

# A Right Most Dear: The Case for a Constitutional Environmental Right

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## I. INTRODUCTION

Environmental law is a statutory animal, and thus discussions of rights therein have been largely relegated to statutory interpretation.<sup>1</sup> Nuisance law along with oil and gas regulation may ultimately touch on what some may recognize as environmental issues, but those are still largely subsets of tort and property law, respectively. Otherwise, environmental law is treated as if it came about ex nihilo when Richard Nixon’s pen left the paper of the National Environmental Policy Act.<sup>2</sup>

As a result of this treatment of environmental law, constitutional and environmental law doctrines seem to only intersect when there is a

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1. See KARL BROOKS, BEFORE EARTH DAY 9 (2009) (“Law schools’ professional presentism, however, impedes historic analysis. Instead of trying to trace environmental law’s origins, most legal academics write as if developments before 1970 happened someplace else . . . reduc[ing] older precedents to quaint curiosities instead of contextualizing environmental law by historicizing its connections to their customary classroom subjects.”). *Id.* at 8.

2. See *id.* at 9 (“Most histories have conventionally dated American environmental law’s emergence to the ‘environmental decade’ of the 1970s, triggered by a handful of publicized events that occurred during the late 1960s.”).

conflict between the two.<sup>3</sup> Constitutional law goes back two centuries, whereas environmental law originated only a little less than fifty years ago, and so presumably environmental rights are not secured by the United States (U.S.) Constitution. Commentators against an environmental constitutional right apparently agree,<sup>4</sup> and even those who would tend to look favorably on a constitutional environmental right seem to have reached that same decision as they limit their thoughts to amending the U.S. Constitution, and analyses of constitutional environmental provisions at both the international and state level.<sup>5</sup>

However, treating constitutional and environmental law in such a conclusory manner stifles legitimate discussion and legal innovations. 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.

That is exactly what this Article seeks to do: seriously consider the existence of environmental protections within the U.S. Constitution, while respecting the “particularly careful scrutiny” that recognizing constitutional rights requires.<sup>6</sup> This Article first analyzes statutory environmental law, while pointing out why constitutional environmental rights should be considered. Secondly, this Article discusses the bases and historical developments of implicit substantive due process rights covered by the Fifth and Fourteenth Amendments to the U.S. Constitution. Third and finally, this Article concludes by presenting the case that due process recognizes a constitutional environmental right, and preemptively responding to likely counter arguments.

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3. The prime example of when environmental law and constitutional rights conflict is when environmental protection interferes with total and free land use. *E.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

4. *See, e.g.*, J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245 (1999) (concluding that no sound environmental amendment has been offered).

5. *See, e.g.*, James May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, 1 IUCN ACAD. ENVTL. L. (2011); *see also* Dan L. Gildor, *Preserving the Priceless: A Constitutional Amendment To Empower Congress To Preserve, Protect, and Promote the Environment*, 32 ECOLOGY L.Q. 821, 846 (2005); Robin K. Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 ENVTL. L.R. 11013, 11018 (2004).

6. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

## II. ENVIRONMENTAL CLAIMS: REMEDIES WITHOUT A RIGHT

Although environmental impacts had been statutorily addressed before,<sup>7</sup> it was not until 1960s into the 1970s that the modern environmental statutes that encompass environmental law were created.<sup>8</sup> This was preceded by the environmental movement of the 1960s, with Rachel Carson's *Silent Spring* largely credited for spurring public environmental concern of the time.<sup>9</sup> On January 1, 1970, then-President Nixon signed the National Environmental Policy Act (NEPA) in front of a national audience watching from their televisions with fevered anticipation.<sup>10</sup> A massive oil spill off the coast of Santa Barbara had primarily pressured Nixon to approve NEPA.<sup>11</sup> However Nixon also responded to the cumulative effect of post-World War II economic boom, partnerships between conservationists and hunters, and a national increase in environmental awareness.<sup>12</sup>

On January 28, 1969, an offshore Union Oil company drilling rig burst in the Santa Barbara channel off the coast of California, leaking 760,000 gallons of oil over ten and a half days.<sup>13</sup> Environmental coalitions composed of the young and old, rich and poor, Republican and Democrat, and others were formed in response to the spill.<sup>14</sup> During that same year the Cuyahoga River's conflagration was brought to the Nation's attention, and again the shocking response was shared by all along the political spectrum.<sup>15</sup> The bipartisanship itself was impressive, but what ultimately made the environmental response successful was that the Santa Barbara oil spill had affected white, upper middle class communities.<sup>16</sup> At the same time, the public was "desperate for a consensus-building issue that could make a difference and turn public

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7. *E.g.*, Atomic Energy Act, 42 U.S.C. § 2011 (1954); Federal Water Pollution Control Act, PUB.L. NO. 80-845, 62 Stat. 1155 (1948).

8. BROOKS, *supra* note 1, at 127.

9. *But see* RICHARD LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 58 (2004) (discussing how other authors such as Murray Bookchin, Ralph Nader, and Paul Elrich also contributed to the public environmental zeitgeist following post-WWII suburbanization).

10. BROOKS, *supra* note 1, at 127.

11. *See* ROBERT EASTON, BLACK TIDE: THE SANTA BARBARA OIL SPILL AND ITS CONSEQUENCES 251 (1972).

12. BROOKS, *supra* note 1 at 39.

13. EASTON, *supra* note 11.

14. *Id.* at 45.

15. LAZARUS, *supra* note 9, at 59.

16. Harvey Molotch, *Oil in Santa Barbara and Power in America*, 40 SOC. INQUIRY 131, 131 (1970).

attention away from” Vietnam War failures and race riots throughout America’s inner cities.<sup>17</sup>

Senator Henry “Scoop” Jackson (D-WA) proposed NEPA, which ultimately originated out of a compromise with Senator Edmund Muskie (D-ME) who had proposed more stringent environmental standards.<sup>18</sup> NEPA created the Council on Environmental Quality within the Executive Branch<sup>19</sup> and requires environmental impact statements (EIS) for every major federal action “significantly affecting the quality of the human environment.”<sup>20</sup> An EIS must consider negative environmental impacts, and provide alternative proposals.<sup>21</sup> Human health may also be considered, but only if it is proximately affected by a federal action.<sup>22</sup> By considering those factors, NEPA’s goal is to encourage federal agencies to make decision with an “enjoyable harmony between man and his environment.”<sup>23</sup> Activists may ensure that NEPA is followed with citizen suits via the Administrative Procedure Act,<sup>24</sup> but NEPA’s safeguards are ultimately procedural, and do not mandate that a federal action be directed towards its most environmentally friendly alternative.<sup>25</sup>

Not long after NEPA became law, Congress passed the Clean Air Act (CAA) of 1970, directing the Environmental Protection Agency (EPA) to improve air quality nationally by cooperating with the states.<sup>26</sup> The federal government first creates National Ambient Air Quality Standards (NAAQS) for criteria pollutants,<sup>27</sup> differentiating between stationary and mobile sources, and then the states define Air Quality Control Regions (AQCRs).<sup>28</sup> Classified for each criteria pollutant, each

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17. LAZARUS, *supra* note 9, at 53.

