

Establishing a Constitutional Right to Environmental Quality

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I. INTRODUCTION

In recent years, environmental issues have captured the attention of people across the world. The need to protect the environment has taken on increasing importance in the face of global climate change, deforestation, and the extinction of living organisms. A recent United Nations report confirms that rapid deterioration of the Earth's environment is threatening our existence.¹ There is a pressing need to address environmental problems to ensure the survival of all living species. While these issues have garnered the attention of world political leaders, there is much more that can and should be done: at this critical moment, a constitutional environmental right will bolster efforts to ensure a healthy environment for us and our future generations.

This article begins by discussing recent efforts to enshrine a fundamental right to a healthy environment in the U.S. Constitution.² It then traces the historical evolution of environmental rights jurisprudence including a discussion of the most salient cases.³ The article then briefly reviews the status of environmental rights in several nations around the world and in international treaties on the matter.⁴ 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.⁵ 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.⁶

II. RECENT ATTEMPTS TO ADOPT A CONSTITUTIONAL AMENDMENT

Since the passage of the United States Constitution, there are estimated to be more than 10,000 proposals in Congress seeking to adopt additional amendments,⁷ most of which have been unsuccessful and some of which have been utterly preposterous.⁸ Of

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¹ Donald A. Brown, *Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at State and Local Levels in the United States*, 5 DICK. J. OF ENVTL L. & POL'Y 175, 178 (1996) (citing World Commission on Environment and Development, *Our Common Future* 6-7 (1987)).

² See *infra* Part II.

³ See *infra* Part III.

⁴ See *infra* Part IV.

⁵ See *infra* Part V (A).

⁶ See *infra* Part V (B).

⁷ Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 9 (2000).

⁸ Dan L. Gildor, *Preserving the Priceless: A Constitutional Amendment to Empower Congress to Preserve, Protect and Promote the Environment*, 32 ECOLOGY L.Q. 821 (2005) (giving an example of a relatively recent proposal that "[n]o person shall be president of the United States who shall not have enough sense to come in out of the rain of bullets." *Id.* at 822-23 citing H.R.J. Res. 637, 94th Cong. (1975)).

the thousands of proposed amendments, only thirty-three received the requisite two-thirds vote in both bodies of Congress to proceed to the states for ratification, but of these, only twenty-seven were approved by three-fourths of the states.⁹ Thus, the Constitution is difficult to amend.

The first meaningful attempt to adopt an environmental quality amendment was in 1968 when Wisconsin Senator Gaylord Nelson proposed an amendment which read: “Every person has the inalienable right to a decent environment. The United States and every state shall guarantee this right.”¹⁰ Senator Nelson’s initial attempt at passing an environmental quality constitutional amendment failed; but two years later, he created Earth Day in an effort to bring environmental issues to the forefront of American discourse.¹¹ The same year Earth Day was launched, Senator Gaylord reintroduced his constitutional amendment, but this resolution also failed.¹²

In 1970, New York Representative Richard Ottinger offered another constitutional amendment which would guarantee Americans the “right . . . to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment shall not be abridged.”¹³ Representative Ottinger’s proposal was also unsuccessful, but he too is credited with helping raise awareness of environmental issues.

Despite concerted efforts by environmental action groups, public interest groups, and individuals,¹⁴ and also despite the fact that many American state constitutions and international constitutions include a codified fundamental right to a quality environment,¹⁵ the U.S. Constitution does not presently include an amendment guaranteeing environmental quality.

⁹ Baker, *supra* note 7, at 9.

¹⁰ Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 120 citing H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968).

¹¹ Gallagher, *supra* note 10, at 120.

¹² *Id.*

¹³ *Id.* citing H.R.J. Res. 1205, 91st Cong. (1970).

¹⁴ Former New York Assemblyman, Richard Brodsky, is the Co-Chair of an organization called “CLEAN” (the Coalition of Legislators for Environmental Action Now). CLEAN has led efforts to enact a constitutional amendment that would “guarantee the right of each citizen to clean and healthful air and water and to the protection of the other natural resources of the nation.” Friends of Richard Brodsky, <http://www.brodsky2006.com/richardbrodskyaboutrichard.htm> (last visited March 1, 2008). CLEAN purports to have ample support from notable environmental groups throughout the country including from Audubon societies and Sierra Clubs. *See* Gallagher, *supra* note 10, at 124-27. In 1990, the National Wildlife Federation attempted to gain support for a constitutional amendment that would guarantee environmental quality, but its proposal was unsuccessful. *Id.* at 128. The National Wildlife Federation is no longer vigorously pursuing this cause. *Id.*

¹⁵ Several American states have a range of constitutional provisions relating to environmental rights. Anil S. Karia, *A Right to a Clean and Healthy Environment: A Proposed Amendment to Oregon’s Constitution*, 14 U. BALT. J. ENVTL. L. 37, 42-45 (2006). Of these states, only a handful are self-executing (Hawaii, Montana, Pennsylvania, Illinois and Massachusetts). *Id.* at 51. The other states with constitutional environmental provisions express a mere public sentiment or public policy aim and do not provide any enforceable right. *Id.* at 42. For a detailed discussion on the states which include some type of environmental protection in their

Having been unsuccessful in passing an amendment to the U.S. Constitution, environmental groups turned to the courts for support in recognizing a constitutional environmental right. The plaintiffs in these cases used various theories to try to persuade the courts: specifically, the Fifth, Ninth, and Fourteenth Amendments have been cited in support for finding a right to environmental quality in the U.S. Constitution.

