

# Incorporating Ecological Ethics into Manifest Destiny: Sustainable Development, the Population Explosion, and the Tradition of Substantive Due Process

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## I. INTRODUCTION

Population growth clearly has never been the sole cause of environmental degradation anywhere. Yet, in light of the scope and speed of environmental decline, the right to an ecologically-balanced environment has much in common with reproductive rights, since both are concerned with ensuring a life of quality.<sup>1</sup>

This Comment seeks to appreciate overpopulation in the United States and its implications for environmental law. While its broad objective is to appreciate the population-environment linkage between unfettered reproduction and the depletion of natural resources, climate change, and destruction of human environment, this Comment is concerned with the means in which sustainable development may evolve amidst the pronatalist (attitude or policy encouraging childbearing) traditions embedded in a rapidly expanding American society. Of

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1. Diana D.M. Babor, *Population-Environmental Linkages in International Law*, 27 DENV. J. INT'L L. & POL'Y 205, 228 (1999).

specific relevance is the issue of instilling population policies that advance the ideals and methods of sustainable development while remaining consistent with the United States Supreme Court's consensus on the scope of individual procreative rights. Given the fundamental shift in paradigm required to move from a culture of unlimited expansion to one of sustainability, the Supreme Court's judicial review power remains a constant consideration for states wishing to experiment in population control policies.

In its current incarnation, the environmental buzz phrase, "sustainable development," has been criticized as an "oxymoron."<sup>2</sup> Ironically, the "seductive vagueness" of such a contradiction of terms has made sustainable development a politically expedient tool for politics and commerce to embrace environmental issues.<sup>3</sup> However, as a broad precautionary policy, sustainable development often fails to translate to the language of U.S. environmental laws.<sup>4</sup> Sustainable development endorses a fundamental ethical shift in societal and individual responsibility owed to future generations. Its policies seek to internalize natural resource capital and human consumption and waste within the cost-benefit calculus of commercial and political decision-making.<sup>5</sup> Indeed popular interest may exist for an economic nexus linking environmental, political, and business goals.<sup>6</sup> However the cultural preoccupation with prolific fertility, material consumption, and individual entitlement, is a substantial obstacle to introducing the

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2. David R. Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1, 1-2 (1998).

3. *Id.* at 3-4.

4. See Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 10 (2007) (describing the predominant view in the U.S. as a "reactive approach that seeks to forestall precautionary measures until detailed evidence proves that significant harm is occurring that cannot be attributed to other causes"); Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U.L. REV. 675, 676 (2003) (describing study of legislative history of the Clean Air Act Amendments to reveal no public discussion). Apparently, "Congress devoted nearly all of its attention to allocating valuable property rights created under the scheme among clamoring interest groups. In other words, Congress fixated on dividing up the pork." Kysar, *supra*, at 676.

5. See Kysar, *supra* note 4, at 678-81 (describing "ecological economics" as an operational regulatory scheme, which is capable of internalizing the constraints of finite natural resources and environmental degradation of human waste); Hodas, *supra* note 2, at 5 ("[T]he key element to sustainable development is the recognition that economic and environmental goals are inextricably linked." (quoting Susan L. Smith, *Ecologically Sustainable Development: Integrating Economics, Ecology, and Law*, 31 WILLAMETTE L. REV. 261, 263 (1995)); see also J. William Futrell, *Defining Sustainable Development Law*, 19 NAT. RESOURCES & ENV'T 9, 9 (2004) ("'[S]ustainable development' has denoted an effort to meld concerns for environmental protection, economic well-being, and social justice.").

6. Futrell, *supra* note 5, at 9.

ecological ethic required for sustainable development.<sup>7</sup> For many Americans sustainable development is counterintuitive. Moderation and restraint are fundamentally un-American. Moreover, procreation is considered a sacred institution. Even in 2008, value judgments are assigned to women according to fertility. Those who have no children, or even one child, are viewed differently from the industrious mother of eight.

The next fifty years will see an estimated fifty percent increase in American population.<sup>8</sup> As environmental pressures of exponential population growth and per capita resource consumption bear down on the United States, existing environmental laws, which have mostly provided damage control, will undoubtedly struggle to mitigate these issues running through the very fabric of American identity.<sup>9</sup> This Comment posits that as continuous population growth swells urban cities and artificially sustained regions, conservation efforts and technological developments will fail to keep pace with resource depletion and degradation to human and natural environments. As such, individuals will begin to understand the significance of unfettered population growth as a numeric variable driving America's ecological impact.<sup>10</sup>

Fertility rights implicate our long tradition as a pronatalist society.<sup>11</sup> Regulation of these rights as a matter of ecological policy is potentially at odds with the penumbra of rights currently deemed fundamental by the Supreme Court.<sup>12</sup> However, as natural resource allocation is continually

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7. See Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 63 (2007) (dispelling common notion that procreation is an unlimited private right, describing its interpersonal scope, which must be reconciled with competing rights and duties to present and future society); see also Hodas, *supra* note 2, at 25 (“[F]or the law to reflect the values of sustainable development, it must reflect the underlying paradigm of the interconnectedness of life on a densely populated, technologically intense world.”).

8. U.S. Census Bureau, U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin, <http://www.census.gov/ipc/www/usinterimproj> (follow “Table 1a” pdf link) (last visited Mar. 24, 2008) (calculating current population at approximately 306,000,000, with projected population for mid-century at 419,854,000).

9. See Babor, *supra* note 1, at 207-21 (describing the anthropogenic effects of perpetual population and consumption growth on climate change, eco-simplification, and water constraints, and suggesting that America is addicted to economic growth and overconsumption, which its laws do not address); Percival, *supra* note 4, at 8-9 (explaining that U.S. regulatory policy is rarely driven by precautionary principles).

