declarations). According to Habermas:

> "[t]he idea of the political realization of philosophy—namely, the autonomous creation, by contract, of legal compulsion springing solely from the compulsion of philosophical reason—is the concept of revolution which followed immanently from the principles of modern Natural Law."

Id. at 86. America, Habermas adds, responded by "positivizing" Natural Law. *Id.* at 85, 91.

27. *See, e.g.*, RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 226 (1990) (explaining Madison's beliefs and the "Gerry-Mason motion for a bill of rights"); WHITE, *supra* note 24, at 184 (detailing Madison's view on a need for a bill of rights); Wilfrid E. Rumble, *James Madison on the Value of Bills of Rights*, *in*

Chief Justice Marshall, for instance, "frequently indicated his belief in the acceptance of natural law principles."[28] Justice Story, too, accepted that the written constitution reflected foundational principles of a republican form of government.[29] Finally, the law of nations so prevalent during the nation's founding further illustrated how Enlightenment thought facilitated a shared belief in—at least—some transcendent principles.[30] Among these transcendent rights included a

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CONSTITUTIONALISM: NOMOS XX 122, 123 (J. Roland Pennock & John W. Chapman eds., 1979) (describing Madison's stance toward a bill of rights). The Bill of Rights ostensibly "codified" accepted natural rights. *See* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 127 (1987). For books addressing the purpose of the Bill of Rights, *see generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 (1962).

28. CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, at 334 (1944). Haines harshly quips that Marshall's "unyielding conservatism" led him to rely upon "European doctrines of natural law . . . to sanction judicial preservation and protection of the sacred rights of property and of contract." *Id.* at 626.

29. *See,* Terrett v. Taylor, 13 U.S. 43, 50 (1815) (noting that a common law principle was "equelly [sic] consonant with the common sense of mankind and the maxims of eternal justice."). Justice Story's modern biographer notes how Edmund Burke influenced Justice Story's opinion in *Wilkinson v. LeLand*, 27 U.S. 627 (1829), and particularly how Story believed that natural rights would naturally succumb to natural law. *See* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 162 (1985).

30. *See* DARREN STALOFF, HAMILTON, ADAMS, JEFFERSON: THE POLITICS OF ENLIGHTENMENT AND THE AMERICAN FOUNDING 3 (2005) ("Our ideals of liberty and equality, the ringing 'self-evident truths' of the Declaration of Independence, and the measured tones of the Constitution and *The Federalist* all echo the language of the Enlightenment and express its most profound convictions about the political life and natural rights of mankind."). *See also generally* Edward S. Corwin, *The Higher Law Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928) (discussing the supremacy of law and background principles); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952) (tracing the influence of the law of nations); J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 58 (1931) (tracing natural law background); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978) (discussing historical origins of the supremacy of law). The Constitution mentions in Article 1, Section 8, Clause 10; further, under the Judiciary Act of 1789, federal courts could hear "civil actions by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *See* 28 U.S.C. § 1350 (2014). Sir Henry Maine wrote how the law of nations

Lockean appreciation for property as something that includes an inalienable right of personhood.[31] And while perhaps Enlightenment philosophy floundered in appreciating nature's importance, the natural rights tradition arguably was broad enough for building a larger foundation that could embrace nature as a component of the Lockean formulae.[32]

Constitutional principles, moreover, are dynamic—regardless of whether one ascribes to a living Constitution theory.[33] Shifting

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reflected "those laws which are common to all mankind," a law that "natural reason appoints for all mankind." HENRY SUMNER MAINE, ANCIENT LAW 27 (1861) (1972 ed.). In his Commentaries, Chancellor Kent expressed that view decades earlier. *See* 1 JAMES KENT, *Of the Law of Nations, in* COMMENTARIES ON AMERICAN LAW (1826); *see also In re* Washburn, 4 Johns Ch. 106 (1819) ("It is the law and usage of nations, resting on the plainest principles of justice and public utility"). *See generally* Arthur Nussbaum, *The Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189 (1942) (providing a history of the law of nations doctrine).

31. *See* MATTHEW STEWART, NATURE'S GOD: THE HERETICAL ORIGINS OF THE AMERICAN REPUBLIC 355-58 (2014). Stewart portrays how deism infused American revolutionary period thought, a perspective consistent with William Cronon's suggestion that "[t]he fact that so many now cite Nature instead [of God] . . . suggests the extent to which Nature has become a secular deity in this post-romantic age." WILLIAM CRONON, UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE 36 (1996).

32. *See* RODERICK F. NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 13-32 (1989); *see also* DONALD WORSTER, NATURE'S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS (2d ed. 1994). Nature nevertheless enjoyed a special status: Post-enlightenment thought treated natural law as a physical manifestation of nature's path, operating within a Newtonian paradigm and evidenced by naturalist and transcendentalist literature. That Wordsworth began *The Recluse* with the words "On Man, on Nature, and on Human Life" is telling. *See* M.H. ABRAMS, NATURAL SUPERNATURALISM: TRADITION AND REVOLUTION IN ROMANTIC LITERATURE 19 (1971) (quoting Wordsworth). Ralph Waldo Emerson's poem *Nature* illustrated the strain of thought acknowledging how "[w]e nestle in nature, and draw our living as parasites from her roots and grains, and we receive glances from the heavenly bodies." RALPH WALDO EMERSON, ESSAYS: SECOND SERIES 161 (Edward W. Emerson ed. 1883). *See also* Roderick Nash, *The Transcendental View: Henry David Thoreau (1851), in* THE AMERICAN ENVIRONMENT: READINGS IN THE HISTORY OF CONSERVATION 9 (1968). For a description of "nature" in the national mind, see generally SAGOFF, *supra* note 11, at 124-35.

33. David Strauss makes this point when opining that constitutional interpretation effectively mirrors a flexible common law process, changing over time. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 887 (1996) ("Constitutional law in the United States today represents a flowering of the common law tradition"). Strauss notes how

fundamental rights rhetoric has served both progressive and regressive campaigns. Antebellum America witnessed the tension between dynamic and static property interests, with the Court first protecting entrenched, static property rights, as a tenet of our constitutional system and natural rights, only to recognize shortly thereafter the necessity of allowing dynamism – that is, competition and technological and economic change.[34] Natural law/rights language then served the abolitionists in the pre-Civil War era,[35] surfacing once again among those championing ostensibly "laissez faire constitutionalism."[36] That same era witnessed the Court "implicit[ly] recogniz[ing] . . . new societal needs."[37] Those needs included an illusory ideal of freedom from what judges may have believed was impermissible class legislation disguised as health and safety measures.[38] And it included, as an element of due process, a fundamental right to an individualized hearing before an institutional body that could adjudicate factual predicates for particular individuals.[39] Of

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common law constitutionalism assists in ensuring that "principles developed through the common law method are not likely to stay out of line for long with the views that are widely and durably held in the society." *Id.* at 929.

34. *See* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971).

35. *See* WHITE, *supra* note 24, at 342, 46; William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974) (exploring jurisprudential styles of reasoning and effect on doctrines).

36. Many scholars explore and describe the notion of a laissez faire judicial paradigm. *See, e.g.*, JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER 1888-1910 (1995); SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901 (1976); PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK (1990); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF THE BAR AND BENCH, 1887-1895 (1976); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1962); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1886-1937 (1998).

37. JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at xi (1978).

38. *See, e.g.*, KENS, *supra* note 36 (placing *Lochner v. New York* in historical context as more than a mere adoption of an economic policy).

39. *See, e.g.*, Londoner v. City and Cnty. of Denver, 210 U.S. 373 (1908) (identifying a due process right to an individual hearing); *cf.* Crowell v. Benson,

course, it also witnessed emerging concepts for protecting free speech.[40] The Due Process and Equal Protection Clauses, in particular, at their lowest denominator protect citizens against unnecessarily arbitrary and overly unreasonable behavior.[41] These clauses also arguably secure citizens some measure of security for redressing personal harms.[42] We may all disagree about the standard, but undoubtedly custom, tradition, and societal norms all inform the process. And as those norms change, Justice Kennedy recently observed, our "constitutional system" is "dynamic" and, as such, "individuals need not await legislative action before asserting a fundamental right."[43]

That those changing norms can embrace the unassailable interrelatedness of our environment with our fundamental freedoms, such as life, liberty, and property, is far from radical. A healthy environment is as necessary for sustaining individual life (as well as future generations) as access to medical care or the ability to earn income. At some level, for instance, the Eighth

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285 U.S. 22 (1932) (holding that the executive branch may constitutionally adjudicate monetary penalties, under the Longshoremen's and Harbor Workers' Compensation Act of 1927).