III. LEGAL HISTORY

In 1970, a non-profit, environmental action group petitioned the court to recognize a fundamental right to environmental quality. In *Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army*, the plaintiff, EDF, sought to enjoin the defendant from constructing a dam across the Cossatot River in Arkansas.¹⁶ The plaintiff relied on three separate constitutional amendments:

The right to enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of life, is part of the liberty protected by the Fifth and Fourteenth Amendments . . . and is also one of those unenumerated rights retained by the people . . . as provided in the Ninth Amendment¹⁷

The court recognized the EDF's efforts to "carve out a mandate from the existing provisions of our Constitution"¹⁸ and stated that such attempts were "not fanciful and may, indeed, some day, in one way or another obtain judicial recognition."¹⁹ Nevertheless, the court held that the plaintiff's constitutional rights had not been violated and that the legislative and executive branches of government were better suited to establish an environmental right.²⁰

One year later, in *Ely v. Velde*, two plaintiffs brought suit against government officials who sought to distribute federal funds for the purpose of building a prison in Green Springs, Louisiana.²¹ Though not the primary argument, the plaintiffs contended that the defendant's actions violated the plaintiffs' constitutional rights to be protected from "unreasonable and arbitrary action."²² The court recognized that there was a

constitutions, *see generally* Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 5-6 (1992), and Karia, *supra*. Because the language of the proposed constitutional amendment discussed in this article is mandatory and prohibitory in nature, the provision would be construed as self-executing. *See infra* Part V (A)(3). India's Constitution contains explicit provisions guaranteeing its citizens the right to environmental quality. *See infra* Part IV. Several European countries have provisions relating to the environment in their Constitutions. Some of these provisions can be interpreted as a fundamental right, and others as statements of public policy. *See generally* Brandl & Bungert, *supra*.

¹⁶ 325 F.Supp. 728, 730 (1970).

¹⁷ *Id.* at 739.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ 451 F.2d 1130, 1139 (4th Cir. 1971).

²² *Id.*

groundswell of support from scholars and commentators on finding environmental protection as a constitutional right; nevertheless, the court declined to elevate the plaintiff's concerns to a constitutional level.²³

The following year, the court decided *Tanner v. Armco Steel*.²⁴ In that case, the plaintiff argued that the defendant, Armco Steel, caused serious injuries by reason of the pollutants emitted from their petroleum refineries.²⁵ The plaintiff's claim rested on a violation of its constitutional rights pursuant to the Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution.²⁶ Unlike in the previous two cases, the *Tanner* court addressed each constitutional argument separately in detail. The court summarily dismissed the Fifth Amendment argument by stating that it serves to restrain the federal government's action against the States, but does not apply to the actions of private entities.²⁷ With respect to the Ninth Amendment argument, the court indicated that to construe the Ninth Amendment and its "penumbra"²⁸ as creating the right to a healthy environment would equate to judicial legislating, and thus would not be appropriate.²⁹ Finally, the court set forth four arguments justifying its decision to find the plaintiff's Fourteenth Amendment claim invalid.³⁰ First, the court noted that there is no evidence that the Fourteenth Amendment ever intended to protect environmental rights.³¹ Next, the court stated that the Fourteenth Amendment provides no standards that would assist courts in deciding whether a plaintiff's rights have been violated and if so, what remedies such plaintiffs should be afforded.³² Third, the court reiterated its view that the executive and legislative branches are better-suited to resolve environmental problems.³³ Finally, the court asserted that such controversies could be handled as state torts cases rather than as federal cases.³⁴

In 1979, the Second Circuit decided *In re Agent Orange Product Liability Litigation*.³⁵ In that case, Vietnam veterans who were exposed to toxic chemicals sued the manufacturers of Agent Orange for injuries caused to themselves and their children.³⁶

²³ *Id.*

²⁴ 340 F. Supp. 532 (S.D. Tex. 1972).

²⁵ *Id.* at 534.

²⁶ *Id.*

²⁷ *Id.* at 534-35.

²⁸ In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas opined that the First, Third, Fourth, Fifth, and Ninth Amendments have "penumbras." These penumbras have been construed as creating fundamental rights which were not expressly enumerated in the first eight amendments. *Id.* at 483-84. The most notable penumbra right is the right of privacy.

²⁹ 340 F. Supp. at 535.

³⁰ *Id.* at 535-537.

³¹ *Id.* at 536 (noting the remarks of Representative Richard Ottinger conceding that a provision protecting environmental rights would have been futile at the time the Constitution was formed and signed).

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 536-37.

³⁵ 475 F.Supp. 928 (D.C.N.Y. 1979).

³⁶ Ellen Tannenbaum, Note: *Symposium: Mass Torts After Agent Orange, The Pratt-Weinstein Approach to Mass Tort Litigation* 52 BROOK. L. REV. 455, 455 (1986).

In what has since become the largest mass tort case in history,³⁷ the court decided a number of procedural issues, but with regard to the environmental aspect, the court stated that there “there is not *yet* a constitutional right to a healthful environment”³⁸ (emphasis added).

Ten years later, in *Stop H-3 Association v. Dole*, several environmental groups sued to enjoin construction of an interstate highway because of its detrimental impact on the environment.³⁹ Although the Ninth Circuit Court of Appeals did not reach the constitutional issue raised by the plaintiffs,⁴⁰ its language is illuminating. It said:

We agree that it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources. The centrality of the environment to all of our undertakings gives individuals a vital stake in maintaining its integrity.⁴¹

In the above cited cases, a common rationale given by the courts in declining to find a constitutional right to a healthy environment is a lack of precedent for doing so. Yet each of the courts has used some language suggesting that such a right may or should be forthcoming. In addition to the specific language already quoted above, in *EDF, Tanner*, and *Stop H-3*, the courts referred to the famous language of Judge Learned Hand in declining “to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.”⁴²

IV. THE INTERNATIONAL REALM

The environmental movement at the international level began to flourish in the 1960s in response to growing concern among nations over the environment's deterioration.⁴³ The result was the passage of the Stockholm Declaration on the Human Environment of 1972⁴⁴ which is generally believed to be the basis of international

³⁷ *Id.*

³⁸ 475 F.Supp. at 934.