10. See, e.g., Richard D. Lamm, *Immigration: The Ultimate Environmental Issue*, 84 DENV. U.L. REV. 1003, 1004 (2007) (describing other environmental leaders' ecological footprint as a formula of I=PAT, where environmental impact was a product of population, affluence, and technology); see also Kysar, *supra* note 4, at 724-26 (describing one scientist's calculation of the “ecological footprint” to determine ecological impact using population as a factor).

11. Dillard, *supra* note 7, at 3-6.

12. Compare *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859, 915 n.3 (1992) (Stevens, J., concurring in part and dissenting in part) (“[A] state interest in population control

divided among a population growing at a compounding rate, consistent access to the natural world may become an unattainable luxury for many. To the extent population growth is perceived to diminish the quality of life for every individual, policies aimed at limiting procreation will become relevant and polarizing issues. This Comment argues that the Supreme Court has an obligation to foster movement toward sustainability by recognizing the compelling interests of future generations in having an ecologically sustainable environment. By analyzing unlimited procreative freedom under a substantive due process methodology relevant to contemporary norms and considerate of international efforts toward sustainability, the Supreme Court has an opportunity to explicitly or implicitly incorporate a fundamental right to ecological well-being. This right could be manifest through the Supreme Court's refusal to expand the existing scope of unenumerated procreative rights. Such a stand would endorse state action necessary to protect the compelling ecological liberty interests of future generations. Implicit in such interests would be the state's obligation to mitigate the exponential growth of present day populations.<sup>13</sup> In terms of regulating procreative autonomy, the states' ecological liberty interests would be narrowly tailored to distinguish between private and public components of fertility. While such a scheme would undoubtedly spark a polarizing debate, it encourages states to experiment with policies necessary for sustainable development, while safeguarding individual physical autonomy.

While a narrowly construed procreative right by the Supreme Court is necessary for sustainable development in the United States, it is not sufficient. In the words of sustainable architect and author William McDonough, "Regulation is a signal of design failure."<sup>14</sup> In other words, governmental and judicial action is only appropriate where the commercial market is fundamentally deficient or fails to correct for an externality perceived as unjust. For implementing principles of sustainable development, commerce remains the appropriate instrument for initiating such a paradigm shift. Unlike the political process, supply

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could not justify a state-imposed limit on family size or, for that matter, state-mandated abortions."), *with* United States v. Lopez, 514 U.S. 549, 551 (1995) (rejecting federal authority to regulate or coerce national programs based on noncommercial norms of health, morals, and public welfare), *and* Dillard, *supra* note 7, at 18 (citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651-52 (1972) (Powell, J., concurring) (proposing that Congress could limit tax deductions for dependents, constituting an intentional effort to "penalize childbearing").

13. See Dillard, *supra* note 7, at 19-20 (noting where the Supreme Court has upheld state regulation in spite of perceived harm to individual liberty).

14. WILLIAM McDONOUGH & MICHAEL BRAUNGART, CRADLE TO CRADLE: REMAKING THE WAY WE MAKE THINGS 54 (2002).

and demand is honest, efficient, and offers individual prosperity. To this end, “ecological economics” provides a means to quantify and internalize the environmental footprints of individual resource and waste costs, while approximating the upward limits of finite natural resources.<sup>15</sup> In theory, as the traditional economic driver of perpetual expansion and development becomes impractical through cost-benefit realities, incentives will shift toward greater bio efficiency (less bad) and, eventually, bio effectiveness (more good).<sup>16</sup> Ecological economic principles offer a compelling nexus between commerce, politics, and ecological conservation. However, an inevitable question arises as to what extent should a market-driven economic formula influence the Supreme Court and its understanding of an unenumerated procreative right.

Part II of this Comment considers the social and environmental impact of a “population bomb” in the United States, arguing that unrestricted procreation is sufficient to prevent sustainable development.<sup>17</sup> Part III provides background to the emergence of sustainable development and its history as an organizing principle in international environmental law, observing its fundamental shift in paradigm.<sup>18</sup> Part III next considers sustainable development in the United States amidst the emergence of ecological economic theory. Part IV considers vulnerabilities embedded within environmental law and ecological economic sustainable development policy. Part V considers the relevance of the Supreme Court’s history in upholding the unenumerated right to contract and the current scope of the procreative right. This Comment concludes that the paradigm shifts toward sustainable development and population control are the same. Both require an intergenerational ethic and acceptance of ecological limitations on human development. While the market is best to facilitate a culture of sustainability, the Supreme Court is best situated to preserve

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15. See generally PHILIP A. LAWN, TOWARD SUSTAINABLE DEVELOPMENT: AN ECOLOGICAL ECONOMICS APPROACH (2000) (examining sustainable development and its meaning in light of economic efficiency); Kysar, *supra* note 4, at 677-85 (reviewing the “alternative vision” of ecological economics).

16. See Kysar, *supra* note 4, at 677-85.

17. See generally PAUL R. EHRLICH, THE POPULATION BOMB (1968) (predicting overpopulation will bring about the demise of humanity).

18. See U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration on the United Nations Conference on the Human Environment*, 11 I.L.M. 1416, U.N. Doc. A/CONF.48/14 [hereinafter Stockholm Declaration]; WORLD COMM’N ON ENV’T & DEV., OUR COMMON FUTURE (1987); U.N. Conference on Env’t & Dev., Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environmental Development*, U.N. Doc A/Conf.151/5/Rev. 1 [hereinafter Rio Declaration].

and articulate the ecological morality behind the concept. Because a constitutional amendment is unlikely, institutionalization remains in the Supreme Court's willingness to implicitly recognize a new social consensus through substantive due process methodology.