40. In one espionage case, Justice Brandeis, in a dissent joined by Justice Holmes, observed how the Court's decision in *Schenck v. United States*, 249 U.S. 47 (1919) "preserve[d] the right of free speech both from suppression by tyrannous, well-meaning majorities, . . . from abuse by irresponsible, fanatical minorities," and "[l]ike many other rules for human conduct, it can be applied correctly only by the exercise of good judgment." Schaefer v. United States, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting).

41. *See* HENRY J. ABRAHAM, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 107 (1977). In *Hurtado v. People of State of California*, 110 U.S. 516 (1884), a case involving an application of the Fifth Amendment to the states, the Court observed how "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Id.* at 537. To be sure, substantive due process later waned as the Court expressed reluctance for expanding its horizons. *See* Albright v. Oliver, 510 U.S. 266, 272 (1994).

42. John Goldberg, when addressing the movement toward tort reform, argues that the Constitution may afford a "right" for "individuals to seek redress against persons who have wronged them." John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529 (2005).

43. Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

Amendment seemingly protects inmates from being exposed to unsafe environmental threats.[44] Should, therefore, other Constitutional clauses be less effective at protecting all citizens from equally debilitative environmental threats? Dissenting in a Food and Drug Administration case, Chief Judge Ginsberg and Judge Rogers of the D.C. Circuit opined how "the most fundamental rights are those that no government of the people would contemplate abridging—it is doubtful that many courts or legislatures have discussed whether the government can determine whether we are allowed to breathe air, but this does not make our access to oxygen any less grounded in history."[45]

III.

CONSTITUTIONAL RIGHTS AND THE COMMON LAW: POTENTIAL AVENUES FOR RECOGNIZING AN ENVIRONMENTAL RIGHT?

The dynamic nature of constitutional rights—potentially informed by evolving globally accepted precepts—appears acutely well-suited for some latent "right" to a healthy environment. Our jurisprudence from its inception through today often explores foreign jurisprudence.[46] The Supreme

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44. *See* Rahman v. Schriro, 22 F. Supp. 3d 305, 313 (S.D.N.Y. 2014) ("Inmates therefore do not have an unqualified constitutional right to an environment free of all harmful substances, but only a right to be free of involuntary exposure to a level of such substances which unreasonably endangers their future health.").

45. Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 722 (D.C. Cir. 2007).

46. The Supreme Court, for instance, examined foreign public law scholars for resolving maritime cases. *See, e.g.*, The Schooner Exchange v. McFaddon, 11 U.S. 116, 144-45 (1812) (handling a maritime dispute between France and the United States over the capture of the Schooner Exchange). Chancellor Kent even referenced Hindu law in a commercial case, Staats v. Ten Eyck's Ex'rs, 3 Cai. 111, 114 (N.Y. Sup. Ct. 1805), and various civil authorities in the famous libel case, People v. Croswell, 3 Johns Cas. 337, 378-79 (N.Y. Sup. Ct. 1804). Both Justice Story and Chancellor Kent, in particular, found civil law relevant. *See* Samuel C. Wiel, *Waters: American Law and French Authority*, 33 HARV. L. REV. 133, 134-37 (1919). The debate surrounding the Court's recent use of foreign jurisprudence is well-documented. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) (discussing the debate); Jacob Foster, *The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa*, 45 U.S.F. L. REV. 79 (2010) (same); Andrew Friedman, *Beyond Cherry-Picking:*

Court abolished the death penalty for juveniles following an international consensus.[47] We saw scholars parade an emerging international consensus on the right to marry for members of the LGBT community, arguing that this consensus supported a constitutionally protected liberty interest and triggered equal rights protections.[48] The international community's emerging

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Selection Criteria for the Use of Foreign Law in Domestic Constitutional Jurisprudence, 44 SUFFOLK U. L. REV. 873 (2011) (same); Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004) (same); Harold Hongju Koh, *International Law As Part of Our Law*, 98 AM. J. INT'L L. 43 (2004) (arguing for using foreign law); Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553 (2007) (discussing the role of comparative constitutional law); Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J. L. & PUB. POL'Y 653 (2009) (discussing the role of foreign law in constitutional interpretation); Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299 (2006) (same); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) (same); Po-Jen Yap, *Transnational Constitutionalism in the United States: Toward A Worldwide Use of Interpretive Modes of Comparative Reasoning*, 39 U.S.F. L. REV. 999 (2005) (same); Vicki C. Jackson, Comment, *Constitutional Comparisons: Convergence Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (discussing the historical role of foreign law and presenting three models for analysis). Also, today's global economic marketplace often precipitates the need for "[n]ational courts and arbitration bodies . . . to apply foreign law." Mathew J. Wilson, *Demystifying The Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 889 (2011).

47. Roper v. Simmons, 543 U.S. 551 (2005). In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court observed how the Eighth Amendment reflects an embedded traditional right, dating back to the English Declaration of Rights of 1688 and the Magna Carta, and its meaning flows "from the evolving standards of decency and that mark the progress of a maturing society." *Id.* at 100-01. And the *Trop* Court, just like the subsequent *Roper* Court, examined the law of "civilized nations of the world." *Id.* at 102.

48. *See* Obergefell, 135 S. Ct. 2584 (2015). Justice Kennedy, writing for the majority in *Obergefell*, not only wrote about the history of marriage across the ocean, but he also added that the Equal Protection Clause permits recognizing "new insights and societal understandings." Obergefell, 135 S. Ct. at 2603. For briefs arguing about an international consensus, *compare* Brief for Foreign and Comparative Law Experts Harold Kongju Koh, Thomas Buergenthal, Sarah H. Cleveland, Laurence R. Helfer, Ryan Goodman, and Sujit Choudhry as Amici Curia in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574), 2015 WL 1022707 (favorably referencing foreign law), *with* Brief for 54 International and Comparative Law Experts from 27 Countries and the Marriage and Family Research Project as Amici Curiae in Support of Respondent, Obergefell v. Hodges, 135 S. Ct. 2584

dialogue surrounding a human right to water,[49] or a right to survive the effects of rising sea levels that threaten an entire community and culture's existence,[50] offers an apropos moment for reflecting on how such rights might become cemented within our constitutional fabric.

Our common law heritage equally demonstrates how arresting environmental threats is unmistakably infused into our legal fabric. To begin with, the common law is inextricably linked to custom. It expanded during the post-Enlightenment world as a higher law manifested itself through the operation of the natural world as discerned by the application of reason. It sanctions judicial canvassing of custom (changing societal behavioral norms) and adjusting rules as necessary in response.[51] Put

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(2015) (Nos. 14-556, 14-562, 14-571 & 14-574), 2015 WL 1432974 (rejecting the use of foreign sources).

49. *See generally* STEPHEN MCCAFFREY & RACHAEL SALCIDO, GLOBAL ISSUES IN ENVIRONMENTAL LAW 60 (2009) (discussing the human right to water); JAMES SALZMAN, DRINKING WATER: A HISTORY 204 (2013) (observing that "calls for a human right to water may be found in more than a dozen international documents"); BENJAMIN K. SOVACOOL & MICHAEL H. DWORKIN, GLOBAL ENERGY JUSTICE: PROBLEMS, PRINCIPLES, AND PRACTICES 329-30 (2014) (discussing scholarship on subsistence rights). James Salzman describes how South Africa, in particular, created a right to water, although it required legislation to translate the "abstract" right into a "concrete" one. SALZMAN, *supra* at 208. For an analysis of an Israeli Supreme Court decision invlolving a right to potable water, see Itzchak E. Kornfeld, *Constitutions, Courts, Subsidiarity, Legitimacy, and the Right to Potable Water*, 21 WIDENER L. REV. 257 (2015).

50. Svitlana Kravchenko observed several years ago how the "[l]inkages between human rights and the environment have been discussed and established during the last fifteen years by several scholars." Kravchenko, *supra* note 19, at 524. Today, we are all too familiar with the threat confronting coastal communities in Alaska. Their cultural existence is threatened by the impending choice of whether to relocate, move, or erect sufficient and yet insurmountably costly coastal barriers. *See generally* MICHAEL COLLIER, THE MELTING EDGE: ALASKA AT THE FRONTIER OF CLIMATE CHANGE (2012) (discussing challenges confronting Alaska coastal communities); NANCY LORD, EARLY WARMING: CRISIS AND RESPONSE IN THE CLIMATE-CHANGED NORTH (2011) (same); CHRISTINE SHEARER, KIVALINA: A CLIMATE CHANGE STORY (2011) (same, with particular focus on Kivalina).

