

**[THE FOLLOWING ARTICLES EVIDENCE A LONG-TERM EFFORT BY ENVIRONMENTAL EXTREMISTS AND MEMBERS OF THE ACADEMY, WHICH ARE ARGUABLY INFLUENCING OBAMA ADMINISTRATION AND CONGRESSIONAL POLICY, TO EMBED VERY COSTLY COMMUNITARIAN ‘SOFT’-SOCIALIST ENVIRONMENT-CENTRIC SUSTAINABLE DEVELOPMENT NORMS OF THE UNITED NATIONS SANCTIONED EUROPEAN AARHUS CONVENTION, THE RECENTLY AMENDED EUROPEAN UNION AND FRENCH CONSTITUTIONS, AND A NUMBER OF UNITED NATIONS MULTILATERAL ENVIRONMENTAL TREATIES, WITHIN THE UNITED STATES OF AMERICA VIA AMENDMENT OF THE UNITED STATES CONSTITUTION AND ITS ACCOMPANYING BILL OF RIGHTS, AND/OR VIA AMENDMENT OF STATE CONSTITUTIONS, TO PROVIDE FOR A RELATIVELY SUPERIOR CONSTITUTIONALLY GUARANTEED ‘ENVIRONMENTAL RIGHT’, THUS EMPOWERING THE ‘ELITES’ OF GOVERNMENT AND NON-GOVERNMENTAL ORGANIZATIONS, PURSUANT TO EUROPE’S PRECAUTIONARY PRINCIPLE AND THE ‘PUBLIC TRUST’ DOCTRINE, TO UNDERTAKE SWEEPING LEGISLATIVE, REGULATORY AND JUDICIAL REFORMS, AND TO EXERCISE AGGRESSIVE ‘GREEN’ ‘POLICE ENFORCEMENT POWERS’ IN THE ‘PUBLIC INTEREST’, THAT WOULD FUNDAMENTALLY ‘CHANGE’ THE AMERICAN COMMON LAW ‘NEGATIVE’ INDIVIDUAL RIGHTS-BASED, FREE MARKET ECONOMIC AND SOCIAL SYSTEMS (i.e. THE UNIQUE AMERICAN SOCIAL COMPACT).]**

<http://www.abanet.org/environ/committees/lawstudents/writingcompetition/2008/WillMitSoL/ShubhaHarris.pdf>

## **Establishing a Constitutional Right to Environmental Quality**

**Shubha Harris†**

May 5, 2008

...This article begins by discussing recent efforts to enshrine a fundamental right to a healthy environment in the U.S. Constitution.2...It then discusses the arguments for and against adopting a

constitutional right to a clean and healthy environment and argues for enacting such a right.<sup>5</sup> Finally, it contends that a fundamental right to a healthy environment can be construed as part of the Fifth Amendment's right to life guarantee, and that the time is right for the U.S. courts to recognize such a right for its citizens.<sup>6</sup> (p.1)

## ...V. A CONSTITUTIONAL ENVIRONMENTAL RIGHT

### *A. A Constitutional Amendment to a Healthy Environment*

#### ***1. Arguments Supporting Adopting a Constitutional Amendment***

There are several arguments in support of adopting an amendment to the U.S. constitution guaranteeing the right to a clean and healthy environment. **A principal reason for establishing a constitutional right to environmental protection is that doing so takes the issue out of the realm of daily politics and therefore less susceptible to political whims.**<sup>59</sup>

...There exists a strong rationale for establishing a constitutional right to environmental protection to insulate environmental values from narrow majorities in legislative bodies: that rationale can best be described as protecting the right of future generations. Legislative action is an important means for protecting the environment. But relying too heavily on Congress to protect the environment is not realistic. Making choices to preserve and protect the environment are difficult ones. It is much easier for legislators to do what is best right now without regard to future impact.<sup>69</sup> Protecting the environment cannot be achieved through short-term measures; rather, it is a long-term goal which requires thoughtful and careful planning. (pp. 7-8)

...**Another reason for** adopting a constitutional right to environmental quality is that doing so would make the right more indestructible than mere statements of policy, procedural norms, or even regulatory statutes.<sup>70</sup> **Enacting a constitutional environmental right would offer environmental protection the highest rank among legal norms, thereby trumping statutes, administrative rules, and/or court decisions on the matter.**<sup>71</sup>

...**A constitutional provision, on the other hand, would provide a minimum guarantee, thereby assuring individuals that the right would receive the same protection accorded other fundamental rights.** This is especially important for the poor and for minorities, who are particularly vulnerable to environmental harm because they often live in contaminated areas and/or work in hazardous conditions.<sup>77</sup> Adopting a constitutional right to environmental quality will therefore assure Americans, in particular traditionally disadvantaged groups, at least a baseline guarantee that their rights to a decent environment will not be infringed without legal recourse. (pp. 9-10)

...**Next, protecting the environment is a global issue. Environmental threats abroad affect Americans and vice versa. Thus, Americans cannot reasonably believe that environmental policy should be only of domestic concern.** As one scholar noted, “[t]he

amount of fossil fuel burning in China will affect temperatures in Kansas, and transportation decisions in California will affect the quality of life in Bangladesh.”<sup>80</sup> The interdependence of human beings is particularly evident when it comes to the environment. **No nation is an island,<sup>81</sup> and the United States’ environmental policy must reflect its role as one part in a single ecosystem.<sup>82</sup> As nations around the world begin to recognize an environmental right, so too should the United States.** Our failure to do so will contravene the progress of global environmental efforts.

Related to the above, **nations around the world are beginning to include environmental protection as a constitutional right.** Arguably, the United States has been the leader of the free world for over a half a century and its Constitution has been and continues to be used as a model to other countries as they form governing documents.<sup>83</sup> The United States should be leading the world on environmental issues – as the U.S. takes aggressive action on the matter, so will other countries. **Adopting a constitutional right to environmental quality will send a message to the world that the U.S. is serious about environmental protection.** (p.10)

### *...2. Arguments Against Adopting a Constitutional Amendment*

...Several American states have recognized the threat to the environment and have passed amendments to state constitutions. Internationally, the right is being interwoven into Constitutions with increasing frequency. **But the right to a healthy environment is generally viewed as a “positive” social right, requiring affirmative action on the part of the government to create a certain standard.** There are several problems with adopting such a positive right in the U.S. Constitution. The first is that **the majority of the Constitution’s existing amendments protect “negative” rights rather than positive rights. Negative rights afford individuals protection against an aggressive government as opposed to positive rights which are individual entitlements to protections by the state requiring definite action on the part of the government.**<sup>93</sup> Many countries that have enacted Constitutions in the past thirty years have included “positive” rights. These more recent Constitutions protect the right to certain minimum conditions including the right to food, adequate housing, and in many countries, the right to a decent environment.<sup>94</sup> Yet these more recent constitutions have been harshly criticized for including overly broad goals and for their failure to deliver the enumerated rights.<sup>95</sup> **Providing a wide array of social and/or economic rights to citizens requires huge expenditures,**

**and by including such guarantees, most countries will not be able to keep pace with the needs of its citizens.**<sup>96</sup> The U.S. Constitution does include three positive rights,<sup>97</sup> but all of the rights adopted since the Bill of Rights are negative rights.<sup>98</sup> Adopting a constitutional “right to a healthy environment” is an aspirational right and is generally seen to be nonjusticiable. **The Constitution does not contain any rights which are solely aspirational** and the notion of including positive, social rights in the Constitution is scorned by many.<sup>99</sup> (pp. 11-12)

**...Undoubtedly, a right that guarantees individuals that the government will refrain from action which causes environmental harm may be difficult for courts to interpret and define.** Yet courts have faced similar struggles with respect to other fundamental rights and, over time, have developed a body of jurisprudence on which we can rely. The same may be true for an environmental right.