## II. POPULATION GROWTH AND ENVIRONMENTAL IMPACT

*[W]e are locked into a system of "fouling our own nest," so long as we behave only as independent, rational, free-enterprisers.<sup>19</sup>*

At the outset, there are a few practical assumptions necessary in evaluating the impact of projected population growth in the United States within the context of environmental degradation: (1) that population will not be dramatically reduced through a natural or man-made disaster such as war, disease, meteor, etc.; (2) that immigration, legal or illegal, will remain a viable means of advancing one's quality of life; and (3) that people will care that the current population will not simply absorb another 120 million humans bodies in the next forty years and will adjust its expectations through technological advancements and reduced levels of consumption, affluence, and ecological quality.<sup>20</sup>

In the United States, the success of environmental issues to transcend political rhetoric and policy and become hard law is inversely proportional to the influence of dominant cultures.<sup>21</sup> Judeo-Christian

19. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245 (1968).

20. See Babor, *supra* note 1, at 215-16 (citing Lamong C. Hempel, *Population in Context: A Typology of Environmental Driving Forces*, 18 POPULATION & ENV'T 439, 443 (1997) (listing eight interactive variables within a causal framework that drive environmental degradation). Variables known to drive environmental degradation include:

1) Anthropocentrism: a core value which refers to the preoccupation with human progress and domination at the expense of other species. It also encompasses the widespread domination of women by men, and the ecological consequences that such domination produces; 2) Contempocentrism: also a core value which involves the human preoccupation with the present, often at the expense of future generations, both human and non-human; 3) Population Growth and Migration: an amplifier, or a principal means by which core values are extended. It involves the rate and magnitude of changes in fertility, mortality, and migration; 4) Technology: can be either beneficial or detrimental but is another amplifier of core values which has an enormous impact on the environment; 5) Poverty: a consumptive behavior variable that is a major creator of ecological poverty; 6) Affluence: also a behavior variable, it encourages environmental destruction through overconsumption, a lack of concern for natural resource depletion and "throw away" consumer lifestyles; 7) Market Failures: represent environmental externalities and unpriced opportunity costs, such as acid rain pollution; and the 8) Failure to have Markets: results in an unacceptable level of environmental damage due to an absence of assigned property rights or a failure to recognize economic value in vital ecological resources and services.

*Id.*

21. See Hodas, *supra* note 2, at 4-8.

beliefs, modern economics drivers, and a legal tradition grounded in seventeenth century philosophy have perpetuated an entitled sense of manifest destiny.<sup>22</sup> In terms of population and consumption, America has adhered to the command to be fruitful and multiply.<sup>23</sup> With a present day population of 302 million, the U.S. population is predicted to increase approximately 50 million by 2025.<sup>24</sup> By mid-century, the U.S. population is expected to reach 420 million, a 43% increase within fifty years.<sup>25</sup> Further census projections estimate an American population of 1 billion by 2100.<sup>26</sup> The U.S. Census Bureau's Population Division explains that the two factors driving population growth are fertility (births) and immigration.<sup>27</sup> The Census Bureau maintains that by 2011, the number of births each year will exceed the highest annual number of births ever achieved in America.<sup>28</sup>

In terms of consumption per capita, the United States is the most "overpopulated" nation on earth.<sup>29</sup> The nation consumes over 4.5 billion metric tons of materials annually.<sup>30</sup> An average American child represents twice the environmental impact as a child born in Sweden.<sup>31</sup> In 1992, scientist Mathis Wackernagel established a measure currently understood as the "ecological footprint."<sup>32</sup> Designed to quantify the ecological impact of a specific nation's populace, the measure

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22. See *id.* at 22-26; see also Jim Chen, *Legal Mythmaking in a Time of Mass Extinctions: Reconciling Stories of Origins with Human Destiny*, 29 HARV. ENVTL. L. REV. 279, 280 (2005) ("Environmental ethics in Western society has never quite shaken the influence of Judeo-Christian religious tradition. One prominent critic has traced the 'roots of our ecological crisis' to the book of Genesis' directive to 'subdue' the earth and to 'have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth.'") (citing *Genesis* 1:28 (Revised Standard Version)); see also A. Dan Tarlock, *A Brief Examination of the History of the Persistent Debate About Limits to Western Growth*, 10 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 155, 155-56 (2004) (arguing that settlers' reliance on the religious pseudoscience of "rain follows the plow" romanticism is ingrained in American culture, and that, "faith in human ingenuity to outwit nature still drives our natural resources and land use policies.").

23. See Babor, *supra* note 1, at 205.

24. U.S. Census Bureau, International Database, Country Summary: United States, <http://www.census.gov/ipc/www/idb/country/usportal.html> (last visited Mar. 24, 2008).

25. *Id.*

26. Lamm, *supra* note 10, at 1003.

27. Jennifer Cheeseman Day, Population Profile of the United States, U.S. Census Bureau, <http://www.census.gov/population/www/pop-profile/natproj.html> (last visited Mar. 24, 2008).

28. *Id.*

29. Babor, *supra* note 1, at 212-13 ("The average person in the U.S. consumes almost 20 times as much as a person in India or China, and 60-70 times more than a person in Bangladesh.").

30. *Id.* at 213.

31. *Id.* at 212.

32. See Kysar, *supra* note 4, at 724.

approximates a nation's biologically productive water and land necessary to produce the level of resources consumed, as well as its capacity to assimilate the wastes generated by a population at a specified standard of living.<sup>33</sup> When the "ecological footprint" of the United States is analyzed, the data reveals that Americans enjoy the most resource-intensive lives on the planet.<sup>34</sup> With roughly 5% of the world's population, America accounts for roughly 25% of global energy use on an annual basis.<sup>35</sup> If one considers the "impact equation," (the effect of resource use per person multiplied by total population) the United States is expanding at a pace incompatible with contemporary understandings of natural resource limitations and global warming.<sup>36</sup>

### III. THE EMERGENCE OF SUSTAINABLE DEVELOPMENT AND ECOLOGICAL ECONOMICS

#### A. *History*

In 1972 in Stockholm, Sweden, at the United Nations Conference on the Human Environment (Stockholm Conference), sustainable development was enumerated as an "imperative goal for mankind."<sup>37</sup> "[H]aving considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment," the Stockholm Conference formally recognized the need to conserve and improve the human environment for present and future generations in a manner consistent with economic and social development.<sup>38</sup> The Stockholm Conference declared as a matter of "common conviction" that states retained their sovereign right to exploit their own resources in accordance with their national policies, and had the responsibility to avoid environmental harm to other states.<sup>39</sup>

The Stockholm Conference did not accomplish the intended level of reduction in environmental problems. After a decade of unsatisfactory

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33. *Id.*

34. *Id.*

35. See Babor, *supra* note 1, at 212; see also Solar Energy Int'l, Energy Facts, <http://www.solarenergy.org/resources/energyfacts.html> (last visited Mar. 24, 2008) ("America uses about 15 times more energy per person than does the typical developing country.").