18. Kit Oldham, *President Richard Nixon Signs Senator Henry Jackson’s National Environmental Policy Act into Law on January 1, 1970*, HISTORY LINK (Nov. 13, 2003), [http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file\\_id=5615](http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=5615).

19. 42 U.S.C. § 4321 (1970).

20. 42 U.S.C. § 4332(C) (1975).

21. *Id.*

22. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 771, 773-74, 776-79 (1983).

23. 42 U.S.C. § 4321 (1970).

24. 5 U.S.C. § 702 (1976).

25. *See* 42 U.S.C. § 4332; *see also* 40 C.F.R. § 1505.1 (1979).

26. BROOKS, *supra* note 1, at 128.

27. The six listed criteria pollutants are carbon monoxide, nitrogen dioxide, lead, ozone, particulate matter, sulfur dioxide, but the EPA is currently going through the process of including carbon dioxide. *See Mass. v. Env’tl. Prot. Agency*, 549 U.S. 497, 528-30 (2007); *see also* 42 U.S.C. § 7521 (1990).

28. 42 U.S.C. §§ 7407 (1998).

AQCR is designated as either an attainment or nonattainment area.<sup>29</sup> An area is in attainment if the air quality therein for a criteria pollutant complies with the NAAQS.<sup>30</sup> If so, the area then enters the Prevention of Significant Deterioration program with less stringent emission limitations.<sup>31</sup> If the area's air quality does not comply with the NAAQS, then it is in nonattainment, requiring stricter emission limitations and "reasonable further progress" with regards to improving air quality.<sup>32</sup>

States maintain air quality in attainment areas and improve nonattainment areas by complying with their self-created State Implementation Plans (SIPs).<sup>33</sup> The SIPs allow for flexible policy making and consideration for local conditions as long as AQCR limits are met. The CAA follows a federalist regime by pushing for national standards as a minimum for air quality but by allowing the states to comply within the means available to them. States may even place their air quality minimums at stricter levels above the NAAQS, but the state must first obtain a waiver to do so.<sup>34</sup> The Act also provides a citizen suit provision to further the CAA's success.<sup>35</sup>

Likewise, the Clean Water Act (CWA) also follows a federalist structure.<sup>36</sup> Congress created the modern CWA in 1972 by revising the preexisting Federal Water Pollution Control Act of 1948.<sup>37</sup> Congress did so by improving enforcement with a federalist regulatory structure wherein the federal government may police individual polluters, and by including a citizen suit provision.<sup>38</sup> Today, the CWA requires anyone who wishes to discharge pollutants into a U.S. waterway to receive a National Pollution Discharge Elimination System permit.<sup>39</sup> U.S. waterways may extend to those bodies of water with a "significant nexus" to a navigable waterway.<sup>40</sup> States may elect to administer the CWA permitting, in which case states may even impose greater water quality standards.<sup>41</sup> CWA

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29. 42 U.S.C. § 7409(b)(1)-(2) (1977).

30. *Id.*

31. 42 U.S.C. § 7410(a)(2)(J) (1990).

32. 42 U.S.C. § 7410(l)(C)(6)(l).

33. 42 U.S.C. § 7410(a)(1).

34. 42 U.S.C. § 7543(b)(1) (1990).

35. 42 U.S.C. § 7604 (1990).

36. *See* 33 U.S.C. § 1342(b) (2012) (providing that states may enforce federal water quality standards).

37. Craig, *supra* note 5, at 11013.

38. *Id.*

39. 33 U.S.C. § 1342(a) (2012).

40. *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring).

41. 33 U.S.C. § 1342(b) (2012).

liability is judged under a strict liability analysis with little to no consideration of culpability.<sup>42</sup>

Similar to the CWA Congress passed the Endangered Species Act (ESA) as a reincarnation of already existing legislation.<sup>43</sup> The Endangered Species Conservation Act was passed in 1969 to expand the protections of pre-existing legislation such as the Lacey Act.<sup>44</sup> The ESA broadens the consideration of endangered species to those beyond U.S. borders, bans the importation of such species or products therefrom, and prohibits the interstate sale and transportation of endangered species.<sup>45</sup> In 1973 the modern version of the ESA was passed unanimously in order to further strengthen endangered species protection.<sup>46</sup>

Today, the ESA also directs the Secretary of Interior to maintain a list of threatened and endangered species,<sup>47</sup> requires federal agencies to consult with other agencies to ensure that agency actions are not likely to jeopardize, destroy, or adversely modify critical habitat for listed species,<sup>48</sup> and bars the “taking” of listed species.<sup>49</sup> The ESA defines “taking” as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,” and any attempt to do the aforementioned.<sup>50</sup> Harm has also been extended to include habitat modification.<sup>51</sup> Although Congressional discussion during the ESA’s passage suggests a distinct bias towards protecting charismatic megafauna,<sup>52</sup> its protections soon reached as far as to save an arguably insignificant snail darter from a multi-million dollar hydro-electric dam.<sup>53</sup>

Beyond those notable federal environmental statutes that emerged after 1970, there are also the lesser recognized Resource Conservation

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42. Kelly v. U.S. Envtl. Prot. Agency., 203 F.3d 519, 522 (7th Cir. 2000) (citations omitted); Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990); Stoddard v. W. Carolina Reg’l Sewer Auth., 784 F.2d 1200, 1208 (4th Cir. 1986); United States v. Earth Sci., Inc., 599 F.2d 368, 374 (10th Cir. 1979); United States v. Tex. Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979).

43. See SHANNON C. PETERSEN, ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK 23-25 (2002).

44. *Id.* at 25.

45. *Id.*

46. *Id.* at 29.

47. 16 U.S.C. § 1533(a) (2003).

48. 16 U.S.C. § 1536(a) (1988).

49. 16 U.S.C. § 1538(a)(1)(B) (1994).

50. 16 U.S.C. § 1532(19) (1994).

51. Babbitt v. Sweet Home Chapter of Cmty.s.’ for a Great Or., 515 U.S. 687, 708 (1995).

52. PETERSEN, *supra* note 43, at 31.

53. Tn. Valley Auth. v. Hill, 437 U.S. 153, 116, 164 (1978).

Recovery Act<sup>54</sup> and Comprehensive Environmental Reclamation, Compensation, and Liability Act<sup>55</sup> addressing solid waste and the restoration of brownfields and other heavily polluted areas, respectively. There are also numerous other environmental statutes that are beyond the scope of this discussion.<sup>56</sup>

Considering the range of all of these statutes, one may think that existing statutory protections have been successful, and indeed environmental quality is markedly better than it was in 1970.<sup>57</sup> Since the CAA's passage, pollutant emissions have dropped by more than half:

[F]rom 273 million metric tons of annual emissions to 133 million metric tons. The reductions for individual pollutants are just as impressive. Over the same period, emissions of lead decreased 98 percent, volatile organic compounds (contributors to ground level smog) 54 percent, carbon monoxide (CO) 52 percent, sulfur dioxide (SO<sub>2</sub>) 49 percent, and nitrogen oxides (NO<sub>x</sub>) 24 percent.<sup>58</sup>

At the same time, this progress occurred with ever increasing efficiency. Since the founding of modern environmental law the U.S. economy has ballooned, increasing nearly two fold, while the “number of vehicle miles traveled in the United States increased by 171 percent, and U.S. energy consumption grew by 47 percent.”<sup>59</sup> Besides emissions, overall air quality has tremendously improved,<sup>60</sup> and reductions in fine particulate matter have increased American life expectancies from two to eight months depending on where they live.<sup>61</sup> As for water, America's rivers no

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54. 42 U.S.C. § 6901 et seq.

