The Federal Government Has an Implied Moral Constitutional Duty to Protect Individuals from Harm Due to Climate Change: Throwing Spaghetti against the Wall to See What Sticks

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The continuing failure of the federal government to respond to the growing threat of climate change, despite affirmative duties to do so, creates a governance vacuum that the Constitution might help fill, if such a responsibility could be found within the document. This Article explores textual and non-textual constitutional support for that responsibility, finding that no single provision of the Constitution is a perfect fit for that responsibility. However, the document as a whole might support constitutionalizing an environmental protection norm as an individual right or affirmative government obligation given the norm's importance to the enjoyment of other constitutional rights and growing public support for mitigating or avoiding the adverse effects of climate change.

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INTRODUCTION

> *Because of the grave risk of serious harms to future generations, our failure to take timely mitigating actions on climate issues can be seen as a serious moral failing, especially in the light of our current knowledge and understanding of the problem.*
>
> —Stanford Encyclopedia of Philosophy[1]

The federal government has an implied constitutional moral responsibility towards its citizens to do no harm. These responsibilities arise under the Fifth Amendment Due Process and Equal Protection Clauses, the Bill of Rights, the Ninth Amendment, and some argue from the Preamble[2] to the Constitution.[3]

1. Andrew Brennan & Yeuk-Sze Lo, *Environmental Ethics*, STAN. ENCYCLOPEDIA OF PHILOSOPHY (Winter 2016 Edition), http://plato.stanford.edu/entries/ethics-environmental/.

2. "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.

3. The thinking, which is not developed in this Article, is that embedded in the words "general welfare" and "our posterity" is a direction that "the environment cannot be exploited beyond its sustainable use." Caleb Hall, *A Right Most Dear: The Case for a Constitutional Environmental Right*, 30 TUL. ENVTL. L.J. 85, 101 (2016). *But see* J. B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 264–65 n.64 (1999). Ruhl somewhat disparagingly comments that such an interpretation of the Preamble "would support a 'right' to a good job, a decent home, a good education, and a whole package of other social

Climate change is an anthropogenic-caused physical phenomenon, which threatens serious harm to the health and well-being of current and future U.S. citizens and to the natural environment on which they depend. The federal government has authority under various laws and common law doctrines to lessen, mitigate, and in some circumstances, avoid those impacts. The government's continuing failure to act under those authorities conflicts with its implied moral constitutional duties. It is the seriousness of the threat from climate change and the failure of the government to respond adequately to it that encourage the search for an affirmative duty to protect human health and the environment in the Constitution.[4]

This Article begins by briefly describing the impacts of climate change to demonstrate that the threat it poses to continued human existence is sufficiently substantial to warrant a constitutional reaction given the failure of the federal government to address it adequately. This discourse is followed by an analysis in Part II on the development of a theoretical framework supporting a constitutional basis for the federal government's moral obligation to protect citizens from harm. Part III then considers both the importance of finding such a duty in the Constitution and how states and other nations have incorporated an environmental protection norm into their constitutions. Part IV discusses what such a norm might look like, tilting toward a norm that imposes a protective duty on the federal government rather than one that creates an individual right. Part V then explores where such a norm might be located in constitutional text.

The Article concludes that it is difficult to find a single uncontested textual place in the Constitution from which one might draw an inference that the federal government has a moral duty to protect citizens from climate-induced harm. However, when the Constitution is viewed holistically, there may be sufficient support for a court to hold the government legally responsible for breaching that duty through acts of commission and omission.

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welfare policies not generally understood as having the status of pre-existing constitutional rights," noting that efforts to find a right to a clean environment in the existing Constitution have all failed. *Id.*

4. Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity*, 68 MISS. L.J. 565, 567 (1998). *See also id.* at 582 ("The call for constitutional recognition of a right to a healthy environment in us and our posterity is premised on the seriousness of our situation and the reluctance we are showing to take effective action."); *id.* at 646 ("It may be, then, that the right to a healthy environment will not achieve constitutional status until the Court becomes convinced both that the environmental dangers are real and that the political branches are failing to act responsibly, despite their pro-environmental rhetoric."). Ledewitz believed that if environmental crises, like global climate change, were "to worsen substantially," and the public were to "demand radical action from the government," the idea of "a constitutional right to a healthy environment" might "no longer seem far-fetched." *Id.* at 569.

I. THE THREAT AND LOOMING REALITY OF CLIMATE CHANGE

If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't. And contrary wise, what it is, it wouldn't be. And what it wouldn't be, it would. You see?

—Alice, Alice in Wonderland[5]

Although the quality of the environment has improved overall since the passage of a surfeit of environmental laws in the last quarter of the twentieth century, there are remaining, unaddressed problems, one of which is climate change.[6] The belief that climate change is happening is almost universal.[7] Indeed, the consensus that the world's climate is changing has reached a "a critical mass,"[8] together with widespread dissatisfaction with the government's inadequate response to it. The fact that a critical mass of the population perceives this as an unaddressed, socially important problem is the reason to turn to the Constitution for a solution. But before doing that, a convincing case must be made that the perception that climate change is a serious problem that the government is failing to address is correct, which this Part endeavors to do.

The Intergovernmental Panel on Climate Change (IPCC) 2007 report concluded that "human activity is 'very likely' causing the world to warm."[9] "Every day about 6.9 billion of us, in ways small and large, collectively discharge prodigious amounts of carbon and other greenhouse gases into the atmosphere."[10] These discharges cause changes in the atmosphere beyond its "natural variability," making it likely that there will be "catastrophic climate disruption caused by greenhouse heating."[11] "The average surface temperature

5. ALICE IN WONDERLAND (Walt Disney Productions 1951).

6. Hall, *supra* note 3, at 92 ("[A]lthough environmental quality has improved overall, environmental statutes fail to address the disproportionate environmental burden the poor and people of color still bear. Worse, climate change continues to be an unsolved problem both domestically and internationally."). Rodger Schlickeisen adds to this list of unaddressed problems "ozone depletion, industrial chemicals that enter the food chain and disrupt hormones in humans and other animals," and irreversible biodiversity loss, the speed of which is accelerating. Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181, 184 (1994).

7. Ledewitz, *supra* note 4, at 569 (citing Jay Michaelson, *Geoengineering: A Climate Change Manhattan Project*, 17 STAN. ENVTL. L.J. 73, 74 n.1 (1998)).

8. *Id.* (citing Michaelson, *supra* note 7, at 74 n.1).

9. *See, e.g.,* IPCC INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007 SYNTHESIS REPORT 5 (2007). *See also id.* at 39 ("Most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic [greenhouse gas] concentrations.").

10. James L. Olmsted, *The Butterfly Effect: Conservation Easements, Climate Change, and Invasive Species*, 38 B.C. ENVTL. AFFAIRS L. REV. 41, 42 (2011).

11. United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, S. TREATY DOC. No. 102-38 (1992), 31 I.L.M. 849 (1992) (entered into force Mar. 21, 1994) ("'Climate change' means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."); STAN. ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 1 (referencing Paul

of the earth increased 0.76° C (1.4° F) in the twentieth century and the prediction is that it will increase by another 1.8 to 4.0° C (3.2 to 7.2° F) in the twenty-first century, depending on pollution levels."[12] Temperatures in the United States may increase between 4 and 11° F by the end of the century.[13]

The harmful impacts of climate change are well known—"longer hot seasons, which result in droughts, shorter and warmer winters," sea level rise (by as much as two meters by 2100), and "more frequent extreme weather patterns such as hailstorms and heavier rains."[14] These impacts lead to increased flooding, wildfires, mudslides, and disease outbreaks.[15] "At best, the symptoms of climate change alter the ability of individuals and governments to use their lands in ways they have in years past. At worst, they force entire communities to relocate and endanger human lives."[16]

Climate change is also a serious problem because it subjects biodiversity "to new risks and uncertainties."[17] The high rate of species loss due to climate change in the last century is expected to accelerate "in the near future by a factor of ten or more."[18] Changes in global temperatures and rainfall, together with ocean acidification and sea level rise, will push many species towards extinction by destroying or diminishing vital habitat, limiting the quality and quantity of prey, and increasing predation, competition, and disease.[19] The overall loss of biodiversity will contribute to "exponential increases in extinction rates"[20] and may "impair the ability of natural ecosystems to regulate atmospheric gases, purify water, decompose wastes, generate fertile soils, provide food directly, cycle vital nutrients[,] and control insects and wildlife diseases that destroy crops and otherwise impact human health."[21] Climate change will challenge "the resilience and adaptive capacity of natural systems."[22] While there may be a

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Ehrlich & Anne Ehrlich, *The Population Bomb Revisited*, 1 ELECTRONIC J. OF SUSTAINABLE DEV., 2009, at 5, 8).

12. Pamela S. Chasek, *Rethinking the Law and Policy of Protected Areas in a Warming World: Evolving Approaches of American Conservation Organizations*, 15 J. INT'L WILDLIFE L. & POLICY 41, 49 (2012).

13. Nicholas Whipps, *What Happens When Species Move But Resources Do Not? Creating Climate Adaptive Solutions to Climate Change*, 66 HASTINGS L.J. 557, 559 (2015).

14. Jamie Kay Ford & Erick Giles, *Climate Change Adaptation in Indian Country: Tribal Regulation of Reservation Lands and Natural Resources*, 41 WM. MITCHELL L. REV. 519, 524 (2015). The net result of all of this is what we call "global climate change." *See* Olmsted, *supra* note 10, at 43.

15. Ford & Giles, *supra* note 14, at 524.

16. *Id.* at 520.

17. Robert L. Fischman & Jeffrey B. Hyman, *The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance*, 28 VA. ENVTL. L.J. 173, 238 (2010).

18. Tristan Kimbrell, Note, *Moving Species and Non-Moving Reserves: Conservation Banking and the Impact of Climate Change*, 22 FORDHAM ENVTL. L. REV. 119, 120–21 (2010).

19. Jaclyn Lopez, *Biodiversity on the Brink: The Role of Assisted Migration in Managing Endangered Species Threatened with Rising Seas*, 39 HARV. ENVTL. L. REV. 157, 161–62 (2015).

20. Olmsted, *supra* note 10, at 56–57.

21. Schlickeisen, *supra* note 6, at 187.

22. Alejandro E. Camacho & Robert L. Glicksman, *Legal Adaptive Capacity: How Program Goals and Processes Shape Federal Land Adaptation to Climate Change*, 87 U. COLO. L. REV. 711, 721 (2016).

future way to "micromanage the natural ecosystems and the millions of species they contain" to avoid some of these impacts through something like geoengineering, Edward O. Wilson, a world renowned biologist, worries that "it will be too late for the ecosystems—and perhaps for us."[23] The loss of species and genetic diversity "will reduce the promise of developing new medicines to fight disease, of using unique biological processes as medical models to discover new health benefits, and of preserving a sufficient variety of food sources to feed an exploding human population."[24] Additionally, the disappearance "of distinctive animals and plants will deprive humanity of significant aesthetic, recreational, and emotional benefits."[25] Economists have assessed the global economic impact of climate change to be around $5.6 trillion.[26]

The federal government has done little to respond to the threats and increasing evidence of climate change. The most recent administration has stopped, slowed, or reversed initiatives taken by the prior administration to lessen the release of carbon dioxide into the atmosphere and encourage adaption to the effects of climate change.[27] It has expunged climate change information from agency websites, and defunded or marginalized programs designed to study, mitigate, or adapt to climate change.[28] The most recent Congress, as well, has defunded administrative climate change initiatives and proposed legislation to block the federal government from regulating greenhouse gas sources.[29] The courts too have largely barred the courthouse door to climate change lawsuits.[30]

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23. Schlickeisen, *supra* note 6, at 189. *See also* STAN. ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 1 (reporting that Stephen Gardiner's pessimism about progress on climate change included a negative view about technological changes like "geoengineering as the antidote to climate problems, echoing the concerns of others that further domination of and large-scale interventions in nature may turn out to be a greater evil than enduring a climate catastrophe").

24. Schlickeisen, *supra* note 6, at 186.

25. *Id.* In addition, the "ethical dilemma of being part of one species that is causing the extinction of many others may produce significant mental anguish." *Id.* at 186–87.

26. Ledewitz, *supra* note 4, at 577 (citing WILLIAM D. NORDHAUS, MANAGING THE GLOBAL COMMONS 82–83 (1994)).

27. *See Climate Deregulation Tracker*, SABIN CTR. FOR CLIMATE CHANGE L., http://columbiaclimatelaw.com/resources/climate-deregulation-tracker/ (listing multiple pages of such initiatives ranging from proposing revisions to the methane and waste prevention rule, expanding offshore oil and gas drilling, withdrawing a proposed rule for flood plain management and resilience, proposing rescission of the Obama Administration's Clean Power Plan, and the U.S. Department of the Interior ordering rescission of all climate and mitigation policies, to name just a few of the more recent ones).

28. *Id.*

29. *Id.* (listing multiple pages of such initiatives, such as a bill passed by the House to reduce economically burdensome regulations, a House bill to terminate EPA, a Senate resolution to overturn the Cross-State Air Pollution Rule, House and Senate bills to delay implementation of the 2015 Ozone Standards, and a House bill to prevent federal agencies from regulating greenhouse gases under existing laws).

30. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) (holding that the Clean Air Act displaced a federal common law claim seeking injunctive relief for greenhouse gas emissions); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857–58 (9th Cir. 2012) (holding federal common law displaced when plaintiffs sought climate change-induced damages); *but see* United States v. U.S. Dist. Court, 884 F.3d 830, 833 (9th Cir. 2018) (declining to order the District Court for the District of Oregon to dismiss a climate change lawsuit).

Finding physical and institutional solutions to climate change is difficult. But, that task is made more difficult by the moral issues wrapped up in the problem, which play a fundamental role in any discussion of climate policy.[31] One ethics scholar, Stephen Gardiner, has identified two moral issues: the "non-identity problem"[32] and the fact that future generations are more likely to suffer the impacts of climate change than present generations, giving the current generation little incentive to address the phenomenon.[33] The "tangle of issues" involved in trying to resolve climate change, according to Gardiner, "conspires to encourage buck-passing, weakness of will, distraction and procrastination, 'mak[ing] us extremely vulnerable to moral corruption.'"[34] Yet, the failure to solve the problems created by climate change now could cause "the diminution not only of nature and natural systems, but also of human dignity itself."[35]

The next Part of the Article explores the moral dimensions of the government's failure to fulfill its legal obligation to protect people from the effects of climate change. In theory, once a society or community comprehends the need for a law and "has embraced the values the law represents," then it "will observe the laws and support their enforcement against those who neglect or reject the laws."[36] Yet, in practice, society has failed, justifying the need for a constitutional protection. Part II addresses whether a climate change legal duty is best expressed as an individual right to be free from the harmful effects of climate change or an affirmative obligation on the government to protect individuals from climate-induced harm, in addition to whether this distinction is meaningful.

II. A MORAL DUTY TO PROTECT PEOPLE FROM ENVIRONMENTAL HARM

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

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31. STAN. ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 1.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. Nicholas A. Robinson, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, 26 HASTINGS INT'L & COMP. L. REV. 387, 396 n.30 (2003).

—Sam Kalen[37]

Before an argument can be made that the environmental protection norm has a constitutional dimension, it is important to understand the scope of the duty and whether the government has a moral duty to protect individuals from harm and what, if any, the consequences are of describing that duty as responding to an individual right or a freestanding, affirmative government obligation.[38] As this Part shows, some scholars describe this as an individual right, others as a government duty. How the term is defined may determine in what way and whether it can fit into the Constitution and whether it is enforceable.[39] Regardless of which side of this debate the scholar is on, they all appear to agree that the duty extends forward to include generations yet born and all have a general idea of its scope.

Professor Martha Nussbaum is among the scholars who suggest that one should "see the question of duties as that of shouldering a burden looking to the future. And that means that it is simply natural, as a next step, to look around the world at the capacities of different structures—nations, corporations, individuals, NGOs—and to favor an allocation of duties that seems most likely" to halt and reverse the impacts of climate change.[40] Professor Rodger Schlickeisen agrees that the duty should be "intergenerational," commenting that "the living are at once trustees of the environment for future generations and beneficiaries of that environment (which previous generations held in trust for them)."[41] Nussbaum also notes, as to the scope of the duty, that before one can decide on what the goals of any duty should be and how to act on them, certain preliminary questions

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37. Sam Kalen, *An Essay: An Aspirational Right to a Healthy Environment*, 34 UCLA J. ENVTL. L. & POL'Y 156, 188 (2016).