36. See Hodas, *supra* note 2, at 2; see also Lamm, *supra* note 10, at 1004 (explaining I=PAT, an environmental equation expressing human environmental impact through the product of population, affluence, and technology).

37. See Stockholm Declaration, *supra* note 19, at 1417.

38. *Id.* at 1416-17; see Hodas, *supra* note 2, at 8 (noting the Stockholm Conference's goals and purpose).

39. Hodas, *supra* note 2, at 8.



attempts to elevate the notion of sustainable development as something more than a world ethic, the United Nations created the World Commission on Environment and Development (World Commission) in 1983.<sup>40</sup> The World Commission embarked on a comprehensive mandate to define the policy issues around the concept of “sustainable development.”<sup>41</sup> After years of work by thousands of individuals and hearings around the world, the World Commission released its report entitled, “Our Common Future,” detailing the “ever increasing environmental decay, poverty and hardship in an ever more polluted world.”<sup>42</sup> As a solution, “Our Common Future” envisioned “a new era of economic growth . . . based on policies that sustain and expand the environmental resource base.”<sup>43</sup> According to “Our Common Future,” sustainable development should serve as the conceptual tool for simultaneously confronting the four inter-connected crises facing the environment: (1) rapid population growth; (2) the tendency of economic growth to consume natural resources and to minimize environmental management in developing countries; (3) “ecological problems arising from soil erosion, water pollution and availability, atmospheric pollution, climate modifications, deforestation, and biodiversity diminishment; and (4) the borrowing of environmental capital from future generations with no intention of or prospect of repayment.”<sup>44</sup> In order to further conceptualize “sustainable development,” the World Commission proposed a set of legal principles, seemingly applicable to all international and domestic occurrences of resource consumption and environmental degradation.<sup>45</sup> Significant to this set of legal principles was the World Commission’s articulation of a fundamental human right to a healthy environment, and the incorporation of future generational interests into conservation efforts.<sup>46</sup>

Like the 1972 United Nations Stockholm Conference, “Our Common Future” failed to attach a definitive meaning behind the bundle of policies “sustainable development” was intended to initiate. In 1992, The United Nations Conference on Environment and Development

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40. *Id.* at 8-9.

41. *Id.* at 9.

42. *Id.* (quoting WORLD COMM’N ON ENV’T & DEV., *supra* note 18, at 363).

43. *Id.* (citing WORLD COMM’N ON ENV’T & DEV., *supra* note 18, at 1).

44. *Id.* (citing WORLD COMM’N ON ENV’T & DEV., *supra* note 18, at 4-6).

45. *See* Hodas, *supra* note 2, 10 (citing NAGENDRA SINGH, *Foreword* to EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS, at xi (1987)).

46. *Id.* at 10 (citing SINGH, *supra* note 45, 25-27).

convened in Rio de Janeiro with the purpose of converting the existing principles into international agreements.<sup>47</sup> The Rio Declaration affirmed sustainable development as the dominant principle in international environmental policy.<sup>48</sup> In addition, it prioritized areas of needed action (Agenda 21), proposed measures to help fund sustainable developmental projects, and initiated two treaties on climate change and biodiversity.<sup>49</sup> However, still absent, were legal rules giving operable meaning to “sustainable development.”<sup>50</sup>

The proliferation of sustainable development, as an all-encompassing concept in its promise to fulfill the needs of the present without compromising the capacity for future generations to meet their own needs, continued to expand through the end of the twentieth century.<sup>51</sup> In 1999, the National Research Council identified the five key objectives it determined as “necessary, ambitious, and achievable by 2050.”<sup>52</sup> Topping the list was the need to “accelerat[e] fertility reduction so that the world’s current population grows only to eight billion by 2050 rather than the nine billion currently projected.”<sup>53</sup> By 2002, the international community’s interest in the conceptualization of “sustainable development” led to the World Summit on Sustainable Development.<sup>54</sup> The result was the Johannesburg Plan of Action, turning the policy focus of sustainable development toward meeting basic human needs in developing countries, as well as preserving biodiversity.<sup>55</sup>

Johannesburg has been criticized as ignoring the most fundamental, yet uncertain, principles behind sustainable development.<sup>56</sup> Labeled the

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47. *Id.* at 13-14.

48. *Id.* at 14 (citing Rio Declaration, *supra* note 18).

49. *Id.*

50. *See id.* at 14-15.

51. *See* John C. Dernbach, *Targets, Timetables and Effective Implementing Mechanisms: Necessary Building Blocks for Sustainable Development*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 79, 90-92 (2002).

52. *Id.* at 95.

53. *Id.* The remaining top objectives for sustainable development included:

providing “adequate water, sanitation, and clean air” for the expected seven billion people who will live in urban areas in 2050, which is two to three times the number of people who now live in urban areas; . . . increasing agricultural productivity in output per hectare by two to three times current productivity levels, on a sustainable basis, by 2050; . . . doubling the historic rate of efficiency improvements for materials and energy use; and . . . restoring and maintaining the functions and integrity of ecosystems that have been dominated by humans, and protecting the least affected ecosystem from land conversion.