55. 42 U.S.C. § 9601 et seq.

56. *E.g.*, Insecticides & Environmental Pesticide Control Act, 7 U.S.C. § 136; Coastal Zone Management Act, 16 U.S.C. § 1451; Federal Land, Policy, and Management Act, 43 U.S.C. § 1701.

57. Jeffrey Holmstead, *Protecting the Environment: Thirty Years of U.S. Progress*, GLOBAL ISSUES (2005), <http://iipdigital.usembassy.gov/st/english/article/2005/06/20050613142715cmretrop9.869021e-02.html#axzz3vBcZs9PK>.

58. *Id.*

59. *Id.*

60. As a percent change in air quality from 1980 to 2014, carbon monoxide levels have improved 85%, ozone 33%, lead 98%, nitrogen dioxide 60%, and sulfur dioxide 80%. *Air Quality Trends*, U.S. ENVTL. PROT. AGENCY (2016), <http://www3.epa.gov/airtrends/aqtrends.html>.

61. C. Pope et al., *Fine-Particulate Air Pollution and Life Expectancy in the United States*, 360 NEW ENGLAND J. MED. 376, 376–86 (2009).

longer burn, or at least rarely so, and “[t]he number of waters meeting quality goals has roughly doubled” since the CWA was made into law.<sup>62</sup>

Given these successes, one may reasonably find current statutory protections sufficient. However, “about half of our rivers and streams, one-third of lakes and ponds, and two-thirds of bays and estuaries are ‘impaired,’” meaning that many times U.S. citizens cannot even fish or swim in U.S. waterways—our national heritage.<sup>63</sup> A worse and recent example is Flint, MI, wherein the water supply of nearly 100,000 people is contaminated with unsafe levels of lead.<sup>64</sup> This state of affairs is far from achieving the CWA’s explicit goal of eliminating all pollutant discharge into navigable waters by 1985.<sup>65</sup> Also, although environmental quality has improved overall, environmental statutes fail to address the disproportionate environmental burden the poor and people of color still bear.<sup>66</sup> Worse, climate change continues to be an unsolved problem both domestically and internationally.<sup>67</sup>

With these still existing environmental threats and unsolved problems, we should be skeptical of the position that environmental statutory law alone is enough. Therefore, we may consider what other environmental remedies may exist, possibly within the U.S. Constitution.

### III. THE RECOGNITION OF IMPLIED RIGHTS

If the U.S. Constitution secures a right to a clean environment, such a right must be implied because the U.S. Constitution does not explicitly guarantee such a right. Thus, an inquiry into a constitutional environmental right requires a discussion of the mechanisms of how

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62. James Salzman, *Why Rivers No Longer Burn*, SLATE (Dec. 10, 2012), [http://www.slate.com/articles/health\\_and\\_science/science/2012/12/clean\\_water\\_act\\_40th\\_anniversary\\_the\\_greatest\\_success\\_in\\_environmental\\_law.html](http://www.slate.com/articles/health_and_science/science/2012/12/clean_water_act_40th_anniversary_the_greatest_success_in_environmental_law.html).

63. *Id.* (citing *National Summary of State Information*, U.S. ENVTL. PROT. AGENCY, [http://ofmpub.epa.gov/waters10/attains\\_nation\\_cy.control#total\\_assessed\\_waters](http://ofmpub.epa.gov/waters10/attains_nation_cy.control#total_assessed_waters) (last visited Jan. 2, 2016)).

64. See Ben Mathis-Liley, *Michigan Knew Last Year that Flint’s Water Might Be Poisoned but Decided Not To Tell Anyone*, SLATE (Jan. 11, 2016), [http://www.slate.com/blogs/the\\_slatest/2016/01/11/state\\_of\\_michigan\\_flint\\_broke\\_law\\_and\\_covered\\_up\\_lead\\_levels\\_in\\_water\\_expert.html](http://www.slate.com/blogs/the_slatest/2016/01/11/state_of_michigan_flint_broke_law_and_covered_up_lead_levels_in_water_expert.html).

65. 33 U.S.C. § 1251(a)(1) (1972).

66. See John Metcalfe, *People of Color Are Disproportionately Hurt by Air Pollution*, CITYLAB (Apr. 15, 2014), <http://www.citylab.com/design/2014/04/people-color-are-disproportionately-killed-air-pollution/8881/>.

67. See Elizabeth F. Valentine, *Arguments in Support of a Constitutional Right to Atmospheric Integrity*, 32 PACE ENVTL. L. REV. 56, 57 (2015).



implicit rights are constitutionally protected through substantive due process.

Buried beneath criminal law provisions, the Fifth Amendment to the U.S. Constitution secures due process rights.<sup>68</sup> The Fifth Amendment provides that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>69</sup> Whereas the Fifth Amendment applies to federal governmental actions, the Fourteenth Amendment to the U.S. Constitution repeats the Fifth Amendment’s due process protection as to the states.<sup>70</sup> Although the text of both Amendments appears to be limited to procedural due process rights, it is now understood that substantive due process is also protected.<sup>71</sup>

Accordingly, substantive 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.”<sup>72</sup> An interest is a right within the concept of ordered liberty, and thus protected by substantive due process, when it is “deeply rooted in this Nation’s history and tradition,” and when it can be succinctly presented with a “careful description.”<sup>73</sup> Additionally, a right must be so “deeply rooted” within U.S. history as to be considered “fundamental.”<sup>74</sup> However, tradition and history are guidelines, not limitations on substantive due process’ expanse.<sup>75</sup> A due process right within our understanding of “liberty” must also be universal—applicable to all people at all times.<sup>76</sup>

Substantive due process theory originated during the Restoration Period following the Civil War and passage of the Fourteenth

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68. U.S. CONST. amend. V.

69. *Id.*

70. U.S. CONST. amend. XIV.

71. See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (detailing the U.S. Supreme Court’s substantive due process analysis).

72. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1953) and *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)). Those rights implicit in ordered liberty include those expressly written in the Bill of Rights and those implicit as well. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847–48 (1992).

73. *Washington v. Glucksberg*, 521 U.S. 703, 720–21 (1997) (citing *Moore v. City of Cleveland*, 431 U.S. 494, 502 (1977) and *Marshall v. Rodgers*, 132 S.Ct. 1446, 1447).

74. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993)).

75. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

76. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 871 (2010) (Stevens, J., dissenting).

Amendment to the U.S. Constitution.<sup>77</sup> Along with the Civil Rights Act of 1866, the Fourteenth Amendment was passed to protect former slaves and others from unconstitutional state action.<sup>78</sup> Litigation involving the Fourteenth Amendment was scant and unnoticeable until the infamous *Lochner v. New York* case.<sup>79</sup>

Nearly fifty years after the passage of the Fourteenth Amendment, the U.S. Supreme Court decided in *Lochner* that there existed an economic substantive due process right written between the lines of the U.S. Constitution's due process clauses.<sup>80</sup> Specifically, the Court invalidated a state statute limiting the hours in a work week, arguing that such a measure impermissibly interfered with citizens' substantive due process "liberty of contract."<sup>81</sup> This theory was used to reject numerous progressive statutes following the Gilded Age, but was ultimately rejected less than thirty years after its inception.<sup>82</sup>

The *Lochner* era came to a close once the U.S. Supreme Court realized that "neither property rights nor contract rights are absolute."<sup>83</sup> Instead due process "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."<sup>84</sup> The Court then incorporated this standard into the strict scrutiny analysis of laws that infringe on due process rights, originating in one of Justice Harlan Stone's footnotes in 1938.<sup>85</sup>

Although *Lochner* is seen as faulty by most practitioners along both the political and legal thought spectrums, *Lochner's* fault is limited to its holding that states may not regulate commerce, not that unenumerated constitutional rights are equally deserving of protection.<sup>86</sup>

After *Lochner*, the field of rights protected by substantive due process continued to expand. The U.S. Supreme Court laid the basis for

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77. U.S. CONST. amend. XIV, § 1; William Musgrove, *Substantive Due Process: A History in the Due Process Clause*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 125, 125 (2008).

78. 42 U.S.C. § 1981 et seq.

79. David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 3 (2003) ("Almost one hundred years after the Supreme Court decided the case, *Lochner* and its progeny remain the touchstone of judicial error.").

80. *Lochner v. New York*, 198 U.S. 45, 55-57 (1905).

81. *Id.* at 56.

82. Musgrove, *supra* note 77, at 129-30 (citing *Nebbia v. New York*, 291 U.S. 502 (1934)).

83. *Nebbia*, 291 U.S. at 523.

84. *Id.* at 525.

85. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

86. Musgrove, *supra* note 77, at 130.

a privacy due process right by recognizing that parents have a fundamental right to control their children's upbringing during the *Lochner* era.<sup>87</sup> In *Meyer v. Nebraska*, the Court declared that states could not arbitrarily limit language education, nor violate equal protection, by banning the teaching of "alien speech."<sup>88</sup> In finding the fundamental nature of parental interest in their children's education, the U.S. Supreme Court focused on the historical protections education and degree of importance it received in the United States.<sup>89</sup>

The Court's interest in privacy later expanded to include the right to procreate in *Skinner v. Oklahoma*.<sup>90</sup> Although Oklahoma's forcible sterilization program for repeat blue collar, but not white collar, criminals was invalidated on equal protection grounds, U.S. Supreme Court also noted procreation is "a right which is basic to the perpetuation of a race."<sup>91</sup> The Court even questioned whether a state has the right to sterilize criminals at all given the "basic" nature of breeding and how "irreparable" the damages would be if such a liberty was relinquished.<sup>92</sup>

From the 1940s onward, substantive due process continued to slowly expand into other territories, but then reached a punctuated equilibrium wherein multiple liberty interests were recognized from the 1960s onward.<sup>93</sup> The privacy right supported by *Skinner* was affirmed, and a due process right to access information on birth control was accepted in 1965.<sup>94</sup> The *Griswold v. Connecticut* Court also noted that certain explicit rights necessarily required implicit rights in order to

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87. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

88. *Id.* at 401.

89. *See id.* at 400 ("The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted.").

90. 316 U.S. 535, 543 (1942).

91. *Id.* at 536.

92. *See id.* at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.").

93. This evolution in substantive due process doctrine coincided with American cultural shifts following World War II, and in response to red scare McCarthyism, but also, not coincidentally, substantive due process received more protection as Justice William Brennan's influence over the court waxed and waned. *See generally* PETER IRONS, BRENNAN V. REHNQUIST: THE BATTLE FOR THE CONSTITUTION (1994).

94. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

protect the explicit.<sup>95</sup> At the same time, the U.S. Supreme Court endorsed Justice John Marshall Harlan II's prior dissent in *Poe v. Ullman* favoring expansive due process and wrote that preceding substantive due process cases "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>96</sup>

A substantive due process right to marriage was suggested shortly after *Griswold*,<sup>97</sup> supported again in 1978,<sup>98</sup> and then fully recognized in 2015.<sup>99</sup> The right to marriage is now protected because of its fundamental nature and traditional esteem.<sup>100</sup> Fourteenth Amendment protections then incorporated the Bill of Rights' protections, and vice versa, in 1968.<sup>101</sup> In 1972, *Roe v. Wade* recognized the substantive due process right to have an abortion, which has since been affirmed due to the fundamental, immensely personal, and private nature of family planning.<sup>102</sup> Five years later the U.S. Supreme Court relied on Justice Harlan's *Poe* dissent again to describe the due process right for family members to live with one another.<sup>103</sup> Again, the right for families to associate as they see fit is protected because of its historical protection and its necessary function as a way to continue teaching our Nation's freedom.<sup>104</sup>

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95. *See id.* at 482-84 ("Without those peripheral rights the specific rights would be less secure.").

96. *Id.* at 484 (citing *Poe v. Ullman*, 367 U.S. 497, 516-17 (1967) (Harlan, J., dissenting)).

97. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival") (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541(1942)).

98. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.").

99. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

100. *See id.* ("In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond.").

101. *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

102. *See Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833, 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

103. *See Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 501 (1977) (quoting *Poe v. Ullman*, 367 U.S. 497, 542-542) (1961) ("Due process has not been reduced to any formula; its content cannot be determined by reference to any code.") (Harlan, J., dissenting).

104. *See id.* at 503-04 ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

The influence of then-Justice William Rehnquist during the Burger Court, along with Justice Rehnquist's rise to the Chief Justice position, constrained substantive due process somewhat during the 1980s.<sup>105</sup> However, even Chief Justice Burger continued to support the recognition of implicit substantive due process rights despite his conservative approach to due process.<sup>106</sup> Chief Justice Burger's confirmation of implicit rights then forced Justice Rehnquist, normally circumspect of acknowledging rights beyond what would have existed at the United States' founding, to strongly suggest that there is a substantive due process right to refuse medical treatment.<sup>107</sup> Into the twenty-first century, substantive due process has protected a right to consensual, sexual intimacy,<sup>108</sup> and most recently, the right of all loving couples to wed.<sup>109</sup>

Alongside the U.S. Supreme Court's evolving understanding of substantive due process, other implicit rights related to explicit rights secured by the Bill of Rights have been acknowledged from the latter half of the twentieth century onward. There is an implicit right to hide your association with targeted groups in order to protect the explicit First Amendment right of association.<sup>110</sup> The First Amendment implicitly guarantees the public right to attend criminal trials in order to secure the rights of a free press.<sup>111</sup> 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.<sup>112</sup> The exclusionary rule was created by implication to secure the meaning of the Fourth Amendment,<sup>113</sup> and the Sixth Amendment right to counsel covertly secures the indigent with an attorney with minimal level of competence.<sup>114</sup> Recently, the U.S. Supreme Court has read beyond the

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105. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (holding that substantive due process does not categorically prevent pretrial detention).

106. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) ("certain unarticulated rights are implicit in enumerated guarantees").

107. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1996) ("We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.") (citing *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278-79 (1990)).

108. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

109. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

110. *Nat'l Ass'n for Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-62 (1958).

111. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

112. *Dickerson v. United States*, 530 U.S. 428, 442 (2000); *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

113. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

114. *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963).

text to recognize the Second Amendment's implicit personal right to own a pistol in order to secure a "right to bear arms,"<sup>115</sup> and that the First Amendment's free exercise clause protects the right to also express one's beliefs, for otherwise a mere right to only hold one's religious views is useless.<sup>116</sup>

In sum the understanding of substantive due process and the implicit guarantees of other constitutional amendments has expanded as the logical implications of due process became apparent. In order for constitutional rights to be able to protect others the rights themselves must be implicitly protected by constitutional guarantees. As a parallel, modern environmental law arose once environmental degradation became apparent, while at the same time numerous substantive due process liberties were enshrined within constitutional doctrine. Both realizations are largely products of the last half of the twentieth century, and both due process protections and environmental protection grew from there onward. However, substantive due process has not been adequately evaluated in light of environmental protection, but should be explored to determine the validity of constitutional environmental rights.

#### IV. THE CONSTITUTIONAL RIGHT TO A CLEAN ENVIRONMENT

The U.S. Constitution secures a right to a clean and healthful environment. This realization is based on the Constitution's implicit guarantees and the substantive due process writings of the U.S. Supreme Court. Naysayers have several counterarguments, which may be initially persuasive. However, the force of voices to the contrary is limited by already recognized due process rights.

##### A. *Recognizing the Right*

A constitutional environmental right arguably exists because otherwise no constitutional right exists. Recall that substantive due process protects all rights within "ordered liberty,"<sup>117</sup> meaning that the right is "deeply rooted" and carefully described.<sup>118</sup> Tradition and history

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115. D.C. v. Heller, 554 U.S. 570, 609 (2008).

116. See *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)).

117. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Palko v. Connecticut* 302 U.S. 319, 325-326 (1938)).

118. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977)).

act as guides but do not set the boundaries of due process review.<sup>119</sup> Rather, both universality<sup>120</sup> and the implicit requirements to preserve due process must also be considered.<sup>121</sup> It is this last inquiry that is key to an environmental right.

The existence of a constitutional environmental right can be based on the nature of practicing constitutional rights themselves. Logically, one cannot speak without breathing. An ability to speak requires an ability to breathe. Likewise, one cannot act without the ability to act. This seems self-evident, but this principle is crucial as it implicitly requires that the ability to act be a precursor to acting. Turning back to constitutional matters, it hardly seems fair for the U.S. Constitution to secure a right to associate with one's own family, if that family does not have an environment in which it may associate. It would also seem odd that one has a right to marry but not have the environment in which a marriage may exist. A right of expression is useless if there is no vital air, which may fill the lungs, and a right of free exercise is a falsehood if religion may not be expressed and taught so as to be perpetuated. For these rights and others, the environment in which they may be exercised is an implicit requirement. As the U.S. Supreme Court has repeatedly recognized implicit rights so as to necessarily secure due process and other rights, an implicit right to some sort of bare modicum of environmental conditions for constitutional exercise is likewise required.

Consider also, that life is a prerequisite of constitutional rights and the exercise thereof. If we understand that rights may be implicitly recognized so as to secure due process and all other rights,<sup>122</sup> then implicitly 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.<sup>123</sup> Of course, there is a distinction between limitations on what

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119. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

120. *McDonald v. Chicago*, 561 U.S. 742, 871 (2010) (Stevens, J., dissenting).

121. *See Moore*, 431 U.S. at 503; *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967); *see also Griswold v. Connecticut*, 381 U.S. 479, 482-84 (1965).

122. *See Moore*, 431 U.S. at 503; *see also Loving*, 388 U.S. at 11; *Griswold*, 381 U.S. at 482-84.

123. "Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources." *Stop H-3 Ass'n. v. Dole*, 870 F.2d 1419, 1430 (9th Cir. 1989).

I have no difficulty in finding that the right to life and liberty and property are constitutionally protected. Indeed the Fifth and Fourteenth Amendments provide that these rights may not be denied without due process of law, and surely a person's health is what, in a most significant degree, sustains life.

*Envtl. Def. Fund v. Hoerner*, 3 ENVTL. L. REP. 20794, 20794-795 (D. Mont. 1970).

the government can do and what the government must do. A right to some measure of environmental quality may not require governmental intervention, but it may prevent governmental behavior that severely debilitates the environment.

A right to a minimal level of environmental quality would also be supported by U.S. tradition. What is more fundamental than a right that provides the very fundament upon which constitutional promises may bear fruit? It is extremely unlikely that the U.S. Constitution's original authors envisioned environmentalism, or even simply the modern concept of "environment."<sup>124</sup> Contemporary understandings of "environment" would have "been meaningless to those attending the Constitutional Convention in Philadelphia [over] 200 years ago."<sup>125</sup> However, due process has never been limited as to the understandings of the extant when it was first drafted.<sup>126</sup> To 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.

When turning to the past though, the founding fathers still recognized the importance of the natural world to the United States' success.<sup>127</sup> At its inception the United States was an "agrarian nation whose leaders appreciated the value of the land and its importance to a growing economy."<sup>128</sup> James Madison recognized the value of agriculture to the United States' success, but even he saw a limit to the dominion that that nation may exert on nature.<sup>129</sup> Thomas Jefferson extolled agriculture,

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124. See Robert Percival, "Greening" the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 812 (2002); RACHEL CARSON, SILENT SPRING 12-13 (1962) ("If 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.").

125. *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 536 (S.D. Tex. 1972) (quoting Representative Richard Ottinger (D-NY), Cong. Rec. 17116 (1968), who offered an environmental amendment to the U.S. Constitution).

126. *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 847-49 (1992) ("It is also tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified . . . But such a view would be inconsistent with our law.") (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989)).

127. See John Jay, *Federalist No. 2*, in THE FEDERALIST PAPERS 12 (Simon & Brown 3d ed. 2010) ("Providence has in a particular manner blessed [the United States] with a variety of soils and productions, and watered it with innumerable streams, for the delight and accommodation of its inhabitants.").