38. *See* Ledewitz, *supra* note 4, at 612 ("Among supporters of the general idea of such an amendment, there is opposition to an amendment based on a concept of rights. This has led to proposals for a constitutional amendment based not on individual rights, but on responsibilities or obligations of government."). *See also* Martha C. Nussbaum, *Climate Change: Why Theories of Justice Matter*, 13 CHI. J. INT'L L, 469, 474 (2013) ("ethical thought in the international sphere ought to begin with an account of our duties, rather than an account of people's entitlements. . . . [W]e [should] think about what we have a duty to do and not to do to, and for, human beings.").

39. Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5, 7 (2011), There are

> two types of uncertainty that are associated with legal liability. The first type, legal uncertainty, relates to uncertainty regarding the content of an obligation. In many cases, legal obligations are vague, and therefore, parties may not be sure, ex ante, whether liability will be attached to a certain type of behavior. The second type, enforcement uncertainty, relates to uncertainty regarding implementation of the legal norm. Violations of legal norms often do not entail any consequences due to problems such as lack of detection.

Id.

40. Nussbaum, *supra* note 38, at 478. *See also id.* ("My own view suggests that we therefore begin with a specification of a threshold of entitlement that seems commensurate with the respect we have for human dignity, and that seems inherent in the idea of a life worthy of people's human dignity."); STAN. ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 1.

41. Schlickeisen, *supra* note 6, at 193.

need to be answered.[42] She wonders whether the focus of any such duty should only be on human capabilities or whether intrinsic—as opposed to instrumental value—should be attached to the capabilities of non-human animals (or even plants).[43]

A rights-based approach can compel the government to act responsibly towards both present and future generations.[44] Giving a new right to an unprotected future generation improves the protection of that group, even if there are protective statutes or regulations because "in the legal hierarchy, rights are at a higher level."[45] Hence any environmental protection norm should be described as a right. Professor Edith Brown Weiss agrees: "Intergenerational rights have greater moral force than do obligations."[46] To her, "the rights of present generations have limits," and she cautions against overstepping them, stating, "[w]e have a right to use and enjoy the system, but no right to destroy its robustness and integrity for those who come after us."[47]

Professor Joseph L. Sax views the obligation to protect the rights of future generations as "not simply leaving the earth as it is . . . but refraining from those acts that impoverish by leaving less opportunity for freedom of action and thought by those who follow us," even though there is "no ordinary legal precept that speaks of a duty not to impoverish the world, nor is there formal recognition of social capital or patrimonial property."[48] He translates this commitment into

42. Nussbaum, *supra* note 38, at 485.

43. *Id.*

44. *An Environmental Right for Future Generations: Model State Constitutional Provisions & Model Statute*, SCIENCE & ENVIRONMENTAL HEALTH NETWORK & THE INTERNATIONAL HUMAN RIGHTS CLINIC AT HARVARD LAW SCHOOL 5 (Nov. 2008) https://sehn.org/pdf/Model_Provisions_Mod1E7275.pdf [hereinafter *Model Provisions and Statute*] ("[A]n environmentally focused, rights-based framework obligates governments to act in a way that takes into account the needs of future as well as present generations."). *See also id.* at 4 ("The current regulatory system . . . fails, however adequately to take into account future generations or the long-term damage that environmental degradation can cause.").

45. *Id.* at 5 ("The granting of a new right to future generations strengthens the protection of the group. The United States places heightened importance on legal principles, such as the freedoms of speech and religion, once they have been enshrined as rights. In the legal hierarchy, rights are elevated above statutes and regulations.").

46. Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198, 204 (1990).

47. *Id.* at 207. Weiss explains further that the

> purpose of human society must be to realize and protect the welfare and well-being of every generation. This requires sustaining the life support systems of the planet, the ecological processes, environmental conditions, and cultural resources important for the survival and well-being of the human species, and a healthy and decent human environment.

Id. at 200. Toward that end, Weiss views "the human community as a partnership among all generations," which requires that, "each generation pass the planet on in no worse condition than it received it and provide equitable access to its resources and benefits." *Id.* at 199, 200.

48. Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVTL. L. 93, 103 (1990).

"a commitment" to maintain the "genetic stock . . . essentially undiminished."[49] In other words, "[t]he stock of resources that constitutes our primary natural endowment should be conserved. The application here is a policy of sustaining yield in the management of resources, whether privately or publicly held, with the goal of undiminished productive capacity."[50]

Like Weiss, Sax questions "whether it is equitable to sacrifice options for future well-being in favour of supporting current lifestyles, especially the comfortable, and sometimes lavish, forms of life enjoyed in the rich countries."[51] Sax supports the concept of sustainable development because it

> meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs,' in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[52]

Given the intergenerational impact of climate change, an intergenerational focus could make the government's obligation to arrest the harms of climate change more robust, regardless of whether the duty is described as an enforcement of a right or an affirmative obligation. Still, various professors have different views on how to characterize the environmental protection norm and where its source could be found.

Professor Bruce Ledewitz defines the right as a right to a "healthy environment,"[53] an environment "that has not been unalterably changed by man."[54] He proclaims that recognition of a constitutional right to a healthy environment is consistent with the Republican thinking's "strong emphasis on

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49. *Id.* at 104–05. *See also id.* at 105 ("The practical application is to make habitat and species preservation a primary programmatic obligation of environmental law.").

50. *Id.* at 105. *See also* Eric T. Freyfogle, *Should We Green the Bill?*, 1992 U. ILL. L. REV. 159, 162 (1992) (identifying as a "central thread" connecting norms of "sustainable living" the "idea that each of our practices must be capable of repetition without harm to the land").

51. STAN. ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 1. *See also id.* ("references to 'the future' need not be limited to the future of human beings only. In keeping with the non-anthropocentric focus of much environmental philosophy, a care for sustainability and biodiversity can embrace a care for opportunities available to non-human living things.").

52. *Id. See also id.* ("The notion of sustainable yield involves thinking of forests, rivers, oceans, and other ecosystems, including the natural species living in them, as a stock of 'ecological capital' from which all kinds of goods and services flow.").

53. Ledewitz, *supra* note 4, at 583.

54. *Id.* at 583–585 (noting that these rights are to a planet that is "predominantly 'natural' rather than a manufactured event"). However, he does not extend this right to nature itself, but grounds it in human welfare. *See id.* at 585–86 ("The right to a healthy environment is one of clear human welfare—not a right in nature itself.") This distinguishes him from CHRISTOPHER STONE, SHOULD TREES HAVE STANDING: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (1974) (asserts that nature itself does have some legal status). *But see* Brendon Swedlow, *Reason for Hope — The Spotted Owl Injunctions and Policy Change*, 34 LAW & SOC. INQUIRY 825, 853, 871–72 (2009) ("the environmental movement is just the latest iteration in efforts to expand the political community on an egalitarian basis, now to include nonhuman species like the spotted owl . . . In this view, environmentalism is a civil rights movement for nature.").

social relations."[55] Ledewitz identifies two beneficiaries of a healthy environment: first, "any individual affected by permanent, human-caused changes in the environment would be entitled to protection"; second, "our posterity," generations who have not yet been born.[56] A rights-based approach "create[s] a general right to a healthy environment, rather than a system based on specific, pre-set levels of pollution,"[57] as our current regulatory system provides. But, in his case, the right is framed in terms of an affirmative governmental obligation.

Sax believes that the source of such a right can be found in a "public welfare responsibility," where the state has agreed "to provide to each individual, as an entitlement, basic means essential to make it possible to flourish as a human being," including food, shelter, and medical care, even if these basics are not yet individual rights.[58] He finds "a claimed right of protection from environmental hazard . . . a small step from the proposition that each individual should be entitled to needed medical care . . . [and] to living and working conditions free from unwarranted health hazards."[59] He writes that "affirmative rights to a level of freedom from risk would be designed to create a basic norm of opportunity so that the least advantaged individual is insulated against imposition of risk below some minimal threshold within his or her own society."[60] This obviates the need to find, in the concept of an environmental right, a specific level of protection above which an assumption of the risk is not warranted, as there is "no objectively correct answer" to that question.[61] Sax elicits "[t]hree basic precepts . . . from the central values of the modern world" that may be "adapted as the source of basic environmental rights: (1) fully informed[,] open decision making based upon free choice, (2) protection of all at a baseline reflecting respect for every member of the society, and (3) a commitment not to impoverish the earth and narrow the possibilities of the future."[62]

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55. Ledewitz, *supra* note 4, at 634.

56. *Id.* at 586–87. *See also* Kalen, *supra* note 37, at 194 ("Leon G. Billings's, who was instrumental in assisting Senator Muskie in crafting many of our modern environmental programs, observation how 'justice in the context of the environment requires gaining widespread global recognition that there is an inalienable right of all people to a clean, healthy[,] and safe environment.'").

57. *Model Provisions and Statue, supra* note 44, at 5 ("Article I of the Model Constitution establishes an inalienable right to an 'ecologically healthy environment' for present and future generations, and it defines this 'fundamental' and 'self-executing' right as including but not limited to 'the enjoyment of clean air, pure water, and scenic lands[,] freedom from unwarranted exposure to toxic chemicals and other contaminants[,] and a secure climate.'"). *Sax*, *supra* note 48, at 96 (Sax identifies a "patrimonial responsibility as a public duty" as one of the bases for environmental rights).

58. Sax, *supra* note 48, at 100.

59. *Id.*

60. *Id.* at 101. *See also id.* at 101–02 ("One important aspect of respect for distinctive communities is listening to their demands for insulation, at least in the absence of some compelling, conflicting need, from imposed pressures of modernization and development that foment destruction of their cultural life.").

61. *Id.* at 100. *See also id.* at 100–01 ("Just how much can individuals be required to submit to risk as a 'conscript' in the struggle to achieve the benefits of a modern society?").

62. *Id.* at 105.

Conflating rights and duties, Sax extrapolates from terms like "environmental quality" and "a decent environment" a "version of welfare-state ideology," the goal of which "would not be government abstention, but rather a call for affirmative action by the state—a demand that it assure, as a right of each individual, some level of freedom from environmental hazards or some degree of access to environmental benefits."[63] Like Weiss, he worries about decisions that might "foreclose future opportunities" by squandering the world's patrimony or social capital[64] or place disproportionate environmental risks upon a "small segment of the population."[65] He argues that while the answer to these concerns is not absolute, he believes that "a fundamental right to a substantive entitlement which designates minimum norms" would help prevent enactment of these worrisome decisions.[66]

Professor Ronald Klipsch also straddles the affirmative obligation rights argument and suggests that "[t]he question should be not whether there is a right to a habitable environment, but whether health, life, property, . . . species, or aesthetic interests . . . are protected from environment-altering activity."[67] Klipsch believes that while "[t]he Constitution does not strike [a precise] ecosystem balance, . . . it does demand that a balance be struck, and that citizens be informed and involved in the striking."[68]

However, Sax identifies several problems with a pure rights-based approach. One is that "specific rights usually grow out of some core social value";[69] yet, "[t]here is no legal tradition in our system that recognizes rights to nature preservation, so we cannot turn to precedent for guidance," nor is there any "historical experience on which to draw to give content to an asserted ecological right."[70] As Sax succinctly notes, "[t]here is no evident environmental principle analogous to the 'hands off' principle that underlies basic human rights."[71] Another problem he identifies is that while environmental claims

63. *Id.* at 95. *See also id.* ("The closest analogy would seem to be found among the precepts of a modern welfare state. The effort to guarantee each individual a basic right to decent housing, health care, nutrition, safe working conditions, and cultural opportunity seems most closely fitted to the effort of articulating basic environmental rights."); Schlickeisen*, supra* note 6, at 207 ("Sax suggests that a 'driving idea behind efforts to establish environmental rights is a version of welfare-state ideology. . . [t]he goal would not be government abstention, but rather a call for affirmative action by the state—a demand that it assure, as a right of each individual, some level of freedom from environmental hazards or some degree of access to environmental benefits.'").

64. Sax, *supra* note 48, at 99. *See also id.* at 105 (explaining that this means protecting biodiversity and conservation of natural resources that constitute the world's primary natural endowment).

65. *Id.* at 99.

66. *Id.* at 100.

67. Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203, 210 (1974).

68. *Id.* at 237. *See also* STAN. ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 1 ("Though 'states [also] have a responsibility towards their own citizens and other states.'").

69. Sax, *supra* note 48, at 94.

70. *Id.*

71. *Id.*

import "certain substantive values," they are not concerned with the integrity of the "structure of democracy," which is the concern reflected in much of the Constitution.[72]

Regardless of the semantic differences between the two sides of the debate over whether halting environmental harm is a right or an affirmative obligation, both sides of the debate agree that the ultimate goal of a protective environmental norm is to create a sustainable environment for present and future generations. The rights approach, however, appears to create more questions and be less bounded than the idea of an affirmative obligation resting on the government to tend to the phenomenon of climate change.

Less apparent from this debate is whether the optimal way to achieve that goal is through the Constitution,[73] and if it is, how that might be done. The next Part of the Article discusses why it is important to constitutionalize protection of the environment and the downside of doing that, followed by a debate on how that might be done. The latter conversation may help decide whether the environmental protection norm should be defined as a citizen's right or the government's duty.

III. WHY IT IS IMPORTANT TO GIVE CONSTITUTIONAL STATUS TO ENVIRONMENTAL PROTECTION

> *We made a choice, over two centuries ago, to craft an operational blueprint for government that would adopt social policy sparingly and only when it was clear that the policy could and would be delivered.*
> —J. B. Ruhl[74]

Giving constitutional status to environmental protection would achieve many things that could lead to greater environmental protection. For example, since one purpose of a constitution is to remove "certain subjects from the vicissitudes of political controversy,"[75] constitutionalizing an environmental protection norm might help break the legislative and administrative deadlock over reforming and strengthening environmental protection and might help

72. *Id.* at 95.

73. *See* Kalen, *supra* note 37, at 175–76 ("with minimal difficulty, the Constitution and the common law could serve as powerful forces in establishing an evolving environmental right[,] aspirational or otherwise."). *See also* Sax, *supra* note 48, at 100. Sax posited that while the question of "whether the majority can be said to owe to each individual a basic right not to be left to fall below some minimal level of substantive protection against hazard" may not be "free from doubt," he believed that "a fundamental right to a substantive entitlement which designates minimum norms should be recognized." *Id.*

74. Ruhl, *supra* note 3, at 281. *See also id.* at 245–46 n.2 (quoting Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 441 (1983) ("The Constitution serves both as a blueprint for government operations and as an authoritative statement of the nation's most important and enduring values.").

75. Hall, *supra* note 3, at 107 (quoting *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638 (1943)).

depoliticize the issue.[76] Given the deep political fault lines in American politics today, it is unrealistic to rely fully on legislative action to protect the environment: "Protecting the environment is a long-term goal" with "few short-term political gains for politicians who support environmentally friendly laws."[77]

Recognition of a constitutionalized norm of environmental protection could also be helpful in achieving "environmental justice for the disadvantaged and oppressed," promoting "international constitutional law, particularly in third world and formerly Communist countries," and buttressing "the effort to preserve biodiversity."[78] Granting constitutional status to environmental protection could highlight to Americans its importance.[79] It might "reinvigorate environmental law, not merely in welfarist terms, but in terms of [the] ethical self-understanding of its authors,"[80] and allow a widely accepted social policy to advance.[81] Indeed, Professor Sam Kalen expresses hope that constitutionalizing an environmental protection norm might reawaken "the popular constitutional movement achieved within those laws."[82]

Finding a place in the Constitution for environmental protection might provide "an over-arching legal and normative framework for directing environmental policy,"[83] give environmental protection some prominence among competing values, and bolster laws designed to protect the environment.[84] It might also act as a brake on governmental action harmful to the environment.[85] Professor Caleb Hall muses that while a constitutionalized

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76. Joshua J. Bruckerhoff, Note, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615, 623 (2008) ("guarantees some degree of environmental protection that is free from daily politics"). *See also* Hall, *supra* note 3, at 107 ("A constitutional right is a floor, not a stop gap measure to be applied if statutory involvement is insufficient.").

77. Bruckerhoff, *supra* note 76, at 623. *See also* J.Y.P., Jr., Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458, 486 (1970) ("judicial recognition of a constitutional right could not begin to resolve our environmental dilemma, it would reorient governmental priorities").

