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ARTICLES: Human Rights and the Environment: A Synopsis and Some Predictions

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SUMMARY:

... More recently, the United Nations and the international community have recognized the link between human rights and the environment. ... It concludes that while there appears to be a growing trend favoring a human right to a clean and healthy environment -- involving the balancing of social, economic, health, and environmental factors -- international bodies, nations, and states have yet to articulate a sufficiently clear legal test or framework so as to ensure consistent, protective application and enforcement of such a right. ... Part II of this article examines the connection between environmental justice, sustainable development, and the human right to a clean and healthy environment. ... ENVIRONMENTAL JUSTICE, SUSTAINABLE DEVELOPMENT, AND THE HUMAN RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT ... Specifically, the Court ruled that the claim brought by a farmer to enjoin drainage of Lake Chungara, " . . . relate to the right to live in an environment free from pollution. . . ." These problems, the Court opined, "affect not only the well being of man but also his own life, and actually not only the livelihood of a single community of persons, at present: future generation would claim the lack of provision of their predecessors if the environment would be polluted and nature destroyed . . ." Thus, shortly after the enactment of the Constitution, the Court established minimal standing requirements to enforce the constitutional-environmental right. ...

TEXT:

[*360] I. INTRODUCTION

Over the last fifty years or so, our understanding and, indeed, definition of human rights has evolved and expanded. Human rights are basically understood to mean those inalienable rights that we possess by virtue of being human. Human rights, therefore, are not based on one's citizenship, race or color, creed, education, or income. Human rights are, in short, universal, and must be respected by all societies and governments. As succinctly stated in the 1993 United

Nations World Conference on Human Rights in Vienna, "all human rights are universal, indivisible and interdependent and interrelated." n1

In 1948, the United Nations first recognized the existence of human rights, which are those freedoms, immunities, and benefits that all human beings should be able to claim as a matter of right in the society in which they live. n2 More [*361] recently, the United Nations and the international community have recognized the link between human rights and the environment. In 1994, for example, Principle 2 of the Draft Declaration of Principles on Human Rights and the Environment provided that "all persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible." n3

As lawyers, we are trained to think in terms of rights, whether procedural or substantive, as being enforceable under law. n4 And, conversely, if they are not enforceable, they do not qualify as rights as a practical matter. This is at the heart of the continuing debate in the international environmental law community regarding the distinction between "hard law" and "soft law." "Soft law" recognizes that there are certain norms that are not enforceable by an international court but are, nonetheless, presumed to have some validity. "Hard law," on the other hand, involves legal norms that are legally binding as a matter of international law and are often accompanied by mechanisms for enforcement by an international court or some other international organ/tribunal.

This article explores the contours of an emerging human right to a clean and healthy environment at the international level in various nations and in several states of the United States of America as both "hard law" and "soft law." The article identifies the meaning that this evolving right has been given in constitutions and formal international documents and by the courts of different governments around the world. It concludes that while there appears to be a growing trend favoring a human right to a clean and healthy environment -- involving the balancing of social, economic, health, and environmental factors -- international bodies, nations, and states have yet to articulate a sufficiently clear legal test or framework so as to ensure consistent, protective application and enforcement of such a right.

Part II of this article examines the connection between environmental justice, sustainable development, and the human right to a clean and healthy environment. Part III explores how the human right to a clean and healthy environment has been treated or understood by international organizations like the United Nations and the Inter-American Commission on Human Rights, and how it has been manifested in protocols, treaties, international instruments, and in the constitutions of various countries. Part IV examines how the human right to a clean and healthy environment has been defined and implemented in constitutions of [*362] several states of the United States. Several notable cases, which have given meaning to the human right to a clean and healthy environment, will be analyzed. Finally, the authors will attempt to reach some conclusions and hazard some predictions regarding whether this human right to a clean and healthy environment will be internationally or widely accepted as an enforceable right. In short, the authors will explore whether there appears to be a trend developing towards recognizing a human right to a clean and healthy environment as an enforceable human right, i.e. "hard law."

II. ENVIRONMENTAL JUSTICE, SUSTAINABLE DEVELOPMENT, AND THE HUMAN RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT

The United States and other governments are grappling with the still evolving major public policy issues of environmental justice and sustainable development. The discussions in the domestic and international environmental law communities involve not only the definitions of these question-begging terms, but also how the definitions can be applied in real-life situations to have any validity. In order to understand and appreciate the applicability of these terms better, the authors will examine how these theoretical terms are applied in the concrete context of water. Water is a good example of the inter-play of these issues because it is a natural resource that everyone needs to survive but is nonetheless a natural resource that is diminishing on a daily basis.

A. THE CASE OF FRESH WATER

United Nations demographers and social scientists have concluded that the world is in the midst of a massive urban transition. In 1975, just over one-third of the world's population lived in urban areas. n5 Currently, "nearly half of the world's population (47 percent) lives in urban areas, a figure which is expected to grow by 2 per cent per year during 2000 -- 15." n6 By the year 2025, the United Nations estimates that almost two-thirds of the world's population will live in densely populated metropolitan areas. n7 Much of this growth will continue to occur in megacities like Tokyo, Japan; Cairo, Egypt; Sao Paulo, Brazil; Mexico City, Mexico; Bombay, India; and Buenos Aires, Argentina. n8 The

expansion of urban areas, consumption patterns of residents, and lack of effective planning for its use by government authorities have exacerbated an already precarious situation with respect to the availability of fresh water.