### ***3. Enacting a Constitutional Amendment to a Healthy Environment***

Notwithstanding the fact that the positive vs. negative right distinction is illusory, the right to environmental protection can be framed as a negative right<sup>111</sup> to assuage those concerned about including positive rights in the Constitution. By analogy, the right of free speech is actually prohibitory in nature and assures individuals that the government will not act in such a way that will restrict their freedom of speech. The specific language of the First Amendment reads: “Congress shall make no law abridging the freedom of speech[.]” Similarly, **an environmental rights amendment could be mandatory and prohibitory in nature and read**

**“Congress shall make no law abridging the right to a clean and healthy environment.”**<sup>112</sup>

**Such a right would guarantee individuals that the government and the private actors it regulates could not pollute or otherwise engage in environmentally destructive behavior.** Establishing the right as a negative right removes the entitlement element viewed by many as problematic with regard to social rights: a negative environmental right does not require the government to bestow upon individuals minimum necessities, but rather assures individuals that the government will refrain from acting in ways that can harm the environment, much like the government must refrain from interfering with an individual’s right to free speech.<sup>113</sup> Additionally, construing the right as a positive right is problematic because such rights lack justiciable criteria<sup>114</sup> and also require implementing legislation. On the other hand, viewing the right as a mandatory, negative right would provide the necessary language for courts to find the right to be self-executing and therefore enforceable.<sup>11</sup> (p.14)

***...B. Judicially-Created Right.***

...In general, originalists ascribe to limiting judicial power by narrowly construing the Constitution.<sup>118</sup> They believe that the meaning of democracy is that elected officials should govern and that judicial review is a “deviant institution” because it allows unelected judges to change the decisions made by elected officials who are directly accountable to the public.<sup>119</sup> Those who subscribe to this methodology argue that in order to limit the power of unelected judges, only those rights specifically enumerated or clearly implied in the Constitution’s text should be protected.<sup>120</sup>

On the other hand, **non-originalists argue that judges should have considerable discretion in interpreting the Constitution.**<sup>121</sup> They contend that the Constitution should evolve not only by amendment, but also by judicial interpretation, and thus judges should be permitted to go beyond just the four corners of the Constitution’s text.<sup>122</sup> Those who espouse this approach contend that because of advances in society and technology, courts are free to protect rights that are not expressly delineated.<sup>123</sup>

A “fundamental right” is given special status because such rights cannot be infringed by the government without a compelling purpose.<sup>124</sup> For the Court to interpret an existing constitutional provision to create a new fundamental right is a not a radical idea. **Although controversial, the Court has created numerous fundamental rights not specifically enumerated in the Constitution using either the Due Process Clause of the Fifth and Fourteenth Amendments or the Equal Protection Clause of the Fourteenth Amendment.**<sup>125</sup> **Either or both of these clauses can give rise to a constitutional right to a healthy environment.** (pp. 15-16)

### ***...1. Judicially Created Rights Using Substantive Due Process***

...In a recent case, *Washington v. Glucksberg*, 521 U.S. 702 (1997)...the majority...reasoned that **a substantive due process right required two elements: first, the asserted right required a determination of whether it was “deeply rooted in [our] Nation’s history and tradition”;**<sup>130</sup> **second, the right required a “careful description.”**<sup>131</sup>

### ***...2. Recognizing a Constitutional Right to a Healthy Environment Using Substantive Due Process***

**Applying this two-part test in favor of finding a constitutional right to a healthy environment does not bode well for the right.** The first factor in the framework requires the right to have been historically and traditionally protected. Yet, **there is scant history supporting a constitutional environmental right.** Undoubtedly, there is ample recent history supporting the right,<sup>132</sup> yet the Glucksberg test requires not a right that has been protected in modern society, but a right that has been traditionally protected throughout America’s history. **The U.S. Constitution**

**says nothing about the environment**, and throughout our nation's history, environmental effects have often taken a back-seat to economic progress.

...**the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), rejected the "deeply rooted in the nation's history" test and stated that to find a right under the substantive due process clause, courts must look to evolving political and cultural values.**<sup>136</sup> Under this framework, an environmental right seems more feasible.

...The majority opinion in *Lawrence* is viewed by many as groundbreaking because it unequivocally engages in making value judgments about what cultural and political ideas should be considered of constitutional importance.<sup>139</sup> **The Court's language in *Lawrence* evinces respect for "constitutional values that have not heretofore found their natural home in the Due Process Clause."**<sup>140</sup> While the majority opinion in *Lawrence* has also been harshly criticized, it is ultimately recognition that constitutional law and culture are juxtaposed in a reciprocal, dynamic relationship whereby each influences the other.<sup>141</sup> Under this view, a constitutional right to environmental protection can be justified.

...**The Court's reasoning in *Lawrence* is a major turning point for the substantive due process doctrine, but it is also significant because it is the first time the Supreme Court cited foreign case law in overturning an American constitutional precedent.**<sup>146</sup> While there is certainly debate over whether, and to what extent, the Supreme Court should look to foreign case law in deciding constitutional questions,<sup>147</sup> **Justice Kennedy's opinion in *Lawrence* clearly suggests that foreign precedent is relevant in our countries' constitutional discourse.**<sup>148</sup> **This fact weighs in favor of finding a constitutional right to a healthy environment for Americans.** As discussed above, the world's largest democracy, India, explicitly recognizes an environmental right in its Constitution and the Indian Supreme Court has also interpreted its Due Process provisions to include the right.<sup>149</sup> Additionally, courts in other countries have recognized the right.<sup>150</sup> These decisions should influence U.S. courts to find an environmental right. (pp. 17-19)

---

[http://repository.upenn.edu/cgi/viewcontent.cgi?article=1006&context=mes\\_capstones](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1006&context=mes_capstones)

**EXCERPTS FROM:**

Department of Earth and Environmental Science  
Master of Environmental Studies Capstone

Projects  
University of Pennsylvania Year 2006  
The Necessity and Possibilities of  
Constitutional Environmental Rights  
Christina Simeone  
University of Pennsylvania

## An American Evolution – Environmental Rights Chapter

### ... Nature and Definition of Environmental Rights

A constitutionally guaranteed environmental right could be worded in many different ways. The wording of the right would shape its duties and scope. Tim Hayward, a scholar devoted to environmental rights, prefers the definition of environmental rights referenced in the Brundtland report of 1987:

*‘All human beings have the fundamental right to an environment adequate for their health and well-being’<sup>1</sup>.*

...A U.S. environmental right would be considered an anthropocentric right, because it considers only human health and well-being, not the environment ‘for its own sake’. An eco-centric environmental right would be worded more as a ‘right OF nature’ rather than a ‘right TO nature’. This distinction is important since legal authorities would probably be more likely to oppose the economic interests of an entity to protect the rights of human than the rights of animals or plants<sup>4</sup>. An anthropocentric right can have two further distinctions, ‘weak’ or ‘strong’ anthropocentrism. Strong anthropocentrism, also called the utilitarian view, would consider only the interests of humans and excludes the interests of nonhumans and the environment for its own sake. The utilitarian view only considers the short-term value of all variables of the ecosystem. By this view, the environment is seen as a life-support system for humans, to be manipulated and used in whatever way humans feel is to their best interests. **The focus of ‘weak’ anthropocentrism is on human interests, but it does consider nonhuman and environmental interests. This view acknowledges that humans are integrally linked to the environment and cannot be separated from it. Weak anthropocentrism maintains that if relatively subordinate human interests conflict with essential interests of nonhumans or the environment, priority could be given to the non-human or environmental interests**<sup>5</sup>. ‘Weak’ anthropocentrism generally recognizes that,

*“human interests are inseparable from the good of the nonhuman constituents of the environment in many ways, some of which we may not yet be aware of, so that a reasonable working presumption (which is absent from ‘strong’ anthropocentrism) is that where there is not a serious cost in human terms there is a positive reason actively to show concern for features and constituents of the nonhuman environment, regardless of whether humans stand to derive any immediate benefit.”<sup>6</sup>*

**Ultimately, the nature of environmental rights requires a concerted International effort towards preservation and protection.** This is due to the interdependence of environmental sectors, trans-boundary effects of environmental harm, and such complex and compounding phenomena as ozone layer depletion and global warming<sup>7</sup>. These factors illustrate how regional environmental protection is beneficial, but not a cure in the face of global damage. Many sectors of the economy serve to negatively impact the environment. The processing of raw materials, fuel use, mining and timber practices, transportation and distribution methods, industrial processes, consumer consumption patterns, product life cycles, and many other common practices of the modern world work together to affect and harm the environment. Pollution in one region can migrate and affect many other regions. Thus environmental protection measures in the United States do not ensure that pollution from other countries will not affect our land and populations. Lastly, ozone layer depletion and global warming have real and significant impacts for the whole of humanity. These problems will not subside unless all actors work to make necessary changes. With these three factors in mind one can understand that problems related to environmental degradation will not be accurately addressed until there is a cohesive international effort. Fortunately, much of the rest of the world has already begun to act<sup>8</sup>. As both a world superpower and cultural icon, the United States has significant influence on the world stage. **As the world’s leading consumer and polluter, the United States the ability to set a revolutionary (or evolutionary) precedent by enacting a constitutionally guaranteed environmental right.** Implementing a constitutionally guaranteed environmental right in the United States could not only improve the domestic environmental situation, but could also prove instrumental in improving the environmental quality of the entire world. (pp. 1-3)

### ... What Should Environmental Right Guarantee?

It is logical that an environmental right would mandate certain duties and guarantees to the people that it protects. An effective environmental right must include duties, and procedural and substantive rights<sup>9</sup>. Additionally, an environmental right should offer injunctive relief and mechanisms to collect damages from infringing parties<sup>10</sup>.