78. 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, 152 (1997). *See also id.* at 126–27 (worrying about "environmental problems that still have not been adequately addressed in the United States, such as global warming and biodiversity. Supporting organizations worry about the environmental legacy we are leaving to future generations. They feel that these problems will never be addressed in the present-day political climate of the United States. Brodsky's supporters feel that an environmental constitutional amendment 'may be our only effective long-term recourse' to compel Congress to act on new problems and to preserve our present-day environmental protection laws.").

79. Bruckerhoff, *supra* note 76, at 623.

80. Kalen, *supra* note 37, at 189 n.126.

81. Ruhl, *supra* note 3, at 271 ("These are examples of institutional necessity, where an amendment, and only an amendment, can allow the widely accepted social policy to move forward in society.").

82. Kalen, *supra* note 37, at 189.

83. Bruckerhoff, *supra* note 76, at 624 (quoting TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 6 (2005).)

84. *Id.* at 624.

85. Hall, *supra* note 3, at 100 ("A right to some measure of environmental quality may not require governmental intervention, but it may prevent governmental behavior that severely debilitates the environment.").

environmental norm may not prevent destruction of the country's "environmental treasures, [] it would prevent governments from playing an active role in such atrocities."[86] And the constitutional concept of due process, if an environmental norm were read into it, might "prevent governments from wholly abandoning environmental protection."[87] Even an aspirational right to environmental protection could "tilt the balance in difficult cases when environmental issues are present" and help "shape legislative debate."[88]

Constitutionalizing environmental protection might "promote [an] expansive interpretation of standing, expand a court's remedial power, or narrow the reach of federalism concerns."[89] At minimum, a constitutional environmental protection norm would require consideration of environmental concerns in deciding constitutional questions like those that arise under the Takings Clause, and in standing and federalism disputes.[90]

If courts were to recognize a due process right to environmental protection, given Congress's almost "unlimited powers to enforce due process rights arising under section [one] [of the Due Process Clause,]" the right "would enable Congress to pass legislation attacking environmental degradation, [which] it could not [previously] reach through its regulatory powers under the [C]ommerce [C]lause."[91] Additionally, there are statutory pronouncements, like those found in the National Environmental Policy Act, which, while not directly enforceable as legislation, might rise to the level of a constitutional norm enforceable through the Due Process Clause or some other constitutional provision.[92]

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86. *Id.* at 109.

87. *Id.*

88. Kalen, *supra* note 37, at 191. *See also id.* at 193 (referring to the decision in *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 1000 (Pa. 2013) and saying, "The court added that the Environmental Rights Amendment did not impose any absolute barrier to altering our natural landscape, but it afforded courts an ability to ensure that 'on balance,' the government 'reasonably account[ed] for the environmental features.'").

89. Ledewitz, *supra* note 4, at 653 ("This effect would be particularly pronounced in regard to the Takings Clause and the doctrine of standing.").

90. Ruhl, *supra* note 3, at 267–68 n.73 ("therefore, an [Environmental Quality Amendment] would need to reverse the Takings Clause in cases of environmental regulation and actively 'tip' government decision-making in favor of the environment when policy decisions present environment versus economy choices."). Ledewitz, *supra* note 4, at 600. *See also id.* at 652–53 ("One meaning of the right to a healthy environment is that other rights should be viewed within an environmental perspective. That is the right to a healthy environment would interject environmental concerns into contexts in which the Court had previously raised other sorts of concerns."); J.Y.P., Jr., *supra* note 77, at 486 ("[t]he peculiar phenomenon by which the exercise of property rights may subtly but irrevocably deprive the public of a natural environment warrants a preferred status for environmental rights.").

91. J.Y.P., Jr., *supra* note 77, at 486.

92. Ledewitz, *supra* note 4, at 608 ("The history of federal constitutional protection of the environment should be conceptualized as including broad statutory language endorsing protection of the environment. Here, the record of concern for the environment is much stronger. Section 101(c) of the National Environmental Policy Act (NEPA), which states that '[t]he Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment' is the most important such pronouncement. Such

A constitutionalized norm of environmental protection would help protect against "egregious" governmental abuses of the environment, "abuses which would fail any traditional balancing analysis."[93] According to David Boyd, "[c]onstitutional recognition of the right to a healthy environment requires that all proposed laws and regulations be screened to ensure that they are consistent with the government's duty to respect, protect, and fulfill the right."[94] This process may be formal or informal.[95] Additionally, the possibility of judicial intervention could be used to force state legislatures to enact environmentally protective legislation[96] and to defend against federal and/or state governmental efforts to turn back progress made in environmental protection since the 1970s.[97] One cannot help but wonder, if there were such a constitutional norm today, whether the current Administration would have such an easy time rescinding environmentally protective regulations and Congress such a free hand overriding or amending prior protective environmental laws.[98]

A norm that is widely accepted by its inclusion in the Constitution usually has been internalized by the public.[99] This will not require external enforcement, reducing concerns about the need for external enforcement.[100] A constitutional environmental protection norm, even an aspirational one,[101] could serve as a "roadmap" to help move a community or individuals to "a desired destination"—here a more sustainable, risk-free, natural environment. It also might change the behavior of anti-environmental economic interests by overriding environmentally harmful behavior.[102] Such a norm would also put the United States on a par with other countries that have done this, as well as with states that have incorporated protection of the environment into their constitutions.[103]

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language may not be directly enforceable, but it does announce a national policy under which enforceable constitutional norms may one day be derived.").

93. Kalen, *supra* note 37, at 194–95.

94. David R. Boyd, *The Constitutional Right to a Healthy Environment*, 54 ENV'T, 2012, at 3, 4.

95. *Id.*

96. Ruhl, *supra* note 3, at 271 ("Where federal legislation cannot impose the policy over state resistance and the courts cannot mold the existing constitutional text to handle the stubborn states, an amendment is the only alternative. These are examples of institutional necessity, where an amendment, and only an amendment, can allow the widely accepted social policy to move forward in society.").

97. Gallagher, *supra* note 78, at 126.

98. *See Climate Deregulation Tracker*, *supra* note 27 (discussing environmental deregulation initiatives proposed by both the Trump Administration and Congress).

99. Feldman & Teichman, *supra* note 39, at 15 (citing Robert Cooter, *Normative Failure of Theory of Law,* 82 CORNELL L. REV. 947, 958–68 (1997)); *see, e.g.*, Richard D. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 376 (1997).

100. Feldman & Teichman, *supra* note 39, at 15 ("norms are enforced by a set of nonlegal sanctions that apply to violators."). *See also id.* at 15–16 ("In this regard, norm violators are expected to feel guilt and remorse notwithstanding the detection of the violation by others.").

101. Nussbaum, *supra* note 38, at 486 ("A norm should be non-utopian but aspirational.").

102. Feldman & Teichman, *supra* note 39, at 14 ("Social norms may be another factor that could lead contracting parties to behave differently from the predictions of the traditional economic model.").

103. Kalen, *supra* note 37, at 162 ("A fundamental, or universally transcendent, right to a clean, healthy, and safe environment seems elemental. The 1972 Stockholm Declaration on the Human Environment recognized how human dignity and freedom can only occur if our natural surroundings

"The value of having a constitutive source of law is to provide 'an evolving repository of the nation's core political ideals and . . . a record of the nation's deepest ideological battles . . . .'"[104]

> By including an analysis of structural environmental constitutionalism into the current canon of environmental constitutionalism scholarship, we can identify imbalances in environmental governance authority and how to adjust those imbalances, facilitate more immediate practical impacts on environmental governance across scales, and lay a firm foundation for other forms of environmental constitutionalism, like fundamental.[105]

The Supreme Court has never concluded that the Constitution does not protect environmental rights or contain an affirmative obligation that the government act to further environmental interests.[106] However, there may be reasons why such a norm does not belong in the Constitution.

First, because an individual right to a healthy environment is not "fundamental," "deeply rooted in U.S. history," nor clearly supported by constitutional text,[107] it would be "a non-textual right."[108] While there might "be some textual provision nominally involved" in the creation of such a right or duty, it would not play a significant role.[109] And non-textual rights generally have not been favored by the Court.[110] When a court engages in protecting "unspecified 'essential' or 'fundamental' liberties, or 'fair procedure' or 'decency,'" it means courts can "give moral content to those conceptions" that will bind future generations.[111] This transforms "the Court's constitutional role" from "the technical and professional one of applying given norms to changing facts" into "the large and problematic role of discerning a society's most basic contemporary values."[112]

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afford an ability to live—for both present and future generations."); *see also id.* at 163–64 (". . . the European Convention on Human Rights recognizes how environmental threats interfere with the most basic of society's obligations: protecting the right to life. And courts in Pakistan and the Netherlands have held in favor of recognizing rights threatened by climate change.").

104. Ruhl, *supra* note 3, at 270 (quoting Tribe, *supra* note 74, at 441–42). *See also* Kalen, *supra* note 37, at 194 (". . . it seems that environmental rights ought to be embedded within our legal lexicon as a reflection of what Lynton Caldwell characterizes as law's 'traditional function' of 'express[ing] the sense of the community regarding rights, wrongs, and obligations.'").

105. Blake Hudson, *Structural Environmental Constitutionalism*, 21 WIDENER L. REV. 201, 215 (2015).

106. Hall, *supra* note 3, at 86 ("The U.S. Supreme Court has ironically never come to the presumably accepted conclusion that the U.S. Constitution does not protect environmental rights. Although naysayers may focus on the absence of approval, the equal absence of disapproval, implicit or otherwise, allows us to seriously consider whether the U.S. Constitution secures environmental rights.").

107. *Id.* at 105. *See also* Kalen, *supra* note 37, at 179–80 (discussing various constitutional amendments proposed in 1970, including one offered by Senator Nelson giving "[e]very person an 'inalienable right to a decent environment' that would be 'guarantee[d]'").

108. Ledewitz, *supra* note 4, at 592.

109. *Id.*

110. *Id.*

111. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN L. REV. 703, 710 (1975).

112. *Id.*

For this reason, prominent legal scholars like Herbert Wechsler and John Hart, as well as the Legal Process School, all contended that "the legitimacy of judicial review rests on the perception and reality that judges are engaged in an interpretive, rather than wholly creative, enterprise."[113] They worried that if the public believed "judges [were] merely imposing their own subjective moral preferences, rather than enforcing determinate constitutional constraints, judicial review might come under popular attack."[114] To them, there was no greater threat to the "appearance of principled decision making" than when the Court acted to protect "unenumerated, yet fundamental, rights."[115] As troubling, a constitutional environmental right would be novel and "novelty in law is the *bête noire* of traditional judicial restraint."[116] But, as Judge J. Skelly Wright wrote,

> [i]t is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great . . . problems to be resolved in the political arena by other branches of government. But these are . . . problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance.[117]

Then, there is the worry that constitutionalizing environmental protection in some form will be "a pretext for litigation aimed merely at slowing down government action with which some particular group does not agree."[118] The fact that anyone might be able to enforce an environmental right or affirmative obligation might undermine the effective functioning of courts and threaten the principle of separation of powers.[119] Judicial review of these claims might, thus, weaken the democratic process by moving the resolution of essentially political disputes into the courts.[120] This, despite the fact that creating a constitutional norm of environmental protection is intended to broaden democratic processes and reduce the need for "substantive court intervention in environmental matters."[121] So-called judicial "democratic decision processes" can cause "circularities in the ordering of social values unless there is a fair uniformity or consensus as to those values and the standards for decision," which there may

113. Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 1022 (2006).

114. *Id.*

115. *Id.*

116. Ledewitz, *supra* note 4, at 627.

117. J.Y.P., Jr., *supra* note 77, at 479 (quoting D.C. Circuit Court Judge J. Skelly Wright in Hobson v. Hansen, 269 F. Supp. 401, 517 (D.C. Cir. 1967)).

118. Ledewitz, *supra* note 4, at 657.

119. Klipsch, *supra* note 67, at 229.

120. *Id.*

121. *Id.*

not be in the case of an environmental protection norm.[122] This may hinder a court asserting "perceived constitutional values in environmental matters."[123]

The doctrines of state action and standing could also be an issue if environmental protection crept into the Constitution, and the political question doctrine might create a barrier to the extent the government's affirmative duties would be involved in any contested application of the norm or failure to apply the norm.[124] Relief under a constitutional environmental protection norm might well depend on "whether a court could find state action, overcome problems of justiciability[,] or impose an affirmative duty of regulation on government officials; in many environmental cases, all three of these obstacles will challenge a court's abilities."[125]

Another major problem in implementing any such norm would be establishing what constitutes unreasonable environmental degradation, which would be difficult and would require empirical data that might not be available.[126] This could result in an unenforceable constitutional provision.[127] An unenforced constitutional norm would undermine its legitimacy, making it difficult for any future government to implement it.[128] Assuming any enforcement problems associated with the norm could be overcome, implementation of any judicial decrees would likely "tax judicial resources," as it might require "close court supervision of the degraders for an extended period of time."[129]

Then there are a host of structural problems with reading an environmental protection right or duty into the Constitution. First, the creation of a right or a duty is "inconsistent with the scheme of the Constitution, which couches guarantees in terms of freedom from governmental action."[130] Further, "[m]any theories about the nature and purpose of constitutions posit that 'exceptional legal entrenchment' is not just the hallmark of constitutions, but their raison

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122. *Id.*

123. *Id.*

124. Ledewitz, *supra* note 4, at 593. *See* J.Y.P., Jr., *supra* note 77, at 474 ("Thus, the viability of judicial activism in environmental cases will largely depend on whether the right of environment would be of the kind which the Supreme Court has given special treatment.").

125. J.Y.P., Jr., *supra* note 77, at 473–74 ("The vehicle for asserting a constitutional right of environment would be 42 U.S.C. § 1983."). *See also id.* ("Thus, if a federal court found sufficient government involvement in unreasonable environmental degradation to satisfy the state action requirement, it could presumably award equitable relief under section 1983 even though private parties were primarily responsible for the degradation.").

126. *Id.* at 477.

127. Hall, *supra* note 3, at 105.

128. Hudson, *supra* note 105, at 215 ("At some point, if fundamental provisions are in place, but are disregarded for long enough, there may be an erosion of institutional legitimacy for any future government seeking to actually implement those provisions.").

129. J.Y.P., Jr., *supra* note 77, at 479–80.

130. *Id.* at 480. *But see id.* ("However, the idea that a state has a positive duty to remedy certain constitutional infringements has appeared in cases enforcing the equal protection rights of [African Americans] to attend racially nondiscriminatory public schools.").

d'être."[131] Viewing the Constitution as a document that entrenches policies and rights "discourages the inclusion of highly specific policy choices," like those that might be encompassed in any environmental protection norm, because those "specific policies are unlikely to remain appropriate or tenable in the face of changing economic and social conditions."[132] Additionally, adding an affirmative obligation to the Constitution would expand the power of the federal government, including the powers of the executive branch vis-à-vis the legislative branch, in contrast to "most constitutional provisions, which limit the powers of government."[133] It also might run afoul of other constitutional provisions like the Takings Clause[134] or be used to slow economic advancement.[135] Indeed, it is possible that claims advocating an expansion in direct judicial enforcement of constitutional environmental rights might actually interfere with contrary "popular and potentially transformative interpretations of the Constitution."[136]

And finally, it may not even be necessary to constitutionalize an environmental protection norm given the numerous statutory protections already in place[137] and generally favorable "cultural attitudes towards environmental protection."[138] Current constitutional design placing environmental regulatory

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131. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1700 (2014).

132. *Id.* at 1701.

133. Ledewitz, *supra* note 4, at 596–97.

134. *Id. See also id.* at 632 ("[A] reinvigorated [T]akings [C]lause in particular and an economic perspective on the Court in general seem absolutely antithetical to constitutional recognition of environmental protection.").

135. Hall, *supra* note 3, at 107. *See also* Kalen, *supra* note 37, at 160–61 (referencing Lynton Keith Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 U. ILL. L. REV. 319, 333–34 (1986) ("Lynton Caldwell wrote about how a stewardship ethic effectively collided with the assumption that society's function is promoting economic value. 'Environmental rights,' he observed, 'are inherently social rights, yet they have hitherto run a poor second to civil and human rights.'")); Klipsch, *supra* note 67, at 232 ("in *Tanner v. Armco Steel Corp.*, . . . the court concluded that constitutional litigation and the judicial process are ill-suited to solving problems of environmental control because of the delicate balance of competing social interests involved, because true solutions will require the application of specialized expertise, and because the inevitable tradeoffs between economic and ecological values should not be made through an ad hoc decision process.").