[*363] 1. The Human Imperative of Fresh Water

One of the greatest threats to the health of urban dwellers in such megacities, particularly the urban poor in the developing world, is the lack of adequate supplies of clean and safe drinking water or sanitation services. The United Nations Environment Program states that:

Water is a key issue in urban areas. The intensity of demand in cities can quickly exceed local supply. . . . Pollution from urban run-off, sewage and untreated discharges of industries has adversely affected many water bodies, leaving many cities with unsafe water supply. n9

The United Nations Human Settlements Program similarly finds that the worldwide urban water and sanitation crisis is "a situation much worse than official statistics reflect." n10 And, "by 2025, according to a U.N. report prepared for the Johannesburg summit [2002 World Summit on Sustainable Development], as much as two-thirds of the world's population could live in countries with moderate or severe water stress." n11

While the rise of megacities is a relatively new phenomenon, the importance of access to clean and safe drinking water has been recognized as a critical link to human health throughout the passage of time. For example, Marcus Vitruvius Pollio, a famous Roman architect and engineer, recognized this relationship as far back as the first century B.C. In his influential and compelling treatise entitled *The Ten Books on Architecture*, Vitruvius categorically stated that:

For it is obvious that nothing in the world is so necessary for use as water, seeing that any living creature, can, if deprived of grain or fruit or meat or fish, or any one of them, support life by using other foodstuffs; but without water no animal nor any proper food can be produced, kept in good condition, or prepared. Consequently, we must take great care and pains in searching for springs and selecting them, keeping in view the health of mankind.

Springs should be tested and proved in advance in the following ways. If they run free and open, inspect and observe the physique of the people who dwell in the vicinity before beginning to conduct the water, and if their frames are strong, their complexion fresh, legs sound, and eyes clear, the springs deserve complete approval. n12

Vitruvius was providing specific instructions on the selection of springs to provide houses with safe drinking water, and he linked directly the physical **[*364]** well-being and health of humans with the water that they used to survive and prosper. His discussion of the importance of having clean water was most telling when he simply concluded by implication: "look at the physique of the people who used the water and if they look healthy, the drinking water was clean and should be used." Conversely, if the humans did not look healthy, do not use the water. These are simple but effective instructions. Thus, if a population does not have clean and safe drinking water, its health will invariably be threatened. Inadequate supplies of clean and safe drinking water make hygiene difficult and, most assuredly, increase the risk of infectious disease in poor communities in those large megalopolises.

More than two thousand years after Vitruvius made these observations, the imperative of access to clean and safe drinking water, in both rural and urban settings, goes unmet for an estimated 1.1 billion people (approximately one in six), according to the World Health Organization (WHO). n13 The United Nations estimates that "unsafe water and sanitation cause . . . 80 per cent of all diseases in the developing world." n14 Indeed, Kofi Annan, United Nations SecretaryGeneral, has observed that, "No single measure would do more to reduce disease and save lives in the developing world than bringing safe water and adequate sanitation to all." n15

Port-au-Prince, Haiti, serves as an excellent example of the adverse impact to the health of the populace in areas of the developing world where clean water is not readily available. One author recently wrote that:

Clean water is only one of the life-threatening problems facing Haiti, the poorest country in the Western Hemisphere, where the life expectancy is 51 years old and 80 percent of people live below the poverty

line. Sixty percent of Haiti's 8 million people do not have safe drinking water, according to the government statistics, and most do not have access to basic medical care. Dirty water, which can cause skin ailments, dysentery and lead to dehydration, is everywhere. The child mortality rate is about 110 per 1,000, more than 13 times the U.S. rate, and more than 10 percent of infant deaths are attributable to dehydration, according to government statistics. More than 90 percent of the people here are illiterate, according to government officials. Most Haitians live in a cesspool of poverty. n16

Moreover, the lack of access to clean and safe drinking water often harms the [*365] most vulnerable. Over forty percent of this burden falls on children under the age of five, although they make up only about ten percent of the world's population. n17 In Mexico, for example, according to reports from both the Ministry of Health and Environment and the Pan-American Health Organization, "70 percent of the 11 million inhabitants who don't have access to potable water live in rural areas. In these areas, almost all of the wells and the other bodies of water which provided drinking water are contaminated." n18 And, "according to the reports, the lack of drinking water in rural areas translates into water and sanitation problems for the cities." n19

2. The Case of Cancun, Mexico

The growth of these megacities is, generally speaking, fueled by the prospect of better employment and educational opportunities, access to comprehensive health care services, and better sanitation services and drinking water. These cities continue to grow because of the perception of people in rural areas that they will provide greater economic and social benefits as compared to rural areas. These perceived "benefits of urbanization," however, do not extend invariably to the poor who tend to cluster on the outskirts of these megacities in shantytowns.

Cancun, Mexico, for example, is a beach resort of 100 luxury hotels that has become one of the major destinations for tourists from the United States. There are also more than 700,000 Mexicans who live in and around Cancun, many of whom work in these luxury hotels. As a result, one author recently stated that "a de facto economic and social apartheid keeps the two worlds of Cancun -- the served and the server -- quite distant except when conducting necessary business." n20 In describing the "other Cancun," this author wrote that:

The gritty downtown sits immediately adjacent to the hotel zone. . . . The inner rings of the city consists of graffiti-covered tenements -- incubators of a robust coca-driven youth-gang culture. This is Cancun's Soweto, the ghetto dormitories that house many of the tourist industry's impoverished workers. Behind most of the grim cinder-block houses stand cramped, low-ceiling, add-on structures with tin roofs, wood-slat walls and earthen or concrete floors. Little more than human stalls, these *cuarterias* -- little rooms -- are illegally rented out by the day or month to the 40,000 or so mostly Mayan construction and hotel workers who commute into Cancun from their rural villages and go back home on weekends or once a month.