54. Alan Hecht, *Building Blocks*, ENVTL. FORUM, Sept.-Oct. 2003, at 19, *available at* [http://www.hks.harvard.edu/sed/does/sdsem/hecht\\_envforum\\_20003.pdf](http://www.hks.harvard.edu/sed/does/sdsem/hecht_envforum_20003.pdf).

55. *See* Futrell, *supra* note 5, at 9.

56. *Id.*

“World Summit of Sustained Denial,” critics point out that the summit “operated on a consensus basis,” in which the most pressing issues, were handled “obliquely, if at all.”<sup>57</sup> “[P]opulation, regulation of genetically modified organisms, and the failure of the United Nations Environmental Program and the Commission on Sustainable Development to function as effective agencies for environmental governance were beyond an easy consensus and were not addressed.”<sup>58</sup>

*B. Emergence Ecological Economics as a Solution to Paradigm Shift*

Sustainable development’s persistent definitional problem . . . has been how to link environmental values with economic development. It is much easier to identify practices that are not sustainable than to define what sustainable development is.<sup>59</sup>

Sustainable development has largely failed as an organizing principle.<sup>60</sup>

Successfully implementing “sustainable development” was previously dependent upon the extent specific activities are commonly agreed to advance a number of environmental, political, economic, and social values.<sup>61</sup> Defining the concept of sustainable development has been analogized to defining the elusive concept of justice.<sup>62</sup> Both are ideal values of the highest rank, but which are so aligned with other values and interests, that they can never be completely separated.<sup>63</sup> However, certain commonalities across cultures have allowed societies to build a common consensus on what is unjust, based on an organizing principle of remedying and preventing those activities which embody the antithesis of the ideal.<sup>64</sup> Justice has come to mean “the active process of remedying or preventing what would arouse the sense of injustice.”<sup>65</sup> While such a conclusion may seem to offer only circular guidance, it highlights the

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57. *Id.*

58. *Id.*

59. Hodas, *supra* note 2, at 15.

60. Hecht, *supra* note 54, at 19 (quoting critics, including Dan Esty, Director of the Yale Center for Environmental Law and Policy). Hecht emphasizes failure of international governments to develop an agreed upon method of implementation and stresses that the fundamental building blocks of “law,” including basic rights, “political will,” and “good governance” are not in place. *Id.* at 21.

61. See Dernbach, *supra* note 52, at 79 (“Sustainable development provides a framework for reconciling and simultaneously furthering the broad goals of peace and security, economic development, social development, and environmental protection.”).

62. Futrell, *supra* note 5, at 9.

63. *Id.* (citing EDMON CAHN, *THE SENSE OF INJUSTICE* (1949)).

64. *Id.* (citing CAHN, *supra* note 63).

65. *Id.*

process of organizing and prioritizing behaviors under the rule of law as the fundamental key in approximating the ideal.<sup>66</sup> Similarly, the ideal of sustainable development necessarily requires the prioritization of individual and collective values to prevent or remedy unsustainable behavior.<sup>67</sup>

Unlike our history and tradition of developing common notions of justice, humans on the societal level are relatively inexperienced in proscribing unsustainable activity.<sup>68</sup> At a biological level, humans are programmed for unrestrained consumption. The sustenance provided by a day's hunt was not a consistent guarantee. In America, this reality still manifests itself today. We are the most consumptive nation, as well as the fattest.<sup>69</sup> As a species, our genes are selected to ensure the species' survival through prosperous fertility, ensuring a sufficient proliferation of dominant and adaptive traits.<sup>70</sup> While civilizations have modified their environment to reduce perceived dangers to human survival, this "survival gene" remains ingrained throughout traditional cultures and values. On a societal level, our history has progressed according to Locke's "residual state of nature."<sup>71</sup> The individual benefited through a cooperative effort toward the public good.<sup>72</sup> As free-market economics allowed the individual to gain material and social reward, through competition, a perpetual expansion and development of institutions and commodities served as the means, and ends, to approximate ideals.<sup>73</sup>

Similarly, sustainable development also attempts to exemplify, through procedure or substantive law, the ideal of the public good, or a multi-generational ecological well-being. However, unlike the past, sustainable development represents an effort to constrain perpetual expansion.<sup>74</sup> To many, it is counterintuitive.<sup>75</sup> This is a logical reaction.

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66. See Centre National de la Recherche Scientifique, Founding Principles of the European Union, <http://www2.cnrs.fr/en/224.htm> (last visited Mar. 25, 2008) (describing European and international incremental institution building processes).

67. Futrell, *supra* note 5, at 12.

68. See Stockholm Declaration, *supra* note 18 (noticeably lacking proscriptive measures).

69. See Babor, *supra* note 1, at 207 ("Unsustainable levels of overconsumption and production are primarily found in affluent societies in the North.").

70. See generally CHARLES DARWIN, ON THE ORIGIN OF THE SPECIES (1859) (broaching natural selection and the evolution of populations).

71. See Dillard, *supra* note 7, at 60-62.

72. *Id.*

73. See *id.*; cf. Kysar, *supra* note 4, at 680-81 (comparing traditional "cowboy economics" with ecological-based "spaceman economics," capable of viewing the earth as a closed, limited system).

74. See Kysar, *supra* note 4, at 678-83 (comparing conventional and ecological economics).

75. See *id.* at 680-81.

Sustainable development as part of the calculus in ecological economics operates to correct the perceived harms caused by collective adherence to established traditions and institutions designed to promote the proliferation of humankind.<sup>76</sup> Many understand the preservation of common cultural values as humankind's greatest accomplishment.<sup>77</sup> Unlike capitalism, advancing sustainable development runs counter to the rational individual. To reach a level in which collective ecological human impact is equal to, or less than, our collective resources consumed, today's individual must contribute more, in order to have less.<sup>78</sup> To many, sustainable development is the tragedy of the commons realized.<sup>79</sup> Thus, successful implementation of sustainable policies must perpetuate a fundamental shift in values toward an unfamiliar ethic of individual restraint and intergenerational responsibility.