136. Ledewitz, *supra* note 4, at 620.

137. *Id.* at 592. Hall, *supra* note 3, at 106 ("[N]o such right is necessary because of the current breadth of environmental statutes and cultural attitudes towards environmental protection."). *See also* Gallagher, *supra* note 78, at 122 ("Dean Ottinger suspects that a constitutional amendment was not considered more carefully by Congress because Congress had already begun to pass landmark federal environmental legislation which would specifically address many of the environmental problems then in the forefront."). Indeed, some have argued that "Congress preferred to avoid exposing all environmental laws to constitutional interpretation by not adopting an amendment." *Id.* at 123.

138. Hall, *supra* note 3, at 106. *But see* Schlickeisen, *supra* note 6, at 184 ("Most disturbing are a suite of problems not targeted by the abovementioned legislation, most of which have arisen or been identified since the early 1970s. These involve more subtle, long-term ecological degradation. They include global warming, ozone depletion, industrial chemicals that enter the food chain and disrupt hormones in humans and other animals, and, perhaps most importantly, biodiversity loss, which is uniquely menacing because of its accelerating speed and irreversibility.").

authority within national and subnational jurisdictions might be "a structural form of environmental constitutionalism that may have as much, or more, impact than the protection of fundamental environmental rights within constitutional text,"[139] obviating the need for a constitutional norm.

Without question there are downsides to granting the environment some status in the Constitution, such as hostility toward increasing the power of the judiciary, creating an unenforceable constitutional right, creating internal tensions in the Constitution between potentially conflicting rights, creating a structural anomaly in the Constitution, undercutting the effectiveness of existing environmental laws, or imposing a heavy implementation burden on the courts. Nonetheless, the reasons favoring going ahead—principally the inability of any branch of the federal government, including the courts, to address and protect against the serious harms caused by global climate change, the opportunity to incorporate environmental concerns into constitutional deliberations involving the Takings Clause or standing doctrine, among others, the potential to block governmental actions in derogation of environmental protection, and the ability to educate the public about the importance of environmental protection—are sufficiently strong to warrant attempting to find a constitutional predicate for it.

It is true that no one has found an environmental protection norm in the Constitution, and indeed, "as far as the environment is concerned, 'the U.S. Constitution is silent.'"[140] On the other hand, the fact that supporters of this goal continue to strive for it regardless makes the issue seem like one that "[will] not go away," giving the repeated efforts some significance.[141] In fact, "there is no impediment in the political Constitution to the derivation of expansive constitutional rights, particularly at a time in which the future of humankind may be at stake," like in the case of climate change.[142]

The next Part of the Article provides further support for this endeavor by discussing how interpreting the Constitution to include an environmental protection right or duty is consistent with accepted theories of constitutional interpretation as well as with state constitutions and the constitutions of other nations, which include this norm.

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139. Hudson, *supra* note 105, at 202.

140. Ledewitz, *supra* note 4, at 606.

141. *Id.* at 607–08 ("On the one hand, the continuing serious interest in an amendment tends to show fundamental societal concern for constitutional protection of the environment. On the other hand, of course, the need for an amendment tends to suggest that no implication of the right is possible or coherent.").

142. Ledewitz, *supra* note 4, at 620.

IV. VARIOUS CONSTITUTIONAL THEORIES AS WELL AS STATE CONSTITUTIONS AND THE CONSTITUTIONS OF OTHER NATIONS SUPPORT A CONSTITUTIONALIZED NORM OF ENVIRONMENTAL PROTECTION

The dogmas of the quiet past are inadequate for the stormy present and future. As our circumstances are new, we must think anew, and act anew.

—Bruce Ledewitz[143]

This Part of the Article explores various interpretative approaches to constitutional text that allow for finding support for non-textual rights in the Constitution. Many of the rights we enjoy today, like the right to privacy, are not articulated in the Constitution, but exist because of an expansive interpretation of a textual constitutional right or sometimes of the Constitution as a whole. One reason for this practice is the influence on the Constitution of common law, a body of law that evolves in response to social needs often to fill gaps left by incomplete positive law. These interpretive approaches to text create a level of comfort with going beyond the written words to find an embedded environmental protection norm in the Constitution. The inclusion of an environmental protection norm in state constitutions and in the constitutions of other countries provide additional support for doing this.

A. A Non-Textual Constitutionalized Environmental Protection Norm Is Consistent with Various Constitutional Interpretive Theories

The Supreme Court plays a pivotal role in defining the scope of legal values as well as the pace that society establishes or preserves a normative value, like environmental protection.[144] In this role, the Court sometimes engages in judicial policymaking where it establishes a policy that it believes reflects sound public policy without any direct input from statutory text or general directions from Congress.

Arguments favoring more expansive and creative interpretations of constitutional provisions, such as the one urged on the reader below, require blurring the line between written and unwritten constitutions and relaxing notions of strict adherence to the text.

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143. *Id.* at 627 (quoting Marilyn C. Vernon & John W. Byrd, *Leadership in the 21st Century: New Roles for Federal Probation and Pretrial Services Chiefs*, 60 FED. PROB. 21, 27 (1996)).

144. Erich Webb Bailey, Comment, *Incorporating Ecological Ethics into Manifest Destiny: Sustainable Development, the Population Explosion, and the Tradition of Substantive Due Process*, 21 TUL. ENVTL. L.J. 473, 489 (2008) ("The history of the Supreme Court's selective incorporation of 'unenumerated' or negative rights into constitutional jurisprudence reveals a tension in the unique and powerful freedom the Supreme Court retains to define the legal scope of societal values, rights, and traditions."). *See also id.* ("To the extent that the Supreme Court's majority members perceive a reciprocal relationship between a particular issue and traditions deemed necessary to the American concept of 'ordered liberty,' the Supreme Court has the capacity to abandon or advance common values otherwise immune to the democratic process.").

> A society can do plenty of writing about legal rules that stay "unwritten"; it can describe its customary traditions in academic treatises, formularies, case reports, and so on, while the traditions themselves remain purely customary. What makes them so, as Blackstone put it, is that "their original institutions and authority are not set down in writing, as acts of parliament are," but they instead "receive their binding power, and the force of laws," simply by usage and reception.[145]

Professor Mark Tushnet contends that "the interpretive resources of American constitutional interpretation are sufficiently rich to support essentially any proposition about what the Constitution permits, requires, or prohibits."[146]

The "fiction of *Ex Parte Young*, the well-pleaded complaint rule, and the so-called *Bivens* action," are all examples of "judicial policymaking"; each reflects to some extent "the Court's view of sound public policy."[147] Professor Thomas Grey gives three additional examples where "courts have created (or found) independent constitutional rights with almost no textual guidance": (1) "the contemporary right of privacy, and the older liberty of contract"; (2) instances where "the courts have given general application to norms that the constitutional text explicitly applies in a more limited way," such as applying the Bill of Rights to the states under the due process clauses; and (3) where the extension or broadening of principles stated in the Constitution go beyond the normative content the Framers intended, citing as examples "the School Segregation Cases, and the extension of the [F]ourth [A]mendment to cover eavesdropping."[148] Professor Jeremy Waldron adds to the list by commenting that

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145. Stephen E. Sachs, *Originalism without Text*, 127 YALE L.J. 156, 160 (2017). *See also* Jeremy Waldron, *Are Constitutional Norms Legal Norms*, 75 FORDHAM L. REV. 1697, 1709 (2006) ("I have always found one of the most attractive features of Hart's jurisprudence to be his insistence that at the foundation of every legal system lie certain basic rules which work more like customs or conventions than like the enacted textual rules.").

146. Brendon Swedlow, *Reason for Hope? The Spotted Owl Injunctions and Policy Change*, 34 LAW & SOC. INQUIRY 825, 852 (2009). *See also* Stephen A. Siegel, *Textualism on Trial: Article III's Jury Trial Provision, the "Petty Offense" Exception, and Other Departures from Clear Constitutional Text*, 51 HOUS. L. REV. 89, 92 (2013) ("Mark Tushnet's recent discussion of 'constitutional workarounds,' which he describes as instances where '[f]inding some constitutional text obstructing our ability to reach a desired goal, we work around that text using other texts—and do so without (obviously) distorting the tools we use.'"); *see also id.* at 94 ("there are credible grounds for suspecting that our constitutional tradition includes a fair number of departures from clear constitutional mandate."). But, Mark Tushnet limits the circumstances in which these workarounds should occur, including "general agreement" that obstructing constitutional text is no longer sensible, to situations with "some substantial degree of bipartisan agreement" where the workaround "is constitutionally appropriate." Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1504 (2009). He notes that "true workarounds," which achieve a result that is inconsistent with another constitutional provision, gives the term workaround "a lightly seedy resonance." *Id.* at 1506.

147. Ledewitz, *supra* note 4, at 623.

148. Grey, *supra* note 111, at 713 n.46. Grey additionally argues that there is an advantage to placing a controversial case in the third group because one might plausibly argue that the "extension of a specific constitutional prohibition really involves only the application of old norms to changed facts, and not a change in the norms themselves." *Id.*

> [t]here is no mention in [the Constitution] of the party system, or of primary elections, yet these are indispensable features of the American political structure. There is no textual norm in the Constitution to the effect that members of the [E]lectoral [C]ollege should vote for the presidential candidate supported by the voters in their state; yet clearly this operates as a convention and as an important feature of our system of election to this crucial office.[149]

Thus, "it is not hard to identify important norms of the U.S. constitutional system" that "cannot be found in the text that we call 'The United States Constitution.'"[150]

> Although everyone agrees that the text is in some sense controlling, in practice constitutional law generally has little to do with the text. Most of the time, in deciding a constitutional issue, the text plays only a nominal role. The issue is decided by reference to 'doctrine'—an elaborate structure of precedents built up over time by the courts—and to considerations of morality and public policy.[151]

Judgments that are reflected in doctrine "embody not just serious thought by one group of people or even one generation, but the accumulated wisdom of many generations," and "reflect a kind of rough empiricism."[152] They are not based on "theoretical premises; rather, they have been tested over time, in a variety of circumstances, and have been found to be at least good enough."[153] In fact, constitutional text has not been the source of most of the important changes to the Constitution; rather, the impetus for these changes was either judicial decisions, fundamental political and social changes, or common law.[154] Constitutional change ultimately occurs over time, instead of all at once.[155] Although one might question "the wisdom and prudence of putting—or more

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149. Waldron, *supra* note 145, at 1711. *See also* Grey, *supra* note 111, at 713 ("While one might disagree with this rough catalogue on points of detail, it should be clear that an extraordinarily radical purge of established constitutional doctrine would be required if we candidly and consistently applied the pure interpretive model.").

150. Grey, *supra* note 111, at 717. *See also* Krotoszynski, Jr., *supra* note 113, at 948 ("*Winship* is particularly significant because no express constitutional provision requires observance of the reasonable doubt standard; the standard is a matter of longstanding tradition and state governments have almost uniformly observed it. The question faced by the Supreme Court was whether a longstanding practice had morphed into a freestanding, non-textual, constitutional right."). *See* 397 U.S. 358, 368 (1970).

151. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883 (1996); *see also* Siegel, *supra* note 146, at 93 ("Constitutional praxis evidently has different norms, and teaches different lessons, from constitutional theory.").

152. Strauss, *supra* note 151, at 891–92. *See also id.* at 892 (referring to this kind of traditionalism and saying "[it] also subsumes the common-sense notion that one reason for following precedent is that it is simply too time consuming and difficult to reexamine everything from the ground up").

153. *Id.* at 891–92. *See also id.* at 904 ("What matters to most constitutional debates, in and out of court, is the doctrine the courts have created, not the text."); *id.* at 904 n.68 (quoting Holmes's remark in *Missouri v. Holland*, 252 US 416, 433 (1920), "[t]he case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago"); *id.* at 877, 892.

154. *Id.* at 905.

155. *Id.* at 884 ("Most of the great revolutions in American constitutionalism have taken place without any authorizing or triggering constitutional amendment.").

accurately leaving—in the hands of judges the considerable power to define and enforce fundamental human rights without substantial guidance from constitutional text and history,"[156] Grey notes that "constitutional commentators from Alexander Hamilton to Alexander Bickel" concluded that it made "some sense to give the final—or nearly final—say over the barrier between state and individual to the 'least dangerous branch,' the one that possesses neither purse nor sword."[157]

While one of the achievements of the Constitution "was the reduction to written form—and hence to positive law—of some of the principles of natural law," it was recognized simultaneously that any written constitution could not "codify" higher law.[158] The Ninth Amendment is the "textual expression" of the concept that there were unrecorded "principles of higher law" at the time the Constitution was written.[159] More recently, constitutional rights, like the right of privacy and the right to travel, have not been derived from the Constitution's text, nor based on "the natural-rights tradition of the [F]ounding [F]athers."[160] More accurately, constitutional rights' "rhetorical reference points are the Anglo-American tradition and basic American ideals, rather than human nature, the social contract, or the rights of man."[161] Given this, Professor David Strauss wonders why we seem to have settled so heavily on the Constitution's text.[162] He answers by saying that although the answer is "multifaceted," there are two things that appear particularly important: "One is the specific way in which the Constitution was drafted; the other is the special status that the Constitution has in the American political culture," giving the text special importance.[163] Strauss additionally notes that there are "seldom . . . strong reasons to reject the text overtly; instead we can reinterpret it, within the boundaries of ordinary linguistic understandings, to reach a morally acceptable conclusion."[164] This approach toward text would appear to allow, at least, for interpreting the *edges* of

156. Grey, *supra* note 111, at 714.

157. *Id. But see id.* (questioning this conclusion and saying "one can ask the jurisprudential question whether as a general matter the defining and enforcing of basic rights without external textual guidance is essentially a judicial task").

158. *Id.* at 715–16.

159. *Id.* at 716.

160. *Id.* at 717.

161. *Id. See also id.* ("But it is the modern offspring, in a direct and traceable line of legitimate descent, of the natural-rights tradition that is so deeply embedded in our constitutional origins.").

162. Strauss, *supra* note 151, at 914. *See also* Sachs, *supra* note 145, at 168 ("A society might use written legal instruments without using them in a particularly originalist way. And the converse is also true: you can have a bona fide originalism in a society that uses no written instruments at all. Which of the two, if either, appears in a given society is a matter of empirics, not of definition. If that's right, then much of the constitutional theory of the past few decades—theory that's placed crucial weight on concepts of writtenness—might need to be rewritten.").

163. Strauss, *supra* note 151, at 914.

164. *Id.*

constitutional text as long as common understandings are not transgressed and the conclusion is deemed morally acceptable by a consensus of the population.[165]

One force for interpretive growth of the Constitution has been the document's relationship to common law.[166] It was a standard nineteenth-century interpretive approach to the Constitution, which continued into the twentieth century,[167] to read common law norms into the Constitution.[168] For Strauss, modern U.S. constitutional law "represents a flowering of the common law tradition."[169]

Common law evolves in response to changes in society and in society's needs, and thus functions "as a window into that community's ever adjusting and presumably 'shared' values."[170] It reflects "changing societal behavioral norms," which courts "canvas" and then use to justify adjusting society's rules.[171] Using the common law as a surrogate for contemporary observance, "[o]ur common law heritage equally demonstrates how arresting environmental threats is unmistakably infused into our legal fabric."[172]

The common law approach "accepts, without apology, that we depart from past understandings, and that we are often creative in interpreting the text."[173]

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165. *Id.* at 915–16 (quoting THE FEDERALIST NO. 49 (James Madison) ("When the examples which fortify opinion are *ancient* as well as *numerous*, they are known to have a double effect. . . . [T]he most rational government will not find it a superfluous advantage to have the prejudices of the community on its side.")).

166. *Id.* at 935 ("Gradual innovation, in the hope of improvement, has always been a part of the common law tradition, as it has been a part of American constitutionalism."). *See also id.* at 879 ("This form of traditionalism, characteristic of the common law method, calls for recognizing the value of conclusions that have been arrived at, over time, by an evolutionary process; . . .").

167. Siegel, *supra* note 146, at 108 n.89 (2013) (referencing *Schick v. United States*, 195 U.S. 65, 69 (1904)).

168. *Id.* at 108. *See also* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 549–50 (1999) (arguing that normative constitutional theorists converge on advancing three principal values—justice, the rule of law, and democracy); *see generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (arguing that valid legal principles are derived from a moralistic interpretive process).

169. Strauss, *supra* note 151, at 887. Strauss notes in addition that "[i]n some of these instances—notably the expansion of the congressional commerce power and the enforcement of gender equality—amendments bringing about the changes were actually rejected, but the changes occurred anyway." *Id.* at 884.