... Dinah Shelton believes that procedural rights of an effective environmental right should require informed consent and political participation Shelton outlines 3 procedural rights that **an environmental right should guarantee; 1) a right to prior knowledge of such action, with corresponding state duty to inform, 2) a right to**



**participate in decision-making, and 3) a right to recourse before competent administrative and judicial bodies**<sup>13</sup>. Provisions must also be made to enable an injunction mechanism for immediate procedural guarantees against action causing environmental degradation<sup>14</sup>. This would not prevent entities from secretly carrying out environmentally harmful projects, but it would give the public the ability to halt such projects once they become aware of them. This injunction would stand until the project could be properly investigated, environmental damages assessed, public participation and information enabled, and damages sought if necessary.

**Shelton maintains that even with the above-mentioned procedural guarantees, two questions still remain to be answered; 1) how do the rights to information and participation apply to individuals outside of those immediately affected, and 2) who makes the final decision about projects affecting the environment and are there substantive limits to decision maker actions?**<sup>15</sup>

The first question addresses an issue related to the trans-boundary nature of the environmental degradation...**The trans-boundary nature of environmental harm requires that provisions be enacted to afford those outside of the state of jurisdiction (or country of jurisdiction) some means of obtaining information, input in decision-making, and legal recourse if damages arise.** This requirement could mandate that emitters of pollution or providers of environmental damage forecast how the pollution they produce will migrate. If foreign states or countries are affected, information, participation, and redress must be provided accordingly. Correspondingly, the first question posed by Shelton touches on the issues of the rights of non-citizens. The second question posed by Shelton involves an international scenario. By this perspective, **international treaties that establish customary norms and standards would place limits on decision makers. Final decision on environmental issues would come from the state of jurisdiction. However, that state would be restricted by the limits set by international treaties.**

**Absent norms and standards set by international treaties,** the second question posed by Shelton remains unanswered for a domestic scenario. In the United States **the state supreme court would have preeminent jurisdiction, with appellate courts and the Federal Supreme Court following. The substance of the federal environmental right and the federal administration tasked to enforce such a right (the U.S. Environmental Protection Agency) would impose limits on state decision makers.** Federal laws set protection mandates such as limits on pollution. States must abide by those federal regulations, but are allowed to create stricter protection mechanisms and limits.

(pp. 4-5)

... The link between human rights and the environment (discussed in detail later in this chapter) is built on the fact that many national and international jurisdictions recognize that the right to a healthy environment is a fundamental human right. The following substantive matters ensue; 1) litigation should be allowed based on this right and facilitating its enforceability in domestic law by liberalizing provisions regarding ‘standing’, 2) acknowledging that other human rights recognized in domestic legal systems can be violated as a result of environmental degradation (right to property, privacy, life)<sup>16</sup>... The second issue relates to that fact that nature and the environment are inherently linked to human existence. Therefore, **established basic human rights may be violated if the environment is degraded. For example, a person’s right to property or privacy may be violated if pollution from a neighboring property migrates to his or her own property.**

... Duties, procedural and substantive rights, and injunction and damages mechanisms are all things that should be guaranteed to each citizen and immigrant under a constitutional environmental right. There are other things, reforms specifically, that should be guaranteed at the inception of an environmental right. These include, but are not limited to the reevaluation of pollution standards, reform of traditional cost-benefit analysis practices, and the manifestation of insulating environmental protection goals from short-term political and economic will. **An environmental right should guarantee that pollution standards be set using the precautionary principle of preventing and anticipating harm.** Thresholds of acceptable risk are extremely hard to determine, however, this should not be deterrence. Thresholds should be set based on the most sensitive groups of the population, namely children, the sick and the elderly. Thresholds limits should also consider the compound affects of multiple sources emitting regulated levels. A further discussion of pollution limit setting is later in this chapter.

**Environmental cost-benefit analysis reform should be guaranteed to take place at the inception of an environmental right.** Traditional methods employed by the Office of Management and Budget have historically undervalued environmental inputs (see the Economics chapter of this book). Most notably these under-valuations have been with respect to deriving consumer demand for environmental services, future generation preferences, perfect and poor substitutability of environmental outputs, environmental weights, and methods of valuing non-market goods. (pp.6-7)

...In 1998 **the United Nations Economic Commission for Europe (UNECE) held the Aarhus Convention, also known as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.** This convention ‘links environmental rights and human rights’, recognizes current obligations to future generations, proclaims that **sustainable development** can only be reached if all stakeholders participate, links government accountability with environmental protection, and

**establishes methods to increase public participation in international environmental agreements**<sup>23</sup>. This agreement establishes procedural rights, rights to information, rights to participation in decision-making, and rights to access to justice in environmental matters. While these rights do not encompass a comprehensive environmental right, they do establish fundamental rights that are necessary to securing the right to a healthy environment.

The preamble of the Aarhus Agreement makes two very important assertions that inextricably link environmental rights with human rights:

- *Recognizing that adequate protection of the environmental is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.*
- *Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.*<sup>24</sup>

The UN asserts that this document is not only about environmental and human rights, but also about government accountability, transparency and responsiveness<sup>25</sup>. This is apparent through the Agreement's three main objectives (or pillars): access to information, public participation in decision-making, and access to justice. (p.12)

**...Aarhus has been ratified by 39 countries including; Greece, Switzerland, Sweden, Norway, the United Kingdom, Germany, Latvia, Romania, etc. The United States has not ratified the Aarhus Convention** at the time of my research. Most recent amendment to the Aarhus Convention was the extension of the rights of public participation in decision-making on genetically modified organisms (GMOs). Also added to Aarhus was the Protocol on Pollutant Release and Transfer Registers and the "Environmental Democracy" clearinghouse, used to promote ideas and awareness about Aarhus covered issues. **Aarhus represents the concerted thoughts and actions of a proactive eastern society focused on basic human rights, such as the right to a healthy environment.**

## **... Can Environmental Rights Be Exercised Using Existing Rights?**

**The government has used property rights to protect certain areas of land. Whether for natural conservation parks, tourist sites, to prevent development, etc, the government has acted to preserve land deemed to be valuable to the general public. Such 'regulatory takings' have prevented certain actions on private land, to the**

dismay of landowners. **The Fifth Amendment of the U.S. Constitution requires the government compensate landowners for taking or limiting their land. However, regulatory takings of the government, for the purpose of protecting the public good, are rarely compensated for. Land-use laws have been a key tool use by the Federal government to achieve environmental protection through regulatory takings.** Such laws as the Endangered Species Act (ESA) and Section 404 of Clean Water Act (CWA) are examples of such land-use laws.

Lavinge asserts that initial zoning, tax, and public works design of land use laws has inhibited United States jurisprudence from developing strong and useful mechanisms to support, analyze, or regulate cumulative effects of environmental decision-making or their impacts on future generations<sup>36</sup>. **Property rights and land-use laws can be very controversial. They may offer means to protect environmentally desirable areas of land, yet do little to protect the health and well being of all citizens. In this sense, property rights are not a substitute for a constitutional environmental right.** However, when landowners are properly compensated for government-seized land, deemed in the interest of the public good, property rights can be effective tools to enforce and implement aspects of a constitutional environmental right. **Properly conceived property rights should be seen as a subordinate mechanism to realizing a dominant constitutional environmental right.**

(pp. 15-16)

## **Methods of Amending the U.S. Constitution**

### **Who Currently Has Environmental Rights?**

State constitutions shape state laws, branches of government, and direct state bureaucracy. All state constitutions are subordinate to the Federal Constitution.

**...State constitutions are more easily amended than the federal constitution. The state constitution amendment process involves voter participation.** This functional difference from the federal constitution allows state constitutions to directly reflect popular opinion, consent and control. They tend to be larger documents because they are more frequently changed...

**... Many states within the United States have amended their state constitutions to include environmental rights provisions. From 1970 to**

**1979, Hawaii, Illinois, Massachusetts, Montana, and Pennsylvania amended their constitutions to include environmental rights<sup>41</sup>. (pp. 18-19)**

## **... What are the Difficulties with Environmental Rights?**

**... It is also noteworthy to recognize that many international documents asserting environmental rights as a human right are not ratified or endorsed by the United States. Apple concludes that a sufficiently specific, universal, and obligatory international treaty accompanied by mainstream recognition of environmental rights would enable U.S. courts to succeed in enforcing environmental rights<sup>55</sup>.**

Sevine Ercmann summarizes the finding of three international meetings regarding the enforcement of environmental laws<sup>56</sup>. Enforcement of environmental laws is paramount to ensuring the enforcement of a constitutional environmental right. The International meetings Ercmann references were sponsored by the U.S. EPA, other relevant U.S. authorities, the Environmental Ministries of the host countries, and the Dutch ministry of Housing, Physical Planning and Environment. These conferences took place in Utrecht, Netherlands in 1990, Budapest, Hungary in 1992, and Oaxaca, Mexico in 1994. Ercmann outlines generalities, necessary means of enforcement, powers to be given to authorities, the role of public awareness, the role of NGOs and other special interest groups, developing mechanisms of enforcement, and three principles going into the future. Ercmann's data are heavily cited because they represent a cooperative international effort to address a very specific problem.