³⁹ 870 F.2d 1419 (9th Cir. 1989).

⁴⁰ The plaintiffs argued that the legislation authorizing the project violated the Fifth Amendment's Equal Protection Clause. *Id.* at 1429. They contended that the legislation should be subject to an intermediate level of scrutiny rather than the less demanding rational basis test because of the importance of an individual's right to a quality environment. *Id.* The court did not decide this issue because the state statute satisfied the requirements necessary under the intermediate scrutiny standard. *Id.* at 1430.

⁴¹ *Id.*

⁴² *Id.* (citing *Specter Motor Service v. Walsh*, 139 F.2d 809, 823 (2nd Cir. 1943) (L. Hand, J., dissenting)).

⁴³ Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 107 (1991).

⁴⁴ Declaration of the U.N. Conference on the Human Environment, princ. 1 (June 16, 1972) U.N. DOC. A/.CONF.48/14/Rev.1 (1973), available at <http://www.unep.org/Documents/Default.asp?DocumentID=97>.

environmental law to date.⁴⁵ Though not a binding document, the Stockholm Declaration connects the right to environmental quality with basic, fundamental human rights, but it fails to explicitly create an independent right to a healthy environment. The Declaration reads:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁴⁶

Subsequent international documents also indirectly link the right to a quality environment to basic human rights. For example, Article 24 of the Convention on the Rights of the Child mandates that states fulfill a child's right to health by actively fighting disease and malnutrition "taking into consideration the dangers and risks of environmental pollution."⁴⁷ The African Charter of Human and Peoples' Rights specifically recognizes an environmental right by stating: "All people shall have the right to a general satisfactory environment favorable to their development."⁴⁸

But the most recent document on environmental quality, The Rio Declaration of 1992, takes a slightly different approach: rather than expressly providing for a human right to a decent environment, the Rio Declaration frames the issue in the context of sustainable development and states that "[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."⁴⁹ The Rio Declaration has been sharply criticized for its failure to recognize a specific human right to the environment instead suggesting that the needs of humans should drive environmental policy decisions.⁵⁰

Nonetheless, nations around the world recognize a constitutional right to environmental quality. In fact, 130 countries have Constitutions that make some specific

⁴⁵ Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L. J. 65, 69 (2002).

⁴⁶ Declaration of the U.N. Conference, *supra* note 44.

⁴⁷ Convention on the Rights of the Child, Nov. 20, 1989, GA Res. 44/25, Art. 24, para. 2(c), UN GAOR, 44th Sess., Supp. No. 49, at 166, UN Doc. A/44/49 (1989), *reprinted in* 28 I.L.M. 1448 (1989); Richard Desgagne, *Integrating Environmental Values Into the European Convention of Human Rights*, 89 AM. J. INT'L. L. 263, 263 (1995); Nina M. Eejima, *Sustainable Development and the Search for a Better Environment, A Better World: A Work in Progress*, 18 UCLA J. ENVTL. L. & POL'Y 99 (1999/2000).

⁴⁸ African Charter on Human and Peoples' Rights, June 26, 1981, art. 24, 21 I.L.M. 59 (entered into force Oct. 21, 1986); Timothy J. Schorn, *Drinkable Water and Breathable Air: A Livable Environment as a Human Right*, 4 GREAT PLAINS NAT. RESOURCES J. 121, 131 (2000).

⁴⁹ United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 14, 1992, Principle 1, 31 I.L.M. 874, 876.

⁵⁰ David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, Or Vice Versa?* 29 GA. L. REV. 599, 614-15 (1995); Marc Pallemmaerts, *International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process*, 15 J. L. & COM. 623, 642 (1996) (noting that "the first principle of the Rio Declaration . . . sounds like the triumph of a delirious anthropocentrism.").

reference to the environment and of these, sixty include the right to a healthy environment as a fundamental right.⁵¹ For example, the world's largest democracy, India, explicitly includes such a right in its Constitution. Article 48A mandates that "the State shall endeavor to protect and improve the environment"⁵² and Article 51A creates a similar duty "of every citizen of India to protect and improve the environment[.]"⁵³ In addition, Article 21, the due process clause guaranteeing that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law,"⁵⁴ has been construed by the Indian Supreme Court as including the right to a healthy environment.⁵⁵ In addition, more than thirty African nations include some type of provision guaranteeing the right to environmental health, although there is scant case law interpreting these Constitutional conditions.⁵⁶

But while India has taken the bold step of recognizing an enforceable fundamental environmental right, most nations whose Constitutions make reference to an environmental right do so as policy statements which serve to influence decision-makers but fail to protect substantive rights.⁵⁷ Therefore, persons who are injured by environmental degradation are unable to bring claims because the provisions on which they rely are unenforceable.⁵⁸

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

⁵¹ James. R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113, 114-115 (2005-2006).

⁵² India Const. art. 48A; Armin Rosencranz & Kathleen D. Yurchak, *Progress on the Environmental Front: The Regulation of Industry and Development in India*, 19 HASTINGS INT'L & COMP. L. REV. 489, 490-91 (1996).

⁵³ India Const. art. 51A(g); Rosencranz and Yurckak, *supra* note 52 at 490-91.

⁵⁴ India Const. art. 21.

⁵⁵ A 1995 decision by the Indian Supreme Court held that "Article 21 protects the right to life as a fundamental right. Enjoyment of life and its attainment including the right to live with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance, free from pollution of air and water sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water pollution etc. should be regarded as amounting to violation of Article 21." *Virendra Gaur v. State of Haryana*, [1995] 2 A.I.R. 577 (S.C.) (India); *see also* Rosencranz & Yurchak, *supra* note 52 at 490-91.