170. Kalen, *supra* note 37, at 173. *See also* Strauss, *supra* note 151, at 929 ("[P]rinciples developed through the common law method are not likely to stay out of line for long with views that are widely and durably held in the society.").

171. Kalen, *supra* note 37, at 172. Fundamental liberty interests, including the right to marry and reproduce, have also emerged through the common law process, particularly where the Court has found the rights engrained in the nation's history and tradition or essential to the pursuit of happiness. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding that freedom to marry is essential to the pursuit of happiness); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding that the right to procreate is fundamental to the survival of the species); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (describing liberty as the freedom to partake in activities "essential to the orderly pursuit of happiness") (cited in Michael O'Loughlin, Note, *Understanding the Public Trust Doctrine Through Due Process*, 58 B.C. L. REV. 1321, 1329 n.59 (2017)).

172. Kalen, *supra* note 37, at 172.

173. Strauss, *supra* note 151, at 934–35.

Under that approach, courts identify "what is truly at stake" in a dispute and determine whether, in an effort to "make the law fairer or more just," a court should depart from long-held understandings.[174] Grey reasons: "If common law development is an appropriate judicial function, falling within the traditionally accepted judicial role, is not the functionally similar case-by-case development of constitutional norms appropriate as well?"[175]

On the other hand, the first component of common law constitutional interpretation "is traditionalist. The central idea is that the Constitution should be followed because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances. The second component is conventionalist."[176] In other words, courts "should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time."[177] A shorthand way of explaining the pull of relying on tradition in interpreting the Constitution is that it is nothing more than giving "the benefit of the doubt to past practices."[178] Neither of these ideologies favor an interpretation that finds an environmental protection norm somehow embedded in the Constitution: an environmental protection norm neither reflects the judgment of past generations nor is it conventional in any way. And, while courts, in common law cases, "occasionally employ 'rights' language when indicating that citizens are entitled to a healthy environment," they will frequently balance any equity that "tolerates economic progress"[179] against those rights. Further, common law claims alleging threatened injuries from global climate change and seeking remedial action have had a "spotty record"[180] in the courts, at best.

Interpretative flexibility, moreover, does not mean the Constitution can be read to mean anything at any specific moment; some interpretive propositions will be "off-the-wall" and others not "legally credible."[181] While a "neutral and durable principle may be a thing of beauty and a joy forever," "if it lacks

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174. *Id.* at 935.

175. Grey, *supra* note 111, at 715.

176. Strauss, *supra* note 151, at 891.

177. *Id.*

178. *Id.* at 895. *See also id.* at 891 ("traditionalism . . . based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience"); *but see* Waldron, *supra* note 145, at 1701 ("[W]e call something an element of positive morality precisely because it is regarded by an 'aggregate of persons' with 'a sentiment of aversion or liking.'").

179. Kalen*, supra* note 37, at 173–74.

180. *Id.* at 174. *See, e.g.*, Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014) (holding that a claim asserting that public trust doctrine imposes affirmative duty on federal government to abate harm caused by climate change lacked federal subject matter jurisdiction), *cert. denied*, 135 S. Ct. 774 (2014); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012) (holding that the Clean Air Act displaced Kivalina's claim for common law nuisance damages). *But see* Juliana v. United States, 217 F. Supp. 3d 1224, 1276 (D. Or. 2016) (allowing claim that government's failure to abate climate change has violated plaintiffs' rights to life, liberty, and property and violated public trust doctrine to go forward).

181. Swedlow, *supra* note 146, at 852.

connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."[182] Professor of Political Science Brendon Swedlow responds that even if the proposition is "'off-the-wall,'" it can become "'legally credible'" if there is political or cultural support for it—"[t]he key thing, . . . is that the interpretations have to be *accepted* by lawyers and judges and ultimately by the broader political world. 'Acceptance depends on a favorable political environment . . . and the resources to exploit the opportunities that environment provides.'"[183]

Strauss observes that change in constitutional doctrine only occurs after "the groundwork" for such a change has been laid: when "either the old doctrine proved unstable on its own terms, or changes in society made it seem wrong," and when the new doctrine was grounded, mostly, "on considerations of policy and social justice."[184] If that observation is correct, then the question is whether sufficient "groundwork" has been laid to support constitutionalizing an environmental protection norm. The next subpart discusses how most U.S. states and most countries have included an environmental protection norm in their constitutions, and how that experience might constitute adequate groundwork to justify the norm's inclusion in the U.S. Constitution.

B. Most States and Other Countries Have Constitutionalized a Norm of Environmental Protection

With respect to the inclusion of an environmental protection right or duty, the Federal Constitution is out of step with its state counterparts and with most of the constitutions of other nations. This subpart discusses both circumstances.

Since the formation of the United States, "Americans have written one [F]ederal Constitution and 149 state constitutions."[185] The majority of these state constitutions "contain positive rights, such as a right to free education, labor rights, social welfare rights, and environmental rights."[186] Therefore, positive rights are not "foreign to the American *constitutional tradition*."[187] An

182. Grey, *supra* note 111, at 704 (quoting John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973)).

183. Swedlow, *supra* note 146, at 852.

184. Strauss, *supra* note 151, at 905. Grey raises a deeper question and that is whether "a 'fundamental law' judicially enforced in a climate of historical and cultural relativism [is] the legitimate offspring of a fundamental law which its exponents felt expressed rationally demonstrable, universal, and immutable human rights?" Grey, *supra* note 111, at 718.

185. Versteeg & Zackin, *supra* note 131, at 1705. The authors add that there have been "twenty-seven amendments to the [F]ederal Constitution and thousands of amendments to. . . . [U.S.] state constitutions." *Id.*

186. *Id.* at 1645. *See also id.* at 1683 (citing PA. CONST. art. 1, § 27) ("As of 2012, thirty state constitutions included one or more provisions requiring the government to care for the poor or the disabled; eleven required the state to set minimum wages or a maximum workday; sixteen protected the right to unionize; nine required the government to regulate workplace safety; and fourteen protected the right to a clean and healthy natural environment.").

187. *Id.* at 1645.

environmental right is a positive right, and thus it is no surprise to find that state "constitutions historically [have] recognized rights to water, fisheries, and other resources," some even adding environmental quality to "the list of fundamentals" more recently.[188] A 1996 survey found that only eighteen state constitutions do not contain at least one substantive environmental provision.[189] Many of the western states have "enshrine[d] water rights in their constitutions."[190] Professors Mila Versteeg and Emily Zackin conjecture that the first Earth Day, in 1970, may have prompted several state legislatures to add environmental rights provisions to their constitutions.[191]

"The expanding scope of [state] constitutions is commonly associated with growth in the scope of governments' responsibilities . . . and decreased restrictions on government."[192] Since increasing governmental responsibilities does not always lead to restrained government,[193] constitutions are frequently drafted "with the express intention of limiting government discretion" by constraining legislative policy choices.[194] Sometimes, states will even include specific instructions in their constitutions about how they want provisions to be interpreted and implemented.[195] Thus, by converting a wide range of topics into state constitutional matters, "popular majorities have attempted to maintain

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188. Kalen, *supra* note 37, at 181–82 (listing as examples Florida, Illinois, Michigan, New York, Pennsylvania, Rhode Island, and Virginia). *See also* Versteeg & Zackin, *supra* note 131, at 1691 n.212 (quoting PA CONST. art I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic[,] and esthetic values of the environment.")); *In re* Maui Elec. Co., 408 P.3d 1, 23 (Haw. 2017) (The Hawai'i Supreme Court ruled that the Sierra Club and its members had asserted a property interest in a clean and healthful environment, protectable under the Hawai'i Constitution's due process clause).

189. Gallagher, *supra* note 78, at 131. *See also id.* at 132 ("State provisions fall into three main categories: public access and use provisions, policy statements, and individual rights (to a clean or healthful environment or a similar right).").

190. Versteeg & Zackin, *supra* note 131, at 1683–84. *See also id.* at 1659 (noting that both state constitutions and the constitutions of other countries have expanded to include "fiscal policy and economic development, management of natural resources, and matters of cultural significance and citizen character"); *id.* at 1681 ("A cursory glance at the world's constitutions reveals that an overwhelming majority *do* contain explicit socioeconomic rights, such as the right to education, health care, housing, social security, work, workplace safety, water, and food.").

191. *Id.* at 1692.

192. *Id.* at 1660–61. The authors note that this second point is particularly intuitive in the context of the U.S. Constitution, "which, as a document of enumerated powers, has long been understood to deprive the federal government of a wide range of powers simply by declining to address them," and might reflect the fact that constitutional constraints on government have been relaxed. *See id.* at 1661

193. *Id.* at 1661 ("Yet governments with more responsibilities are not necessarily unconstrained governments. Increased constitutional scope does not automatically track increased government discretion.").

194. Versteeg & Zackin, *supra* note 131, at 1661. *See also id.* at 1662 ("[C]onstitutional drafters may increase constitutional scope in order to limit governmental discretion."); *id.* at 1662 ("In some cases, constitutional expansion has constrained government not by forcing it to accept new responsibilities, but by expressly prohibiting the adoption of particular policies. For instance, constitution makers at both the state and national level have often used constitutions to correct or preempt certain government behaviors regarding fiscal and economic behavior.").

195. *Id.* at 1667.

better control over their officeholders, forcing legislatures to take on important social roles and preventing those legislatures from repeating disastrous policy choices."[196] As discussed earlier, the inclusion of an environmental protection norm in the Federal Constitution would help citizens persuade federal officeholders to abate the adverse effects of climate change and prevent initiatives to increase those effects.[197] It might also induce Congress to become positively proactive on the topic of climate change.[198]

Not only is the Federal Constitution anomalous when it comes to state constitutions with respect to the inclusion of an environmental protection norm, it is also an anomaly in the world community. Including the emerging Eastern European democracies, "virtually every constitution adopted or revised since 1970 . . . either state[s] the principle that an environment of a specified quality constitutes a human right or impose[s] environmental duties upon the state."[199] The right to a healthy environment follows the right to strike and unionize as among the most common provisions found in the world's constitutions.[200] Ninety-two countries have determined that this right warrants constitutional status since the mid-1970s.[201] Even in countries with constitutions that "merely enshrine negative rights," those constitutions "commonly recognize positive governmental obligations that flow from these negative obligations," and that "governments can violate negative-rights clauses by not acting or by failing to prevent rights abuses by private citizens."[202]

In a recent decision, the High Court of Ireland, in *Friends of the Irish Environment CLG v. Fingal County Council*, declined to give petitioners the specific relief they wanted, but recognized a new constitutional right to the environment in the country's constitution as consistent with the human dignity and well-being of citizens at large, saying,

> [a] right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be

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196. *Id.* Versteeg and Zackin acknowledge that many reject state constitutions as a model because they "are so different in form and function from the national Constitution," and that the breadth of their scope, "elaborate detail, and frequent revision" make them seem more like laws and less "constitutional," but argue that it may be "time to revisit and revise this conclusion" because the "features of state constitutions that have drawn such derision from American legal scholars are standard features of constitutions around the world." *Id.* at 1706.

197. *See supra* pp. 113–17 (discussing effect of including an environmental protection norm in the Constitution).

198. *Id.*

199. Ledewitz, *supra* note 4, at 604. *See also id* at 601 ("The existence and use of environmental rights internationally suggests that such rights can be a matter of practical constitutional interpretation.").

200. Versteeg & Zackin, *supra* note 131, at 1685. *See also* Boyd, *supra* note 94, at 5 ("Portugal (in 1976) and Spain (1978) were the first countries to include the right to a healthy environment in their constitutions.").

201. Boyd, *supra* note 94, at 5.

202. Versteeg & Zackin, *supra* note 131, at 1682.

> seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution.[203]

The Norwegian constitution grants every person "a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained" and directs that "[n]atural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well."[204] Section twenty-four (1996) of the Constitution of the Republic of South Africa states that "[e]veryone has the right (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations[.]"[205]

The effect of these constitutional provisions has been to strengthen environmental laws in seventy-eight out of the ninety-two countries that adopted them.[206] Some countries with a constitutional right to a healthy environment have used it to close gaps in their environmental laws. Professor David Boyd cites Costa Rica and Nepal as examples of countries with an environmental protection norm in their constitutions whose courts ordered their governments to enact laws and regulations to protect fisheries and lessen air pollution.[207] Courts in these countries "have consistently held that laws, regulations, and administrative actions that violate the constitutional right to a healthy environment will be struck down."[208]

The practical impact in countries with these constitutional provisions is that they have "smaller ecological footprints" and have "made faster progress in reducing emissions of sulfur dioxide, nitrogen oxides, and greenhouse gases than nations without such provisions."[209] According to Versteeg and Zackin, the socioeconomic rights, like rights to a healthy environment and to education, found both in state constitutions and the constitutions of other countries, have forced "those governments to enact reforms that the political and economic environment might render particularly challenging to achieve."[210]

Boyd argues that "when the consistent relationship between constitutional provisions and superior environmental performance is combined with the evidence of stronger environmental legislation, enhanced opportunities for

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203. Friends of the Irish Environment CLG v. Fingal County Council [2017] IEHC 695 (H. Ct.) (Ir.).

204. *Model Provisions and Statute*, *supra* note 44, at 3.

205. *See* Versteeg & Zackin, *supra* note 131, at 1691 n.212.

206. Boyd, *supra* note 94, at 5 ("Laws were amended to specifically focus on environmental rights, as well as access to environmental information, participation in decision making, and access to justice.").

207. *Id.* at 7. *See also id.* at 8 ("Courts have ruled that the constitutional right to a healthy environment imposes three duties upon government: to respect the right by not infringing it through state action; to protect the right from infringement by third parties (which may require regulations, implementation, and enforcement); and to take actions to fulfill the right (e.g., by providing services including clean water, sanitation, and waste management.")).

208. Boyd, *supra* note 94, at 8.

209. *Id.* at 11.

210. Versteeg & Zackin, *supra* note 131, at 1699.

public participation in environmental governance, and increasing enforcement of environmental laws, the case for entrenching environmental protection in national constitutions must be regarded as compelling."[211] Yet, the Supreme Court has interpreted the United States' Constitution as not including positive rights, let alone "a requirement that the government take affirmative action to protect recognized *negative* rights."[212] The Court "has rejected constitutional claims to housing, to public education, and to medical services, on the view that the government does not owe its citizens any affirmative duty of care."[213]

The fact that so many states and countries recognize a right to a healthy environment, or something equivalent to that, makes it harder to dismiss the recognition of such a right under the Federal Constitution "as a merely subjective judgment."[214] Kalen comments that the "international community's emerging dialogue surrounding a human right to water, or a right to survive the effects of rising sea levels that threaten an entire community and culture's existence, offers an apropos moment for reflecting on how such rights might become cemented within our constitutional fabric."[215] The only remaining task for this Article then is to find a textual or extratextual constitutional home for it in the Constitution. Accordingly, the next and final Part of the Article turns to that task.

V. A CONSTITUTIONAL HOME FOR AN ENVIRONMENTAL PROTECTION RIGHT OR DUTY

> *On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please.*
>
> —Thomas Jefferson[216]

211. Boyd, *supra* note 94, at 8.

212. Versteeg & Zackin, *supra* note 131, at 1681. The U.S. Constitution "stand[s] out as 'a charter of negative rather than positive liberties.'" *Id.* at 1682.

213. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1133 & nn.2–5 (1999) (cited in Versteeg & Zackin, *supra* note 131, at 1681 n.179 (citations omitted)). *See also* DeShaney v. Winnebago Cty. Dep't of Soc. Services, 489 U.S. 189, 196 (1989) (no "affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual" can be found in the Due Process Clauses).

214. Ledewitz, *supra* note 4, at 601.

215. Kalen, *supra* note 37, at 171–72; Ledewitz, *supra* note 4, at 600–01 (To the extent the United States does not recognize an environmental right or acts in contravention of that right, when so many other countries recognize it, creates an impression that the United States "is seeking its own advantage as the world's wealthiest nation").

216. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, at 392, 396 (Julian P. Boyd ed., 1958).

Some scholars have proposed amending the Constitution to add an environmental protection right or duty.[217] Because of the low likelihood of success for such an initiative in the current political environment, this Article investigates whether the same result could be achieved through judicial interpretation of constitutional text.[218] More specifically, this Part examines the possibility that the Substantive Due Process and Equal Protection Clauses, the Ninth Amendment, or other rights guaranteed by the Bill of Rights might individually or collectively provide a possible base for an environmental protection norm, as well as whether there are extratextual rationales for it. This Part opens with a discussion of what an environmental protection right or duty might look like before determining whether it could fit into one of the homes identified above.