51. This became accepted dogma of the German historical jurisprudence school, followed by Sir Henry Maine and Oliver Wendell Holmes's *The Common Law*. *See generally* DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 115-16, at 215-68 (2013)

simply, the common law changes (however slowly) as society and the needs of society so warrant.[52] For any particular society, therefore, the common law operates as a window into that community's ever adjusting and presumably "shared" values. Fundamentally, it reflects the importance of having a forum for redressing societally recognized injuries.[53] And those injuries naturally include environmental harms. Even courts occasionally employ "rights" language when indicating that citizens are

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(discussing historical school); KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA 1790-1900 (2013) (discussing the history and role of the common law); ELLEN HOLMES PEARSON, REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC (2011) (portraying the nature and influence of the common law prior to 1900); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994) (tracing background of historical jurisprudence). The German philosopher Friedrich Karl von "Savigny claimed that law, like language and manners, is tied to the history of a particular people," and progresses with the progress of the community. RABBAN, *supra* at 98. The currency of that sentiment became widespread in the early Twentieth Century, illustrated by Alexander Lincoln's comment that "[l]aw is not an eternal truth, but a human and finite method of settling controversies and governing the relations of individuals, in which all differences are not errors, and which is adopted to suit the needs and express the ideals of the community over which it reigns." Alexander Lincoln, *The Relation of Judicial Decisions to the Law*, 21 HARV. L. REV. 120, 129 (1907); *see also* F.A. Greer, *Custom in the Common Law*, 9 Q. REV. 153 (1893) (discussing custom and the common law); James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991) (discussing custom); *cf.* Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811 (2012) (arguing for custom in interpreting the Thirteenth Amendment).

52. Judges, in the words of Frederick Pollock, sit as purveyors of law with "a more or less direct connection with the citizens of the commonwealth as a whole" and presumably appreciate and, thus, accommodate prevailing norms. Frederick Pollock, *The Continuity of the Common Law*, 11 HARV. L. REV. 423, 433 (1898). This essay, though, is not the vehicle for discussing the perpetual conversation of how the common law, bounded by *stare decisis*, can commensurately promote change while ensuring stability and predictability. For other works that do, see generally BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); JEROME FRANK, LAW AND THE MODERN MIND (1930); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

53. In a 2002 lecture at New York University Law School, the then Chief Justice of the Supreme Court of Texas presented examples of how the common law and many states sought to ensure the availability of remedies for harm to absolute rights. *See* Thomas R. Phillips, *Speech: The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003).

entitled to a healthy environment – albeit often then employing a balancing of equities that tolerates economic progress.[54] This "right" naturally flows from "[t]he maxim that every man must so use his own property as not to inure another, . . . known to every lawyer, and approved by every moralist."[55] Ernest Freund wrote how the common law "recognizes . . . certain natural rights," including "purity of air."[56] One court even suggests that Congress could not regulate to destroy, rather than promote, "wild game life."[57] To be sure, the common law's failures in thwarting environmental degradation are apparent, thus precipitating the need for statutory programs; but, it's recrudescence today is equally promising as judges continually mold doctrines to parry new threats. While common law claims focusing on threats from greenhouse gas emissions have proved problematic,[58] other similar claims have succeeded.[59] After all, a

54. *See* Holman v. Athens Empire Laundry Co., 100 S.E. 207 (Ga. 1919) (quoting Wood's treatise on Nuisances that "[e]very person has the right to have the air diffused over this premises . . . in its natural state and free from artificial impurities"); Austin v. Augusta T. Ry. Co., 34 S.E. 852, 867 (Ga. 1899) (quoting Wood on Nuisances about every person's right to have pure air and water, as "a natural one."); Hulbert v. California Portland Cement Co., 118 P. 928, 933-34 (Cal. 1911) (accepting Wood on Nuisance). In *Hulbert*, the court quoted Wood on Nuisance to the effect that our right to a healthy environment is a "primary or natural right." *Id.* at 933. This became a theme in copper smelter cases. *See, e.g.*, American Smelting & Refining Co. v. Godfrey, 158 F. 225, 229 (8th Cir. 1907).

55. Whitney v. Bartholomew, 21 Conn. 213, 217 (1851) (involving a blacksmith).

56. ERNST FRUEND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 424, at 450 (1904).

57. Cochrane v. United States, 92 F.2d 623, 627 (7th Cir. 1937).

58. *See, e.g.*, Alec L. v. Jackson, 863 F. Supp. 2d 11 (D.D.C. 2012) (dismissing a federal public trust complaint), *aff'd sub nom.* Alec L. ex rel. Loorz v. McCarthy, 561 Fed. App'x. 7 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 774 (2014); Kanuk v. Alaska, 335 P.3d 1088 (Alaska 2014) (rejecting several barriers to asserting the claim, but concluding that the issue presented a political question); Butler ex rel. Peshlakai v. Brewer, No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. Ct. App. Mar. 14, 2013) (affirming the dismissal of a public atmospheric trust complaint).

59. *See, e.g.*, Juliana v. United States, 2016 WL 1442435 *2 (D. Ore. Apr. 8, 2016) (allowing a case to proceed under "a novel theory somewhere between a civil rights action and NEPA/Clean Air Act/Clean Water Act suit to force the government to take action to reduce" the threat from greenhouse gas emissions); Zoe v. Wash. Dep't of Ecology, No. 14-2-25295-1 SEA, 2015 WL 7721362 (Wash.

precept for many post-Enlightenment societies is to protect life, liberty, and property. It seems anomalous, therefore, for the common law to protect our property and physical bodies, and yet not protect the surrounding environment that is so necessary to sustain them.[60] Joe Sax eloquently captured this point roughly twenty five years ago.[61] And Victor Flatt, more recently, has demonstrated how common law principles of tort and property both support an environmental right: Flatt suggests that, "[i]f we see that our environmental rights are the same as our common law rights, the history of our common law development can best tell us how those rights are to be protected."[62]

The discussion so far suggests that, with minimal difficulty, the Constitution and the common law could serve as powerful

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Super. Ct. Nov. 19, 2015) (favoring a public atmospheric trust); Chernaik v. Kitzhaber, 328 P.3d 799 (Or. Ct. App. 2014) (holding that greenhouse gas claims were justiciable), Chernaik v. Brown, No. 16-11-029273 (Or. Ct. App. May 11, 2015); Kain v. Dep't of Envtl. Prot.,—N.E.3d —, 2016 WL 2859219, at *1 (Mass. May 17, 2016) (concluding that rate-based emission standards fail to achieve the "mass-based reductions in greenhouse gases" that the Legislature intended when it adopted the Global Warming Solutions Act).

60. Eric Freyfogle argues persuasively how we must advance beyond cribbed traditional concepts and acknowledge that progress embraces expanding notions of our relationship to the environment. ERIC T. FREYFOGLE, JUSTICE AND THE EARTH: IMAGES FOR OUR PLANETARY SURVIVAL 31, 37 (1995). Our common law conception of property, in particular, should progress; it ought to signal communal ownership norms that transcend physical boundaries. *Id.* at 52-53. "In coming years," he writes, "property norms will need to be based on context, on accommodation to the needs of all surrounding life." *Id.* at 55. J.B. Ruhl similarly explores how our common law ought to embrace natural capital and ecosystem services as baseline underlying principles. *See, e.g.*, J.B. Ruhl, *The "Background Principles" of Natural Capital and Ecosystem Services—Did* Lucas *Open Pandora's Box?*, 22 J. LAND USE & ENVT'L. L. 525 (2007); J.B. Ruhl, *Toward a Common Law of Ecosystem Services*, 18 ST. THOMAS L. REV. 1 (2005); J.B. Ruhl, *Ecosystem Services and the Common Law of "The Fragile Land System,"* 20 NAT. RESOURCES & ENV'T. 3 (2005).

61. *See* Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVT'L L. 93, 100 (1990). Sax posited that, while the question of "whether the majority can be said to owe to each individual a basic right not to be left to fall below some *minimal* level of substantive protection against hazard" may not be "free from doubt," he believed that "a fundamental right to a substantive entitlement which designates minimum norms should be recognized." *Id.* (emphasis added).