[*366] The water system was privatized a decade ago, but with deference to the tourist hotels; many in Benito Juaraz have running water only three or four hours a day. . . . Today, about half of the residents are not connected to the sewer system, and local groundwater has turned toxic. n21

Nevertheless, the prospects of a better life in Cancun will continue to attract job-seeking subsistence farmers whose livelihoods have collapsed, and who "have flooded Cancun, accelerating what was already explosive and chaotic growth." n22

In Mexico, "authorities with the Ministry for Social Development (SEDESOL) have projected that by 2030, the population will surpass 127 million inhabitants, 70 percent of whom will live in cities. Growth of urban centers will tax existing drinking water and sanitation services. Experts warn that if these resources are not provided to the population, poverty and disease will spread." n23 Cancun is not the only city in Mexico suffering from rapid population growth. In Mexico City itself the situation appears to be getting worse. Rodolfo Tuiran, Mexico's Under Secretary for Urban Development, recently reported that:

The nation's capital is one of the most seriously threatened. Continued population growth, lack of water treatment facilities, and a rapidly depleting aquifer have led metropolitan officials to predict a dire water shortage within 10 years. In the capital, per capita consumption of water stands at 350 liters a day, a

number inflated by widespread leaks spilling over a third of the water pumped from the aquifer beneath the Valley of Mexico. n24

Under Secretary Tuiran also reported that 63 of 121 major Mexican cities of 50,000 inhabitants face critical or very critical water shortages and direly need to implement conservation measures, provide water treatment facilities, and protect threatened water supplies. He went on to point out that the growth of these cities needs to be better regulated to absorb the flow of migration from the countryside, and if action was not taken soon, the sixty-three cities could be rendered practically uninhabitable. He stated that "if we do not carefully control the development of our cities and the number of people living in them, we are compromising the future of the country." n25

The environmental implications of this massive transition of people into Port-au-Prince, Cancun, Mexico City, and elsewhere throughout the developing world into the megacities, are quite significant. As these centers of humanity continue to become overpopulated and spread without effective urban planning, [*367] access to essential natural resources, like safe drinking water, will become an increasingly desperate problem. Moreover, these "new" urban dwellers generate massive amounts of waste that are disposed of both inside and outside of the megacities. And, in the process, the lack of planning will create or exacerbate urban environmental problems including, but not limited to: (1) inadequate supplies of clean and safe drinking water or sanitation services; (2) the uncontrolled disposal of untreated wastewater because of the lack of an expanded infrastructure; (3) increased air pollution because of the cocktail of pollutants from vehicular, energy, and industrial sources; and (4) the generation of tremendous amounts of solid and hazardous wastes that are, nevertheless, uncollected and disposed of in "unofficial" locations.

This foreseeable and already occurring crisis raises the following rhetorical questions. Are these "new" urban, poor dwellers entitled to clean water to use for drinking, cleaning, and cooking food? Are the urban poor entitled to sanitation services that are made available to others living in those megacities? Are the urban poor entitled to environmental justice as defined by community activists and government officials in the United States? Are the urban poor entitled to live in sustainable communities as defined by the international environmental law community? And, finally, are the urban poor entitled to a clean and healthy environment as a human right?

B. ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT: TOWARD A RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT

1. Environmental Justice -- The U.S. Response

Environmental justice, as a public policy issue in the United States, addresses the needs and the environment of all communities. The U.S. Environmental Protection Agency (EPA) defines the term as follows:

Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. *Fair Treatment* means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state and local, and tribal environmental programs and policies. *Meaningful Involvement* means that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will [*368] be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected. n26

A special concern of the EPA is the adverse impact on the health of community residents who have been environmentally overburdened and who are exposed disproportionately to environmental harms and risks in comparison to other communities in the United States. Because of the continuing effects of historical overt discrimination, and passive, race-neutral permitting and regulatory actions, these communities tend to be minority and/or low-income, whether urban or rural. n27

A former editor of the *EPA Journal* once stated that:

The physical environment of America's minorities -- Hispanics, Native Americans, Asians, African Americans, the poor of any color -- has in one way or another been left out of the environmental cleanup

of the past two decades. Black children, as a whole, have more lead in their blood than do white children. Blacks are decidedly over-represented in air pollution nonattainment areas. The environment of migrant farmworkers, particularly in their exposure to hazardous pesticides, has not been well protected, to say the least. People of color are much more likely to have hazardous waste sites in their backyards than do whites. n28

Like Vitruvius, environmental justice advocates recognize the direct link between the environment and the health of community residents. They recognize that a clean and healthy environment will have a positive impact on the overall health of community residents. They recognize that access to adequate supplies of natural resources, such as clean and safe drinking water, among all communities is essential to the health and prosperity of all people, regardless of race, color, national origin, or income. They recognize that the fair and equitable distribution [*369] of sanitation services among all communities is also essential to the health and prosperity of all people. And, they argue that government, at all levels, is responsible for maintaining natural resources, including water, in such a manner that the needs of all communities can be met fairly and equitably. An environmental justice advocate once stated categorically that "what is ultimately at stake in the environmental justice debate is everyone's quality of life. The goal is equal protection, *not* equal pollution." n29

2. Sustainable Development -- An International Response

Closely related to the issue of environmental justice is the issue of sustainable development. The Brundtland Commission defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." n30 Sustainable development, thus, basically means: (1) that today's progress must not come at tomorrow's expense; and (2) that human progress must be sustained not just in a few places for a limited number of years, but for the entire planet into the distant future. n31

In a recent article entitled, "One Species, One Planet: Environmental Justice and Sustainable Development," the Center for International Environmental Law (CIEL) concluded that environmental justice and sustainable development are virtually synonymous. n32 CIEL stated that:

The concept of sustainable development and environmental justice share many critical and defining characteristics. Each requires taking into account and integrating policies relating to social justice, environmental protection, and economic development. Furthermore, each involves focusing on real life conditions now facing individuals and local communities, while also addressing the impacts that different policy options may have in the future -- to ensure, on one hand, that development is sustainable and, on the other; that policy choices not only achieve equitable results in the short term, but also do not cause or perpetuate injustice in the longer term. Similarly, achieving sustainable development requires transparent decision-making processes and meaningful opportunities for public participation, as does environmental justice. n33

[*370] 3. An Emerging Right to a Clean and Healthy Environment

In a spring 1998 law review article, Professor J.B. Ruhl explored how both environmental justice and sustainable development were evolving towards enforceable hard law in the United States. n34 He argued that both these legal and policy ideas have had to move through the following seven degrees of real-world relevance:

First Degree: The idea becomes widely expressed through a generally accepted norm statement.