A. What an Interpretative Constitutional Environmental Protection Norm Might Look Like

An interpretive norm can be functional—its principal purpose to change how government operates, prohibit specific governmental activity, create new or affirm existing rights, or merely express an aspirational goal.[219] Alternatively, its primary purpose may be to define relationships between or within various government entities, between the government and citizens, or relationships between citizens.[220] Regardless of its purpose, if the interpretive norm, whether in the form of a right or a duty, is to survive, it must be "socially acceptable and institutionally necessary," as well as implementable by political and legal institutions.[221] The interpretations must be reducible to binding legal principles, "sufficiently clear to minimize unanticipated interpretations," and "enduring even in the face of shifting political climates."[222] The question remains even after application of these filters whether interpreting the Constitution to include an environmental protection right or duty would be such an "outlier" interpretation as to warrant "extreme caution."[223] Ruhl appears to put the right to a clean

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217. *See* Ruhl, *supra* note 3, at 249 n.14 (listing and critiquing some of those articles).

218. The low likelihood of amending the Constitution in the present fractious political environment makes Professor Tushnet's "workaround" theory particularly appealing as an alternative to "*amending* the Constitution without altering its text, in the same family as judicial interpretation and 'constitutional moments.'" Tushnet, *supra* note 146, at 1510.

219. Ruhl, *supra* note 3, at 253. Although Ruhl is discussing constitutional amendments and using a biaxial matrix to evaluate those amendments, the matrix and discussion are a useful way of thinking about interpreting the Constitution. He notes that very few amendments have an aspirational function or address the citizen-citizen relation target, and none does both, *i.e.* "establish aspirations for citizen-citizen relations." *Id.*

220. *Id.*

221. *Id.* at 264 (explaining how "it does not seem unreasonable to ask of any proposed social policy amendment whether it is socially acceptable and institutionally necessary"). Ruhl refers to these qualifications as "filters." *Id.*

222. *Id.*

223. *Id.* at 261 ("Hence, while I do not go so far as to suggest we should disqualify proposed outlier amendments per se, I believe the history of the existing amendments forcefully supports the case that we

environment in that outlier category, commenting that "other rights of a free society . . . are already constitutive 'givens' for society."[224]

The effect of these "filters" is to narrow down substantially what such a right or duty might look like. According to Ruhl, only those that are "the most accepted, important, necessary, enforceable, clear, and enduring need apply for a position in the Constitution."[225] Ruhl notes that most of the existing amendments to the Constitution are "prohibitory" in nature, so to the extent rights are established, they are established by "negative implication," pointing to all or parts of the Second, Third, Fourth, Eighth, and Ninth Amendments, as well as those parts of the Fourteenth Amendment incorporating due process rights against the states, to prove his point.[226] So an environmental protection norm added to the Constitution by interpretation, just like an amendment, must be drafted in a way that fits comfortably in the dominant pattern. Accepting Ruhl's statement, any interpretive norm would be best stated either as a specific right that cannot be violated, like the Ninth Amendment, or a prohibition against something negative happening to protected individuals, like the Tenth Amendment, with the government as the implied actor. An open-ended right or duty would not fit.

Since any amendment or interpretation of the Constitution "is a profoundly political question," there must be a sufficiently large segment of society that believes in the message conveyed by the proposal—large enough to approach consensus, even if the majority of people are indifferent to it, and broad and deep enough to avoid the appearance of a faction or special interest group.[227] Since the principal function of any text, let alone constitutional text, is to offer "a ready-made solution that is acceptable to everyone," an interpretation of the text that struck most people as contrived would subvert the text's function.[228] When consensus for an interpretation is lacking, the interpretation is premature.[229]

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should approach future outlier proposals with extreme caution."). *See also id.* ("But the fact that we have stayed on a path away from outlier amendments, whether that has been by deliberate policy or by accident, makes the case for staying on that path more powerful.").

224. *Id.* at 264.

225. *Id.* at 255.

226. *Id.* at 257–58. Additionally, Ruhl notes that although the Sixth, Seventh, and Tenth Amendments were considered to have embodied pre-existing rights at the time of ratification, their texts "purport to create or affirm rights." *Id.* at 258.

227. *Id.* at 265–66. *See also* Strauss, *supra* note 151, at 907 n.72 (quoting JOHN RAWLS, POLITICAL LIBERALISM 134–40 (1993) and saying "[i]t is crucial to Rawls's idea that the political conception is willingly affirmed by the holders of different comprehensive views, as fully consistent with their comprehensive views").

228. Strauss, *supra* note 151, at 913.

229. Kalen, *supra* note 37, at 186 n.109 (citing Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 198 (2003) ("[Thompson] concludes, however, that it is premature to establish such a right before a sufficient consensus emerges.")). *See also* Ruhl, *supra* note 3, at 265–66 ("An amendment made possible by the majority's indifference, or born of revolutionary zeal, may present unanticipated political turmoil after ratification when its support is tested by the realities of implementation."). Ruhl discounts the urgency behind the push by environmentalists to amend the Constitution as little more than a "political

Kalen has just this concern about a constitutionalized environmental norm—he worries that there may be a lack of "social consensus on the general goal of a 'healthful environment.'"[230] While this may be true with respect to such a general goal, in part because of the difficulty of giving context to that goal, this Article argues that the discrete issue of global climate change, because both its impacts and potential remedies are broadly understood by the vast majority of people, as discussed in Part I, has social consensus.

Additionally, any change to the Constitution, either through interpretation or amendment, must be capable of being implemented. To be implementable, according to Ruhl, any interpretation creating an environmental protection norm must be enforceable, clear, and durable.[231] Without some means of enforcing the norm, it may dissolve "into aspirational emptiness . . . ultimately losing its constitutive impact."[232] Although "[n]o purely aspirational expressions exist in any amendments to the Constitution,"[233] Kalen believes that there is room for an aspirational right in the Constitution, one that fosters community values and "expresses a vision for a value that has emerged through our democratic process."[234] He notes that Sax "captured this idea when he expressed how an environmental right furthers the ideals of a democratic society founded on principles of self-government."[235] Theoretically, citizens consent to live in a society that imposes limits on them, in exchange for which society has an "affirmative obligation to do what it can to maintain a 'minimal level of substantive protection.'"[236] The argument here is that society has an obligation to protect its members from environmental harm. Thus, an aspirational environmental right, like an aspirational "right to personal security, personal freedom, basic protections against poverty, or emergency medical assistance" reflects "our society's appreciation for the fundamental role the environment plays in the health and welfare of individuals."[237]

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rumble" and not a "matter of institutional structure that can only be solved through an amendment to the Constitution." *Id.* at 272–75.

230. Kalen, *supra* note 37, at 185–86 (quoting Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance,* 27 RUTGERS L.J. 863, 898 (1996)) ("Professor Thompson suggests that recognizing an environmental right is more problematic than other constitutional rights because of a lack of 'societal consensus on the general goals of a 'healthful environment.''")). Thompson adds, according to Kalen, that natural resource issues may "present a slightly stronger process justification for a constitutional provision than pollution issues present." Thompson, Jr., *supra* at 899.

231. Ruhl, *supra* note 3, at 275.

232. *Id. See also* Hudson, *supra* note 105, at 214. *But see* Kalen, *supra* note 37, at 192 ("[A]n aspirational right to a healthy environment can be enforced judicially through traditional balancing.").

233. Ruhl, *supra* note 3, at 258 ("[T]he absence of aspirational text in the United States Constitution is one of its defining characteristics.").

234. Kalen, *supra* note 37, at 190.

235. *Id.*

236. *Id.*

237. *Id.*

The terms of any norm must also be definable, the parameters of any prohibitions must be sufficiently clear, and any expression of rights capable of being translated into enforcement methods.[238] An interpretation that does not clearly describe the right or duty could "lead to unintended interpretations and applications."[239] Clarity and durability also relate to enforceability because, as noted above, an unclear norm cannot be enforced.

This is all fine on a meta plane. However, as Kalen notes, the "proverbial Devil . . . lurks behind any conversation about the details of what precisely it means to have a right."[240] For example, to whom does the right belong, is the right a "positive or negative one," and against whom may the right be claimed; alternatively, which entity has an obligation to respect such a right?[241] The definitional problems associated with a norm that merely imposes duties on others may share some of the same problems when defining a "healthy" environment. However, to the extent that executive agencies have determined standards for a "healthy" environment, that determination could be folded into the government's duty to protect individuals from any harm that might result from a drop below that set level.

There is also an obvious tension between wanting to make a text sufficiently permanent and stable and not imposing one generation's social norms onto future generations, which might lead to "grave mistakes."[242] The "key . . . is to decide which objects of government are permanent and which are not, and then devise a text that captures the appropriate balance between stability and flexibility."[243] Protecting the world from the adverse effects of climate change is rapidly becoming a goal of the present generation and, since future generations will be the most affected if climate change is not averted or mitigated, there should be little, if any, subversion of those future interests by the creation now of an enforceable right or duty in the Constitution to protect them.

With this guidance in mind, the next subpart turns to where an environmental norm might fit in the Constitution.

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238. Ruhl, *supra* note 3, at 276.

239. *Id.* at 278. *See also* Hall, *supra* note 3, at 109 (noting his belief that such a right may be "carefully described").

240. Kalen, *supra* note 37, at 187.

241. *Id.* Kalen provides a partial answer—"a right to a healthy environment embraces the characteristics of both negative and positive rights—and, as such, I call it a transcendent aspirational right." *Id.* at 188.

242. Ruhl, *supra* note 3, at 279 ("the text of an amendment must balance between stability and flexibility with respect to the future"). *See also id.* ("An amendment's ability to freeze social policy into future generations makes it an attractive source of permanence.").

243. *Id.* (quoting JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES 92 (1994)); *see also* Versteeg & Zackin, *supra* note 131, at 1669 ("[T]he US Constitution and the politics surrounding it are characterized by an unusual degree of concern for the document's stability. This mindset is reflected in a pervasive veneration of the Constitution's origins and in Americans' general reluctance to alter it.").

B. Where an Interpretative Environmental Protection Norm Might Fit in the Constitution

Professor Ronald Klipsch identifies two potential approaches to finding constitutional support for environmental rights: one would be to find them in individual constitutional guarantees, such as in the Due Process and Equal Protection Clauses; the other would be to find that the entire Constitution provides a source for them.[244] He prefers the approach in which each constitutional guarantee is viewed independently because it is more consistent with traditional analysis and because the "right would bear a traditional name," like a due process violation, instead of finding that an untethered environmental right had somehow been infringed.[245] He notes, however, that the narrowness of this approach would "foreclose any broad rights for the preservation of ecosystems."[246] The second approach, which looks to the "Constitution as a whole, including the [P]reamble," would be broader and thus "more consistent with the rights sought by ecologists."[247]

Ledewitz sees the Constitution as "a kind of intergenerational deal we make with ourselves," in which "extraordinary majorities of the past have the power to trump contemporary majorities."[248] He adds that an even "more meaningful way to think about this, especially since the [F]ramers no doubt thought that being bound by the Constitution was beneficial for future generations, is to treat the Constitution as an intra-family relationship."[249]

This subpart, following Klipsch's approach, first looks at various provisions of the Constitution to see if one or more of them might include an environmental protection right or duty, such that its breach would violate specific constitutional text.[250] It then looks at the Constitution as a whole to see if collectively the document supports an environmental protection norm and thus can be the source of an individual right to protection from environmental harm or an affirmative duty on the government to respect and protect it.

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244. Klipsch, *supra* note 67, at 210.

245. *Id.*

246. *Id.*

247. *Id.* at 210–11. *See also* Hall, *supra* note 3, at 108 ("The U.S. Constitution secures the right to a basic level of environmental quality needed for the exercise of all other constitutional rights."); *id*. at 109 ("A constitutional right to a minimal environment would be fundamental and deeply rooted within the United States because otherwise no constitutional protections would be secured.").

248. Ledewitz, *supra* note 4, at 661. *See also id.* at 662 ("That kind of contract-sounding language—third party beneficiaries and consideration and so forth—is one way to think of the rights of future generations under the Constitution.").

249. *Id.* at 662.

250. Tushnet's "workaround" theory flags workarounds of constitutional provisions that "reflect such deep commitments" that are "truly basic to the Constitution" as potentially "worrisome." Tushnet, *supra* note 146, at 1507. He terms these commitments as making up what he calls the "thin Constitution," as opposed to the "thick Constitution," which includes its organizational details. *Id.* at 1507. Each of the provisions discussed in this Part are part of Tushnet's "thin Constitution." Yet even these provisions may be worked around when there is sufficient will to do that. *Id.* at 1514.

1. The Due Process Clause

The most likely home for an interpretive environmental protection norm is the Due Process Clause of the Fifth Amendment. Since the turn of the last century, courts have used the due process clauses of both the Fifth and Fourteenth Amendments "as a constitutional reservoir of values to support a broad spectrum of limitations upon conduct-regulating and enforcement policies of the state and national governments."[251] The Supreme Court, in its first attempt at construing the Fifth Amendment Due Process Clause, stated that the phrase due process "conveyed the same meaning as the phrase 'law of the land' as used in the Magna Carta six and a half centuries earlier."[252]

A positive feature of the Due Process Clause for purposes of this analysis is its ability to adapt to changing times.[253] Constitutional principles are generally dynamic.[254] This dynamic feature of constitutional rights, including the Due Process Clause, appears particularly suited for "some latent 'right' to a healthy environment."[255] As Professor Caleb Hall says, "[t]o argue that due process does not encompass some yet unforeseen right because of history alone uses the same logic that denies the existence of substantive due process itself."[256]

The Due Process Clause constrains "law-making and guards against arbitrary or irrational government intrusions into protected rights. As such, it serves as one of the primary checks on state exercise of the police power."[257] When the challenged governmental action has a "proper public purpose, such as serving the public health, safety, morals, or general welfare," government action

251. Klipsch, *supra* note 67, at 222.

252. O'Loughlin, *supra* note 171, at 1326 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856)).

253. J.Y.P., Jr., *supra* note 77, at 465–66 (arguing that "the Supreme Court has demonstrated increasing receptiveness to a generalized 'right to be let alone,'" and that "the evolving character of the 'right to be let alone' suggests that due process is not a static concept"). The author of the Note uses as an example the willingness of the Court to recognize a "right to be let alone" as a base to expand the individual's aura of constitutional protection to include the integrity of his natural surroundings. *Id. See also* Hall, *supra* note 3, at 94 ("After *Lochner*, the field of rights protected by substantive due process continued to expand.").

254. Kalen*, supra* note 37, at 167 ("Constitutional principles, moreover, are dynamic—regardless of whether one ascribes to a living Constitution theory.").

255. *Id*. at 170.

256. Hall, *supra* note 3, at 100. *See also* Versteeg & Zackin, *supra* note 131, at 1666 (noting that "case studies have found that the drafters of both the Canadian Charter of Rights and Freedoms and the Indian Constitution deliberately avoided the term 'due process of law' for fear that it would provide overly broad discretion to the judiciary, opting instead for more specific language"); Ledewitz, *supra* note 4, at 589 (John Hart Ely "says the dispute is between 'interpretivism,' which holds that 'judges . . . should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution,' and 'noninterpretivism,' which holds that 'courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.' Substantive due process is associated with noninterpretivism.").

257. O'Loughlin, *supra* note 171, at 1327. *See also* Hall, *supra* note 3, at 93 ("[S]ubstantive due process now protects individuals from governmental behavior that 'shocks the conscience,' in the criminal law context, and other infringements of rights 'implicit in the concept of ordered liberty.'").

will be justified in most situations.[258] This should be true when the government takes steps to abate the adverse effects of climate change by obstructing those who are contributing to it or protecting citizens from its harmful effects. When the government's action, however, interferes with an especially important public right, then its justification for its action must be particularly compelling.[259] This situation could arise in the case of climate change when the government's protective action invades a protected property right. There is certainly no freestanding protected public right to contribute to the adverse effects of climate change.

The Due Process Clause protects fundamental rights. Justice Harlan maintained that the Due Process Clause "protects 'basic values 'implicit in the concept of ordered liberty,' regardless of whether such values are embodied in the Bill of Rights or its penumbras."[260] The fundamental nature of "a due process right is determined by deference to history, our basic societal values[,] and the doctrines of federalism and separation of powers"; as Justice Goldberg said, any "unenumerated constitutional rights must be so rooted in 'the traditions and [collective] conscience of our people . . . as to be ranked as fundamental.'"[261] The idea of tradition helps assure that to the extent that political decision makers depart from text, their opponents can be more confident that society will control them, if they cannot control themselves.[262]

Moreover, "certain explicit rights necessarily required implicit rights in order to protect the explicit."[263] Rights found in the concept of ordered liberty include those that are explicitly set forth in the Bill of Rights, and those that are implicit in the right to ordered liberty.[264] An example of the expansiveness of

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258. O'Loughlin, *supra* note 171, at 1327.