62. *See generally* Victor B. Flatt, *This Land Is Your Land (Our Right to the Environment)*, 107 W. VA. L. REV. 1, 32 (2004).

forces in establishing an evolving environmental right – aspirational or otherwise. For those who might treat such a suggestion as too fanciful, forays into promoting an environmental right through legislation, or lex legis, demonstrate otherwise. E.O. Wilson counsels us that "[t]he strength of each country's conservation ethic is measured by the wisdom and effectiveness of its legislation in protecting biological diversity."[63] The trajectory of legislation during the 1960s and 1970s signaled the possibility of establishing such a conservation ethic.

IV.
LEGISLATING FOR A HEALTHY ENVIRONMENT: INCORPORATING ENVIRONMENTAL RIGHTS INTO THE LAW

The roughly two decades following WWII left Americans with more income and yet an environment far less accommodating to human health, welfare, and happiness.[64] In 1960, presidential candidate John F. Kennedy lamented how "[e]ven in material terms, prosperity is not enough when there is no equal opportunity to share in it; when economic progress means overcrowded cities, abandoned farms, technological unemployment, polluted air and water, and littered parks and countrysides."[65] That decade witnessed colorfully sanguine statements about our appreciation for wilderness and other ecological values.[66] Congress passed the NEPA,[67] the 1970 Clean

63. EDWARD O. WILSON, THE FUTURE OF LIFE 185 (2002). Correspondingly, Bob Taylor notes how Mark Sagoff "believes that environmental legislation will only make sense if we think of it as an expression of our moral values as a nation." TAYLOR, *supra* note 11, at 73.

64. *See* Adam Rome, *"Give Earth a Chance": The Environmental Movement and the Sixties*, J. AM. HIST. 525 (2003).

65. *Id.* at 531.

66. *See, e.g.*, Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-1136 (2012)). *See generally* Eric T. Freyfogle, *Wilderness and Culture*, 44 ENVTL. L. 1149 (2014) (exploring the relationship between culture and wilderness, ultimately arguing for a culture that accepts more responsibility and humility in human interactions with wilderness).

67. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970), (codified as amended at 42 U.S.C. §§ 4321-4370(h) (2012)).

Air Act,[68] the 1972 Federal Water Pollution Control Act,[69] the Endangered Species Act,[70] the Coastal Zone Management Act,[71] and considered sweeping national land use legislation.[72] Ecology's importance and popular recognition surged,[73] and it became acceptable to talk about a right to a healthy environment. During a committee hearing concerning the 1970 Clean Air Act, for instance, Congressman Hechler of West Virginia expressed optimism that the "President and the [EPA] will seize this challenge and thus protect the right of every citizen to breathe clean air."[74] The Act's principal sponsor, Senator Muskie, echoed that theme, observing how one hundred years earlier, a Massachusetts state agency opined "[w]e believe that all citizens have an inherent right to the enjoyment of pure and uncontaminated air and water and soil, that this right should be regarded as belonging to the whole community."[75]

Notably, that same year President Nixon signed the National Environmental Policy Act (NEPA) into law.[76] NEPA's drafters

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68. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671(q) (2012)).

69. 1972 Federal Water Pollution Control Act, Pub. L. No. 92-240, 86 Stat. 47 (codified as amended at 33 U.S.C. §§ 1251-1387 (2012)).

70. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-44 (2012)).

71. Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-1466 (2012)).

72. *See Land Use Policy and Planning Assistance Act: Hearings on S. 268, Part 1 Before the Comm. on Interior and Insular Affairs*, 93rd Cong. (1973); *see also* Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and National Land -Use Legislation*, 28 URB. LAW. 7 (1996) (proposing three major pieces of federal land-use legislation).

73. *See generally* KIRKPATRICK SALE, THE GREEN REVOLUTION: THE AMERICAN ENVIRONMENTAL MOVEMENT 1962-1992 11-28 (Eric Foner ed., Hill and Wang 1993) (discussing the growth of the American environmental movement); PETER CLEARY YEAGER, THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 103-106 (Cambridge University Press 1991) (detailing the emergence of a broad environmental consciousness).

74. ENVTL. POLICY DIV. OF THE CONG. RESEARCH SERV., NO. 93-18, 93RD CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 116 (Comm. Print. 1970) (emphasis added).

75. 116 Cong. Rec. 32,903 (1970).

76. *See* Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370(h) (2012)).

sought to establish a "national policy" that promoted an acute appreciation for protecting our environment. And while today we treat the statute as merely imposing procedural obligations on agencies, the legislative history surrounding the efforts by Senator Jackson and those on his staff who assisted in the drafting of the statute suggest much more.[77] The drafters, admittedly, stopped shy of creating an environmental right, but they included language declaring Congress's purpose of "encourag[ing] productive and enjoyable harmony between man and his environment," favoring "efforts which will prevent or eliminate damage to the environment and biosphere."[78] Indeed, when the Senate first passed the bill, it "had a ring of an environmental bill of rights," but the House objected to the specific language.[79] Instead, the language was changed to charge federal agencies with the "continuing responsibility" of employing "all practical means" in the implementation of their programs to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings."[80] Yet NEPA's drafters paid little attention to "rights" and judicial enforcement.[81] David Sive wrote how NEPA held the promise of "declaring that environmental rights are, if not 'all that makes life worth living,' at least of sufficient importance 'to impose greater burdens of proof, and/or more thorough judicial review' than rights in many other fields not currently the subject of critical nationwide involvement."[82]

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77. *See generally* Sam Kalen, *Ecology Comes of Age: NEPA's Lost Mandate*, 21 DUKE ENVTL. L. & POL'Y F. 113 (2010) (examining, in part, "the coalescing forces of the ecological movement and Congress's desire to legislate on environmental quality that ultimately produced NEPA.").

78. National Environmental Policy Act § 2, 42 U.S.C. § 4321 (2012).

79. Luther J. Carter, *Environmental Policy Act: Congress Passes a Landmark Measure—Maybe*, 167 SCI. 35, 35-36 (1970).

80. National Environmental Policy Act § 101(b)(2), 42 U.S.C. § 4331(b)(2).

81. *See* Richard A. Liroff, *NEPA Litigation in the 1970s: A Deluge or a Dribble?*, 21 NAT. RESOURCES J. 315, 317-18 (1981).

82. David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 650 (1970). Some early cases even tilted toward affording substantive significance to NEPA's mandate. *See, e.g.*, Envtl. Def. Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728, 743 (E.D. Ark. 1971) ("The act clarifies congressional policy and imposed an obligation upon the defendants to protect the environment in planning and

But others lamented how the statute lacked a sufficiently clear path for enforcement. Professor Sax, for instance, testified that NEPA failed to "make crystal clear the right of citizens to sue," and it was too limited in applying to only federal agency actions.[83] Congressman Richard Ottinger advocated for another, "new statement of national purpose," suggesting that NEPA "suffers from indecisiveness. Although it sets forth a bold statement of environmental policy, the Act provides little or no mechanism for enforcing that policy."[84] Also, Congress seemingly weakened NEPA's evident environmental mandate when it passed the Environmental Quality Improvement Act of 1970, which suggested in its findings that our national environmental policy was evidenced by other pollution abatement programs and similar legislative efforts—impliedly hinting that NEPA arguably added little to what already existed.[85]

Congress, moreover, passed NEPA amid an evolving dialogue about the possibility of developing an enforceable environmental right. Congressman Richard Ottinger, for example, proposed an environmental constitutional amendment in 1968, and wrote two years later how "only an amendment to the Constitution, guaranteeing to each citizen a wholesome and unimpaired environment, can overcome" the ease with which current conservation efforts may be evaded.[86] Senator Nelson urged an

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conducting their lawful activities.").

83. *Environmental Protection Act of 1970: Hearings on S. 3575 Before the Subcomm. on Energy, Natural Res., & the Env't of the S. Comm. on Commerce*, 91st Cong. 29 (1970) (statement of Joseph L. Sax, Prof. of Law, Univ. of Mich.).

84. Hon. Richard L. Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666, 671 (1970). Congressman Ottinger's spouse also advocated for environmental protection, as well. *See, e.g.,* BETTY ANN OTTINGER, WHAT EVERY WOMAN SHOULD KNOW—AND DO—ABOUT POLLUTION: A GUIDE TO GOOD GLOBAL HOUSEKEEPING (1970). Arguably Ottinger failed to appreciate how NEPA's policy could be enforced, and simply presumed a need for yet another mechanism—a mechanism that he initially considered two years before Congress passed NEPA. Quite possibly such sentiments undermined the force of NEPA's policy among contemporary commentators.