Second Degree: Advocating the opposite of the norm is no longer a tenable policy position.

Third Degree: The charge of acting contrary to the norm can no longer be left unaddressed.

Fourth Degree: Failure affirmatively to portray an action as consistent with the norm is seen as a significant deficiency.

Fifth Degree: Important governmental authorities establish the norm as an explicit policy goal.

Sixth Degree: Actions are denied or delayed necessary authorization on the basis of a perceived failure to facilitate the norm.

Seventh Degree: The norm is fully transformed into law to apply measurable, rationalized, routine standards of environmental evaluation, authorization and performance. n35

Professor Ruhl concluded that sustainable development and environmental justice are at different stages of development. He concluded that "sustainable development is not at the Sixth Degree yet," given that "at the federal level, no new laws have been enacted and no existing laws have been interpreted as mandating what amounts to sustainable development. No federal court has imposed such a standard on any project as a matter of constitutional requirement or raw judicial fiat." n36 With respect to environmental justice, he stated that:

environmental justice has not reached the point at which a body of law to apply has formed that embodies the norm statement. There certainly is no independent body of environmental justice law. For now, government authorities must employ other legal regimes as surrogates in order to take an environmental justice focus. Although that approach does not preclude explicit [*371] consideration of environmental justice issues, it provides only an indirect way of forming hard law out of the policy content. n37

In his view, environmental justice had reached the Sixth Degree, but had not reached the Seventh Degree.

C. THE UNITED STATES FEDERAL GOVERNMENT EXPERIENCE -- HARDENING OF THE LAW

Since Professor Ruhl's 1998 article, despite legislative actions in the states of California, Florida, Arkansas, and others, there is, as yet, no specific environmental justice legislation at the federal level. However, it has become clear that if environmental justice issues and concerns are going to be successfully addressed by the EPA, in particular, and the federal government, in general, existing environmental laws have to be used more extensively and more creatively. Since the EPA implements and enforces environmental laws to protect human health and the environment of all people, including residents living in minority and/or low-income communities that tend to be disproportionately exposed to environmental harms and risks, it logically follows that the greatest chance of successfully addressing their issues and concerns would have to be subsumed within the context of traditional environmental laws. Indeed, the first clause of the federal Environmental Justice Executive Order, directs federal agencies, "to the greatest extent practicable and permitted by law . . . each Federal agency shall make environmental justice part of its mission . . ." n38 Therefore, both to help achieve the goal of environmental justice and to satisfy the requirements of Executive Order 12898, it was essential for the EPA's chief legal officer, the General Counsel, to issue a legal memorandum setting forth how environmental justice can be incorporated into the Agency's programs through the effective use of environmental laws and their implementing regulations.

As reflected in former EPA General Counsel Gary Guzy's December 1, 2000 memorandum to senior officials, the Agency determined that many of the statutes it implements provide the various EPA regulatory programs with the authority to address environmental justice issues and concerns. n39 These laws, which encompass the breadth of the EPA's activities, include, among others:

- [*372] a) setting standards under Section 304(a)(1) of the Clean Water Act;
- b) permitting facilities pursuant to Section 305(c)(3) of the Resource Conservation and Recovery Act;
- c) awarding grants in accordance with Section 117(e) of the Comprehensive Environmental Response, Compensation, and Liability Act; and
- d) reviewing actions taken by other Federal agencies, states, and tribal governments as a result of Section 309 of the Clean Air Act. n40

Moreover, these laws require the Agency to consider a variety of factors, including: (a) public health; (b) cumulative impacts; (c) social costs; (d) welfare; and (e) general environmental and human health impacts. n41 This release of this

wide-ranging memorandum was the first time that the Office of General Counsel explicitly recognized that existing environmental laws could allow the Agency to address environmental justice issues and concerns.

Consistent with this legal opinion, former Administrator Christine Todd Whitman issued a memorandum, dated August 9, 2001, to senior EPA officials where she categorically stated that:

The purpose of this memorandum is to ensure your continued support and commitment in administering environmental laws and their implementing regulations to assure that environmental justice is, in fact, secured for all communities and persons. Environmental statutes provide many opportunities to address environmental risks and hazards in minority communities and/or low-income communities. Application of these existing statutory provisions is an important part of this Agency's effort to prevent those communities from being subject to disproportionately high and adverse impacts, and environmental effects. n42

In addition, to ensure that the public understands and appreciates how the environmental statutes and their implementing regulations administered by the Agency can be used to address environmental justice issues and concerns, EPA's Office of Environmental Justice provided funds, through a cooperative agreement with the Environmental Law Institute, to produce two comprehensive reports: (1) *Opportunities for Advancing Environmental Justice: An Analysis of U.S. EPA Statutory Authorities*, which states that "a fuller understanding of EPA's authorities to promote environmental justice is important because the public has a vital role to play in the effective implementation of EPA's environmental protection program;" n43 and (2) *A Citizen's Guide to Using Environmental Laws to [*373] Secure Environmental Justice* that "focuses on opportunities, legal rules, and tools that community residents have under environmental laws to protect their health, the health of their families and neighbors, and their environment." n44 A companion video/DVD, *Communities and Environmental Laws*, to the *Citizen's Guide*, has also been developed. All are available to the public upon request.