⁵⁶ Carl Bruch, et al, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131 (2001).

⁵⁷ May, *supra* note 51 at 118-19.

⁵⁸ *Id.* at 116.

whims.⁵⁹ As one scholar has noted, adopting constitutional environmental principles “secures [them] against the vicissitudes of routine politics.”⁶⁰ Since many view this as anti-democratic, establishing a particular value as a constitutional right requires a special justification to the take matter out of the realm of majoritarian decision-making.⁶¹ For instance, freedom of expression was undoubtedly a reaction against English society’s suppression of speech and of the press.⁶² Although there is little agreement among scholars as to why freedom of speech is protected as a fundamental right,⁶³ the four most often cited reasons are: to promote self-governance,⁶⁴ to facilitate the discovery of truth through the “marketplace of ideas,”⁶⁵ to further personal autonomy,⁶⁶ and finally, to encourage tolerance.⁶⁷ Similarly, freedom of religion is accorded constitutional protection because of the belief that religious freedom is deeply inherent in each individual and that political decisions should not be permitted to interfere with man’s essential nature.⁶⁸

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.⁶⁹ Protecting the environment cannot be achieved through short-term measures; rather, it is a long-term goal which requires thoughtful and careful planning. Yet, proposing and passing environmentally-friendly laws carry few benefits for politicians seeking short-term gains.

⁵⁹ *Id.* at 121-22.

⁶⁰ TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 7 (2005)

⁶¹ Posting of Marcia Gelpe to http://www.wmcl-bb.org/webapps/portal/frameset.jsp?tab=courses&url=/bin/common/course.pl?course_id=_1389_1, February 10, 2008, 02:21 CST.

⁶² ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1048 (2005).

⁶³ *Id.*

⁶⁴ *Id.* The idea is that freedom of speech is essential in a democracy because the result is an open forum where voters can frankly voice their opinions about political candidates. Therefore, political officials are held accountable and are susceptible to replacement via public criticism. *Id.*

⁶⁵ *Id.* at 1048-49. The marketplace of ideas approach takes the view that the truth is most likely to emerge through competition in the market. *Id.* at 1049.

⁶⁶ *Id.* at 1048, 1050. The argument is that engaging in voluntary expression defines oneself. *Id.* at 1050.

⁶⁷ *Id.* at 1048, 1051. This principle is based on the notion that tolerance is a desirable value and that protecting unpopular speech demonstrates tolerance. *Id.* at 1051.

⁶⁸ Gelpe, *supra* note 61; *see also* Lee v. Weisman, 505 U.S. 577 (1992) (declaring unconstitutional for clergy to deliver prayers at public school graduation ceremonies and stating that “[t]he First Amendment’s Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.”).

⁶⁹ Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L. J. 181, 182 (1994) (stating that relying on the legislative process to pursue environmental goals is inadequate because of its “bias[] in favor of current benefits as opposed to the long-term future.”)

Thus, including an environmental right will force legislators to consider the issue and act accordingly.

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.⁷⁰ 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.⁷¹ There are, of course, numerous federal statutes which contain strong environmental protections. Foremost among these statutes is the National Environmental Policy Act (NEPA) which has assumed legendary status because of its procedural requirement obligating any federal agency to perform an Environmental Impact Statement before taking action that may affect the environment.⁷² But NEPA has been sharply criticized for its lack of judicial enforceability⁷³ and for its ineffectiveness because of project-specific exemptions.⁷⁴ There are other environmental statutes that create enforceable rights but these too have their limitations,⁷⁵ and NEPA is the most likely federal statute to create a private cause of action.⁷⁶ Therefore, even statutes can fail to provide the purported protections. A constitutional provision, on the other hand, would provide a minimum guarantee, thereby assuring individuals that the right would receive the same protection

⁷⁰ May, *supra* note 51 at 118.

⁷¹ Brandl & Bungert, *supra* note 15, at 4.

⁷² Bradley C. Karkkainen, *Whither NEPA?* 12 N.Y.U. ENVTL. L.J. 333, 333 (stating that NEPA has received quasi-constitutional status as one of the foundational laws of the modern administrative state); *see also* Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations From NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207 (1992) (quoting several commentators that refer to NEPA as the environmental "Ten Commandments," "the environmental bill of rights," and "an environmental Magna Carta."). *Id.* at 207 (citing Peter Borrelli, *Environmental Ethics-The Oxymoron of Our Time*, Amicus J., Summer 1989, at 39, 41 (book review), Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L.REV. 230 (1970), and DANIEL R. MANDELKER, NEPA LAW & LITIGATION THE NATIONAL ENVIRONMENTAL POLICY ACT § 1:01 (1984) respectively).

⁷³ Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND, RES. ENVTL. L. 245, 259 (2000) (noting that one of NEPA's primary shortcomings is the Supreme Court's reluctance to challenge decisions made by the executive and legislative branches).

⁷⁴ *See generally* Victor M. Sher, & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws* 15 Harv. Envtl. L. Rev. 435 (1991) (describing congressional exceptions to NEPA and stating that although Congress originally intended NEPA to have considerable impact, in response to lawsuits seeking to enforce NEPA, Congress created numerous "exemptions robbing the statutes of their anticipated effect."). *Id.* at 438.

⁷⁵ *See* Erin Englebrecht, *Three Fallacies of the Contemporary Legal Concept of Environmental Injury: An Appeal to Enhance "One-Eyed Reason" With a Normative Consciousness*, 18 Tul. Envtl. L. J. 1 (2004) (arguing that most environmental statutes contain "escape hatches" which were subsequently enacted to mollify industry and landowners thereby diminishing the statutes' original intent).

⁷⁶ Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in Us and Our Posterity*, 68 MISS. L.J. 565, 614-15 (1998).

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.⁷⁷ 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.