128. Percival, *supra* note 124, at 813.

129. See James Madison, *Address to the Agricultural Society of Albemarle, Virginia*, in LETTERS AND OTHER WRITINGS OF JAMES MADISON, VOLUME III 68 (J. B. Lippincott & Co. 1884)



but also believed that no one “by natural right” could exploit natural resources beyond that which would put posterity at a disadvantage.<sup>130</sup> Perhaps the Founding Fathers’ sentiments that the environment cannot be exploited beyond its sustainable use are why the U.S. Constitution’s promises were ultimately guaranteed “to ourselves and our posterity.”<sup>131</sup> The divide between today’s and the founding fathers’ notions of “environment” is then more linguistics and anachronism, not meaning. The U.S. Supreme Court has also echoed the sentiment that the environment must be protected for posterity.<sup>132</sup>

Outside of the Takings Clause, the U.S. Supreme Court has only discussed environmental rights in light of substantive due process when Justice William O. Douglas mentioned it in passing dicta in a solo dissent.<sup>133</sup> In voting to grant certiorari to an antitrust dispute, Douglas rebuked his colleagues for treating a corporate law matter with the sensitivity of constitutional law.<sup>134</sup> He stated that due process liberty includes “the ‘liberty’ to exploit people, *our resources, our environment.*”<sup>135</sup> If due process must be universal, then all people must have access to exploit the environment.<sup>136</sup> A universal right to exploit may seem environmentally destructive, but if all people, including all extant generations and posterity, are to have access to environmental amenities then the environment must be exploited in a sustainable manner such that its availability is not deprived by governmental actors. For how else may a right to exploit be exercised universally?

Past judicial inquiries into the existence of a constitutional environmental right found no such right. Those cases should be

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(“On comparing the vast profusion and multiplicity of beings with the few grains and grasses, the few herbs and roots, and the few fowls and quadrupeds, which make up the short list adapted to the wants of man, it is difficult to believe that it lies with him so to remodel the work of nature as it would be remodeled, by a destruction not only of individuals, but of entire species.”).

130. See Valentine, *supra* note 67, at 93 (“Then no man can by *natural right* oblige the lands he occupied, or the persons who succeed him in that occupation to the [payment] of debts contracted by him. For if he could, he might during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not the living, which would be reverse of our principle . . .”) (quoting Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION (Barbara B. Oberg & J. Jefferson Looney eds., 2008)).

131. See Valentine, *supra* note 67, at 91 (citing U.S. CONST. pmbl.).

132. Missouri Portland Cement Co. v. Cargill, Inc., 418 U.S. 919, 920 (1974).

133. *Id.*

134. *Id.*

135. *Id.* (emphasis added).

136. See McDonald v. Chicago, 561 U.S. 742, 871 (2010) (Stevens, J., dissenting) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

reevaluated in light of recent due process jurisprudence including implicit security rights.

Presumably inspired by the successes and possibilities of the environmental movement of the late twentieth century, lawyers made environmental substantive due process claims.<sup>137</sup> The first federal cases tested the limits of the new NEPA statute and tried to adapt tort theory, but failed to convince judges that a constitutional environmental right exists.<sup>138</sup> The Federal District Court of Montana recognized that we are all “constitutionally protected in our natural and personal state of life and health,” but did not see any state action in the approval of a business license for a paper mill without requiring any pollution mitigation.<sup>139</sup> The Eastern District Federal Court of Arkansas did state that due process encompassing environmental protection was “not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition.”<sup>140</sup> The Eastern District Court of New York even hinted that a constitutional right to a healthful environment may someday be recognized.<sup>141</sup> Notably, the Ninth Circuit Court of Appeals found that “it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment,” but deferred to not formally recognize that right in a NEPA dispute.<sup>142</sup> Other federal district and appellate courts also failed to extend constitutional protections to environmental claims.<sup>143</sup> Constitutional environmental

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137. *E.g.*, *Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 325 F. Supp. 728, 739 (E.D. Ark.) *supplemented*, 325 F. Supp. 749 (E.D. Ark. 1971).

138. *Id.* at 739; *Tanner v. Armco Steel Corp.*, 340 F. Supp. 340, 535 (S.D. Tex. 1972) (citing *Envtl. Def. Fund v. Corp of Eng'rs*, 325 F. Supp 728, 739 (E.D.Ark.1970)).

139. *Hoerner*, 3 ENVTL. L. REP. at 20794-95.

140. *Envtl. Def. Fund.*, 325 F. Supp. at 739.

141. *See In re “Agent Orange” Prod. Liab. Litig.*, 475 F. Supp. 928, 934 (E.D. N.Y. 1979) (“Since there is not *yet* a constitutional right to a healthful environment . . . there is not *yet* any constitutional right under the fifth, ninth, or fourteenth amendments to be free of the allegedly toxic chemicals involved in this litigation”) (emphasis added).

142. *Stop H-3 Ass'n v. Dole*, 870 F. 2d 1419, 1430 (4th Cir. 1989).

143. *Concerned Citizens of Neb. v. United States Nuclear Reg. Comm'n*, 970 F. 2d 421, 426–27 (8th Cir. 1992); *BAM Historic Dist. Ass'n v. Koch*, 723 F.2d 233, 237 (2d Cir. 1983); *Gasper v. La. Stadium & Exposition Dist.*, 577 F.2d 897, 898 (5th Cir. 1978); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971); *MacNamara v. Cty. Council of Sussex Cty.*, 738 F. Supp. 134, 141-42 (D. Del. 1990); *Fed. Emp. for Nonsmokers' Rights (FENSR) v. United States*, 446 F. Supp. 181, 184-85 (D. D.C. 1978); *Pinckney v. Ohio Env'tl. Prot. Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974); *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061, 1064-65 (N.D. W.V. 1973); *James River and Kanawha Canal Parks, Inc. v. Richmond Metro. Auth.*, 359 F. Supp. 611, 641 (E.D. Va. 1973).

claims have dwindled since the initial rush of the 1970s, and subsequent suits continue to fail.<sup>144</sup>

The deference of federal courts to established law and unwillingness to expand due process rights, is not surprising because “if a case may be decided on either statutory or constitutional grounds . . . for sound jurisprudential reasons . . . [courts] will inquire first into the statutory question.”<sup>145</sup> As environmental law is a statutory animal, of course courts will rely on statutory answers to settle disputes and tend to disregard proposed changes to constitutional doctrine.<sup>146</sup> These lower court decisions can be further distinguished by pointing out that they conflict with Justice Douglas’ exploitative right,<sup>147</sup> and that they should be interpreted in light of later U.S. Supreme Court decisions reviewed above because most of those earlier federal cases did not use the modern substantive due process doctrine.<sup>148</sup>

### B. *Carefully Describing the Right*

No right, no matter how deeply rooted, is protected by substantive due process unless it can be carefully described.<sup>149</sup> Otherwise, a due process right could be limited into practical meaninglessness and nonexistence or expanded as to be over-burdensome and self-defeating. If due process necessarily entails a constitutional environmental right to a minimal environment where due process may be sustained therein, this right can be carefully described as a floor beneath which the state may not actively enable the environment to degrade.<sup>150</sup>

Instead of maintaining specific “transient levels of the quality of neighborhood life,” this right prevents the state from depreciating, or arbitrarily interfering with, environmental quality beyond that essential

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144. *See, e.g.,* Castro Rivera v. Fagundo, 310 F. Supp. 2d 428, 436 (D.P.R. 2004) *aff’d sub nom. Castro-Rivera v. Fagundo*, 129 F. App’x 632 (1st Cir. 2005) (rejecting a civil rights claim based on environmental harm).