Moreover, the Agency's Environmental Appeals Board (EAB) has issued several decisions that support the argument that the EPA can take environmental justice issues and concerns into consideration when they arise. The EAB has concluded that the Agency should consider environmental justice issues when reviewing permits issued under: the Clean Air Act, n45 the Safe Drinking Water Act, n46 and the Resource Conservation and Recovery Act. n47

In sum, based upon these and other Agency activities, the proverbial "toothpaste is out of the tube": environmental justice, indeed, is imbedded in existing environmental laws and their implementing regulations.

D. THE LOGIC OF A RIGHTS-BASED APPROACH

In light of the evolutionary process proffered by Professor Ruhl, CIEL states that:

Sustainable development and environmental justice, thus, are symbiotically related and should be pursued in tandem. Only then will sustainable development be achieved at the ground-level where all biodiversity reservoirs, carbon sinks, watersheds, forests, pasturelands, and coastal and marine resources are located, often in close proximity to hundreds of millions of human beings directly dependent on these vital resources for their lives and livelihoods. n48

The "hundreds of millions of human beings directly dependent on these vital resources for their lives and livelihoods" presumably includes the urban poor in megacities.

And, as stated by CIEL, in its thoughtful article:

[*374] The strengthening and promotion of a rights-based approach to sustainable development deserves concentrated attention and efforts by all actors. Such an approach would serve to reinforce human rights principles of non-discrimination, gender-equality, non-retrogression, and the right to remedy. U.N. Secretary-General Kofi Annan in his 1998 Annual Report on the Work of the Organization said: "the rights-based approach describes situations not simply in terms of human needs, or of development requirements, but in terms of society's obligations to respond to the inalienable rights of individuals." It is only by shifting the current focus from a market-based approach to a rights-based one,

that some hope for sustainability and justice can be upheld. Existing trends in international law serve to affirm this. n49

In other words, there is a direct link between environmental justice, sustainable development, and the human right to a clean and healthy environment that is, arguably, enforceable in accordance with the "rights-based approach to sustainable development," described by Secretary-General Annan. n50 The following sections seek to examine how this rights-based approach continues to evolve and mature. Consistent with Professor Ruhl's analysis, the question that could be posed is: Whether this notion of a human right to a clean and healthy environment is at the Fourth, Fifth, or Sixth Degree of real-world relevance?

III. EVOLUTION OF THE CONCEPT OF A HUMAN RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT AT THE INTERNATIONAL LEVEL

This Part discusses key milestones in the evolution of the concept of a human right to a clean and healthy environment in multilateral and regional contexts and in the constitutional law of various countries. A variety of formulations of the right have emerged -- some derived from other human rights, others stand on their own as a fundamental right. As is the case with environmental rights provisions in U.S. state constitutions (see Part IV), the international evolution of a human right to a clean and healthy environment is marked by questions of whether the right is sufficiently specific to be justiciable. These questions of vagueness and justiciability are linked to an ongoing debate over the extent to which courts are appropriate arbiters of the economic and social trade-offs involved in ensuring a basic level of environmental health, or whether an approach that focuses more on participatory processes than on substantive rights would make better use of the competencies of courts, legislatures, and tribunals.

A. INTERNATIONAL INSTRUMENTS

Since the United Nations first expressly linked human rights to the environment in 1972, n51 the international community has grappled with whether the [*375] relationship is best stated in terms of a right owed to individuals (i.e., "hard law"), and, if so, whether that right derives from another already recognized right, and whether such a right should be considered hard law or soft law. The right to a healthy environment was first expressed as a right derivative of the "right to life," in the Stockholm Declaration. n52 Since then, as the complexity of the link has become better understood, the international community has demonstrated a reluctance to establish the right as "hard law."

1. The 1972 Stockholm Conference

The evolution of the concept of a human right to a clean and healthy environment dates back to the United Nations Stockholm Declaration of 1972. Among other things, the Stockholm Declaration provides that: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations." n53 This formulation recognizes environmental quality as an essential adjunct to fundamental rights. This link was eloquently described by Christopher G. Weeramantry, former Vice-President of the International Court of Justice, who stated that: "the protection of the environment is . . . a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights. . . ." n54 The Stockholm formulation, however, has been criticized as conceiving of an environmental human right narrowly in that in deriving the environmental right from "the right to life itself," the Stockholm formulation limits the right to only apply in life-threatening situations. n55 Moreover, as will be elaborated upon in the discussion of formulations of such a right in various states in the United States, this approach frames the right as derivative. This approach can be contrasted with an alternative approach of recognizing a fundamental right to a clean and healthy environment that is not derived from other rights. n56

2. The 1992 Rio Conference on Environment and Development

In 1992, the Rio Declaration placed the issue of a human right to a clean and healthy environment squarely within the context of sustainable development.