85. Pub. L. No. 91-224, § 202, 84 Stat. 114, 114 (1970).

86. Ottinger, *supra* note 84, at 672. He added that such a "national statement of policy . . . might clarify our present ambivalence. It would provide

amendment affording "[e]very person" an "inalienable right to a decent environment" that would be "guarantee[d]."[87] In 1970, Congress explored other avenues for strengthening citizens' right to protect the environment. It considered amending NEPA to afford a cause of action,[88] and more significantly held hearings on S. 3575, the Environmental Protection Act of 1970, introduced by Senators Hart and McGovern.[89] This Environmental Protection Act would have "provide[d] that each person is entitled by right to the protection and enhancement of the environment," and it was modeled after Professor Sax's citizen suit provision developed for the Michigan Legislature.[90] Testifying in support of the bill, Professor Sax observed how it would "permit citizens to obtain judicial scrutiny of private or public conduct which may have unreasonable adverse impact on the environment in land and water resources. It recognizes," he added, "that each person has a legally enforceable right to the protection, preservation, and enhancement of that environment."[91] David Sive, one of the nation's most renowned

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badly needed guidance to the federal agencies and would also provide the most effective environmental protection within our power." *Id.* Ottinger was New York's representative, and his state had been considering a provision. Editorial, *Protecting the Environment*, N. Y. TIMES, Dec. 5, 1969. The United Auto Workers supported the proposal. *U.A.W. Asks Bill of Rights to Protect Environment*, N. Y. TIMES, Apr. 22, 1970.

87. S.J. Res. 169, 91st Cong. (2d Sess. 1970).

88. H.R. 15578, 91st Cong. (2d Sess. 1970).

89. *See Environmental Protection Act of 1970: Hearings on S. 3575 Before the Subcomm. on Energy, Natural Res., & the Env't of the S. Comm. on Commerce*, 91st Cong. (2d Sess. 1970). *See generally* Robert E. Lutz, Stephen E. McCaffrey, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L. Q. 561, 608 (1971) (arguing for expanded citizen engagement in the judicial arena and presenting a fairly thorough account of contemporary legislative efforts along with discussing judicial treatment).

90. *Environmental Protection Act of 1970: Hearings on S. 3575 Before the Subcomm. on Energy, Natural Res., & the Env't of the S. Comm. on Commerce*, 91st Cong. 1 (2d Sess. 1970) (statement of Sen. Hart, Chairman, Subcomm. on Energy, Natural Res., & the Env't).

91. *Id.* at 27. Professor Sax testified the following year on a subsequent environmental right proposal, lamenting how "[d]espite the impression that a casual reader of news reports may have, the struggle for the right to a decent environment has not yet been won." *Environmental Citizen Act: Hearings Before the Subcomm. on Fisheries & Wildlife Conservation of the H. Comm. on*

environmental advocates, also encouraged the Legislature to adopt the bill, along with a constitutional amendment.[92] And congressman Udall informed his colleagues that legislation was necessary to afford "all citizens a federally guaranteed right to a pollution-free environment."[93]

States similarly engaged in this national conversation about an environmental right. In 1972, University of Virginia constitutional scholar A.E. Dick Howard examined state forays into elevating the protection of the environment into state constitutions.[94] He noted how state constitutions historically

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Merchant Marine and Fisheries, 92nd Cong. 83 (1971-72) (statement of Joseph L. Sax, Prof. of Law, Univ. of Mich.).

92. *Environmental Protection Act of 1970: Hearings on S. 3575 Before the Subcomm. on Energy, Natural Res., & the Env't of the S. Comm. on Commerce*, 91st Cong. 109 (2d Sess. 1970) (statement of David Sive, Attorney, Winer, Neuberger, & Sive). Sive added that his experience with New York's environmental constitutional right suggested widespread support for such measures. *Id.* at 109-110. *See also Conserving Natural Resources*, N.Y. TIMES, Sept. 14, 1968 (discussing the legislative pushback on the proposed constitutional amendment and the public's increasing support of the conservation movement).

93. 117 Cong. Rec. 3845 (1971) (statement of Sen. Udall) (re-introducing the proposed Environmental Protection Act of 1970, amending NEPA to afford citizens an express right to sue). The Department of Justice found troubling all such efforts to expand citizen access to the courts. *See Environmental Protection Act of 1970: Hearings on S. 3575 Before the Subcomm. on Energy, Natural Res., and the Env't of the S. Comm. on Commerce*, 91st Cong. 125 (2d Sess. 1970) (statement of Shiro Kashiwa, Assistant Att'y Gen., Land & Natural Res. Div., U.S. Dep't of Justice). *See also* E.W. Kenworthy, *Justice Department Curbs Use of 1899 Pollution Act*, N.Y. TIMES, July 11, 1970 (reporting that the Justice Department limited the scope of cases prosecutors could pursue under the Refuse Act of 1899). Even the Council on Environmental Quality opposed expansive citizen suit measures. *See Expanded Pollution Suits Hit*, WASH. POST, Apr. 16, 1971; E.W. Kenworthy, *Citizen Suits on Pollution Opposed by White House*, N.Y. TIMES, April 16, 1971. This was likely anticipated, as the public was well aware of how the Justice Department "bluntly opposed citizen groups challenging the decisions of Federal agencies." Gladwin Hill, *Conservationists See Gains in U.S. Courts*, N.Y. TIMES, Oct. 19, 1970. The Council's advisory committee, however, had recommended endorsing such measures (with "minor qualifications"). Peter Braestrup, *Panel Backs Pollution Bills*, WASH. POST, Sept. 16, 1970.

94. *See* A.E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972). Professor Howard also engaged in public discussions about the efficacy of Professor Sax's effort in Michigan. *See* Tom Wilkinson, *Virginians Score Pollution Woes to Governor's Unit*, WASH. POST, Jan. 26, 1971.

recognized rights to water, fisheries, and other resources, and more recently had added "environmental quality" as one of the list of "fundamentals," particularly "in Florida, Illinois, Michigan, New York, Pennsylvania, Rhode Island, and Virginia."[95] Illinois, for instance, provides that "[e]ach person has the right to a healthful environment" and it "may enforce this right against any party."[96] In fact, according to Professor Barton Thompson, Jr., "[m]ore than a third of all state constitutions, including all written since 1959, address modern concerns of

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95. Howard, *supra* note 94, at 197-98. When announcing his proposed constitutional amendment for Maryland, delegate Steven Sklar proclaimed that "[n]o right could be more precious than the right to breathe air which will sustain, rather than destroy life." *Md. Amendment Eyed in Antipollution Fight*, WASH. POST, Jan. 17, 1970. *See also Environment Bill Comes Up Tuesday*, WASH. POST, Mar. 2, 1970 (discussing Maryland proposal); John Hanrahan, *Most Maryland Delegates Back Bill Giving Right to Clean Environment*, WASH. POST, Jan. 22, 1970; John Hanrahan, *Md. House Kills Bill on Environment*, WASH. POST, Mar. 5, 1970. Massachusetts's proposal was supported by the Harvard Environmental Law Society, with one supporter hoping the "legislation [would] place blame for air pollution at the source. For too long," he lamented, "citizens have had to wade through bureaucratic red tape to alleviate air pollution." *Bill to Allow Suits in Pollution Backed*, N. Y. TIMES, Feb. 4, 1970.

96. Ill. Const. of 1970, art. XI, § 2. State conservationists heralded Illinois' amendment, which afforded "private citizens the authority to initiate legal proceedings to enforce their 'right to a healthful environment.'" *See* Seth S. King, *Illinois Votes New Constitution; Bill of Rights Clauses Widened*, N.Y. TIMES, Dec. 17, 1970, at 35. Illinois courts, consequently, tend to focus mostly on the second clause and removing barriers such as standing for challenging actions. Citizens Opposing Pollution v. ExxonMobile Coal U.S.A., 962 N.E.2d 956, 967 (Ill. 2012). But the language arguably connotes more. *See* Glisson v. City of Marion, 720 N.E.2d 1034, 1042 (Ill. 1999) (discussing the language's history). In *Glisson*, the Illinois Supreme Court quoted the following from the amendment's history about what the drafters understood when using language about "healthful environment":

> The Committee selected the word "healthful" as best describing the kind of environment which ought to obtain. "Healthful" is chosen rather than "clean", "free of dirt, noise, noxious and toxic materials" and other suggested adjectives because "healthful" describes the environment in terms of its *direct effect* on *human life* while the other suggestions describe the environment more in terms of its physical characteristics. A description in terms of physical characteristics may not be flexible enough to apply to new kinds of pollutants which may be discovered in the future.