145. *Herns v. McRae*, 448 U.S. 297, 306-07 (1980).

146. *Id.*

147. *Missouri Portland Cement Co. v. Cargill*, 418 U.S. 919, 920 (1974).

148. *See, e.g.,* Pinckney v. Ohio Env’tl. Prot. Agency, 375 F. Supp. 305, 310 (N.D. Ohio 1974) (determining that there is no constitutional environmental right based only on the explicit text of the U.S. Constitution and a limited discussion of fundamental nature of such a right, or lack thereof).

149. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

150. *See* Janelle Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT’L LEGAL PERSP. 185, 217–18 (2001) (“Finding a middle ground between the various interpretations of the right will result in a ‘careful’ definition of the right at the federal level.”).

level of constitutional expression.<sup>151</sup> Such a right does not impede purely private development, but it does present a negative requirement to not act so as to violate everyone's access to whatever environment is required for constitutional expression.<sup>152</sup> This may involve preventing all governmental aid of development projects that further impose disproportionate environmental burdens on communities of color.<sup>153</sup> Such a right may also preempt legislation that seeks to actively deteriorate environmental conditions.<sup>154</sup>

Due process may also impede governments from wholly disregarding environmental protections. A full repeal of all existing environmental statutes seems unlikely, but mainstream U.S. political forces have seriously suggested abolishing the U.S. Environmental Protection Agency.<sup>155</sup> "Right to Farm" political forces since the 1980s have also been successful in depriving ruralites of common law environmental protections.<sup>156</sup> The idea that environmental protection is constantly under threat of repeal should bring pause and consideration that constitutional protection may be warranted. Regardless of the specifics, this right can be universal, exercisable by all.<sup>157</sup>

### C. *Defending the Right*

Of course, with any legal theory that posits that there is a currently unrecognized constitutional right, there are bound to be critics and

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151. BAM Historic Dist. Ass'n v. Koch, 723 F.2d 233, 237 (2d Cir. 1983).

152. Shubha Harris, *Establishing a Constitutional Right to Environmental Quality*, AM. BAR ASS'N (May 5, 2008), <http://apps.americanbar.org/enviro/committees/lawstudents/writing/competition/2008/WillMitSoL/ShubhaHarris.pdf> (citing Joshua Bruckerhoff, Note, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615, 626-27 (2008)).

153. Such protections would be in addition to Title VI environmental justice claims, which seeks to mitigate discriminatory environmental impacts, either intentionally or in effect, by removing any federal funding that goes to projects with said impacts. 42 U.S.C.A. § 2000d-1 (1964). To establish such a claim there must be federal funding of an agency or other actor that is acting such that there will be a disproportionately negative impact on a community of color. *See id.*

154. *See, e.g.*, Patrick Ambrosio, *Making Sense of the Sense Act*, BLOOMBERG, Mar. 14, 2016, <http://www.bna.com/making-sense-sense-b57982068474/>.

155. Oliver Milman, *Republican Candidates' Calls To Scrap EPA Met with Skepticism by Experts*, GUARDIAN (Feb. 26, 2016), <http://www.theguardian.com/environment/2016/feb/26/republican-candidates-donald-trump-eliminate-epa-law-experts>.

156. Ross Pifer, *Right to Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707, 710 (2013).

157. McDonald v. Chicago, 561 U.S. 742, 871 (2010) (Stevens, J., dissenting).

deniers. Those naysayers are likely to present six major critiques, which will be addressed in kind.

The first likely critical response from judges and other legal commentators is that such a right to requisite environmental amenities is not fundamental<sup>158</sup> or deeply rooted in U.S. history.<sup>159</sup> The fundamental nature of a constitutional environmental right has already been addressed above, and such a counterargument presents a limited view of due process that would foreclose many of our current due process protections.<sup>160</sup>

The second probable contrary argument is that such a notion is not supported by the text of the U.S. Constitution. This particular argument is odd because the U.S. Supreme Court has repeatedly “acknowledged that certain unarticulated rights are implicit in enumerated guarantees.”<sup>161</sup> Furthermore, the U.S. Constitution explicitly provides that enumerated rights “shall not be construed to *deny or disparage* others retained by the people.”<sup>162</sup> A constitutional environmental right cannot be marginalized or ignored simply because it lacks explicit backing, and any attempted textualist rebuttal of an environmental due process right ironically ignores the very text of the U.S. Constitution. As such, this second position against any currently unrecognized due process right is unwittingly self-defeating.

The third likely retort against this Article’s conclusion is that a constitutional environmental right is not enforceable.<sup>163</sup> It is correct that if a right cannot be enforced, then “it effectively does not exist.”<sup>164</sup> However, thinking that constitutional environmental rights are not

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158. See, e.g., *Lawrence v Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (citing *Reno v. Flores*, 507 U.S. 292, 303 (1993)).

159. See, e.g., *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 536 (S.D. Tex. 1972) (“First, there is not a scintilla of persuasive content in the words, origin, or historical setting of the Fourteenth Amendment to support the assertion that environmental rights were to be accorded its protection. To perceive such content in the Amendment would be to turn somersaults with history.”); see also Daniel Reeder, *Federalism Does Well Enough Now: Why Federalism Provides Sufficient Protection for the Environment, and No Other Model Is Needed*, 18 PENN. ST. ENVTL. REV. 293, 306-07 (2010).

160. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (holding that there is a fundamental right to marriage); see also *Roe v. Wade*, 410 U.S. 113, 153-167 (1973) (holding that the implicit right to privacy guarantees a fundamental right to access abortion services).

161. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980).

162. U.S. CONST. amend. XI (emphasis added).

163. E.g., Reeder, *supra* note 159, at 308; see also Ruhl, *supra* note 4, at 275-79 (arguing that an environmental, constitutional amendment would be too aspirational to be practically enforceable).

164. Reeder, *supra* note 159, at 308.

judicially enforceable comes from assumptions that they are either incredibly difficult, “nearly impossible to delineate with sufficient specificity,” or that they “will always be too broadly drawn.”<sup>165</sup> Courts may find it difficult to ascertain whether a constitutional environmental due process right has been violated, but just because something is hard does not make it impossible. Logistics were not considered when recognizing that abortion was secured by the U.S. Constitution, despite its political controversy and continued debate over application.<sup>166</sup>

Simply because we may not be able to point with absolute specificity within the center of the constitutional gradient does not mean we lack certainty along the ends of the spectrum.<sup>167</sup> Put another way, it does not follow that because artistic and pornographic works may have blurred boundaries sometimes, the Birth of Venus is indistinguishable from the most misogynistic of desires. Cases where a constitutional environmental protection may be problematic should not justify ignoring those opposite cases where a right is clearly infringed. There is also no reason to think that current standing jurisprudence would prevent aggrieved plaintiffs with cognizable harms to address their claims.<sup>168</sup> If the U.S. Supreme Court can successfully tailor free speech,<sup>169</sup> privacy,<sup>170</sup> and property rights,<sup>171</sup> it is not apparent why an overly broad view of environmental rights could not be likewise limited.