[*376] Principle 1 of the Rio Declaration provides that "human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." n57 Although Rio Principle 1 recognizes the links between a clean and healthy environment, development, and the protection of human health, it has been criticized for avoiding the use of *rights* language. n58 The Rio Declaration takes a softer approach than the Stockholm Declaration. The approach taken in the Rio Declaration can be viewed as reflecting growing recognition by

governments of the complexity of political, social, and economic concerns that are involved in the quest for sustainable development. n59

3. Draft United Nations Declaration of Principles on Human Rights and the Environment

After the Rio Declaration, the debate continued to evolve. The *rights* based formulation was expressed at a U.N. meeting of Experts on Human Rights and the Environment at the United Nations in 1994. That group of experts produced a U.N. Draft Declaration of Principles on Human Rights and the Environment, stating that "all persons have the right to a secure, healthy and ecologically sound environment." n60 However, the members of the United Nations did not choose to enact this into a binding legal instrument, perhaps recognizing that a legislative/policy based approach is more appropriate than a court/adjudicative based approach. n61

4. The 2002 World Summit on Sustainable Development

Indeed, the evolution of a legally enforceable right to a clean and healthy environment, at the international level, continues to encounter obstacles, even as the issue gains greater prominence. The Plan of Action issued at the 2002 World Summit on Sustainable Development is notably non-committal with respect to a human right to a clean and healthy environment. It recommends that States [*377] "acknowledge the consideration being given to the possible relationship between environment and human rights, including the right to development." n62 The Plan of Action recognizes the complexity of sustainable development, containing discussion of the myriad challenges that need to be addressed for sustainable development to become a reality. At the same time, the Plan of Action recognizes the critical role of good governance both within countries and at the national level, including the importance of public participation and government responsiveness -- thus converging in at least this respect with the process-focused thread in the evolution of a human right to a clean and healthy environment.

5. U. S. Courts and International Law

The United States Court of Appeals for the Second Circuit recently sounded a further note of caution, with respect to an internationally recognized right to a clean and healthy environment. In *Flores v. Southern Peru Copper Corporation*, n63 the plaintiffs brought personal injury claims under the Alien Tort Claims Act against copper mining corporations doing business in Peru. n64 Plaintiffs alleged that pollution from Southern Peru Copper Corporation's mining, refining, and smelting operations emitted large quantities of sulfur dioxide and heavy metals into the local air and water, resulting in adverse health impacts. Plaintiffs claimed that this violated customary international law by infringing upon their rights to life and health. The lower court rejected their claim, and the Court of Appeals affirmed the decision. The Court of Appeals noted, "as a practical matter, it is impossible for courts to discern or apply in any rigorous, systematic, or legal manner international pronouncements that promote amorphous, general principles." n65 The Court of Appeals also noted that the rights to life and health as expressed in various international instruments cited by plaintiffs are "boundless and indeterminate. They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them." n66 The Court of Appeals concluded that the asserted "right to life" and the "right to health" are insufficiently definite to constitute rules of customary international law.

6. U.N. Committee on Economic, Social and Cultural Rights

Although the evolution of a legally enforceable human right to a clean and healthy environment continues to face obstacles, the concept endures and appears [*378] to have evolved in ways that can have a significant impact on environmental law and policy. Recent action at the United Nations highlights the central importance of access to safe drinking water to life and health. In November 2002, the U.N. Committee on Economic, Social and Cultural Rights adopted a comment on Article 11 of the International Covenant on Economic, Social, and Cultural Rights, stating that: "The human right to water is indispensable for leading a healthy life in human dignity. It is a pre-requisite to the realization of all other human rights." n67

Former WHO Director-General Dr. Gro Brundtland noted that this development "is a major boost in efforts to achieve the Millennium Development Goals of halving the number of people without access to water and sanitation by 2015 -- two pre-requisites for health." She expressed the view that the recognition of water as "a basic human right will provide an effective tool to make a real difference at the country level." n68

B. REGIONAL INSTRUMENTS

Regional legal instruments have also contributed to the evolution of the concept of a human right to a clean and healthy environment. The link between human rights and environmental quality is more frequently couched in terms of rights in regional instruments than in instruments of a more global nature. The African Charter of Human and People's Rights, the American Convention on Human Rights, and country reports of the Inter-American Commission on Human Rights have all made contributions to the evolution of the concept of a human right to a clean and healthy environment. Nonetheless, the evolution towards such a right as "hard law" is by no means complete or certain.

1. The African Charter of Human and People's Rights

The African Charter of Human and Peoples' Rights provides that "all peoples shall have the right to a general satisfactory environment favorable to their [*379] development." n69 This provision is worded to endow the right on "peoples," which suggests a collective right rather than an individual right. This provision also links the environmental right to development in a way that can be read as suggesting that the environmental right is conditioned on development, rather than creating an unencumbered environmental right. In recognizing this connection to development, this provision can be viewed as reinforcing the importance of environmental protection in the larger context of development, rather than as recognizing a fundamental right independent of this context. Perhaps in recognition of the complexity of the context, this right has, to date, been treated as aspirational rather than justiciable. n70

2. American Convention on Human Rights

The approach taken in the African Charter can be contrasted with the approach reflected in the American Convention on Human Rights. The Additional Protocol to the American Convention provides that "everyone shall have the right to live in a healthy environment and to have access to basic public services." n71 This provision is drafted as an individual right, rather than a collective right, and is not expressly conditioned on development. As such, it follows the "fundamental right" approach, in contrast to the collective right approach taken in the African Charter.