259. *Id.* ("Actions that infringe particularly important rights require a more compelling public interest.").

260. J.Y.P., Jr., *supra* note 77, at 460 (quoting Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring)).

261. *Id.* at 463. *But see* Krotoszynski, *supra* note 113, at 949 (quoting *In re* Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting) ("I realize that it is far easier to substitute individual judges' ideas of "fairness" for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right.")).

262. *See also* Strauss, *supra* note 151, at 924 ("once a society develops political traditions, political actors can be more confident that their opponents, even if arguably departing from the text, will operate within the traditions, or will be reined in by other forces in society if they do not do so").

263. Hall, *supra* note 3, at 95–96 (referencing Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

264. *See, e.g.*, Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 847–48 (1992) (acknowledging both express and implicit rights expressed in Roe v. Wade, 410 U.S. 113, 166 (1973)); Washington v. Glucksberg, 521 U.S. 703, 720–21 (1997) (citing Moore v. City of Cleveland, 431 U.S. 494, 502 (1977) (detailing the U.S. Supreme Court's substantive due process analysis); Marshall v. Rodgers, 566 U.S. 284, 288 (2012) (stating requirements that rights be succinctly presented with a careful description to be protected by substantive due process); Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (quoting Reno v. Flores, 507 U.S. 292, 303 (1993)) (explaining how rights must be deeply rooted within U.S. history as to be considered fundamental); Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (discussing how tradition and history are guidelines, not limitations); McDonald v. City of Chicago, 561 U.S. 742, 871 (2010) (Stevens, J., dissenting) (stating that a due process right within

substantive due process is its incorporation of the implicit right to marriage "because of its fundamental nature and traditional esteem."[265] This substantive due process analysis required a finding that the claimed right or interest is "deeply rooted in this Nation's history and tradition,"[266] in other words, that the "protected interests derive from preexisting notions of the law."[267]

An argument can be made that the public's right to a clean and sustainable environment is deeply rooted in the country's history and tradition.[268] According to Ledewitz, since Frederick Jackson Turner announced the closing of the American frontier in 1893, as a country we have had some understanding that there were environmental limits.[269]Additionally, "the enormous body of environmental regulation, state constitutional environmental provisions[,] and common law restrictions reinforce a right to environmental protection."[270] This history and body of law mean that no one in the country today "would think there is a right to pollute the air or land of his or her neighbor."[271] Additionally, given the Framers' concern about protecting a sustainable environment and the fact that they "put a premium on environmental amenities,"[272] one could consider

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our understanding of liberty must be universal). These cases are cited in Hall, *supra* note 3, at 93, nn.72–76.

265. Hall, *supra* note 3, at 96 (citing *Obergefell*, 135 S. Ct. at 2598). *See also* J.Y.P., Jr., *supra* note 77, at 486 ("This Note has postulated that a constitutional right of environment can be recognized because it is 'fundamental' and that it can be effectively asserted against government officials because it is 'preferred.'").

266. Hall, *supra* note 3, at 93 (quoting *Glucksberg*, 521 U.S. at 703 ("[T]he Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition.")) To be within the concept of "ordered liberty," the claimed right must be "deeply rooted" such that it is considered "fundamental," and also be capable of a "careful description." *Id.* Hall notes, however, that tradition and history are only "guidelines," and are "not limitations" on the concept's expansiveness, but the concept must be "universal—applicable to all people at all times." *Id*. *See also Moore*, 431 U.S. at 503 (saying that the Constitution protects an interest because that interest is rooted in the Nation's history and tradition); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (saying that claims of entitlement come from existing understandings of law, not the Constitution). These cases are cited in O'Loughlin, *supra* note 171, at 1340 n.160 (2017); *id.* at 1340 (". . . when identifying fundamental liberty interests that merit protection, courts look to tradition and the nation's history to identify those interests that Americans recognize as vital to their pursuit of happiness") (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)); Krotoszynski, *supra* note 113, at 936 ("[T]he Supreme Court has found that the guarantees against self-incrimination, double jeopardy, and uncompensated takings are sufficiently 'implicit in the concept of ordered liberty' to be incorporated against the states through the Due Process Clause of the Fourteenth Amendment.").

267. O'Loughlin, *supra* note 171, at 1329 (citing *Roth*, 408 U.S. at 577). *See also* Krotoszynski, *supra* note 113, at 933 ("Beginning with *Twining v. New Jersey* and *Palko v. Connecticut* and continuing through *Duncan v. Louisiana*, the Supreme Court has used tradition to determine whether particular guarantees in the Bill of Rights apply to the states.").

268. Indeed, this is exactly the argument that U.S. District Court Judge Ann Aiken made in Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) ("Exercising my 'reasoned judgment,' I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.").

269. Ledewitz, *supra* note 4, at 646.

270. *Id.*

271. *Id.*

272. Hall, *supra* note 3, at 109.

environmental protection a foundational idea. And, to the extent the courts look to state acceptance as a means of determining that a right is part of the country's tradition,[273] the fact that most of the states have incorporated environmental protection into their constitutions argues in favor of considering an environmental protection norm traditional and thus incorporated into the fundamental rights that the Due Process Clause protects.[274]

Historical acceptance of some beliefs or institutions serves to validate them.[275] "[T]he longer a constitutional regime endures, the more it develops constitutional traditions, and the more stable the patterns of cooperation become in society."[276] When that happens, "the text becomes less important, and the distinction between written and unwritten constitutions blurs."[277] However, while a "substantive due process doctrine limited to protecting the traditions maintained since time immemorial will not cause much ruckus," if it acts to foreclose "any possibility of establishing new or modified traditions, . . . it fences out all claims that a new tradition has emerged" and "that a new national consensus exists regarding a particular claim of right."[278] Thus, the argument would be that the Due Process Clause should not be used to block any new consensus about the importance of environmental protection and the emergence of a new environmental right.

However, relying on previous Court precedent offers a weak rationale for considering an environmental protection norm a matter of tradition because the precedent on climate change has been uneven.[279] Nor can foreign law help

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273. Krotoszynski, *supra* note 113, at 937.

274. Krotoszynski argues that a lot of states accepting an initiative over a relatively short time frame presents a stronger argument in favor of that initiative reflecting "tradition" than what the law was like at the Founding. *Id.* at 1000. *See also id.* at 1015 ("Justice Kennedy's focus [in *Lawrence*] on the direction of legal change over the last fifty years, rather than the preceding 250 years, also seemed justified if the tradition test is to honor not only old traditions, but also new ones. A tradition test that does not look beyond Lord Coke will largely eliminate substantive due process review for contemporary legal claims.").

275. *Id.* at 976 (quoting Justice Kennedy's concurring opinion in Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 40 (1991) (Kennedy, J., concurring) ("Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair.")). But Krotoszynski warns that "[i]f the tradition inquiry is to serve as more than a mere Dumbo's feather, it must constrain discretion in a meaningful and predictable way." Krotoszynski, *supra* note 113, at 942.

276. Strauss, *supra* note 151, at 924.

277. *Id. But see id.* at 923 ("The point is not that the Framers, or 'we the people,' commanded the reforms that the Court undertook. The Court undertook those reforms, and the reforms lasted, because they made moral and practical sense, and because, by virtue of their connection to the text, society could reach agreement (or at least narrow the range of disagreement) on a legal outcome even in the face of deep moral disagreement.").

278. Krotoszynski, *supra* note 113, at 998.

279. *See* Am. Elec. Power v. Connecticut, 564 U.S. 410, 424 (2011) (holding the Clean Air Act displaced federal common law claim seeking injunctive relief for greenhouse gas emissions); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857–58 (9th. Cir. 2012) (holding federal common law displaced when plaintiffs seeking damages). *But see* Juliana v. United States, 217 F. Supp. 3d 1224, 1233–34, (D. Or. 2016) (allowing lawsuit to proceed alleging government's fossil fuel policies violated their

support the argument that an environmental norm is traditional,[280] given the Court's current hostility toward using foreign law as a test for anything.[281] Therefore, even though most countries have included an environmental norm in their constitutions,[282] making the norm "traditional" in those countries, that rationale will be unhelpful here.[283]

Ledewitz contends that substantive due process found in the Fifth and Fourteenth Amendments together with the Equal Protection Clause, "are the doctrinal underpinnings to the right to a healthy environment."[284] He argues that the Due Process Clause "protects rights not protected by any other specific provision of the Constitution."[285] "[It] guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint."[286] Conceptually,

> the right to a salubrious environment satisfies both tests of constitutionality. If the environment is destroyed, human life will perish. Under the 'penumbra' theory, one's Bill of Rights guarantees are more 'meaningful' if he is alive to enjoy them; under the substantive due process approach, the preservation of the species is probably the most fundamental value of our, or any, society.[287]

Using the analytical method from *Washington v. Glucksberg*,[288] which looks to history, legal traditions, and practices, "we would have additional

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fundamental constitutional rights as well as the government's public trust duties toward them). *See generally* Michael C. Blumm & Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 7 (2017) (noting that unlike most recent environmental lawsuits, which rely largely on statutes and regulations, *Juliana* is instead a human rights case).

280. Krotoszynski, *supra* note 113, at 941.

281. *See* Krotoszynski, *supra* note 113, at 941 (referring to Justice Scalia's dissent in Atkins v. Virginia, 536 U.S. 304, 348 (2002), "Justice Scalia insisted that '[w]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution'"); *see also* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (Scalia, J., dissenting) ("While '[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well,' they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.") (citation omitted).

282. *See supra* pp. 130–32 (discussing how other countries have constitutionalized an environmental protection norm).

283. *See supra* note 281.

284. Ledewitz, *supra* note 4, at 588. *See also* Klipsch, *supra* note 67, at 223–24 ("Assuming that there is the requisite government action involved in air pollution activities, the due process clauses may provide limitations on those activities if 'life' includes 'health' and 'deprive' includes 'threaten.'"); Kalen, *supra* note 37, at 169 ("The Due Process and Equal Protection Clauses, in particular, at their lowest denominator protect citizens against unnecessarily arbitrary and overly unreasonable behavior. These clauses also arguably secure citizens some measure of security for redressing personal harms.").

285. Ledewitz, *supra* note 4, at 635.

286. *Id.* at 638 (quoting Washington v. Glucksberg, 521 U.S. 702, 719 (1997)).

287. J.Y.P., Jr., *supra* note 77, at 463.

288. *See* Ledewitz, *supra* note 4, at 648–49.

justification for recognizing rights, particularly environmental and constitutional rights, in future generations."[289] Yet, intuitively, the fundamental nature of marriage or abortion is easier to see and demonstrate than environmental protection, which can be both subjective and subject to change.[290]

Yet, there are a host of problems with using the Due Process Clause as a basis for constitutionalizing environmental protection. One is that substantive due process is not universally considered a "persuasive form" of constitutional interpretation; another is that its dependence on judicial interpretations usurps "democratic prerogatives," (thus) inciting opposition to its use.[291] According to Justice Harlan, "it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process."[292]

Another problem with relying on the Due Process Clause as a basis for an environmental protection right or duty is that a large swath of environmental cases that pose no threat to human health would be excluded.[293] To rise to the level of a violation of the Substantive Due Process Clause, there must be an actual deprivation of life or at least a substantial reduction in individual life expectancy.[294] While the "injured individual [often] benefits to some extent from the polluting activity," for example by paying less for the good or activity that injured them, this "should not stop the assertion of individual rights."[295] Klipsch thinks the fact that sometimes individuals who have been harmed by pollution benefit in some way from the pollution should not prevent their assertion of an individual environmental right, but the possibility of that situation arising "should be a factor to consider before creating absolutes within a social

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289. *Id.* at 662–63.

290. *See* Hall, *supra* note 3, at 108.

291. Ledewitz, *supra* note 4, at 616–17. *See also* Krotoszynski, *supra* note 113, at 957 (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 678 (1966) (Black, J., dissenting) ("Moreover, when a 'political theory' embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.")).

292. Krotoszynski, *supra* note 113, at 958 (quoting *Harper,* 383 U.S. at 678 (Harlan, J., dissenting)). According to Krotoszynski, "Justice Harlan's strict insistence on a preexisting tradition going back to the time of the framing would unduly limit the Supreme Court's updating function and, in all probability, force greater reliance on the amending process to maintain the vitality of the Constitution." *Id.*

293. Klipsch, *supra* note 67, at 230 ("Environmental activities which pose no apparent threat to human health contain no clear principle which would either establish the existence of substantive environmental rights or which could be reasonably applied to decide specific cases. A right against unreasonable impairment of health would *seem* to be principled, if only because it is supported by the language of the due process clause.").

294. *Id.* at 225 n.118. Klipsch argues that mere suffering would not warrant raising what might otherwise be considered a nuisance to a constitutional "deprivation." *Id.* He likens this analysis to taking property "by a severe and continuing nuisance." *Id.*

295. *Id.* at 227.

context."[296] And, even when public health is at issue, with no offsetting benefits, there is no clear answer as to what the scope and amount of protection should be as "the due process clause does not begin to answer the question 'how much,'"[297] and the causal connection between injury and environmental harm can be beyond evidentiary proof.[298]

Additionally, the Due Process Clause limits the exercise of governmental authority, not individual action,[299] requiring some form of government responsibility toward the environment to qualify as government involvement.[300] The requirement that the claim or interest must be carefully described[301] may also be problematic in the case of an environmental right or duty.[302] And protection of one individual's right to environmental protection might come at the expense of another individual's constitutionally protected right to enjoy their property. As Justice Harlan wrote,

> [a]s a general proposition it seem[ed]. . . very dubious that the Constitution was intended to create certain rights of private individuals as against other private individuals. The Constitutional Convention was called to establish a nation, not to reform the common law. Even the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority, not other individuals.[303]

So, the Due Process Clause as an independent base for an environmental protection right or duty seems far from a sure thing.

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296. *Id.*

297. *Id.* at 230.

298. J.Y.P., Jr., *supra* note 77, at 467. The author of the Note goes on to speculate that "[s]uch burdens might be eased, however, if environmental protection were recognized as a collective right of the public." One approach to overcome this problem "would protect the public from unreasonable environmental degradation. The 'unreasonable' standard is necessary because the public interest in preserving environmental integrity is not only one of degree, but it also competes with the public interest in maintaining material progress." *Id.* at 473.

299. Klipsch, *supra* note 67, at 211. *See also id.* ("The mere issuance of a license, however, is not sufficient government involvement for there to be "state action" under the fourteenth amendment, nor, presumably, under the fifth.").

300. *Id.* at 214 n.64 (theorizing that this might be possible under the public trust doctrine). *See also* Ledewitz, *supra* note 4, at 658 ("Substantive due process, if really linked to the text of the Due Process Clause, would contain a state action requirement.").

301. Ledewitz, *supra* note 4, at 635 (discussing Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (Rehnquist, C.J.)). *See also* Krotoszynski, *supra* note 113, at 1014 ("The most compelling factor Justice Kennedy invoked in his majority opinion in *Lawrence* was the shift in state laws from 1961 to 2003.").

302. *See* Ruhl, *supra* note 3, at 279 (explaining why the correct environmental policy "is not clearcut," and saying "[b]ut environmental policy, like economic policy, education policy, welfare policy, and most of social policy in general, is defined by hard choices and complicated, multidimensional problems").

303. United States v. Guest, 383 U.S. 745, 771 (1966).

2. The Equal Protection Clause

The Equal Protection Clause prevents the government from acting out of "animus or indifference to the needs of a particular group of its citizens,"[304] in other words, from engaging in any activity that is "grounded in or reflective of the view that some citizens have less value as persons than others."[305] An animating principle of "the rule of law" and the concept of equal protection found in the Constitution "is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[306]

Future generations are a group of citizens whose needs are ignored by the federal government's current indifference to climate change's impacts. This policy void "accept[s] the likelihood of permanent, irreversible change to the environment that will greatly harm future generations."[307] It also impairs future citizens' access to government.[308] The current generation's "indifference to the needs of the future," reflected in weak to non-existent governmental policies, creates "an insurmountable barrier" to immediate significant change.[309] Only if government action encourages current citizens to act in a way that assures the interests of future ones, can future citizens "metaphorically" be thought of as having any access to government.[310] The Equal Protection Clause might provide a basis for the Court to rectify this imbalance by encompassing an environmental protection right or duty, and forcing current representation of future interests. Given climate change's permanent alterations, the need for current representation of future interests is particularly important.[311] The Equal Protection Clause violation cannot be remedied in the future.[312] In this way, government inaction "is destroying the opportunity for future generations to enjoy the natural world as all previous humans have done."[313] Moreover, the current generation, perhaps because of lack of empathy or government incentives, has shown itself unwilling to make any "serious sacrifices for our

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304. Ledewitz, *supra* note 4, at 591.