... Ercmann points out general methods to ensure that environmental laws are properly interpreted and enforced. He begins by stating that national and international legal requirements regarding administrative, civil, and criminal provisions must be adopted. These legal requirements should begin with effective compliance measures and increased administrative control and participation.

... The international environmental enforcement conferences defined compliance as follows:

***“Compliance is the full implementation of environmental requirements. Compliance occurs when requirements are met and desired changes are achieved....If requirements are well-designed, then compliance will achieve the desired environmental results. If the requirements are poorly designed, then achieving compliance and/or the desired outcome will likely be difficult...”<sup>57</sup>***

Enforcement is defined as follows:

**“...Enforcement is the set of actions that government or others take to achieve compliance within the regulated community and to correct or halt situations that endanger the environment or public health.”<sup>58</sup>**

Traditional methods of enforcement include monitoring, inspection, reporting, gathering evidence to locate violations, and negotiating with individuals and industrial entities regarding methods of achieving compliance. **The last step of compliance enforcement is the ability of enforcement agencies to pursue legal action or to dispute settlements**<sup>59</sup>.

Ercmann emphasizes that the success of an enforcement program depends on how the state exercises discretion when prioritizing environmental needs and objectives, and how it chooses the enforcement mechanism to achieve its objectives. **Ercmann notes that effective enforcement may require reorganizing administrative structures, implementing environmental legislation, using innovative administrative instruments, drafting precise and comprehensive legally binding instruments, and making short-term economic sacrifices**<sup>60</sup>. **All these aspects of ensuring effective enforcement of environmental laws could increase the operating expense of government agencies. Changing administrative structures, drafting precise new laws, forgoing short-term economic benefits, and implementing new enforcement instruments all have associated costs.** These costs should be seen as short-term investments for long-term environmental protection. (pp. 23-24)

**...Authoritative agencies should have the power via administrative and criminal law to 1) seize property; 2) bar a facility from government loans, guarantees or contracts; 3) require service or community work to benefit the environment; 4) impose restrictions on financial assistance; 5) seek reimbursement for public authorities cleanup expenses; 6) impose fines with specified amounts per unit; and 7) seek imprisonment**<sup>63</sup>. Ercmann maintains that enforcement authorities should have the responsibility of granting permits, authorizations, monitoring, reporting, emergency powers, and authorization of remedial action.

**Emerging environmental enforcement mechanisms that are complimentary to regulations have proved to be effective in increasing compliance outcomes**, according to Ercmann. Increases in public awareness through community motivation, education, and incentives have served to enhance regulatory efforts, even when implementation yielded adverse economic impacts<sup>68</sup>. **Nongovernmental organization (NGOs) and citizens have also played important roles in detecting violations and notifying authorities, applying public pressure, and bringing suits to enforce the law. NGOs have proved particularly effective in enforcing compliance through organizing and applying community pressure**<sup>69</sup>.

... Issues of **extending standing to citizens, environmental organizations, and NGOs have also bolstered compliance outcomes**, according to Ercmann. An entity must prove that they have standing in a case in order to qualify it for judicial review. Citizen lawsuits can increase public awareness and motivate action by politicians. **Allowing environmental organizations and NGOs standing in court, because of their high level of specialization and expertise, allows many cases to be brought that may not have otherwise had a chance to be heard.** This is because individuals who suffer damages may not have the financial resources to back a case. Also, communities who suffer environmental harm may lack the organizational skills and funding to mount a convincing legal effort. **Extending standing to environmental organizations and NGOs** can help these individuals and communities pursue their right to legal redress. (pp. 25-26)

**...If the law views the duties of government, under an environmental rights provision, as primarily of “the state to implement and enforce laws that secure to the individual the enjoyment of what is intended as the substance of the right”, then the role of government enforcement seems more clear**<sup>83</sup>. This simply leads to stricter interpretation and implementation of environmental rules and regulations. **The judiciary, congress and the executive would be forced to take more precautionary measures to insure that the government was fulfilling its duty to protect citizen’s environmental rights. However, government duties would have to expand to meet the needs of increased citizen participation, requests for access to information, and avenues of legal redress for environmental matters.**

... There are many issues concerning imperfect information with respect to environmental problems. Some natural systems are imperfectly or incompletely understood by science, such as global warming. Some sources of pollution are hard to identify, especially when multiple sources are emitting levels below the legal limit. Additionally, the causes of some environmental problems are difficult or impossible to identify within the specific degree of accuracy needed to pursue legal action. In the face of these uncertainties, **an environmental right would still require that the court protect citizens if environmental quality has fallen below the guaranteed threshold level. The courts will face considerable problems of knowledge when faced with certain environmental issues. Tim Hayward suggests that a solution to this problem could be to establish a specialty environmental court**<sup>84</sup>. Establishing a specialty court would have the dual benefit of reducing the increased litigation burden that will undoubtedly arise once environmental rights are enacted. The United States legal system is already overburdened. A large influx of new environmental litigation could serve to cripple the system in its current framework. Establishing a new environmental court could result

in a more effective way to address environmental litigation through a trained judiciary, expert panels, and a dedicated legal process.

... **Fulfilling all these additional governmental duties increases the operating expense of the federal and state government.** Herein lies the biggest issue with respect to enforcement, the cost. **The government will be required to provide new services, an increased volume of services will be requested, and the government will hold a greater degree of liability if they don't fulfill their obligations.** For example, Dinah Shelton states that a state may become responsible for the actions of private actors if they fail to exercise proper due diligence to prevent or respond to violations<sup>85</sup>. This government liability is a result of the environmental right being classified as a basic human right. Human rights impose positive and negative duties on the government. If the government fails to perform some of its positive duties, liabilities may result. **Environmental rights may place the government in an uncomfortable position of having to simultaneously increase its expenditures and expose itself to additional liability.** This dual increase in financial burden stemming from new administrative duties and liability exposure gives the government substantial reasoning to oppose environmental rights.

**The government is not the only sector of society that will have to bear the costs of an environmental right.** Costs associated with shifting to more sustainable and environmentally friendly business practices cause many commercial and industrial actors to oppose environmental rights. There has been a longstanding belief by industry that strict environmental standards reduce competitiveness<sup>86</sup>. This belief is true to a certain extent, but is not a rule. There are short-term cost increases and necessary capital investments that will be required of many industrial and commercial entities with the adoption of an environmental right. Increased costs will be necessary to invest in new technology and processes to comply with stricter environmental regulations. These increased costs will no doubt reduce profits in the short term. Many corporations resist this because they are responsible to create quarterly profits for investors. Reduction in profits, even in the short term, could result in lower stock prices and decreased financial commitments from investors. Moreover, cost increases in production may have to be passed on to the consumer in the form of higher product prices. This reduces a company's competitiveness in the free market. This may not be a problem if all domestic industries are required to conform to the same standards. In this sense, everyone producing a product will be required to make the same adjustments (assuming their methods of production are similar), and incur similar cost. (pp. 28-30)



...The development of an environmental right would require old pollution standards to be reviewed and new pollution standards to be set. **An environmental right should guarantee that pollution standards would be set using the precautionary principle**. The precautionary principle states that if the consequences of an action are unknown, but judged to have the potential for significantly negative or irreversible consequences, it is better to avoid that action. (p. 32)

## ...Conclusion

A weak anthropocentric constitutional environmental right worded as,

***“All human beings have the fundamental right to an environment adequate for their health and wellbeing”***,

could have the benefit of protecting humans as a priority while still considering the nature for its own sake. **The need for such a right as a *fundamental* human right is recognized and established by international organizations and treaties**. These entities acknowledge that a healthful environment is a prerequisite to being able to enjoy more traditional and established human rights. Within the United States several state constitutions have also reflected the public’s desire for environmental rights and protection.

While the idea of environmental rights seems appealing, the drafting, implementation, and enforcement of such a right is pragmatically unattractive. To ensure the feasibility and enforceability of such a right it will have to be drafted with considerable attention to detail. **The precautionary principle and doctrine of public trust can guide lawmakers in formulating an amendment that would be interpreted and enforced in the spirit as well as the definition that the law intended**. A properly conceived amendment would address implementation and enforcement pathways to achieving goals, self-executing provisions, procedural and substantive rights, necessary reforms, duties of the government, legal rights of citizens and immigrants, mechanisms to solve conflicts with existing laws, flexibility provisions, methods of seeking redress, guarantees set up by the right, and relationship of the federal right to existing state and federal environmental protection legislation and regulation.

The considerable difficulties that exist with creating a workable environmental right should not prevent the undertaking. Aside from the legal and administrative planning that must go into the development of such a right, significant costs will also be required. **The government and industry might oppose environmental rights because of the cost impact. By the same token, citizens may oppose environmental rights because of higher product prices and the inevitable tax increase that would occur to finance its implementation**. What should be kept in perspective is that the environmental affects everyone, in all areas of the world, in all sectors of the economy, for as long as the human race exists.