Id. at 1042 (emphasis added) (quoting Record of Proceedings, Sixth Illinois Constitutional Convention, v. 6, 697-98, (1972)).

pollution and resource preservation."[97] Montana's response to growing environmental concerns was particularly instructive. In 1971, the Montana Legislature acknowledged the urgency of protecting ecological resources.[98] Montana's description of its 1971 Environmental Policy Act (MEPA) poignantly asserts that the Act "accepted the obligation of the state to use all practical means to '. . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.'"[99] "The act specifies a citizen's right to a healthful environment and a responsibility to preserve and enhance that environment."[100] And in 1972, Montana ratified a new constitution, which included a corresponding provision for protecting the environment.[101]

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97. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003). Jack Tuholske also surveys various state efforts to constitutionalize an environmental right, along with its global context, and offers some "promises and pitfalls of constitutionalizing the environment." Jack R. Tuholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough*, 21 WIDENER L. REV. 239, 255 (2015).

98. ENVTL. QUALITY COUNCIL, FIRST ANN. REP. at 102 (1972). *See also* Jerry Holloron, *Bipartisan Group Sponsors Environmental Policy*, MISSOULIAN, Jan. 8, 1971 (noting that "the legislation would require a unified systematic approach toward environmental problems"). In addition, in 1971, "Florida's Environmental Protection Act[] was enacted as a means of carrying out Florida's constitutional mandate to abate air and water pollution within this state," and it was described as having "created a new cause of action, giving the citizens of Florida new substantive rights." Friends of Everglades, Inc. v. Board of Cnty. Comm'rs of Monroe Cnty., 456 So. 2d 904, 912-13 (Fla. 1st Dist. App. 1984), *review denied sub nom.*, Upper Keys Citizens Ass'n v. Bd. of Cnty. Comm'rs of Monroe Cnty., 462 So. 2d 1108 (Fla. 1985).

99. ENVTL. QUALITY COUNCIL, *supra* note 98, at iv. This early report, by those possibly most familiar with the law, believed that the environmental impact statement would employ a "balancing analysis." *Id.*

100. *Id.* at 108.

101. In 1972, Montana ratified its new constitution with an environmental quality provision. MONT. CONST. art. IX, § 1. *See, e.g.,* Cape-France Enter. v. Estate of Peed, 29 P.3d 1011, 1016-17 (Mont. 2001) (stating that environmental considerations, as evidenced by the provision, may justify applying the doctrine of impossibility for contract recession). Courts have employed the Montana provision to justify regulation. *See, e.g.,* Seven Up Pete Venture v. State, 114 P.3d 1009, 1023 (Mont. 2005); Hagener v. Wallace, 47 P.3d 847, 858 (Mont. 2002) (Nelson, J., concurring); Douglas v. Judge, 568 P.2d 530 (Mont. 1977) (hearing a state constitutional challenge to a renewable energy program and

Admittedly, such provisions generally garnered insufficient currency – at least until recently. In 2003, Professor Thompson wrote that the various constitutional provisions "play at best a marginal role in most states."[102] That changed most recently when the Pennsylvania Supreme Court enforced that state's Environmental Rights Amendment, added to the state Constitution in 1971. Article 1, Section 27 of the Pennsylvania Constitution provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people.[103]

The Pennsylvania Supreme Court held that this provision establishes two distinct rights, one declaring the right of Pennsylvania citizens to enjoy a healthy environment, and a corresponding obligation on the state to avoid acting "contrary to this right."[104] According to the court:

> The right to "clean air" and "pure water" sets plain conditions by which government must abide. We recognize that, as a practical matter, air and water quality have relative rather than absolute attributes. Furthermore, state and federal laws and regulations both govern "clean air" and "pure water" standards and, as with any other technical standards, the courts generally defer to agency expertise in making a factual determination whether the benchmarks were met. That is not

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noting a Montana constitutional provision). *See also* Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality, 988 P.2d 1236, 1243-49 (Mont. 1999) (discussing constitutional amendment and its history); Thompson, Jr., *supra* note 97, at 157-58 (noting that although environmental rights have not been adopted at the federal constitutional level, more than a third of states have in state constitutions); John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323 (1996) (discussing Montana's 1972 Constitution, which included environmental quality provisions).

102. Thompson, *supra* note 97, at 163.

103. PA. CONST. art. 1, § 27.

104. Robinson Twp., Washington Cnty. v. Commonwealth of Pa., 83 A.3d 901, 951 (Pa. 2013).

> to say, however, that courts can play no role in enforcing the substantive requirements articulated by the Environmental Rights Amendment in the context of an appropriate challenge.[105]

The second component of the Amendment, according to the court, imposes an affirmative mandate to preserve environmental values – again by protecting "people from governmental action that unreasonably causes actual or likely deterioration of these features."[106]

V.

RECONCILING POSITIVE AND NEGATIVE RIGHTS: AN ASPIRATIONAL ENVIRONMENTAL RIGHT?

The final part of this essay, then, is for those who favor *Robinson Township* and are willing to entertain an environmental right, but reticent because of the conundrum surrounding enforcement. Several recent forays into the desirability of an environmental right admittedly urge caution: Dan Tarlock, for instance, cogently quips that "the idea of a constitutional right to some environmental state is dead in the water."[107] Professor Thompson suggests that recognizing an environmental right is more problematic than other constitutional rights because of a lack of "societal consensus on

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105. *Id.* at 953. The court cited approvingly to Professor John Dernbach's article on the history of Pennsylvania's provision. *See* John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trus*t, 104 DICK. L. REV. 97 (1999); *see also generally* John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENVTL. L. 463 (2015) [hereinafter Dernbach, *The Potential Meanings of a Constitutional Public Trust*] (examining the Pennsylvannia constitutional environmental rights and the treatment of those rights by courts).

106. *Robinson Twp.*, 83 A.3d at 953.

107. *See, e.g.*, Dan Tarlock, *Why There Should Be No Restatement of Environmental Law*, 79 BROOK. L. REV. 663, 672 (2014); J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 251 (1999) (exploring "the soundness of proposed social policy amendments to the Constitution"). *But cf.* Flatt, *supra* note 62 (arguing that there is a need for the public to better understand the nature and effect of the environmental rights afforded to them).

the general goals of a 'healthful environment.'"[108] But he adds how intergenerational equity and ensuring a healthy environment for future generations (i.e., sustainability) may justify considering such a right.[109] Tarlock posits that the two principal objections to any right are that the Constitution generally protects "negative" rights, "and thus it imposes no affirmative duties on the state except to treat citizens fairly and with some dignity,"[110] and that "even if this hurdle can be overcome, the content of any potential environmental right is too contingent compared with other rights to be characterized as fundamental." In other words, it cannot be considered fundamental because "[o]nce one concedes that citizens have no right to a zero-risk environment, it is not possible to specify with any level of confidence the content of a potential environmental right."[111] And then, of course, there is the general caution that we all too often employ "rights" rhetoric that hints at absolutes, as Tarlock suggests, and by doing so we overlook what Mary Ann Glendon refers to as the "illusion of absoluteness."[112]

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108. Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L. REV. 863, 898 (1996); *see also id.* at 919-20 (while "[s]ubstantive constitutional provisions" might "play a useful role in the environmental field," "environmentalists are wise to be skeptical of the value of new substantive environmental provisions"). Thompson adds, however, that natural resource issues may "present a slightly stronger process justification for a constitutional provision than pollution issues present." *Id.* at 899. A considerable portion of Thompson's analysis focuses on how the public trust concept exhibits a willingness to constitutionalize a measure of resource protection. *Id.* at 907-14.

109. *Id.* at 900-02; *see also* Thompson, *supra* note 97, at 198 (claiming that "[t]he political process does not account fully for the interests of future generations, arguing for some form of intergenerational constitutional protection"). According to Thompson, "intergenerational concerns and opening the way for a dialogue among the various branches of government and the citizenry concerning the role that intergenerational considerations should play." Thompson, *supra* note 108 at 907. He concludes, however, that it is premature to establish such a right before a sufficient consensus emerges. Thompson, *supra* note 97, at 198.