In the United States, the present capacity of sustainable development to conceptualize the "interconnectedness of life on a densely populated, technologically intense world,"<sup>80</sup> and promote human health and well-being, while securing intergenerational equity, is proportional to its affiliation with formulaic economic theories designed to capture natural capital costs and distribute resources according to intra- and intergenerational considerations.<sup>81</sup> Such economic efforts seek to internalize environmental externalities within an objective economic analysis.<sup>82</sup> In the United States, the applicable economic endorsement of sustainable development has spurred a proliferation of "tradable permits, corrective taxes, disclosure schemes, and other tools designed to replicate the conditions of a well-functioning market."<sup>83</sup>

The emergence of "ecological economics" has marked the dissatisfaction of environmental economists with a perceived "expedient compromise"<sup>84</sup> associated with current efforts and corporate interest

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76. See *id.* at 677-78.

77. See Lucia A. Silecchia, *Environmental Ethics from the Perspectives of NEPA and Catholic Social Teaching: Ecological Guidance for the 21st Century*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 659, 664-65 (2004) (noting the importance of ecological issues among religious faiths).

78. See Dillard, *supra* note 7, at 60-62.

79. See generally Hardin, *supra* note 19 (focusing on collective action problem created by natural resources open to exploitation by anyone without any legal or social constraint).

80. Hodas, *supra* note 2, at 25.

81. Smith, *supra* note 5, at 294.

82. See LAWN, *supra* note 15, at 3-7.

83. Kysar, *supra* note 4, at 675.

84. Hodas, *supra* note 2, at 5.

politics.<sup>85</sup> Cornell Law Professor Douglas A. Kysar has described the shortcomings of current environmental regulation:

[T]he failure of existing environmental trading programs to inspire serious democratic deliberation about environmental goals is caused in no small part by a fundamental conceptual flaw in our background assumptions about the natural world and its relation to our economic activity. Specifically, because mainstream economic accounts generally fail to recognize absolute limits imposed by nature on the ability of humans to appropriate and utilize natural resources, they also fail to provide an adequate conceptual basis on which to make the political judgments required by tradable permit schemes.

. . . [E]nvironmental law does not suffer from a lack of well designed, well-studied policy tools to achieve its goals, but rather from a lack of urgency among policymakers and the public concerning the necessity to achieve those goals.<sup>86</sup>

Ecological economics strives to combine economic and conservational understandings within a “preanalytic vision” of human activity.<sup>87</sup> This is accomplished by assigning a fixed algebraic variable to the calculated limits of earth’s finite resources.<sup>88</sup> Ecological economics seeks to continually develop this fixed variable by ever-quantifying the relationship between natural capacity, resource use, and waste emissions generated by human activity.<sup>89</sup>

The potential appeal ecological economics has toward addressing overpopulation in the United States is encouraging. While opposing arguments are emotional and founded on irrational biases, they are nonetheless grounded in human history and tradition of pronatalist policies. The utility of ecological economics is its rational approach to quantifying the ecological impact of humans and objectifying what has traditionally been considered a subjective belief in environmental value.<sup>90</sup> Unlike traditional economics, efficiency and conservation become the primary motivating variables, as opposed to expansion.<sup>91</sup> Furthermore, as society nears a maximum sustainable biological limit, or “carrying capacity,” ecological economics purports to value the remaining resource flow qualitatively, leaving the political process to dictate proper use.<sup>92</sup>

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85. Kysar, *supra* note 4, at 676-77.

86. *Id.* at 676-78.

87. *Id.* at 677.

88. *See, e.g.*, LAWN, *supra* note 15 (applying ecological economics for sustainable development in practice).

89. Kysar, *supra* note 4, at 681-82.

90. *Id.* at 680-83.

91. *Id.*

92. *Id.* at 681.

Part IV considers the social externalities inherent in such an economic policy.

#### IV. PRECAUTIONARY ARGUMENTS AGAINST A PRECAUTIONARY POLICY

In many ways environmental law in the United States has been shaped according to common law tort principles.<sup>93</sup> As such, the notion of sustainable development in the United States has remained subservient to reactive regulatory policies, which seek to control behavior only after substantial harm has manifested.<sup>94</sup> Indeed, uncertainty is a distinguishing characteristic of environmental law.<sup>95</sup> Environmental degradation is the product of a multitude of incremental acts, occurring over long spans of time and transcending jurisdictional boundaries.<sup>96</sup> As the result of prevailing social values and a reactionary disposition to unforeseen harm, the United States lacks the tools to incorporate the issue of unfettered population growth into productive political discourse. Sustainable development thus fails to win support with a majority of critics, too frightened by the prospect of Huxley's brave new world to give proper consideration to the environmental threats humans face due to an ever-increasing population.<sup>97</sup>

Therefore, one of the greatest challenges to sustainable development and, in particular, ecological economics lies in conquering the fears surrounding a policy considered fundamentally counterintuitive,

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93. See Hodas, *supra* note 2, at 22-23 ("Common law doctrines that inform our thinking today date as far back as 1536, when the doctrine of public nuisance and its special injury rule first appeared. The tort law that evolved was based on concepts of specific harm caused by specific actions that were identifiable and localized in space and time. The justifications for strict causation and standing requirements associated with this tort law 'made sense in an era when misuse of existing technology affected only people in the immediate vicinity of the activity and caused only limited harm.' The concerns of a person living in 1536—a horse falling into a ditch along the side of a road—pale in comparison to 'modern global climate change, loss of species diversity, chemical plant accidents, supertanker oil spills, contamination of air, land and water, and the like worries about.'").

94. *Id.* at 20-21.