**Preserving the environment for the benefit of the health and well being of the human race requires sacrifices to be made by all who enjoy the services the environment provides. Government, industry and consumers will all have to share the cost of adopting and implementing constitutional environmental rights.** Formulating a plan to Phase in this right will help all parties absorb the associated increased costs over time, with minimal discomfort.

**The costs incurred to institute and enforce environmental rights should be viewed as market corrections for years of under-valuation of the benefits of environmental goods, services, inputs, and outcomes. The economic prosperity that America has experienced since its establishment has largely been at the expense of environmental prosperity, wellbeing, and abundance.** It is as if America used a credit card, backed by the environmental, to finance its development. Timber was cut, land, air and water were polluted, species decimated, natural features destroyed, natural resources plundered, all for benefit of Americans. Now that America has developed and stabilized that credit card debt should be repaid. Large accrued interest has mounted on this debt, in the form of pollution, degradation and public policy, business practices and consumer consumption patterns that underestimate the value of environmental inputs. The enormous cost of paying back the debt may be preventing the government from acting, causing industry to resist and making consumers intimidated or complacent. Postponing action further will not solve the problem, it will only increase the intensity of the environmental debt as well as increase the likelihood of negative environmental outcomes. Enacting a constitutional environmental right seems like an enormous undertaking, because it is. It has to be because the breadth of the environment, severity and history of environmental abuse and under-valuation, and the life-sustaining and health determining role of the environment dictate that it be so monumental. The importance of environmental protection for current and future generations argues that the daunting task of creating a viable solution should not deter it from being developed. (pp. 38-39)

## ... **An American Evolution – Public Health Chapter**

### **Introduction**

... Environmental pollution, caused by human related activity, poses a considerable concern to public health.

**...Amending the U.S. Constitution with an environmental rights provision would affect how the government, industry, and the public perceive environmentally related public health issues.** Environmental rights would effectively enhance the health of the public by 1) **forcing the government to adopt stricter pollution standards resulting from their increase liability exposure;** 2) **enact comprehensive environmental regulations to curtail regulatory fragmentation;** 3) **give citizens,**

**environmental organizations and the EPA more power to stop the actions of entities who pose greater risks to human health; 4) deter future environmentally irresponsible behavior by setting up hefty fines and sanctions for violators and pathways to legal redress for those whose rights have been violated; and 5) encouraging stricter product testing to protect environmentally-related consumer health.** An environmental right could realize many positive indirect effects on public health as well. These include environmentally corrective cost-benefit analysis methods resulting in fewer government projects and programs that negatively impact the natural environmental and human health. **Negative effects could result from environmental rights if the associated cost increases are not managed correctly.**

### ... Conclusion

... **The growing elderly population in America is also more susceptible to environmentally related pollution and hazards.** America faces the problem of having more elderly people who will require increased amounts of medical care because of their old age and susceptibility to disease. Paying for this care will result in a substantial burden on all Americans. **Environmental pollution and hazards particularly affect the elderly.** Reducing environmental pollutants could have the cost saving benefit of reducing the amount of medical care required for the elderly population. In this sense, money spent to enact stricter regulations could be realized as cost savings resulting from reduced health expenditures on the federally dependent elderly.

**Quality of life is another important issue to be considered.** America is, arguably, the global benchmark for standard of living and quality of life. Americans tend to be risk adverse (value avoiding risks) and support environmental regulations to enhance their quality of life. America has many regulations to protect public health from pollution; however, those regulations are fragmented and not comprehensive. Industrial hegemonies exist because operations of the chemical industry directly affect the American economy through production of inputs, products, and related services. Fragmentation of regulations and the pervasiveness of the chemical industry in the American economy have led to a complex problem. **Imposing stricter health-based pollution standards, guided by the precautionary principle (*instead of maximum allowable levels*), places limits on the industry that could negatively impact our domestic economy.** The government is likely unwilling to do this because it equates standard of living and quality of life with economic stability and productiveness. This philosophy may have to change in light of diseases related to environmental pollution. The logic behind this change would come at the realization that Americans value the prevention of disease, through the strict regulation of environmental pollution, more than they value incremental increases in the productivity of the economy. (p. 41)

...**As the world's leader, America could set a significant precedent by enacting a constitutionally guaranteed environmental right. The value of this measure would be realized through symbolism and substance.**

**America would be forced to invest in changing many of its environmentally irresponsible behaviors.** These actions and investments could convince other countries of America's honest effort to protect the environmental and human health. Other countries may choose to follow America's progressive lead, for economic or ideological reasons, by enacting their own comprehensive environmental right. This could result in more positive human health outcomes all over the world, by reducing native and transboundary environmental pollution. (p.42)

...**A constitutionally guaranteed environmental right** would not prevent all environmentally related health issues from occurring. It would reduce negative human health outcomes related to anthropogenic pollution by preventing, reducing and eliminating pollution. **Though it would impose a cost burden on the domestic economy**, these costs can be phased in tolerably. Moreover, these short-term costs could prevent larger long-term costs related to caring for the unhealthy population and correcting damage done to essential aspects of the environment. (p.43)

## ...**An American Evolution – Government Chapter**

... **The forefathers did not foresee a Constitutional framework for environmental protection.** In the absence of an amended Bill of Rights to this regard, the U.S. Constitution has not reflected the need for environmental protection. (p.3)

... **The U.S. Constitution has 3 main issues to address when faced with environmental protection and environmental rights issues; 1) inclusiveness of protection; 2) applicability of due process; and 3) fragmentation of political power<sup>2</sup>.** (p.4)

... While some forms of protection are in place for future generations, **the rights of future generations are not recognized in the U.S. Constitution.** An environmental right would do much to preserve the habitat for future humans and insure that benefit-seeking actions of the present are not undertaken at the cost of future generations.

... Due process of law ensures that a person receives fundamental fairness and substantial justice in the legal process<sup>7</sup>. It refers to how and why laws are enforced. **The fourth Amendment guarantees, “the right of people to be secure in their persons, Houses, papers, and effects.” Yet, with many environmental matters, these rights are being infringed upon.**

... **A person's body can be exposed to chemicals through the air, water, or food, without the person being aware of the violation. This is an infringement of a person's fourth Amendment rights.** Due process of law would insure legal redress to a person who has been exposed to chemical contamination.

... Humans are exposed to these chemicals by breathing air, eating contaminated fish, meats or produce, or ingesting contaminated water. With time, a person can build up a significant amount of chemicals in his or her bloodstream. This exposure and subsequent build up occurs without the knowledge or permission of the individual. Negative health effects may ensue depending on the pathology of the chemicals, sensitivity of the individual to the chemicals, and amount of exposure. **The ill person's unalienable right to "life, liberty and the pursuit of happiness", as stated in the Declaration of Independence, has been infringed upon.** If a negative health outcome manifests, the person has no one to pursue for damages. Hence, the right to due process has been withheld from this person. **Those who produce and release chemicals into the air have infringed upon the Fourth Amendment rights of those who have been exposed. The Fifth and Fourteenth Amendments state that we cannot be deprived of life, liberty or property without due process of law. Victims of negative health outcomes related to ambient environmental pollution are not afforded this Constitutional guarantee.** (pp. 6-7)

### ...Cost of Regulation

**The largest barrier to enacting an environmental right in the United States is cost. Environmental protection through regulations has a significant cost impact on all areas of the economy. A Constitutional environmental right would increase costs for consumers, businesses, and the government.**(p. 35)

### ...Federalism and Environmental Rights

...A discussion about governmental aspects of a Constitutional environmental right would not be complete without examining the relationship between federal and state governments. There are three basic types of government in the world today, **federalism, unitary systems, and confederacies.** The idea behind federalism is that there is a national framework of laws that hold significant power, with subordinate state laws and governments that also hold significant power. **The U.S., Canada, Australia, Russia, and Brazil are all governed by a federal system.** The unitary system is currently the most prevalent in the world. **Unitary systems hold power in a central national government, with very little power being given to political subunits likes towns, provinces, etc. Examples of countries run by unitary systems include China, Britain, and France.**

...The question regarding federalism and environmental protection is whether the federal government should be in charge or if state governments should hold more power. Currently, the federal government sets environmental standards and state governments are allowed to enact stricter standards, but cannot have standards below the national maximums.

**Advocates of national control over environmental protection believe that it is necessary to prevent states from lowering environmental standards to increase competitiveness and attract business, coined the ‘race to the bottom’. Federal environmental protection has also been sought because of the transboundary nature of pollution. This rationale suggests that a downwind state could be negatively affected by the upwind state’s pollution or that pollution from one area can affect many other areas. Therefore, a national limit should be in place to offer a baseline amount of protection to all states, regardless of geography.** Another argument for federal power is that many state pollution control agencies are short staffed and unable to handle the burden of statewide environmental protection. Correspondingly, national advocates believe that state governments do not have the knowledge to handle many pollution issues. Many argue that power must be given to the federal government to avoid pressure from local industries that would otherwise overrun state governments. It is also argued that the federal government would be better suited to protect the environment because it can achieve economies of scale, thus creating a cost advantage. Lastly, some believe that the federal government should have more control over environmental protection because citizens have the right to a clean environment.