The fourth likely reaction against a constitutional environmental right is claiming that no such right is necessary because of the current breadth of environmental statutes and cultural attitudes towards environmental protection.<sup>172</sup> Besides ignoring the failed goals of

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165. *Id.* at 308-12.

166. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847-48 (1992).

167. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (resolving the difference between pornography and art as “I know it when I see it”).

168. *See* Eurick, *supra* note 150, at 219 (“Causation will also be difficult in areas like water pollution, but . . . it may not be impossible to prove that the government is responsible for discharges that will injure plaintiffs”). *Contra* Reeder, *supra* 159, at 308-309.

169. *E.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994) (“While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities’ police powers.”).

170. *E.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. at 847-48.

171. *E.g.*, Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (holding that landmark designations that restrict one’s use of property are not takings).

172. *See, e.g.*, Reeder, *supra* note 159, at 311-12 (asserting that an environmental, constitutional amendment is not necessary because of pre-existing federalism and environmental statutes); *see also* Ruhl, *supra* note 4, at 264-74 (arguing why an environmental, constitutional amendment is not necessary).

environmental protection, such a stance forgets how important due process is, and that the “very purpose of a [Constitution] was to withdraw certain subjects from the vicissitudes of political controversy.”<sup>173</sup> Asserting that current environmental protections are sufficient neglects to consider that the political pendulum may swing. A similar stance against constitutional recognition could be taken regarding healthcare rights, as states were already regulating doctors and hospitals before those rights were recognized.<sup>174</sup> A constitutional right is a floor, not a stop gap measure to be applied if statutory involvement is insufficient.

Pointing to cultural recognition of environmental protection’s importance as a reason to disregard constitutional protection also ironically forgets that cultural practices and expectations have effectively constitutionalized implicit protections before.<sup>175</sup> Just as *Miranda* rights were given constitutional recognition through cultural acceptance, so could environmental protections.

The fifth possible critique of constitutional environmental rights is that such protections will halt industrial advancement. This fifth position is similar to the third critique because it confuses application concerns with considerations of whether a right exists at all, but it is also especially narrow in that it neglects to consider international success with constitutional environmental rights.<sup>176</sup> Most constitutions secure environmental protections, and about a third of those protect procedural as well as substantive environmental rights.<sup>177</sup> Recent global activity also suggests that even more countries will continue to gain constitutional environmental protections.<sup>178</sup> Despite constitutional environmental

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173. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); Harris, *supra* note 152, at 7-8.

174. *See* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *see also* *Casey*, 505 U.S. at 847-48.

175. *See* *Dickerson v. United States*, 530 U.S. 428, 443 (“We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where warnings have become part of our national culture.”) (citing *Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J. dissenting)).

176. Erin Delay, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, 17 INT’L J. PEACE STUD. 71, 79 (2012) (citing DAVID BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 47-67 (2012)).

177. *Id.*

178. David Boyd, *The Constitutional Right to a Healthy Environment*, ENV’T SCI. & POL’Y FOR SUSTAINABLE DEV. 5 (July-Aug. 2012), <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>.

protections, the march of industrial progress has no suggestion of stopping.

Sixth and finally, critics may note that several of the due process cases relied upon for this argument deal with personal familial matters.<sup>179</sup> Accordingly, whereas it is easier to see the fundamental nature of marriage or abortion, it is less apparent why the government may not more easily intrude into environmental affairs. However, not only does the constitutional environmental right described in this Article rely on other due process cases outside the family sphere, but our interactions with environs are incalculably personal.<sup>180</sup> From the first dealings people have in the natural world as children to the identities communities develop around surrounding landmarks, environmental connections invariably become a part of American identities. Humans also shape their environments in response to their personalities. Our dependence on environmental amenities is fundamental to our life and identities.

## V. CONCLUSION

This Article presents the case that the U.S. Constitution secures the right to a basic level of environmental quality needed for the exercise of all other constitutional rights. Such a conclusion is made despite case law and opinions to the contrary,<sup>181</sup> in full knowledge that others have failed to convince the public of the same conclusion,<sup>182</sup> and that other legal theories have been posited within the environmental domain, but failed to take hold.<sup>183</sup> However, “[t]he nature of injustice is that we may not always see it in our own times,” and so the pursuit of justice requires a constant reappraisal of current law.<sup>184</sup> Critics of a constitutional environmental right may not see the injustice of an unrecognized right

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179. *E.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598; *see also Casey*, 505 U.S. at 847-48.

180. *See Sierra Club v. Morton*, 405 U.S. 727, 745 (1972) (Douglas, J., dissenting) (describing the relationship some have with the natural world as “intimate”); *see also Stop H-3 Ass’n v. Dole*, 870 F. 2d 1419, 1430 (9th Cir. 1989) (“The centrality of the environment to all of our undertakings gives individuals a vital stake in maintaining its integrity.”).

181. *E.g.*, *Envtl. Def. Fund v. Corps of Eng’rs*, 325 F. Supp. 728, 739 (E.D. Ark. 1971).

182. *E.g.*, Valentine, *supra* note 67, at 106; Harris, *supra* note 152, at 7-11; Bruckerhoff, *supra* note 152, at 622-25; Eurick, *supra* note 150, at 188; Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity*, 68 *Miss. L.J.* 565, 582 (1998).

183. *E.g.*, CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING?* 3 (2010) (“I am quite seriously proposing that we give legal rights to forests, oceans, rivers, and other so-called ‘natural objects’ in the environment—indeed, to the natural environment as a whole.”).

184. *Obergefell*, 135 S. Ct. at 2598.



now, but due process jurisprudence demonstrates an increasing and repeated constitutionalization of implicit rights so as to secure the practice of due process. The idea of a constitutional environmental right may then be considered in light of recent developments in due process law, and the constant search for justice may continue.

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. The Founding Fathers put a premium on environmental amenities, and today's society continues that sentiment.<sup>185</sup> This right may also be carefully described.<sup>186</sup> A constitutional environmental right may not impede private destruction of environmental treasures, but it would prevent governments from playing an active role in such atrocities. Due process could also prevent governments from wholly abandoning environmental protection. Legitimate discussion should not be ignored, and the due process right to a minimal level of environmental health and security should be seriously considered as a right most dear.

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185. See Jay, *supra* note 127, at 68; see also Madison, *supra* note 129; see also Valentine, *supra* note 67, at 57-58.

186. Eurick, *supra* note 150.