95. See Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 318-19 (2003).

96. *Id.*

97. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932); see Richard G. Wilkins & Jacob Reynolds, *International Law and the Right to Life*, 4 AVE MARIA L. REV. 123, 133, 143-47 (2006) (warning all interested in protecting "the intrinsic value of human life" to remain alert to "magic mirrors" and "coded and purposefully vague language" surrounding international efforts to couch the reproductive debate in terms of "environmental preservation," "empowerment of women," and "access to healthcare"); Diane L. Slifer, *Growing Environmental Concerns: Is Population Control the Answer?*, 11 VILL. ENVTL. L.J. 111, 118 (2000) (marginalizing those supporting population policies as "doomsayers"); Ron N. Andreason, *The International Convention on Population Development: The Fallacies and Hazards of Population "Control"*, 1999 B.Y.U. L. REV. 769, 769 (1999) (questioning population reduction programs meant to improve the human environment).

while anticipating the externalities naturally produced by a market-driven design. One concern lies in the ethical displacement of human value in the quest to avoid the upward limits of resource exhaustion.<sup>98</sup> For example, Philip A. Lawn's *Toward Sustainable Development: An Ecological Economics Approach* provides for the implementation of "transferable birth licenses" as a solution to establishing an ecological sustainable human population.<sup>99</sup> The theory provides that each person would be entitled to the license to have one child.<sup>100</sup> If one was to die before they procreated, the license could be willed to anyone of the deceased's choice.<sup>101</sup> If a child died, the license would "pass to the next of kin."<sup>102</sup> The penalty for procreating without a license is a fine in relation to the quarterly-calculated market price for purchasing a transferable license.<sup>103</sup> The penalty price would be set above this market rate, and to the extent one could not afford the penalty, the penalty would be imposed over time through an increase in the marginal tax rate of the offender's income.<sup>104</sup> Lawn called this a "procreation levy."<sup>105</sup> It is calculated to engender the "least resistance" from society as the scheme is implemented.<sup>106</sup> Once established, the extent of punishment varies according to its effectiveness in minimizing the number of violations in relation to a fixed "population target."<sup>107</sup>

## V. THE SUPREME COURT AND UNENUMERATED RIGHTS

Since individual and collective rights will conflict, it may be preferable to view the "right" and the "duty" as complementary, or two sides of the same coin. In consequence, the "flip side" of the coin, being the fulfillment of the duty and the denial of the right, or adherence to a constraint on its exercise, is not easily agreed to because it can be drastic in its scope.<sup>108</sup>

Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week.<sup>109</sup>

[I]f the core reason behind preserving the environment is to preserve the Earth for the enjoyment and use of future generations . . . : [d]oes it

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98. LAWN, *supra* note 15, at 299-300.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. LAWN, *supra* note 15, at 299-300.

105. *Id.*

106. *Id.*

107. *Id.*

108. Babor, *supra* note 1, at 222.

109. *Lochner v. New York*, 198 U.S. 45, 57 (1905).



really makes sense that we limit the number of humans in the future generations—limit those for whom we are trying to preserve the Earth? . . . [I]s it logical to take away the opportunity of enjoying the environment from those for whom we profess to save it?<sup>110</sup>

If there is a basis for an unlimited procreative right in the United States it is not expressly enumerated in the text of the United States Constitution.<sup>111</sup> However the Supreme Court has held that some liberties are so important, that they are deemed “fundamental,” immune from governmental infringement.<sup>112</sup> 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.<sup>113</sup> In essence, the Supreme Court determines the pace at which a popular electorate is able to establish or preserve normative values in society through the rule of law.<sup>114</sup> 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.<sup>115</sup> The scope of articulated traditions associated with procreative autonomy can provide a starting point. Additionally, a historical appreciation of the Supreme Court’s own limits in maintaining

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110. Slifer, *supra* note 97, at 158.

111. Dillard, *supra* note 7, at 11.

112. See *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (finding fundamental right to refuse mandatory sterilization grounded in eugenics theories); cf. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese prisoners based upon irrational nonexistent threat).

113. See Ronald J. Krotoszynski, *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, 932-37 (2006) (suggesting that cases follow a predetermined result based upon subjective preconceptions).

114. Compare *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (narrowly construing “ancient roots” tradition analysis to find no “fundamental right [for] homosexuals to engage in acts of consensual sodomy”); with *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (correcting earlier analysis and finding liberty interest in “intimate consensual conduct”); and *Romer v. Evans*, 517 U.S. 620, 622-24 (1996) (finding animus in rational basis review for state amendment based on popular moral concern marginalizing homosexuals, who have not traditionally constituted a suspect class, or discrete and insular minority).

115. See *Lawrence*, 539 U.S. at 576-77 (correcting earlier tradition analysis); cf. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (“We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”); *id.* at 132 (O’Connor, J., concurring) (criticizing plurality opinion that “sketches a mode of historical analysis to be used when identifying liberty interests . . . that may be somewhat inconsistent with our past decisions” and refusing to “foreclose the unanticipated by the prior imposition of a single mode of historical analysis”).

the unenumerated right to contract can provide a fixed point from which to measure the extent “tradition” is adjusted according to political will and a shift in perceived cultural values. A perceived variable in this equation is the extent the Supreme Court can maintain a rational construct of the procreative right in the face of “super-rational” ecological economic quantifications.<sup>116</sup> This Comment suggests that the act of meshing ecological rights with the limits of procreative autonomy could serve two purposes: (1) to provide a foundation for a flexible liberty interest in ecological well-being from which future environmental rights could emerge according to a rational continuum and (2) to provide a snapshot through legal precedent of the current environmental landscape, such that subsequent understandings of ecological well-being are not completely relative to the realities of the time.