305. *Id.* at 644 ("This view of unconstitutional animus is closer to the situation we are in today, since the current generation is willing to place burdens on future citizens it would not be willing to accept for itself.").

306. *Id.* at 642 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

307. *Id.* at 644.

308. *Id. See also* J.Y.P., Jr., *supra* note 77, at 483 ("[T]here are two arguments for according special judicial treatment to environmental rights. First, a 'minority' interest indeed may be at stake. In this area, unlike any other, today's degradation may profoundly 'oppress' future generations. Protecting this voiceless minority's interests could justify judicial activism in environmental cases.").

309. Ledewitz, *supra* note 4, at 644.

310. *Id.*

311. *Id.* at 644–45.

312. *Id.* at 645. *See also id.* at 591 ("In terms of environmental harm, today's generation may be thought of as the majority using its political muscle to permanently disadvantage future generations. Future generations, as an entirely unrepresented group, stand in as clear need of constitutional protection as do other vulnerable minorities.").

313. *Id.* at 642.

descendants" despite indications of the "coming catastrophe," making it unlikely that they will be able to enjoy the same amenities.[314]

If a court can be persuaded that "future generations have a right to be heard in the governing process," then the question is "whether there is today an unjustified, actual refusal to represent their interests" in that process.[315] And, if the Equal Protection Clause is capacious enough to protect future generations because they constitute "a 'discrete and insular minority' needing special protection by the courts," then courts owe them a "duty of impartiality."[316] In the context of climate change, this means that, in addition to the right to be represented in the governing process, the unrealized right of future generations to be shielded from the adverse effects of climate change warrants both recognition and protection now, and the government's failure to do any of this violates the Equal Protection Clause.

There is a second sense in which the Equal Protection Clause might house an environmental protection norm, and that is to the extent that environmental harms caused by climate change fall disproportionately on discrete segments of the population, such as low-income communities or communities composed of peoples of color or other minority individuals.[317]

> For a variety of social, economic, and political reasons, minorities and the poor make up the greatest percentage of Americans who suffer the effects of living in environmentally contaminated neighborhoods and of working in environmentally hazardous workplaces. Typically, minorities and the poor have been unable to sue and to recover for environmental damage. They are often unable to make state and federal agencies respond to their environmental problems.[318]

With respect to climate change, it is often minorities who live in areas that are most vulnerable to the effects of climate change, with limited access to health care services and less capacity to relocate or rebuild after a climate-induced disaster like flooding or wildfires.[319] Members of these communities are more likely to live in homes without air conditioning and with poor insulation, making

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314. *Id.* at 665. *See also id.* ("But we have no personal incentives to act and many incentives not to act in the current environmental crisis.").

315. *Id.* at 667.

316. *Id.* at 643. *See also id.* at 659. One problem that Ledewitz brushes off is that "there would be something ludicrous about recognizing the rights of generations unborn, but not recognizing any rights in an unborn being already in existence." *Id.* at 660 (citing Roe v. Wade, 410 U.S. at 158 ("holding, inter alia, that fetus is not 'person' for purposes of due process. 'All this, together with our observation . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.'")).

317. *See generally* Hope M. Babcock, *Here Today, Gone Tomorrow—Is Global Climate Change Another White Man's Trick to Get Indian Land? The Role of Treaties in Protecting Tribes as They Adapt to Climate Change*, 2017 MICH. ST. L. REV. 371, 378–85 (2017) (describing the impact of climate change on Indian tribes).

318. Gallagher, *supra* note 78, at 152.

319. U.S. E.P.A., CLIMATE CHANGE, HEALTH, AND ENVIRONMENTAL JUSTICE 1 (2016).

them vulnerable to temperature extremes.[320] They are also more likely to have poor access to health care as well as emergency services.[321] They may also have limited transportation options and no access to emergency warnings in their native language, such as might be needed during a climate-driven disaster.[322] Members of these communities may be more prone to diseases, such as diabetes and respiratory illnesses, requiring medical care, which in a disaster may become unavailable.[323] Rising water temperatures increase the likelihood of waterborne illnesses from bacteria, parasites, and harmful algae, and intense storms can damage water treatment systems and stormwater infrastructure.[324] Individuals of color or from low-income or immigrant communities are more likely than the average community to have health problems like diabetes, asthma, and chronic pulmonary diseases, conditions that can be aggravated by high heat, changes in the pollen season, and wildfires, such as might occur more frequently in a climate-changed environment.[325]

To the extent that the Equal Protection Clause protects discrete groups of citizens, and both future generations and environmental justice communities qualify for protection under the Clause, then it might provide a home for an environmental protection norm and a corresponding right or affirmative duty. Finding an individual right or an affirmative governmental duty would enable these groups to use the Clause to protect themselves from the government's apathetic and harmful climate control policies.

3. The Bill of Rights

Like the Court's "evolving" approach to substantive due process, from the second half of the twentieth century, the Court's approach to the Bill of Rights has involved finding implicit rights embedded in explicit rights.[326] For example, the Court has ruled that the

> First Amendment implicitly guarantees the public right to attend criminal trials in order to secure the rights of a free press. The Fifth Amendment's witness clause also implicitly requires a warning to the accused of the right to remain silent to act as a safe guard against self-incrimination. The exclusionary rule was created by implication to secure the meaning of the Fourth Amendment, and the Sixth Amendment right to counsel covertly secures the indigent with an attorney with minimal level of competence.[327]

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320. *Id.* at 2.
321. *Id.*
322. *Id.*
323. *Id.* at 4.
324. *Id.* at 3.
325. *Id.* at 2–4.
326. Hall, *supra* note 3, at 97.
327. *Id.* at 97.

In *District of Columbia v. Heller*,[328] the Court read into the Second Amendment, which Hall described as the "implicit personal right to own a pistol in order to secure a 'right to bear arms,'" and Justice Kennedy, in *Burwell v. Hobby Lobby Stores, Inc.*,[329] found in the First Amendment's Free Exercise Clause the right to express one's religious beliefs.[330]

If rights like the right to own a gun and the right to express religious beliefs may be implicitly recognized in the Bill of Rights, then Hall reasons "there must be a right to some basic environmental quality so as to sustain life so that all other constitutional rights may be protected and exercised."[331] As Rachel Carson explains, "[i]f the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problems."[332]

Environmental scholars, like Carole Gallagher, argue that "preservation of the environment is essential to one's individual rights of self-realization, of one's right to learn and to discover truth[,] and of one's right to participate fully in our democracy" and "[that] these rights are all necessarily implied by the language of the First Amendment."[333] However, the Court quashed that idea in *Lyng v. Northwestern Indian Cemetery Protective Ass'n*,[334] when it said that "it would not recognize environmental rights to be inherent in the First Amendment at any time in the near future."[335]

An alternative approach that emanates from the Bill of Rights as a whole is that there are penumbral rights, which radiate out from the Bill of Rights, whose "existence is necessary in making the express [Bill of Rights] guarantees fully meaningful."[336] The Court in *Poe v. Ullman*, after endorsing an expansive view of the Due Process Clause, wrote that the due process cases on which it relied "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[337]

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328. D.C. v. Heller, 554 U.S. 570, 581 (2008); Hall, *supra* note 3, at 98.

329. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1939)).

330. Hall, *supra* note 3, at 97–98.

331. Hall, *supra* note 3, at 99. *See also id.* at 98 ("[T]he understanding of substantive due process and the implicit guarantees of other constitutional amendments has expanded as the logical implications of due process became apparent."); Gallagher, *supra* note 78, at 119 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 462 (1988) and saying "[t]he Supreme Court noted that the Indians' religious practices are inextricably bound to the land and nature. It also noted that "successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting").

332. Hall, *supra* note 3, at 100 n.124 (quoting RACHEL CARSON, SILENT SPRING 12–13 (1962)).

333. Gallagher, *supra* note 78, at 118.

334. 485 U.S. 439, 457–58 (1988).

335. Gallagher, *supra* note 78, at 118.

336. J.Y.P., Jr., *supra* note 77, at 461–62.

337. Hall, *supra* note 3, at 96. *See also* Krotoszynski, *supra* note 113, at 937 ("Just as due process protects 'fundamental' rights so deeply rooted in the nation's history and tradition that they appear in the

Justice Douglas, who was an advocate of this theory, argued that "the Constitution protects these 'penumbral' rights just as it protects the 'fundamental' specific guarantees which the general rights preserve."[338] He reasoned that the specific rights in the Bill of Rights "are not complete in themselves, but that they also evidence more general, 'peripheral' rights without which 'the specific rights would be less secure.'"[339] In *Griswold v. Connecticut*,[340] the Court found Connecticut's law on contraception an unconstitutional infringement on a 'penumbral' right of privacy emanating from the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution, as made applicable to the states by the Fourteenth Amendment.[341]

Thus far, "no federal court has explicitly recognized a fundamental environmental right, whether emanating from the penumbra of the Bill of Rights or otherwise."[342] Although finding a fundamental environmental right in the penumbra is less contentious than finding a right for it in the Due Process Clause, a leap must still be made to also include more privileged communities within this penumbral right.

4. The Ninth Amendment

The Ninth Amendment provides that the Constitution's list of enumerated rights "shall not be construed to deny or disparage others retained by the people."[343] Scholars variously view the Ninth Amendment as "a source of natural justice rights[,] a rule of construction for securing unenumerated rights (but not a source of rights)[,] a grant of standing to argue public rights[,] a source of public rights[,] and solely a protector of individual, personal rights."[344] The Supreme Court is less clear about what it is.[345]

There are two basic arguments for using the Ninth Amendment as a source of a new substantive right or duty like the one argued for here: the Amendment is (1) its own source of these rights, or (2) a rule of construction that allows a search of the Constitution as a whole for new rights.[346] Reflecting a slightly different version of the second argument, Justice Goldberg, together with Justice

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Bill of Rights, it also grounds judicial recognition of rights that have no written analogue in the Bill of Rights. Enumeration in the Bill of Rights can be a sufficient condition for judicial recognition and enforcement of a right against the federal and state governments, but it is not a necessary condition.").

338. J.Y.P., Jr., *supra* note 77, at 460.

339. *Id.* at 459–60.

340. 381 U.S. 479, 483 (1965).

341. Gallagher, *supra* note 78, at 111.

342. *Id.* 111–12.

343. U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."). *See also* Hall, *supra* note 3, at 105.

344. Klipsch, *supra* note 67, at 219–20.

345. *Id.* at 219 ("The Ninth Amendment is many things to many people, but what it is to the Supreme Court is not entirely clear.").

346. *Id.* at 220. *See also id.* at 221 ("[b]y its terms the amendment applies to the entire Constitution, rather than just the first eight amendments.").

Brennan and Chief Justice Warren, in a concurring opinion in *Griswold*,[347] articulated the belief that the Ninth Amendment is not an "independent source of rights," rather that the Amendment's "language and history imply the existence of unenumerated fundamental rights which are contained in the traditions and collective conscience of our people."[348] Like the three concurring Justices in *Griswold*, Grey maintains that "[t]he [N]inth [A]mendment on its face has no substantive content! It is rather a license to constitutional decisionmakers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed therein."[349] According to Grey, the Ninth Amendment reflects the Amendment's framers' belief that "unwritten higher law principles had constitutional status," a belief that was implicitly and explicitly reflected in constitutional text from the country's beginning and is reflected in the "'majestic generalities' of section I" of the Amendment.[350]

Therefore, as with the Due Process Clause, the question that must be answered with respect to the use of the Ninth Amendment in this context is whether the rights or duty claimed in this Article have sufficient historical or fundamental status to warrant being considered an unwritten "higher law principle"—in the case of the Ninth Amendment, on the order of a natural right—to be protected by either of those constitutional provisions. To the extent that this natural right analysis under the Ninth Amendment approximates the "tradition" analysis under the Due Process Clause, the answer to the question might be in the affirmative. But, the Ninth Amendment suffers from the same uncertainties and controversy that attend the Due Process Clause and thus alone seems a "slender reed"[351] to support such a right or duty.

This Part of the Article has identified several places in the Constitution where an environmental protection norm in the form of an individual right or a governmental duty might find a home, but has also shown that none is a perfect fit. Thus, the best approach may be the one that Klipsch disdained—looking for support in the Constitution as a whole, an approach the Court followed when it constitutionalized new rights in the recent past, like the right to life or the right to privacy. In those situations, new, broadly accepted unenumerated rights, which were either so basic or necessary for the realization of enumerated rights, found support in the entire constitutional text.

An environmental protection norm is both basic and necessary because it is a prerequisite for the fulfillment of many of the enumerated rights. For example,

347. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

348. Klipsch, *supra* note 67, at 222. *See also* J.Y.P., Jr., *supra* note 77, at 460–61 ("Indeed, Justice Goldberg conceded that the ninth amendment is not an 'independent source' of fundamental rights; rather, it 'simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments . . . is not restricted to rights specifically mentioned in the first eight amendments.'").

349. Grey, *supra* note 111, at 709.

350. *Id.* at 717.

351. Missouri v. Holland, 252 U.S. 416, 434 (1920) ("To put the claim of the State upon title is to lean upon a slender reed.").

the right to life and liberty would be meaningless if there was no clean air to breathe or clean water to drink. Indeed, protection of the environment and natural resources is critical to our Union's survival, implicating the entire Constitution for its support. And states that have either incorporated or found such a norm in their existing constitutional text, as well as other nations who have taken the same approach, signal broad-based social acceptance of the norm as a constitutional right.

However, the blunt fact is that there is simply no "clear legal and historical precedent for basic constitutional environmental rights."[352] Courts are afraid of "being drawn into political, scientific, social[,] and economic battles of the moment," such as envelop modern environmental policy, and believe themselves scientifically and technically "inadequate" to define the bounds of a healthy or clean environment.[353] They would much prefer delegating that task to the legislative or executive branch of government.[354]

CONCLUSION

> *Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant[.]*
>
> —Judge Learned Hand[355]

The questions this Article has tried to answer are whether the time has come to incorporate an environmental protection norm into the Constitution in the form of an individual right or an affirmative governmental duty, and, if it has, how that can be done. Prior to addressing these questions, the Article discussed a predicate one, whether the norm should be in the form of a right enjoyed by individuals or an obligation imposed on the government. The Article is largely agnostic on the resolution of that issue, although tilting slightly towards framing the norm as a duty because it may present fewer implementation problems than if it were couched as a right.

As for the first question, the Article concludes that the time is emphatically now for constitutionalizing an environmental norm. Given the government's abdication of responsibility, constitutionalizing such a norm is the only way that individuals, particularly the country's most vulnerable ones and those unborn, and the environment are going to be protected from the growing threat of climate change. The Article shows how interpreting the Constitution to include an

352. Gallagher, *supra* note 78, at 117.

353. *Id.*

354. *Id. See also id.* ("The basic holdings of *Ely v. Velde*, *EDF v. Corps of Eng'rs*, and *Tanner v. Armco Steel*—that there are no constitutionally-protected environmental rights pursuant to the Fifth, Ninth and Fourteenth Amendments—have been applied consistently by the federal courts since these decisions.").

355. Spector Motor Service, Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944).

environmental protection norm is consistent with an interpretive history of the Constitution, which has allowed constitutional text to be expanded to incorporate other basic, socially accepted norms in the form of rights or duties. The Article also identifies specific places in the Constitution where an environmental protection norm might find an interpretive home, but here it ran into trouble.

While finding a specific constitutional provision sufficiently capacious to house an environmental protection norm would be more consistent with the traditional approach to constitutional interpretation, the problem is that each identified place has problems and thus offers too slender a reed to support such a bold claim. Yet, there may be support in the Constitution as a whole, an approach followed with respect to other relatively new rights, like the right to privacy, because the unenumerated right in question was basic and had been accepted by society. The Article argues that the norm's basic nature, which makes it a predicate to the public enjoying many of its rights under the Constitution, and the growing public consensus about the unanswered threat posed by climate change create support for its inclusion in the Constitution.

We welcome responses to this Article. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.