Furthermore, the United States Constitution is our nation's supreme law. Constitutional provisions carry great weight with the American public and provide model rules which individuals should follow and shaping the actions of our citizenry.⁷⁸ Americans identify many constitutional rights as a core part of our culture, often instilling a sense of national pride around these rights.⁷⁹ Adopting a constitutional amendment to environmental quality may result in Americans taking a more active role to educate themselves about environmental issues, and, over time, shape our environmentally significant behavior for the better.

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.”⁸⁰ The interdependence of human beings is particularly evident when it comes to the environment. No nation is an island,⁸¹ and the United States' environmental policy must reflect its role as one part in a single ecosystem.⁸² 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.⁸³ 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. Sitting on the sidelines while other countries enshrine environmental rights in their constitutions will make it appear as though the U.S. is putting its interests above the rest of the world. If some countries take measures to

⁷⁷ Gallagher, *supra* note 10 at 152.

⁷⁸ Brandl & Bungert, *supra* note 15, at 4.

⁷⁹ *Id.*

⁸⁰ Brown, *supra* note 1, at 180.

⁸¹ *Id.*

⁸² *Id.* at 180-81.

⁸³ See generally Ronald St. J. MacDonald, Book Review, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* 86 AM. J. INT'L L. 192 (1992) (reviewing the book, CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD, and stating that the contributing editors are unanimous about the fact “that the U.S. Constitution has had profound influence around the world” because of its durability, the success of its governing bodies, and the abundance of decisions interpreting the document). *Id.* at 196.

protect the environment while others fail to take such action, those countries which enact the right will do so at the expense of the nations that do not take action. Countries such as the United States that do not implement the right to environmental protection will therefore be seeking their own advantage vis-à-vis other nations.

2. *Arguments Against Adopting a Constitutional Amendment*

Opponents of amending the Constitution to include a right to environmental quality make several arguments to support their position. As an initial matter, many scholars oppose amending the Constitution, except in extremely rare instances, because of the document's sacred status. Opponents of amending the Constitution point to the words of James Madison cautioning against constitutional amendments except "for certain great and extraordinary occasions."⁸⁴ They also argue that Article V designates elaborate procedures for amending the constitution, thereby supporting their contention that amendments should be discouraged.⁸⁵ Practically, then, the difficulty in amending the Constitution poses a significant challenge for any amendment, including an environmental rights amendment, yet there are other concerns as well. Critics also contend that the Constitution should not be used as a vehicle to prescribe social values.⁸⁶ Supporters of this argument point to the absence of constitutional amendments for other liberties such as the right to adequate housing or safe healthcare.⁸⁷ Further, scholars point out that there is very little consensus among the general public and also among legislators on environmental policy, therefore a constitutional amendment is not viable.⁸⁸ Next, opponents argue that constitutional amendments should only be adopted in situations where government institutions are incapable or unwilling to themselves bring about the desired social policy.⁸⁹ They contend that given the enormous number of environmental regulations passed over the last few decades, there is no evidence that government is unwilling or unable to involve itself in the matter.⁹⁰ Finally, some point to the purported difficulty in implementing such an amendment and the onslaught of litigation that will inevitably result from the passage of an environmental rights amendment as individuals seek to enforce the right.⁹¹

a. *Counter-Arguments*

⁸⁴ Theodore C. Sorensen, *The American Constitution: Basic Charter or First Draft?*, 40 ARIZ. L. REV. 709, 715 (1998) (citing *The Federalist* No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961)).

⁸⁵ See generally Baker, *supra* note 7 (providing an overview of the proper procedures to amend the Constitution and discussing the difficulty and rarity of actually adopting an amendment).

⁸⁶ J. B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, 11 NAT. RESOURCES & ENVT. 46, 47 (1997).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

It is difficult to articulate precise standards for when amending the Constitution is appropriate. What some hold as a fundamental right will certainly not be the same for others. Protection of the environment has only recently become a societal concern. Population explosion, technological advancement, and consumer habits have placed a strain on the environment unlike no other time in history.⁹² 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.⁹³ 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.⁹⁴ Yet these more recent constitutions have been harshly criticized for including overly broad goals and for their failure to deliver the enumerated rights.⁹⁵ 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 apace with the needs of its citizens.⁹⁶ The U.S. Constitution does include three positive rights,⁹⁷ but all of the rights adopted since the Bill of Rights are negative rights.⁹⁸ 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.⁹⁹

⁹² See John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299, 301 (2000).

⁹³ Cass Sunstein, *Social and Economic Rights? Lessons from South Africa 2*, <http://www.law.uchicago.edu/academics/publiclaw/resources/12.CRS.pdf> (last visited March 15, 2008).

⁹⁴ See *supra* notes 51-56 and accompanying text.

⁹⁵ J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don’t Measure Up*, 74 NOTRE DAME L. REV. 245, 281 (1999).

⁹⁶ Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution*, 10 AM. U. INT’L L. REV. 1233, 1235, 1238 (1995).

⁹⁷ The Sixth, Seventh, and Tenth Amendments create certain rights. The Sixth and Seventh Amendments set forth certain rights for persons charged with crimes including the right to a speedy and public trial by an impartial jury. U.S. Const. amend. VI, VII. The Tenth Amendment reserves certain rights to the States. U.S. Const. amend. X.

⁹⁸ Ruhl *supra* note 85, at 258.

⁹⁹ See generally Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001) (arguing that efforts to recognize positive rights explicit in the U.S. Constitution are imprudent and would ultimately be ineffective because of the economic and political realities of enforcing such rights); see also Schwartz, *supra* note 86, at 1235 (stating that “[t]o most American lawyers, putting economic and social rights in a constitution verges on the unthinkable.”).