The Fourteenth Amendment purports to provide “equal protection” and “due process” under the law to all citizens.<sup>117</sup> From 1890 to 1937, the Supreme Court understood “due process” to include the substantive values associated with laissez-faire capitalism, the dominant economic and social understanding of the era.<sup>118</sup> Striking down regulations aimed at addressing workplace safety and worker exploitation, the Supreme Court derived an implicit “fundamental right to contract” from the Constitution.<sup>119</sup> To the extent the Supreme Court protected the unenumerated fundamental right to contract, legislative and executive attempts to combat exploitation failed.<sup>120</sup> However, the onslaught of the Great Depression and Roosevelt’s “New Deal” made apparent the social constraints of unrestrained capitalism.<sup>121</sup> To a great extent, the Supreme Court’s prioritization of an “unenumerated” economic policy prevented the equitable reallocation of resources, forestalling efforts to initiate a “New Deal.”<sup>122</sup> As the legal “freedoms” of contract and property advanced by the Supreme Court came to be seen as an illusion by the majority of American individuals, the Supreme Court was forced to abandon its tradition in order to preserve its own legitimacy.<sup>123</sup>

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116. See LAWN, *supra* note 15, at 23 (explaining that a ecological economics requires a “dogmatic belief in objectivity”).

117. U.S. CONST. amend. XIV, § 1.

118. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 590-601 (2002).

119. *Lochner*, 198 U.S. at 64.

120. See *id.*

121. CHERMERINSKY, *supra* note 118, at 590-601.

122. *Id.*

123. See *id.*

As the Court began to restructure its Fourteenth Amendment jurisprudence to address issues relating to social inequality, the Supreme Court, to an extent, embraced its own policy of sustainable development by conceding its institutional limits and tailoring its “judicial activism” toward advancing noneconomic principles implicit in the text of the constitutional endorsement of equality.<sup>124</sup> While the Supreme Court moved away from its enforcement of implicit contractual rights, it nonetheless established the early precedent for understanding the scope of procreative rights.<sup>125</sup> In *Skinner v. Oklahoma*, the Supreme Court invalidated the state’s Habitual Criminal Sterilization Act, requiring the forced sterilization of criminal offenders convicted three times of “moral turpitude.”<sup>126</sup> Justice Douglas wrote for the Court: “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching and devastating effects.”<sup>127</sup>

The Supreme Court’s development of procreative rights continued two decades later, in what is known as the modern era of substantive due process. In 1965, the Court resumed the policy of extracting unenumerated fundamental rights from the Constitution; however, unlike the *Lochner* Era, the Supreme court justified the existence of unenumerated fundamental rights in relation to several Constitutional Amendments.<sup>128</sup> In *Griswold v. Connecticut*, the Supreme Court invalidated the state’s criminal law proscribing the sale and use of contraceptives.<sup>129</sup> Justice Douglas wrote for the Court: “We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”<sup>130</sup> The Supreme Court went on to proclaim that “the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>131</sup> The Supreme Court found that the criminal ban on contraceptive use was a “repulsive” and overinclusive law that invaded “the sacred precincts of marital

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124. See *Skinner v. Oklahoma*, 316 U.S. 535, 5441 (1942).

125. See *id.*

126. *Id.* at 536, 541.

127. *Id.* at 541.

128. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

129. *Id.* at 485-86.

130. *Id.* at 482.

131. *Id.* at 484.

bedrooms.”<sup>132</sup> Thus, the Supreme Court officially recognized a protected “zone of privacy” associated with the marriage relationship, noting that such a fundamental right predated the founding of the United States.<sup>133</sup>

The Supreme Court expanded the zone of privacy beyond the family to individuals in *Eisenstadt v. Baird*.<sup>134</sup> In *Eisenstadt*, a woman was convicted of distributing contraceptive foam to individuals at a public meeting at Boston University, in which she was speaking on the subject of overpopulation.<sup>135</sup> The Supreme Court framed the protected right as “the decision whether to bear or beget a child.”<sup>136</sup> The Supreme Court characterized procreation as private and invalidated the statute on the basis that it treated married and unmarried women who were similarly situated dissimilarly.<sup>137</sup>

Since the *Lochner* Era and the subsequent articulation of procreative liberties grounded in the sanctity of marital precincts and the continuation of the human species,<sup>138</sup> the Supreme Court’s consensus on fundamental liberties has deconstructed according to the various approaches to discerning tradition.<sup>139</sup> As the Supreme Court’s protection of fundamental traditions necessary for ordered liberty have delved into untraditional and highly political issues of abortion, assisted suicide, and homosexual equality, it struggles to reconcile new cultural values according to a generalized notion of tradition. Legal scholars have posited that the Supreme Court post-*Lochner* is operating in a postmodern world. Its written methodologies seem to follow a predetermined result. Critics argue that the Supreme Court has failed to provide a consistent formula, finding and rejecting traditions based on original intent, states’ consistent and contemporary observance, its own precedent, and international law.<sup>140</sup>

## VI. CONCLUSION

The *Lochner* Era rejected the notion that an unenumerated right could be objectively construed and sustained against the evolution of social norms and values. By presenting a multitude of opinions and

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132. *Id.* at 485-86.

133. *Id.*

134. 405 U.S. 438 (1972).

135. *Id.* at 440; see Dillard, *supra* note 7, at 16 (discussing the Supreme Court’s decision in *Eisenstadt*).

136. *Eisenstadt*, 405 U.S. at 453.

137. *Id.* at 454-55.

138. See *Griswold*, 381 U.S. at 485-86.

139. See Krotoszynski, *supra* note 113, at 932-37.

140. *Id.* at 938-42.

perspectives on tradition, the Supreme Court remains flexible in its defense and assertion of fundamental liberties. The opportunity thus exists for the Supreme Court to incorporate collective environmental rights through its control of the unenumerated procreative right. While the commercial future of sustainable development lies in market implementation, the necessary paradigm shift required to embrace untraditional ethical requirements is most properly reserved to the Supreme Court. By articulating procreation as both a private decision and public enterprise, the Supreme Court can lay the moral foundations for states to experiment with population policies designed to balance the rights of future generations with the physical autonomy of the present. This Comment observes that as the effects of population growth are felt, the initial focus should be toward a practical step of eliminating federal tax deductions for couples having over three children. Such a simple act would carry enormous significance, officially placing the issue on the table.