**Supporters of an increased state role in environmental protection believe that state governments are closer to the people and are more able to identify and address their needs and desires. State governments are also more familiar with the specific environmental concerns affecting their jurisdiction, and may thus be able to address those concerns more efficiently without the distortion of national intervention.** Schoenbrod asserts that the federal lawmakers make relevant and irrelevant environmental regulations, but are not held accountable by the local citizens for results because the politicians are too far removed from the citizens<sup>184</sup>. State supporters also point to the role of state experiments in coming up with innovative and efficient methods of handling environmental problems. Too many federal regulations could prevent these experiments from taking place and could result in the stagnation of creative solutions. Some also suggest that the federal chain of command may be too lengthy and burdensome to implement. Overly broad federal regulations maybe so cumbersome and full of exclusions and variances that state governments may not be able to interpret or administrate them properly<sup>185</sup>. Advocates of increased state power also assert that the ‘race to the bottom’ does not exist because of NIMBY (not in my back yard) pressure from citizens. They claim that there is actually a ‘race to the top’ fueled by citizens that offsets pressure from industries to relax rules. State supporters also suggest that the federal government is susceptible to intense industrial and partisan pressure, which could undermine environmental outcomes. (pp.44-45)

...There is also the belief that **globalization has put more pressure on all levels and aspects of government**. Federal, state and local governments have lost incremental units of power as transnational corporations proliferate and NGOs and non-profits gain increased citizen support and

organizational competency<sup>190</sup>. **This has increased the role of the national government as the central orchestrator, while giving state governments more power and control over implementation, often through outsourcing to private contractors.** This phenomenon has resulted in problems of; 1) inability to adapt traditional systems to new problems; 2) limited capacity and accountability; 3) lack of education; 4) issues of scale<sup>191</sup> (p.46)

...local governments better address some pollution problems while federal efforts can more appropriately handle other environmental problems. Kettl asserts that the federal government's inability to coordinate between partisan groups, Congress, and the executive branch may limit national power relevance.

...current forms of government environmental regulation are not effective since they cannot respond to the dynamic and exponential nature of environmental pressures and resulting problems.

...Kettl's points about the difficulties coordinating different branches of government and the lack of accountability of the federal government are **two negative points against the current system of nationally centered environmental protection.** Although, this does not mean that the states should be given the dominant role in environmental protection, it does mean the current system may need restructuring. **A Constitutional Amendment for an environmental right maybe the exact type of restructuring that is needed to address the issues of coordination and accountability. A Constitutional environmental right would set up positive and negative duties for the federal government as well as legal ramifications if those duties were not fulfilled. The increased legal liability would be an incentive for the government to act appropriately in environmental matters, for fear of expensive legal repercussions. The federal government may be more likely to track accountability for environmental issues to assign blame for costly fines and legal actions associated with environmental proceedings.** Surely, any administration would want to know which person in the chain of command was responsible for any improper actions that cost the government money and negative press. Matters concerning the Constitutional also take higher priority in Washington. This increased priority could facilitate coordination between the branches of government. The wording of the Constitutional Amendment could also guide law and policy makers when posed with tough issues, yielding clearer options and choices while reducing debate and partisan politics. **A Constitutional right does not mean that states would be given less power in environmental protection. States would still be allowed to have stricter standards than the federal government. Furthermore, a Constitutional commitment to environmental protection could cause more states to adopt state environmental rights.** (p.47)

## ... CONCLUSION

**...The current form of the U.S. Constitution has inherent barriers to environmental protection that exclude future generation, prevent due process of the law, and impede environmental policy through government fragmentation. Amending the Constitution with an environmental right would address these shortcomings and grant superior environmental health and protection for current and future Americans.**

It is also clear that the United States Environmental Protection Agency is not powerful enough to do its job effectively. An environmental right could do much to rehabilitate the agency by giving it a right to protect and by reforming much of its internal and external structure. The EPA is also in desperate need of some independence and insulation from the executive, legislative, and judicial branches. It is evident from many examples that political pressure has the ability to undermine environmental protection. An environmental right could help protect the agency from short-term political pressure in favor of long-term environmental protection.

The cost of regulation is the most burdensome aspect of environmental regulation. Historically, the environmental and the goods and services it provides have been taken for granted by humans. Placing increased protection mechanisms on the environment and valuating goods and services that were previously not quantified before could put a short-term strain on domestic and world economies.

**Phasing in this right over a five or ten year period is a good way to help markets adjust and minimize social costs associated with increased environmental regulation.** Focusing on the long-term objectives of better health outcomes, stabilizing global climate, avoiding future costs related to environmental degradation and instability, achieving a guaranteed level of environmental quality, and leading developing nations towards an environmentally responsible evolution will help justify short-term costs and economic transitions. Implementing this right will require the government to weight benefits of increased protection with decreased benefits in other areas of spending. Principles of proportionality can help identify the best way to minimize costs and use government resources the most efficiently. **Short-term sacrifices will have to be made by all sectors of the economy to develop, implement, and enforce a environmental right.**

The public seems to be more aware of environmental issues and demand is increasing for more environmental protection. Although awareness and demand are increasing, the public seems to be uneducated about the cost realities of augmented environmental protection. They seem to understand that the government must limit business practices, because these practices often harm the environment. They also seem to understand that without decisive government action, individual actions to protect the environment are barely incremental. It is possible that the costs associated with an environmental right would decrease the demand for more environmental protection, in favor of short-term economic benefits. Since it is human nature to prefer current consumption over consumption in the future, it may be hard to appeal to the public to incur costs now to enjoy benefits sometime in the future. It may even be harder to convince people that these costs should be borne now, when the majority of the benefits may not be enjoyed in the same lifetime that the costs were incurred. The majority of the benefits will be received by future generations in the form of climate stability and preserved environmental quality, but present generations do stand to enjoy considerable benefits as well.



There are valid arguments for state and federal control over environmental protection. It is also evident that some environmental protection functions are more suited for state implementation where as other are better suited for federal administration. An environmental right would grant more power to the federal government, but would give the states considerable power in setting stricter standards, implementing and enforcing environmental laws. The superior role afforded to the federal government is important to enable increased scientific inquiry and to coordinate in international efforts to address global environmental issues.

An Amendment to the U.S. Constitution would have considerable symbolic value. Even if it was loosely constructed and not self-executing it could have a strong effect on government, business and consumer behavior. It could tip the balance in executive and judicial decision-making and change the way Congressional officials approach environmental matters. An environmental right will not prevent or address every environmental issue, but it would elevate environmental protection to a higher level of national priority. It would also spur the United States to become more environmentally sustainable and efficient, which will be advantageous in the future marketplace with higher energy costs and increased demand and competition for resources. All humans should perceive an environmental right as a economic and biological necessity. We need it to protect ourselves from short-term profit-seeking behavior that benefits a minority and harms the majority. We need it in order to obtain a competitive advantage for the future. Most of all, we need it to preserve the habitat of our species, to the best of our ability, to insure our long-term survival. (pp. 48-49)

## An American Evolution – Economics Chapter

### Introduction

**Economic realities are some of the most powerful forces working against the establishment of stricter environmental regulations and a Constitutional environmental right. It is important to understand how certain aspects of America's economy, government economic policies and corporate structures affect the environment and society. At the heart of many environmental problems lies the very economic foundation of our society, capitalism.** Although capitalism is one of the most successful ways to organize a society, it is incurring many problems as populations' increase, resources diminished and environmental degradation becomes widespread. The global proliferation of capitalism and the pursuit of economic growth is changing the earth. As the world strives to increase economic activity and production, global and local environmental problems are being created and societal welfare may be stagnating. The preoccupation with short-term economic goals is being carried out at the expense of the environment and the livelihood of future generations. (p.1)

## ...Externalities

...**A Constitutional environmental right could mandate pollution taxes or the development of an institutionalized environmental labeling program, both of which could account for negative environmental externalities.** A government run eco-labeling program would initially be voluntary, with the idea that perhaps in time it could become mandatory. Environmental labeling would require products to display information about the environmental impacts related to the life cycle of the product. This would educate consumers about the products they are buying and hopefully encourage producers to improve the environmental performance of their products. **Many of the negative externalities created by the production and consumption of the product would be calculated in the environmental lifecycle rating displayed on the eco-label.** In this sense the true impact of the product would be understood, even if it was not monetized and inputted into the market price of the good. **There are obviously costs associated with an environmental labeling scheme. These costs would be borne by producers, consumers and the government.** Perhaps even a tiered cost system could be developed so that environmentally harmful products will be charged more than innocuous products. (pp. 9-10)

## ...Cost Benefit Analysis

...**A Constitutional environmental right could reform many cost benefit analysis methods that undervalue the environment. A special form of cost benefit analysis can be developed that incorporates a low discount rate and higher weights attached to environmental benefits and costs.** In this sense, economists would quantify environmental services through existing valuation techniques, but greater weights would be applied to reflect the fact that these valuation techniques are limited in their ability to account for the breadth of benefits the environment provides or the exponential costs that occur as a result of its degradation. **Perfect substitutability would not be assumed in environmental CBAs and corrective measures and enhanced costs would have to be attached to this exclusion.** These corrections would help CBAs arrive at a more accurate conclusion with respect to the environment. They would also take into account that the public is adverse to risk and values the low cost and stable services that a healthy environment provides. (p.18)

## ...Globalization

Globalization is the interconnection and integration of different national and region markets resulting in one large global market. (p.18)

...Clearly, globalization has its benefits and its costs, socially and environmentally. The pursuit of economic growth, via liberalized free trade, has had many negative consequences that have not been compensated for.