Some argue that only negative rights should be protected because judicial enforcement of positive rights is an impossible task.¹⁰⁰ Yet this argument fails to recognize that enforcing negative rights requires courts to give substance to affirmative obligations on the part of the government. For example, property rights are deeply embedded in this nation's history, yet such rights would be meaningless without police and courts to enforce them.¹⁰¹ Thus, negative rights require government action akin to positive rights.

The argument referred to above that a constitutional environmental amendment is unnecessary because the government is neither unwilling nor incapable of impacting environmental policy¹⁰² can also be discredited. True, the federal government has enacted a plethora of legislation that seeks to protect human health and the environment, but as previously discussed,¹⁰³ these statutes are often inadequate: thus, much more can and should be done. A recent national poll reports that forty-four percent of Americans believe, in general, that environmental regulations have not gone far enough.¹⁰⁴ More than sixty percent of Americans believe that regulations concerning specific environmental concerns, including laws to prevent water and air pollution and regulations focused on conserving energy, have not gone far enough.¹⁰⁵ In an article written by two federal officials, it is acknowledged that the public expects more to be done with respect to protecting the environment, and that the government should play a larger role in environmental policy.¹⁰⁶

The "floodgates of litigation" argument previously mentioned¹⁰⁷ is often cited as a reason not to encourage policies that might lead to increased litigation. This concern is neither well-founded nor persuasive. In order to have standing to sue in federal court, a plaintiff must allege injury, causation, and redressability. While the standing criteria previously were given broad interpretation, in a recent case involving environmental harm, the Supreme Court reviewed the standing doctrine and tightened the requirements necessary for a plaintiff to challenge government action thereby limiting the potential cases that may be brought by litigants contesting environmentally harmful causes.¹⁰⁸

¹⁰⁰ "The inability of the judiciary to develop remedies that effectively enforce positive rights constitutes a reason not to recognize them." *Id.* at 879.

¹⁰¹ Schwartz, *supra* note 96, at 1236.

¹⁰² See *supra* notes 89-91 and accompanying text.

¹⁰³ See *supra* notes 72-76 and accompanying text.

¹⁰⁴ Roper Report Card, The National Environmental Education & Training Foundation, *Americans' Low "Energy IQ;" A Risk to Our Energy Future, Why America Needs a Refresher Course on Energy*, (August, 2002), available at <http://www.neefusa.org/pdf/roper/Roper2002.pdf> (last visited March 10, 2008).

¹⁰⁵ *Id.* at iv.

¹⁰⁶ Lois J. Schiffer & Timothy J. Dowling, *Reflections on the Role of the Courts in Environmental Law*, 27 ENVTL L. 327, 332-333 (1997). The authors are government officials. Ms. Schiffer is the Assistant Attorney General for the Environment & Natural Resources Division (ENRD) of the U.S. Department of Justice and Professor of Environmental Law at Georgetown University Law Center. *Supra*, at 342, note a. Mr. Dowling is a lawyer in ENRD's Policy, Legislation & Special Litigation Section. *Id.*

¹⁰⁷ See *supra* note 91 and accompanying text.

¹⁰⁸ See generally Sarah A. Robichaud, Note: *Lujan v. National Wildlife Federation: The Supreme Court Tightens the Reins on Standing for Environmental Groups*, 40 CATH. U. L.R. 443

Furthermore, the argument regarding whether a specific policy should be adopted to lessen the Court's burden has been advanced by a notable defendant and summarily dismissed by the Court.¹⁰⁹ "Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. See Fed. Rules Civ. Proc. 12, 56. Moreover, the availability of sanctions provides a significant deterrent to litigation[.]"¹¹⁰ 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 right¹¹¹ 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."¹¹² 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.¹¹³ Additionally, construing the right as a positive right is problematic because such rights lack justiciable criteria¹¹⁴ 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.¹¹⁵

(discussing the Court's decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), to narrow the number of cases brought by environmental litigants using the standing doctrine).

¹⁰⁹ *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (dismissing the President's argument that disallowing him absolute immunity from civil liability would lead to an aggrandizement in the number of private lawsuits filed against the President).

¹¹⁰ *Id.* (citation omitted).

¹¹¹ Joshua J. Bruckerhoff, Note: *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615, 626-27 (2008).

¹¹² *See id.* at 627.

¹¹³ Bryan P. Wilson, Comment, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?* 53 EMORY L.J. 627 (2004).

¹¹⁴ Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 943 n. 91 (1985).

¹¹⁵ Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?* 17 HARV. ENVTL. L. REV. 333, 342 (1993) (stating that

As argued above, there are numerous reasons that support adopting a constitutional environmental right and there exists a feasible means of enacting such an amendment. Concededly, the passage of such an amendment is a difficult task. Nevertheless, there are many reasons that support a judicially-created right to environmental quality.

B. Judicially-Created Rights

For years, there has been ample debate among practitioners, scholars, and judges regarding the appropriate method of constitutional interpretation. On opposite sides of the debate over whether the Court can read additional non-textual rights in the Constitution are the originalists and the non-originalists¹¹⁶ (also often referred to as the interpretivists and the non-interpretivists, respectively).¹¹⁷

In general, originalists ascribe to limiting judicial power by narrowly construing the Constitution.¹¹⁸ 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.¹¹⁹ 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.¹²⁰

On the other hand, non-originalists argue that judges should have considerable discretion in interpreting the Constitution.¹²¹ 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.¹²² 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.¹²³

A “fundamental right” is given special status because such rights cannot be infringed by the government without a compelling purpose.¹²⁴ 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.¹²⁵ Either or both of these clauses can give rise to a constitutional right to a

mandatory provisions that impose limits on legislative authority are usually construed as self-executing).

¹¹⁶ Chemerinsky, *supra* note 62, at 11.