110. Tarlock, *supra* note 107, at 671-72.

111. *Id.* at 672.

112. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991). Glendon opines that "when we want to protect something, we try to get it characterized as a right." *Id.* at 31. Yet, while we may talk about a right to property, for instance, it is far from absolute. *See id.*

The proverbial Devil, though, lurks behind any conversation about the details of what precisely it means to have a right. To be sure, rights historically are considered as either positive or negative:

> At a minimum, to say that an individual A has a *right* to either to do or have a certain thing T is to say that at least one other person B has an *obligation* either to provide A with T or at least not to interfere with A in his attainment and enjoyment of T.[113]

Positive rights fall into the former category, while negative rights are in the latter. Negative rights, though, are not necessarily absolute. For example, negative rights between citizens and the government generate levels of scrutiny, force explanations, and protect against arbitrary behavior, but they do not require affirmative government action.[114] Positive rights, conversely, are less common here in the United States. A discussions of rights, consequently triggers three questions: To what entity or person does the right belong; is it a positive or negative right; and finally, "[a]gainst whom is the right claimed – i.e., what person or body of persons has the obligation to respect the right?"[115] The problem, however, as Eric Freyfogle suggests, is that because conversations about "rights" generally connote obligations between people or between people and the government, our traditional understanding of "rights" appears ill-suited for dialogues about the environment.[116] To this, Freyfogle responds that "perhaps the best idea is to stick to" fundamental concepts and "simply talk about what is right and

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at 20-30. Glendon also notes that other nations embrace positive rights, imposing on the government an obligation to protect their citizens' welfare. *Id.* at 99.

113. JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 82 (Rev. ed. 1990) (emphasis in original).

114. Shortly after the Court affirmed the fundamental liberty interest recognized in Roe v. Wade, 410 U.S. 113, 170 (1973), it held that the existence of the right did not create an absolute positive right obligating affirmative governmental action. *See* Maher v. Roe, 432 U.S. 464, 469 (1977); Harris v. McRae, 448 U.S. 297, 298 (1980).

115. MURPHY & COLEMAN, *supra* note 113, at 82.

116. FREYFOGLE, *supra* note 60, at 57-58.

wrong, what is wise and foolish, or what is far and unfair."[117]

The answer arguably is that a right to a healthy environment embraces the characteristics of both negative and positive rights – and, as such, I call it a transcendent aspirational right. Indeed, while some state constitutions impose purportedly affirmative obligations on the state to promote environmental protection for the benefit of their citizens,[118] in practice they become negative rights, enforced only when the harm exceeds certain bounds. In *Robinson Township*, the court hinted that the right includes both positive and negative components –although it was enforced under a negative rights paradigm.[119] Those who are now championing the public trust to protect our atmosphere are arguing that the right is a positive one, requiring that institutional entities do more to protect our planet from climate change.[120]

We unnecessarily cabin our dialogue, therefore, by focusing too much on whether a right is positive or negative. Law generally imports obligations, however specific or vague, about what citizens or the government must do or refrain from doing; and it defines relationships between citizens and their government, citizens and other citizens, and citizens and the natural and anthropogenic world. We generally consider these relationships separate from ethics, morality, or religious tenets. Yet each of these obligations serve beside law as organizing norms for communities. Our Declaration of Independence, after all, furnishes aspirational principles. Today, NEPA's grandiose language about a healthy environment is considered

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117. *Id.* at 58. He further suggests that we expand our notion of property rights to embrace a more collective community right that appreciates the importance of nature. For a discussion of how theories of property began changing during the 1960s welfare state and foundational scholarship on zoning, see Robert H. Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve*, 1986 U. ILL. L. REV. 361 (1986).

118. Howard, *supra* note 94, at 198-99. Montana's constitutional provision "clearly and unambiguously imposes upon the State the obligation" to protect the environment for future generations and a corresponding responsibility for administering its programs. Hagener v. Wallace, 309 Mont. 473, 490 (2002) (Nelson, J., concurring).

119. *See supra* notes 103-04 and accompanying text.

120. *See supra* note 2 and accompanying text.

aspirational.[121] In the words of its primary sponsor, it "makes a concern for environmental values and amenities a part of the charter of every agency of the federal government."[122] The Council on Environmental Quality (CEQ) is premised upon a government-wide infusion of environmental values into our institutional fabric. When the CEQ's first Chair floated the idea of such an institution, he opined how a group focused on environmental quality would render "quality of the environment . . . [an] important new status in planning and policy-making at the highest level of government."[123] Even President Nixon posited that CEQ would serve as "the keeper of our environmental conscience."[124] Congress equally promoted lofty aspirational goals elsewhere through many of our modern environmental programs.[125] This panoply of institutionalized decisions led Professor Kysar to suggest that we should "live up to the laws we already have, in the hope that the popular constitutional movement achieved within those laws can be reawakened."[126]

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121. *See* Henry M. Jackson, *Foreword: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073, 1079 (1970).

122. *Id.*

123. RUSSELL E. TRAIN, POLITICS, POLLUTION, AND PANDAS: AN ENVIRONMENTAL MEMOIR 50 (2003).

124. *See* Richard Nixon, Special Message to the Congress on Environmental Quality (Feb. 10, 1970), *available at* http://www.presidency.ucsb.edu/ws/?pid=2757.

125. These goals are embedded in congressional declarations of goals and policies. *See, e.g.*, 42 U.S.C. § 4901(b) (2016) (declaring in the Noise Control Act of 1972 that "it is the policy of the United States to promote an environment for all Americans free from noise . . . ."); *id.* § 7401(b)(1) (expressing in the Clean Air Act Amendments of 1990 the Congressional intent of "protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."); 29 U.S.C. § 651(b) (2012) (stating that the Occupational Health and Safety Act is designed to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."); 33 U.S.C. §1251(a) (1972) (identifying the objective of the Clean Water Act of 1972 as "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."). *See also* Robert W. Adler, *The Decline and (Possible) Renewal of Aspiration in the Clean Water Act*, 88 WASH. L. REV. 759, 763-75 (2013) (identifying the features of the Clean Water Act that make it a highly aspirational and ambitious statute).

126. DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL

An aspirational right promoting community values can, at the very least, serve several functions.[127] To begin with, it expresses a vision for a value that has emerged through our democratic process.[128] Joe Sax captured this idea when he expressed how an environmental right furthers the ideals of a democratic society founded on principles of self-government.[129] Citizens theoretically consent to an organized society in return for society's affirmative obligation to do what it can to maintain a "minimal level of substantive protection."[130] An aspirational environmental right announces – like a right to personal security, personal freedom, basic protections against poverty, or emergency medical assistance – our society's appreciation for the fundamental role the environment plays in the health and welfare of individuals.[131]

LAW AND THE SEARCH FOR OBJECTIVITY 232 (2010). Professor Kysar persuasively argues that we must "reinvigorate environmental law, not merely in welfarist terms, but in terms of ethical self-understanding of its authors." *Id.* at 238. The promise of environmental law, for Kysar, is affording future generations "foundational legal importance." *Id.* at 240. I believe he shares my view that liberalism's focus on human dignity and respect ought to embrace future generations. *See id.* at 242-3.

127. Professor Thompson, for instance, addresses the utility of a "Community Values Model" for state constitutions, albeit questioning its applicability to modern state constitutions. *See* Thompson, *supra* note 108, at 903.

128. *See* SAGOFF, *supra* note 11, at 117, 119. This is what Mark Sagoff describes as expressing our preferences, transcending a utilitarian decision that merely exhibits collective self-interest, possibly skewed by the influence of self-interested groups with unequal political power. Sagoff adds:

> The goals a society chooses should be consistent with a sense of decency and compassion for which there is no analytical or methodological substitute. They will also depend on the place of that society in the historical progress of humankind and on the lessons it has learned from experience. The goals we choose should also represent reflective judgment on what other societies have done and tried to do.

Id. at 121.

129. Sax, *supra* note 61, at 96. Sax's environmental right emerges from three core values: "(1) an open process of decision making; (2) recognition of the intrinsic value of each individual; and (3) patrimonial responsibility as a public duty." *Id.*

130. *See* Sax, *supra* note 61, at 100.