...**Although a Constitutional environmental right would not directly effect the environmental injustices that are occurring as a result of globalization, it could indirectly effect them. A Constitutional environmental right could change the mindset and political climate in America, which could translate into the nation ratifying important international environmental agreements such as the Kyoto Protocol or the Basel Convention.** By instituting such a right in the United States many domestically run companies would be incentivized to improve their environmental performance. This could result in better domestic and foreign environmental outcomes if the companies export goods or services. Since the United States is considered the major world power, implementing an environmental right domestically could send a powerful signal to the rest of the world. (p.24)

### ...**Gross Domestic Product**

...**A Constitutional environmental right could require that an environmental set of indicators be implemented and considered in tandem with the GDP,** much like how the NNP (“net national product”) is used. Of course there are many difficulties associated with the design and use of these environmental indicators, but the U.S. is presently developing environmental indicators and can look to the GPI and the UK’s MDP as examples. It is difficult to believe that the indicators developed by the US will perfectly measure the well being of the environment. It is important to understand that a perfect environmental indicator can be developed overtime, in the absence of a perfect indicator, the best available alternative should be used so the relationship between economic growth and environmental well being can be understood and properly dealt with. (p.32)

### ...**Short-Term Thinking: Capitalism and Corporations**

**Capitalism is the socioeconomic system that governs the United States and many other nations around the world. Capitalism advocates the control of the ‘means of production’ of goods to those who invest money into the production process.** These private investors contribute capital to the means of production in the hopes of achieving a profit. **Capitalism advocates uninhibited markets, private ownership, and free enterprise as ways to achieving greater efficiency, increased opportunity, enhanced product quality and reduced product costs.** As discussed in the beginning of the chapter, Adam Smith believed that free market capitalism and the individual pursuit of profits would result in benefits for all of society. **The existence of externalities and limited resources offers disputes to Adam Smith’s**

theory that social welfare will benefit from capitalism. Correspondingly, capitalism is often characterized by unequal distribution of wealth, intense competition and the pursuit of self-interest unencumbered by ethics, all of which maybe counterproductive to increasing overall social welfare. One reason is because capitalism may make some individuals better off through capital accumulation, perhaps at the expense of other individuals. **Karl Marx, who believed that capitalism would result in a crisis, popularized this problem. Marx believed a crisis would result as the large population of working class (and a near non-existent middle class) confronts the small numbers of wealthy people who have accumulated the majority concentration of capital.**

...**Many aspects of capitalism are harmful to the environment.** One of the most damaging characteristics of capitalism is that it's foundation in self-interest leads to short-term thinking. Entities within a capitalist society will focus on maximizing profits for themselves, as a result society as a whole may or may not receive indirect benefits.

However, it is almost certain that future generations are incurring large costs as a result of this short-term self-interested behavior. These costs are related to environmental damage and non-renewable resource use.

...**Environmental regulations are put in place to protect the public from the actions of the self-interested polluters. As a result market prices, profits, labor wages and property rents are all affected by environmental regulations.** These regulations help protect the public at large from the actions of the self-interested. The existence of environmental regulations is proof that self-interested actions of the capitalist will not always result in benefits for society as a whole. (p. 33)

...Some believe that capitalism is ecologically unsustainable, that it can function in the short –term, but can not ultimately survive.<sup>75</sup> **Andriana Vlachou believes that the sustainability of capitalism is uncertain, especially since it has several characteristics that are contradictory to ecological sustainability<sup>76</sup>.** It is important to note that sustainability has many different definitions. **The World Commission on Environment and Development (a/k/a the “Brundtland Commission”) defines sustainable development as development that meets the needs of present generations without**

**compromising the ability of future generations to meet their own needs<sup>77</sup>. This definition of sustainability is already in conflict with capitalism**, because capitalism is not about fulfilling needs, it is about accumulating capital. It values growth in all forms, whether it is needed or not.

Vlachou uses a modified definition of sustainability in relation to capitalism. She asserts that capitalism is ecologically sustainable if it can secure the natural conditions and processes that are necessary for its existence<sup>78</sup>. This definition posits capitalisms ability to survive as the only measure of sustainability. This seems logical since without basic environmental conditions to support human life and labor capitalism would cease to have a society to exist within. Correspondingly, if capitalism depleted all the natural resources available it would have nothing left to base production on. (p.34)

...**Vlachou observations indicate that** the future of capitalism is uncertain. **Capitalism may eventually be a cannibalistic system, doomed to implode on itself. It may be the very foundation of capitalism, which is rooted in short-term self-interest that is driving the destruction of the environment and possibly catabolizing itself.** As Kirkpatrick Sale states, **“To put it starkly, that {the market economy} means that the environmental movement can never win, can never be anything but a tolerated gadfly, as long as it functions within capitalist society.”**<sup>83</sup> (p. 35)

...**American corporations may be particularly shortsighted and detrimental to the environment, compared to European corporations<sup>89</sup>.** Conley suggests that **this is because American corporations tend to focus narrowly on shareholders while European corporations focus on a broader range of stakeholders (employees, creditors, suppliers, communities). This is partly because unions have more power, growth rates are lower, and unemployment is higher in Europe. American short-term focus is also related to the power that mutual funds have over the institutional investor sector. Large institutional investors hold the majority of stock shares in America and Europe.** The logic is as follows: corporations are dependent on institutional investors to finance their operations, pension funds and insurance companies have long time horizons for investment returns, mutual funds have relatively shorter time horizons, therefore institutional mutual fund investors may require corporations they invest in to deliver profits in the short-term. **American financial markets are larger than European financial markets in the categories of equities, fund management (pension fund, insurance companies, mutual funds, private wealth management, hedge funds) and investment banking.**<sup>90</sup> (p. 37)

...Since American financial markets have a larger proportion of short-term oriented investments, corporations that are dependent on these investments may adopt a shorter term focus compared to European corporations. Additionally, European corporations are adopting the idea of 'corporate social responsibility' much faster than American corporations<sup>91</sup>. 'Corporate social responsibility' is the notion that corporations must deliver more than just financial returns to their shareholders, such as sustainable growth, fair employment, and social and environmental well being. (p.38)

...A Constitutional environmental right could be an objective ethic imposed on capitalism and corporate practices. Granting citizens environmental rights will create new exposure to liability for those entities that harm the environment, increase environmental health related risks, carryout environmental injustices, or act in ways that exploit the environment and compromise the well being of others. Environmental rights could serve to unify and strengthen environmental regulations for air, water, chemicals, wastes and exports. It would force companies to consider the environmental impacts of their actions, for fear of expensive litigation. It could also give Congress the Constitutional power to regulate the environment independent from the Commerce Clause, thus limiting economic considerations from environmental protection. Although a Constitutional environmental right will not cure all environmental problems, it has the potential to address many environmental issues that result from capitalistic practices. (pp. 39-40)

## ...Conclusion

...The underlying problem behind the corporation is of course capitalism. Capitalism is what dictates the *modus operandi* of economic self-interest, the corporation simply compounds this problem by shortening the time allowed to deliver profits through financial quarters, the stock market and dependence on shareholders. Capitalism affects every area of American society including the government, public health decisions, environmental justice, and many others. The rise of globalization has allowed the ideals of capitalism to seep into every area of the globe. Breaking down borders to allow the search for short-term maximized profits to carry on in any conceivable location

without concern for individuals, societies or the environment. Via the WTO, many policies to protect egregious injustices committed by agents of corporate capitalism have been eliminated as barriers to free trade. Globalization has expanded market opportunities and delivered lower priced goods to consumers, giving them the impression that it is a good thing. Americans are consuming more than they need and perhaps are not much better off for it. The American GDP consistently climbs, adding to the notion that all is well. However, under the surface the well being of society as a whole may be stagnating and even declining. Plagued by hidden externalities, the environment is also suffering in the name of economic growth.