¹¹⁷ Maureen B. Callahan, *Cultural Relativism and the Interpretation of Constitutional Texts*, 30 WILLAMETTE L. REV. 609 (1994).

¹¹⁸ Chemerinsky, *supra* note 62, at 11.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 12.

¹²⁴ *Id.* at 815.

¹²⁵ See *infra* note 126 and accompanying text (providing examples of cases where the Court has created a fundamental right from an existing constitutional provision).

healthy environment. The remainder of this article discusses what the author believes to be the most viable possibility for finding a judicially-created right: the Due Process Clauses of the Fifth and Fourteenth Amendments.

1. Judicially Created Rights Using Substantive Due Process

The phrase “substantive due process” has been coined to encompass the broad interpretation of rights under the due process clauses of the Fifth and Fourteenth Amendments. Though the concept has been discredited,¹²⁶ the Supreme Court has relied on substantive due process to recognize numerous rights not clearly enumerated in the Constitution.¹²⁷

In a recent case, *Washington v. Glucksberg*, involving an alleged violation of substantive due process, the Supreme Court used the theory to decide that individuals do not have the fundamental right to physician-assisted suicide.¹²⁸ At issue in the case was a challenge to a state statute that made it a crime for doctors to assist a suicide.¹²⁹ Although the *Glucksberg* majority upheld the statute, it 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”;¹³⁰ second, the right required a “careful description.”¹³¹

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,¹³² yet the *Glucksberg* test requires not a right that has been

¹²⁶ James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 315 (1999) (“[W]e apparently need periodic reminding that ‘substantive due process’ is a contradiction in terms--sort of like ‘green pastel redness.’” (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (Harvard U. Press, 1980)) and referring to Judge Richard A. Posner’s statement in *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir. 1982) where he referred to substantive due process as “the ubiquitous oxymoron” and stating that the term “oxymoron” is widely used in the scholarly literature by opponents of the doctrine). Ely, Jr., *supra* at 512.

¹²⁷ *Zablocki v. Redhail* (holding that the right to marry is a fundamental right protected under the liberty of the due process clause); *Stanley v. Illinois* (deciding that fathers of children born out-of-wedlock have a fundamental right to custody of their children); *Moore v. City of East Cleveland* (expressly relying on substantive due process in declaring the right to keep a family together); *Roe v. Wade* (using substantive due process to find the right to an abortion).

¹²⁸ 521 U.S. 702 (1997).

¹²⁹ *Id.* at 706-07.

¹³⁰ *Id.* at 721.

¹³¹ *Id.* at 721.

¹³² Consider the numerous environmental protection statutes including, but not limited to, the Clean Air Act, the Endangered Species Act, the Pollution Prevention Act, and the Safe Drinking

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 Industrial Revolution is a prime example of the failure of our nation's policymakers to safeguard the environment. The adverse impacts of pollution and other environmentally destructive causes have only recently gained the attention of the general public and of legislators.

The test announced in *Glucksberg* has been criticized for its rigidity and obscurity.¹³³ Indeed, evaluating whether a fundamental right to a healthy environment is a right that is deeply rooted in our nation's history demonstrates an essential flaw with the *Glucksberg* approach: admittedly, environmental rights have not been traditionally protected, yet the need for doing so has not emerged until recently. Air pollution only became a major problem after the Industrial Revolution.¹³⁴ Water pollution has recently become of widespread concern because of sanitary sewers which serve as a delivery device for the spread of hazardous chemicals.¹³⁵ The endangerment of humans and other living species and the large-scale destruction of the natural world have only become issues in modern history. Thus, to require a finding that the right has been historically protected is a circular argument. Nevertheless, under the *Glucksberg* test, an environmental right would likely fail the first prong of the two-part test.

In an opinion more recent than *Glucksberg*, the Supreme Court in *Lawrence v. Texas* 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.¹³⁶ Under this framework, an environmental right seems more feasible.

At issue in *Lawrence* was a state statute criminalizing acts of sodomy between members of the same sex.¹³⁷ The Court held that the statute was unconstitutional under

Water Act. For a comprehensive list of federal environmental laws, see U.S. Environmental Protection Agency, Laws, Regulations, Guidance and Dockets, <http://www.epa.gov/lawsregs/laws/index.html> (last visited March 6, 2008); see also Ruhl, *supra* note 86, at 48 (referring to the amount of federal environmental statutes that have developed over the past twenty-five years as "gargantuan").

¹³³ See Laurence H. Tribe, *Lawrence V. Texas: The "Fundamental Right that Dare Not Speak Its Name"*, 117 HARV. L. REV. 1893, 1994 (2004) (observing that [t]he *Glucksberg* opinion does indeed put forth an effort to collapse claims of liberty into the unidimensional and binary business of determining which personal activities belong to the historically venerated catalog of privileged acts and which do not[.]); see also *Constitutional Law—Substantive Due Process—Eleventh Circuit Upholds Florida Statute Barring Gays From Adopting.—Lofton v. Secretary of the Department of Children & Family Services*, 538 F.3d 804 (11th Cir. 2004), 117 HARV. L. REV. 2791, 2795 (2004) (noting that *Glucksberg* reduces substantive due process "to a trivial and circular analysis" and that its approach is "twisted").

¹³⁴ Victor B. Flatt, *This Land is Your Land (Our Right to the Environment)*, 10 W. VA. L. REV. 1, 23 (2004) (citing Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked, What's Failed: What Might Work*, 21 ENVTL L. 59 (1991)).

¹³⁵ Flatt, *supra* note 134 at 23-24 (citing William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part 1*, 22 STAN. ENVTL L.J. 145 (2003)).

¹³⁶ 539 U.S. 558 (2003).