131. An aspirational environmental right may be considered a Kantian natural right for individuals to be treated with dignity and respect, similar to a right not to be killed without justification. Such a right gains further currency if

An aspirational right also can be solidified with little disruption. On a practical level, as Professor Thompson posits when talking generally about an environmental right, an aspirational right can tilt the balance in difficult cases when environmental issues are present.[132] Or, as he further observes, it can help "shape legislative debate."[133] Nor is it beyond the ken of the judiciary to shape how an aspirational environmental right affects concrete cases. South Africa's Constitutional Court observed how South Africa's right to water was not an absolute privilege.[134] Courts, as David Sive explains, had to expand on concepts such as "equal protection of the law," and could equally "spell out the problem of defining" an environmental right.[135] To be sure, some in the early 1970s considered whether we needed a specially trained "environmental court" to resolve ecologically-infused disputes.[136] But that seems unnecessary as courts traditionally examine appropriate levels of environmental protection when fashioning an optimum remedy in a common law dispute. Judge Oakes aptly noted how courts invariably

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we consider that, absent an aspirational right to a healthy environment we are not treating the ability of future generations to survive and prosper with sufficient sensitivity. *See* MURPHY & COLEMAN, *supra* note 113, at 86.

132. *See* Thompson, *supra* note 108, at 905.

133. *Id.* at 905-06.

134. *See* SALZMAN, *supra* note 49, at 209.

135. *Environmental Protection Act of 1970: Hearings on S. 3575 Before the Subcomm. on Energy, Natural Res., & the Env't of the S. Comm. On Commerce,* 91st Cong. 110 (1970). Sive added:

> [i]f we regard environment as fundamental—and I certainly believe it is as fundamental as anything that we have today, not excluding our basic right of due process and equal protection, et cetera—if we do regard this as fundamental, then I think it must go through the same evolutionary process through our courts that due process and equal protection and other constitutional requirements went through.

Id.

136. *See* Water Pollution Control Act, Pub. L. No. 92-500, § 9, 86 Stat. 816, 899 (1972) (initiating exploration of the concept of environmental courts). *See also* Scott C. Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973) (discussing Congress's initiation of a feasibility study of the creation of an environmental court). *Cf.* Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal and Expert Members*, 5 TRANS. ENVTL. L. 175 (2015) (discussing the role of experts in India's system).

must engage in some substantive review.[137]

Indeed, an aspirational right to a healthy environment can be enforced judicially through traditional balancing. Rights need not be absolute.[138] Indeed, NEPA and some state counterparts, such as MEPA, contemplated an evolving appreciation for how to best balance conflicting priorities and interests in these situations. In *Calvert Cliffs' Coordinating Committee v. AEC*, the D.C. Circuit at first believed that NEPA's language warrants giving the courts authority to ensure that federal agencies engage in an adequate balancing of the environmental consequences of any agency decision.[139] NEPA's language acknowledging consideration of "presently unquantified environmental amenities and values" reflects an expectation that such values will be balanced against those that are presently quantifiable, and that these unquantifiable "amenities and values" might someday be quantified.[140] The Montana Constitution's language paralleled NEPA, and Montana initially

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137. Judge Oakes stated:

> In spite of the plentitude of discussion in recent years as to how far courts must defer to the rulings of an administrative tribunal, it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions. Before doing so they will, of course, —like the administrative tribunals themselves—look for light from every quarter, and after all crannies have been searched, will yield to the administrative interpretation in all doubtful cases; but they can never abdicate.

Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 453 F.2d 463, 484 (2nd Cir. 1971) (Oakes, J., dissenting).

138. Professor Sax opined that "[s]urely there can be no precept to leave nature untouched, so that no tree should be cut down and no river dammed." Sax, *supra* note 61, at 94.

139. *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1113-14 (D.C. Cir. 1971). For a contextual history of the case, see Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 483, 504-09 (2009).

140. *Id.* at 1113. Early in MEPA's development, for instance, the Environmental Quality Council noted how Professor Eugene Odom's work on ecosystem services could be employed as an analytical methodology. EQC Report, *supra* note 98, at 127. But the Council cautioned that when "elevat[ing] presently unquantified environmental values to partnership with economic and technical considerations . . . [,] reduction to easy quantities is not the only—and probably not the most fruitful—approach." *Id.*

accepted Calvert Cliffs' finding that balancing was necessary.[141]

The Pennsylvania Supreme Court recently confirmed the notion that courts can effectively police overly insensitive, environmentally-laden decisions.[142] After Pennsylvania passed Act 13, which amends the Pennsylvania Oil and Gas Act and restricts the ability of local communities to regulate oil and gas activities (fracking), Robinson Township challenged the Act's constitutionality under the Environmental Rights Amendment to the Pennsylvania Constitution. In its opening salvo on the role of the judiciary when confronting such broadly worded rights, the Pennsylvania Supreme Court observed:

> Courts are equipped and obliged to weigh parties' competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by the other branches of government. The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, inter alia, our air and water quality.[143]

The court added that the Environmental Rights Amendment did not impose any absolute barrier to altering our natural landscape, but it afforded courts an ability to ensure that "on balance," the government "reasonably account[ed] for the environmental features."[144]

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141. EQC Report, *supra* note 98, at 128.

142. *See* Robinson Twp., Washington Cnty. v. Commonwealth of Pa., 83 A.3d 901 (Pa. 2013); Robinson Twp., Washington Cnty. v. Commonwealth of Pa., 96 A.3d 1104 (Pa. Commw. Ct. 2014) (subsequent case). *See also generally* Joshua P. Fershee, *Facts, Fiction, And Perception in Hydraulic Fracturing: Illuminating Act 13 And* Robinson Township v. Commonwealth of Pennsylvania, 116 W. VA. L. REV. 819 (2014) (discussing the context and importance of the *Robinson* litigation).

143. *Robinson Twp.*, 83 A.3d at 953.

144. *Id.* Professor Dernbach explores the role of balancing in some depth. *See* Dernbach, *The Potential Meanings of a Constitutional Public Trust, supra* note 105, at 503.

VI.
CONCLUSION

By any reasonable measure, it seems that environmental rights ought to be embedded within our legal lexicon as a reflection of what Lynton Caldwell characterizes as law's "traditional function" of "express[ing] the sense of the community regarding rights, wrongs, and obligations."[145] That sense includes appreciating how we must ensure that future generations will enjoy nature's capital.[146] Our capacity to act selfishly toward others is infused within modern Kantian moral philosophy, and we correspondingly ought to embrace a tenet of that philosophy and recognize how protecting our environment is fundamental for human survival. Leon G. Billings, who was instrumental in assisting Senator Muskie in crafting many of our modern environmental programs, observed how "justice in the context of the environment requires gaining widespread global recognition that there is an inalienable right of all people to a clean, healthy and safe environment."[147] This was the incipient mission of Senators such as Muskie, Nelson, and Jackson, as well as House members such as Richard Ottinger. And as the flame from their torch continues, it ought to furnish a sufficient foundation for establishing an aspirational environmental right: a right to a clean, healthy, and safe

145. Caldwell, *supra* note 12, at 332.

146. *See* FREYFOGLE, *supra* note 60, at 87-91 (addressing ethical obligations to future generations). An aspirational environmental right that includes future generations might furnish a thematic principle for infusing sustainable development into our legal fabric. *See generally* JOHN C. DERNBACH, ACTING AS IF TOMORROW MATTERS: ACCELERATING THE TRANSITION TO SUSTAINABILITY (2012); SOVACOOL & DWORKIN, *supra* note 49, at 327-28 (noting arguments for an inter-generational right). An inter-generational right to a healthy environment surfaced in *Minors Oposa v. Factoran*, a case from the Republic of the Philippines. *See* 224 S.C.R.A. 792 (S.C. July 30, 1993) (Phil.), *reprinted in* 33 I.L.M. 173 (1994); McCaffery & Salcido, *supra* note 49, at 23.

147. Hon. Leon G. Billings, Md. House of Delegates, The Environmental Right Is Not For Sale: Remarks Presented at the Summer Seminar on Halki '97: The Environment and Justice (June 25, 1997), *available at* http://www.muskiefoundation.org/istanbul.leonbillings.html.

environment that lingers in the background to protect against egregious abuses to the environment – abuses which would fail any traditional balancing analysis. This is not only a propitious, but also an acutely urgent, time for ascending to what Charles Reich urged back in 1970: a level of Consciousness III, where we at least place our natural surroundings within our anthropocentric natural rights as homo sapiens.[148]

148. CHARLES A. REICH, THE GREENING OF AMERICA 382 (1970).