3. Regional Human Rights Bodies

i. Inter-American Commission on Human Rights

The monitoring activities of regional human rights bodies have also contributed to the evolution of the concept of a human right to a clean and healthy environment. The Inter-American Commission on Human Rights (IACHR) devoted particular attention to the environment, human health, and human rights in several of its recent studies on the human rights situations in various countries. n72 The IACHR, in its report on the human rights situation in Ecuador, noted the threat environmental degradation poses to the realization of the right to [*380] life and physical security and integrity in the context of health impacts resulting from pollution caused by oil extraction activities. n73 The IACHR linked such pollution to the denial of basic human dignity, noting that "conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being" n74 Thus, in this report, the IACHR echoed the "derivative right" approach of the Stockholm Declaration. The IACHR also noted the link to development, expressing the view that the Convention does not prevent development, but requires that it take place in a manner that respects individual rights. n75 It also noted that environmental problems resulting in human rights violations may be traced to governance problems such as inadequate regulation. n76 The IACHR also indicated that "the quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse." n77

The IACHR also called on the government of Ecuador to take steps to better address serious pollution problems and to improve the dissemination of environmental information and opportunities for meaningful public input. These links between environmental degradation and procedural rights and other governance issues are themes echoed throughout the environmental human rights debate. The recognition that public participation in the relevant policy-making processes is critical to achieving the appropriate balance of priorities and interests to protect human health in the context of sustainable development and is a recurring theme in legal instruments and cases following the process-based approach. n78

ii. European Commission on Human Rights

Efforts to derive an environmental right from other rights contained in the European Charter of Human Rights have yielded mixed results. In *Powell & Rayner v. U.K.*, for example, the European Commission on Human Rights rejected a claim based on adverse effects of airport noise under a balancing test that considered the positive impact of the airport

to justify infringement on the right to privacy. n79 In *Lopez Ostra v. Spain*, however, the European Court of Human Rights ruled in favor of a claim that the failure by the public authorities to take measures to control noxious fumes and effluents from a treatment plant near [*381] an apartment building infringed upon the right to private and family life. n80 In both decisions, balancing of environment and economic concerns played a major role.

4. The Aarhus Convention

The critical role that public participation plays in efforts to advance environmental health was also recognized by European governments negotiating the Aarhus Convention. This treaty, negotiated under the auspices of the U.N. Economic Commission for Europe, establishes obligations concerning access to information, public participation, and access to justice with the *objective* of empowering people to enjoy a human right to a clean and healthy environment. n81 Like the IACHR Ecuador report and several U.S. state cases discussed in Part IV, this treaty emphasizes the importance of public participation to achieving an environmental human right.

C. NATIONAL CONSTITUTIONS

Constitutions of numerous countries around the world contain environmental provisions, taking a variety of forms. n82 More than ninety national constitutions recognize a duty owed by the national government to its citizens to prevent harm to the environment. n83 Of these, over fifty recognize the importance of a healthy environment, either as a duty of the state or as a right. n84

Far fewer national constitutions, however, are self-executing. For example, less than twenty of these constitutions explicitly make those who harm the environment liable for compensation or remediation of the harm, or establish a right to compensation for those suffering environmental injury. n85 Commentators [*382] have noted, with respect to environmental provisions recently included in African constitutions, the near-total absence of court cases interpreting these provisions and proposed several possible causes, including the novelty of such provisions, the limited extent of public interest litigation, and "the failure of governments to set up the machinery to implement their constitutional duties." n86

Moreover, across nations many of the constitutional provisions are found not in a Bill of Rights or Fundamental Rights section, but in a Directive Principles Chapter, and thus are often not justiciable. n87 Thus, justiciability is an issue at the national level, as it is with respect to international instruments n88 and state constitutions. n89 However, even where justiciability is an issue, these provisions, are not without weight. They can provide legislative direction and authority and set the tone for legislative and executive policy development. They can also inform interpretation by courts of subsequent legislative enactments if governments follow through with appropriate legislation to protect environmental health.

In an increasingly large number of countries, but still the vast minority, courts are finding environmental constitutional provisions self-executing, conveying both procedural and substantive rights. A few such provisions are reviewed below, selected, in part, to provide geographic diversity, inclusion of both civil and common law traditions.

1. The Constitution of India

Perhaps more than in any other country, the judiciary of India has taken a proactive role in developing jurisprudence around environmental and other constitutional provisions to help secure a right to a clean and healthy environment for its citizens. The courts' activism, however, is not a barometer of Legislative or Executive Branch's commitment to environmental protection. Indeed, the courts' activity may, in some large part, be spurred by the perceived lack of engagement on the part of the other two branches of government to protect human health and the environment. While the reasons for India's reliance on constitutional provisions are many, Chief Justice B. N. Kirpal of the Supreme Court of India recently observed, "it has frequently fallen to the judiciary to protect environmental interests, due to the sketchy input from the legislature and laxity on the part of the [*83] administration." n90

While the Constitution of India was amended in 1976 to expressly address environmental quality, n91 the Supreme Court of India has linked human rights to the environment through the older constitutional guarantee to "right to life," under Article 21. This fundamental right, made actionable under Articles 32 and 226, provides simply, "no person shall be deprived of his life or personal liberty except according to procedure established by law." n92 Despite the simplicity of Article 21, courts have found it to be a basis for sustainable development and intergenerational equity, which the Court described as meaning "what type or extent of development can take place, which can be sustained by nature/ecology with or without mitigation;" n93 and the public trust doctrine. n94

Moreover, the Supreme Court of India has recently relaxed standing requirements, which has not only increased the number of public interest suits brought under Article 21, but has created the opportunity for India's judiciary to play an active role in addressing environmental conditions. n95 Chief Justice Kirpal has noted that public interest litigation, in addition to addressing the perceived short-comings of the other branches of government, "is usually more efficient in dealing with environmental cases, for the reason that these cases are concerned with rights of the community rather than the individual." n96 Therefore, he notes "the court is able to look at the matter from the point of view of an environmental problem to be solved, rather than a dispute between two parties." n97

Additionally, addressing the procedural aspect of environmental justice, the Chief Justice endorses relaxed standing requirements as a means to "take care of the many interests that went unrepresented for example, that of the common people who normally had no access to the high judiciary." n98 Indeed, the courts [*384] have been careful to police the motives of plaintiffs, who seek to bring public interest litigation. In *Subhash Kumar v. State of Bihar*, for example, the Supreme Court of India affirmed that the constitutional right to life includes "the right of enjoyment of pollution free water and air for full enjoyment of life." n99 However, on the facts before it, the Court dismissed the case, finding that the plaintiff was not a representative of the public interest, but rather brought the case to settle "a personal grudge." n100