¹³⁷ *Id.* at 562.

the theory of substantive due process.¹³⁸ 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.¹³⁹ The Court's language in *Lawrence* evinces respect for "constitutional values that have not heretofore found their natural home in the Due Process Clause."¹⁴⁰ 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.¹⁴¹ Under this view, a constitutional right to environmental protection can be justified. In the last half century, concern for the environment has become a major political and cultural concern. There is no shortage of contemporary laws regulating the environment: the array of federal statutes and executive orders which aim to protect the environment is substantial.¹⁴² Modern elected officials from both major political parties ascribe to environmental values.¹⁴³ In fact, environmentalism is currently the most popular social movement with more than three-quarters of Americans identifying themselves as "environmentalists."¹⁴⁴ This number is striking given that twenty-five years ago, there were no environmentalists and the scientific study of the interaction between humans and the environment was in its nascent phase.¹⁴⁵ These recent developments demonstrate the evolution of environmental values into a core part of our political and cultural landscape. As society evolves, so do our values, and the substantive due process doctrine permits the Court to recognize these changes.

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.¹⁴⁶ While there is certainly debate over whether, and to what extent, the Supreme Court should look to foreign case law in deciding constitutional questions,¹⁴⁷ Justice Kennedy's

¹³⁸ *Lawrence*, 539 U.S. 558.

¹³⁹ Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 96 (2003).

¹⁴⁰ *Id.* at 97-98.

¹⁴¹ *Id.* at 8.

¹⁴² See *supra* note 90 and accompanying text.

¹⁴³ George H.W. Bush indicated his desire to follow the example of President Theodore Roosevelt and become "the Environmental President." Likewise, Bill Clinton's presidency was marked by a Republican Congress unsympathetic to environmental issues. Nevertheless, he was still responsible for increasing the number of national monuments, protecting four million acres of land, and enhancing protection in the Florida Everglades and Hawaii's coral reefs. David Walls, Environmental Movement, Sonoma State University, <http://www.sonoma.edu/users/w/wallsd/environmental-movement.shtml> (last visited March 4, 2008).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ William N. Eskridge, Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 INT'L J. OF CONST. L. 555, 555 (2004).

¹⁴⁷ On the issue of American courts looking to foreign precedent, Justice Sandra Day O'Connor remarked: "Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international

opinion in *Lawrence* clearly suggests that foreign precedent is relevant in our countries' constitutional discourse.¹⁴⁸ 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.¹⁴⁹ Additionally, courts in other countries have recognized the right.¹⁵⁰ These decisions should influence U.S. courts to find an environmental right.

Critics of finding a constitutional right to environmental protection under substantive due process argue that such a broad interpretation may lead to endless fundamental rights. Admittedly, the framework set forth in *Lawrence* may lead to additional fundamental rights pursuant to the test. Yet the argument that the test will lead to countless rights is baseless. The judicial branch has few means to execute its judgments. Therefore, the public's opinion of judicial decisions, particularly with respect to whether the decisions accord with public sentiments, is integral to the judiciary's effective dispositions and cautions restraint by the Court. As Justice Frankfurter once noted, "[t]he Court's authority – possessed of neither the purse nor the sword – ultimately rest on sustained public confidence in its moral sanction."¹⁵¹

The *Lawrence* decision necessarily implicates the Court in making value judgments in order to protect the rights and liberties of Americans. *Lawrence* laid the groundwork for the protection of environmental rights as a fundamental value and at the next opportunity, the Court should recognize such a right. The long-term effect of creating a fundamental environmental right will be the protection of the environment for us and our posterity.

community should at times constitute persuasive authority in American courts. . . . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here." Eskridge, *supra* note 146 at 556 (citing Sandra Day O'Connor, *Keynote Address before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002)). At the confirmation hearing for U.S. Court of Appeals Judge Samuel Alito, Jr., he was asked about whether he believed foreign precedent should be relevant to the Supreme Court. He replied: "I don't think that foreign law is helpful in interpreting the Constitution. . . . We have our own law, we have our own traditions, we have our own precedents, and we should look to that in interpreting our Constitution." Daniel J. Frank, Notes, *Constitutional Interpretation Revisited: The Effects of a Delicate Supreme Court Balance on the Inclusion of Foreign Law in American Jurisprudence*, 92 IOWA L. REV. 1037, 1042 (2007) (citing Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 370 (2006) (statements of Samuel Alito, Jr. in response to questions from Senator Kyl)). For more on the debate between originalists and transnationalists (the former are those who believe foreign case law is not relevant to American constitutional jurisprudence while the latter believe it is relevant), see generally Frank, *supra* at 1043-48.

¹⁴⁸ See Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 48-50 (2004).

¹⁴⁹ See *supra* notes 52-55 and accompanying text.

¹⁵⁰ See *supra* notes 51-56 and accompanying text.

¹⁵¹ *Baker v. Carr*, 369 U.S. 186, 267 (1962) ((Frankfurter, J., dissenting) (asserting that the Court should not decide a racial gerrymandering case because it was a political question)).

VI. CONCLUSION

The current state of the environment calls for drastic action to ameliorate the negative effects of environmental destruction – a constitutional right to a healthy environment will enshrine the importance of the environment into our constitutional culture and will have long-term benefits. While enacting a constitutional amendment to a healthy environment has been criticized as being impractical,¹⁵² these critiques can be discredited;¹⁵³ enacting a negative environmental right similar to existing constitutional amendments is the most feasible approach.¹⁵⁴ Alternatively, judicial recognition of an environmental right is possible under the Court’s substantive due process jurisprudence.¹⁵⁵ After *Lawrence*, the time is right for the Court to embrace the opportunity to fashion an environmental right.

¹⁵² See *supra* notes 84-91 and accompanying text.

¹⁵³ See *supra* notes 92-110 and accompanying text.

¹⁵⁴ See *supra* notes 111-115 and accompanying text.

¹⁵⁵ See *supra* notes 132-151 and accompanying text.