**...A Constitutional environmental right would affirm that a clean and healthful environment is an inalienable right of every person, codifying the once unconscious assumption that many people believed into law. This would effectively help protect the environment, the rights of future generations, and the well being of current generations. This right would also depart with many traditional beliefs, such as the belief that the environment should be free for all to enjoy. Although there is no way to prevent people from freely breathing air, consuming fresh water, or enjoying the sunset provided by nature, it should be understood that modern day realities warrant increased environmental protection. More environmental protection comes at a cost that should be borne by society as a whole, including corporations, small businesses, the government and consumers. These increased costs should not be perceived as payments to use environmental services; they should be viewed as compensation to preserve the natural balance necessary for individual life, capitalism and the human species to survive. Furthermore, the difficulties and costs arising from the initial implementation of a Constitutional environmental right should not be viewed as inefficiencies of the right, they should be seen as corrections for decades of abuse and under valuation of the environment. (p. 41)**

---

<http://www.sehn.org/rtfdocs/futuregenerations.pdf>

## **Constitutional Experiments: Protecting the Environment and Future Generations**

**By Carolyn Raffensperger**

**Conservation Biology  
Volume 17, No. 6, December 2003**

The great beauty of U. S. constitutional law is that there are actually 51 constitutions, not just one big, old, fossilized document. All 50 states have constitutions, and many regularly revise them through constitutional conventions. These conventions provide the citizenry with an opportunity to experiment and amend these venerable documents so that they reflect changes in the contemporary world rather than the antiquated conditions of centuries ago.

**Several state constitutions have environmental provisions, most of which were drafted and adopted in the 1970s.** These provisions often grant a right to a healthy environment (Illinois), establish a duty to maintain a healthy environment for future generations (Illinois and Pennsylvania), or even improve the environment (Montana) and give the public a right to enforce these provisions (Illinois). **Some state constitutions also assert that public natural resources are the common property of all people (Pennsylvania and Hawaii). These basic constitutional ideas embody the precautionary principle and the public trust doctrine** that David Orr mentions in his essay.

**Two states, Montana and Hawaii, reinforced their constitutional environmental provisions through innovative, far-reaching lawsuits. The resulting court decisions are reverberating throughout the nation and likely will eventually affect the Supreme Court's interpretation of U.S. constitutional rights.**

The provision in Montana's 1972 constitution that was challenged in a 1999 mining lawsuit says that "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." This provision was invoked in a lawsuit brought by Montana environmental groups suing the Montana Department of Environmental Quality for granting a permit to the Seven-Up Pete Joint Venture to pump millions of gallons of arsenic-tainted water into the Landers Fork and Blackfoot Rivers...In October of 1999 **the Montana Supreme Court ruled unanimously that Montanans' constitutional right to a clean and healthful environment is a fundamental right.** As important, this right is intended to prevent, not just redress, harm.

**In an opinion written by Justice Terry Trieweiler, the Montana Supreme Court concluded that Montanans have a right to prevent harm.** In an often-quoted phrase, Trieweiler said, "Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." The Court also said, "We conclude that the delegates' (to the Constitutional Convention) intention was to provide language and protections which are both anticipatory and preventative." **This opinion is significant because environmentalists could actually sue to prevent damage; they did not have to wait until the harm had occurred to get justice. Anticipation**



**and prevention are at the heart of the precautionary principle, which is designed to prevent harm, not measure and manage it.**

...In a similarly visionary decision, **the Hawaiian Supreme Court explicitly adopted the precautionary principle to further the public trust doctrine that is embedded in Hawaii's state constitution.** The article of public trust doctrine in the constitution says that “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people” (Article XI, Conservation, Control and Development of Resources, Conservation and Development of Resources Section 1.).

The Hawaiian Supreme Court used this constitutional provision of public trust in its Waiahole Ditch Decision (*Water Use Permit Applications*, 94 Hawaii 97; 9 P.3d 409, 2000). The Waiahole Ditch case was brought by small family farmers and Native Hawaiians challenging the decision by the Commission on Water Resource Management to allocate water from the Wai’ahole Ditch. Water in the ditch had been diverted for 80 years by sugar plantations of central Oahu. The court said, “The duty to protect public water resources is a categorical imperative and the precondition to all subsequent considerations, for without such underlying protection the natural environment could, at some point, be irrevocably harmed and the duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses could be endangered.”

**The Court in Hawaii not only reinforced the public trust doctrine but argued that the precautionary principle was essential for implementing the doctrine:**

“The absence of firm scientific proof should not tie the Commission’s hands in adopting reasonable measures designed to further the public interest.” The Court said,

***Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt ‘precautionary principles’ in protecting the resource.*** *That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. In addition, where uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.*

For those who are ruling on the U.S. Constitution, Hawaii and Montana may seem distant. But court watchers have argued that **the Supreme Court is constantly monitoring state court**

decisions as a barometer for the will of the people. This suggests that both the environmental constitutional provisions and the state court decisions will filter up to the U.S. Supreme Court and influence environmental cases.

---

[http://www.law.fsu.edu/journals/landuse/vol17\\_1/kibert.pdf](http://www.law.fsu.edu/journals/landuse/vol17_1/kibert.pdf)

## GREEN JUSTICE: A HOLISTIC APPROACH TO ENVIRONMENTAL INJUSTICE

NICOLE C. KIBERT

*170 J. LAND USE & ENVTL. L. [Vol. 17:1 Fall, 2001]*

Environmental injustice is a phenomena that occurs in the United States and around the world in which people of color and of lower socio-economic status are disproportionately affected by pollution, the siting of toxic waste dumps, and other Locally Unwanted Land Uses (LULUs).

Initially “environmental justice” was referred to as “environmental racism” because of the disproportionate impact on people of color; however, it is now clear that environmental health risks are foisted predominately on lower income groups of all racial and ethnic groups. In order to be inclusive, as well as to avoid the extra baggage that comes with calling an act “racist,” practitioners almost exclusively use the term “environmental justice” rather than “environmental racism.”<sup>1</sup> (p.169)

**Use of the term “environmental justice” is a step in bringing the issue of a constitutional right to live in a healthy environment for all people – not just to those who are interested in racial equality.**

### ...II. WHAT IS ENVIRONMENTAL JUSTICE?

The United States Environmental Protection Agency defines “environmental justice” as **the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws regulations and policies.**<sup>2</sup> Fair treatment means that no group - including racial, ethnic or socioeconomic groups - should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs.<sup>3</sup> **Many studies have shown that, over the past 20 years,**

**minorities - African Americans in particular** - are more likely to live in close proximity to an environmental hazard. (p.170)

### **...III. BRIEF HISTORY OF THE ENVIRONMENTAL JUSTICE MOVEMENT**

**The official history of environmental justice is approximately 20 years old.** (p. 171)

### **... IV. ORIGINS OF ENVIRONMENTAL INJUSTICE**

**... Deep Ecology is an ecological philosophy that places humans within the context of ecological systems rather than outside or central to the system.<sup>23</sup> In addition, humans are considered to be equal, not superior or more important, in value to other components of an ecological system...**Naess and supporters of Deep Ecology believe that if we could focus on the impact of all of our actions on everything in the system (and importantly place humans within the system) that we could achieve social justice and live in harmony with the environment. Another one of the tenets is to fight against pollution and resource depletion. Taken together, these two tenets describe environmental justice: to treat all people equally while reducing pollution. (p.173)

### **... V. SOLUTIONS FOR ACHIEVING ENVIRONMENTAL JUSTICE**

#### ***A. Legal Solutions***

**... In order to successfully litigate for environmental justice, lawyers must be able to merge civil rights law and environmental law into one coherent area... Cases have been successful when utilizing a barrage of legal theories in the same suit, including the 13th<sup>34</sup> and 14th<sup>35</sup> amendments, Title VI of the Civil Rights Act,<sup>36</sup> NEPA,<sup>37</sup> and a variety of local zoning and historic preservation acts.** (pp. 175-76)

**...Carol Browner, the EPA Administrator during the Clinton Administration, stated in her introduction to the EPA's Environmental Justice Strategy, "President Clinton and I believe that all Americans deserve to be protected from pollution – not just those who can afford to live in the cleanest, safest communities. All Americans deserve clean air, pure water, land that is safe to live on, and food that is safe to eat."**<sup>43</sup>

**...One way for environmental justice advocates to accelerate the process of recognition of a federal right to a healthy environment is by determining a**

philosophical route to follow which will aid in achieving the necessary paradigm shift. (pp. 176-77)

### *B. Philosophical Solutions: A Cultural Paradigm Shift*

The most obvious way to stop environmental injustice is to stop putting people at risk by allowing industry and the government to continue to utilize risk analysis as a method for determining whether pollution should be allowed. There are alternative methods of determining whether a project should proceed. The precautionary principle has been defined as "when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof."<sup>46</sup> This method focuses on how to avoid exposure rather than measuring the amount of acceptable risk. In order to encourage alternative methods, such as the precautionary principle, we will have to encourage the government to move away from risk analysis and place the burden on the potential polluter rather than the potentially ill-affected public. A shift such as this will take nothing less than a cultural paradigm shift in which permitting processes are completely open to the public, especially the potentially affected people, and a full range of options are discussed, including no action at all.<sup>47</sup> (p.178)