Observers have commented that judicial activism in India will have to be tempered because "court dockets are full and judges are conscious that systemic changes in a country as vast as India are unlikely to be brought by judicial intervention alone." n101 However, based on the facts and circumstances in India, until the judiciary finds "the circumstances of inefficiency within the executive and the existence of skeletal legislative framework" are addressed, courts are likely to continue to give meaning to the "principles of Indian environmental law that are resident in judicial interpretation of laws and the Constitution." n102

2. The Constitution of the Philippines

Petitioners have been successful in bringing actions under the Constitution of the Philippines, which provides, pursuant to Article II, section 16, that "the state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." n103 In *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*, n104 children, through their parents, brought an action to have all existing timber license agreements on federal lands canceled, based on their constitutional environmental rights. In the first instance, the trial court dismissed the children's claim for lack of standing.

On appeal, however, the Supreme Court of the Philippines reversed the lower court's decision and remanded the case for reconsideration. Basing its decision on the right to a clean and healthy environment, specified under Article II, section 16, Chief Justice Davide, writing for the Court, opined that:

We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generation, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept [*385] of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the rhythm and harmony of nature.' Nature means the created world in its entirety. . . . Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come. n105

Therefore, the petitioners were permitted to pursue their claim for equitable treatment and to secure their constitutional right to a clean and healthy environment both for their own benefit and as representatives of generations yet to come. n106

A concurring opinion, authored by Justice Feliciano, differed substantially from the majority in several major respects. Justice Feliciano noted that while the right to a balanced and healthful ecology is fundamental, he found that it could not be considered specific enough to form the basis of a cause of action and is not self-executing. n107 He cautioned that the courts not venture "into the uncharted ocean of social and economic policy making." n108 Justice Feliciano's view echoes the vagueness and justiciability concerns raised in *Flores* above and in the cases before the state courts of the United States, discussed below.

3. The Constitution of Colombia

The courts of Colombia, like the courts of India, have found an enforceable right to a healthy environment under the constitutional guarantee of a right to life. n109 Article 11 of the Constitution of Colombia, enacted in 1991, provides simply, "the right to life cannot be denied." n110 The courts, however, have [*386] interpreted the language expansively in a variety of factual contexts. n111 In the same year that Article 11 was adopted, residents represented by a non-governmental organization (NGO) brought an action, through an *amparo*, n112 to have their Article 11 rights protected from the noxious operation of an asphalt facility. n113 The trial court granted relief. Like the framers of the Stockholm Declaration of 1972, the trial court found that a right to a healthy environment is a derivative right of the right to life. Specifically, the trial court opined that:

Everyone has the right to enjoy and live in a healthy environment. This should be regarded as a fundamental human right, which is a prerequisite and basis for the exercise of other human, economic and political rights. It should be recognised that a healthy environment is a *sine uine qua non* condition for life itself and that no right could be exercised in a deeply altered environment. n114

The Constitutional Court upheld the lower court's decision on appeal. n115 Moreover, the Court held that the constitutional right to life not only carries with it a substantive right to a healthy environment, but may also convey implicit procedural rights to participate in environmental decisions. The Court held that "[the right to a healthy environment] has been conceived as a group of basic conditions surrounding man, which define his life as a member of the community and allow his biological and individual survival, in addition to his normal participation and integral development in society." n116 Thus, notwithstanding this derivative nature of the right, the Court found that a right to a healthy environment extends to circumstances beyond those in which a human life is imperiled. n117

The Constitutional Court has continued this line of reasoning in other cases. For example, in *Victor Ramon Castrillon Vega v. Federacio Nacional de Algodoneros y Corporation Autonoma Regional del Cesar*, n118 the Constitutional Court found that toxic fumes from an open pit violated nearby residents' Article 11 rights. n119 In that case, the Court ordered the facility to remediate the site and to pay past and future medical expenses to those who became sick. Similarly, a [*387] lower court found a violation of Article 11 rights based on the harm to local indigenous people who suffered as the result of illegal forest clear-cutting. In addition to ordering restoration of the area, the lower court ordered damages based on the constitutional injury.

4. The Constitution of Chile

The Constitution of Chile, executed in 1980, creates several environmental rights. Article 19 provides for a "right to life" and a "right to live in an environment free of contamination," n120 which apply to individuals. Article 19 also creates affirmative obligations on the Government of Chile to "ensure that the right to live in an environment free of contamination is not violated" and to "serve as a guardian for and preserve nature/the environment." n121 More than aspirational goals, the Constitution of Chile provides a right of action to enforce these rights under "protection actions" pursuant to Article 20. n122

Although Chile is a civil law country, the courts have created a protective jurisprudence that is enforceable by individuals. In the first of three cases that help define the parameters of the broadly phrased constitutional-environmental provisions, *Comunidad de Chanaral v. Codeco Division el Saldor*, n123 the Supreme Court found that the right to a clean environmental is owed not only to individuals and communities, but to future generations. Specifically, the Court ruled that the claim brought by a farmer to enjoin drainage of Lake Chungara, ". . . relate to the right to live in an environment free from pollution. . . ." These problems, the Court opined, "affect not only the well being of man but also his own life, and actually not only the livelihood of a single community of persons, at present: future generation would claim the lack of prevision of their predecessors if the environment would be polluted and nature destroyed . . ." n124 Thus, shortly after the enactment of the Constitution, the Court established minimal standing requirements to enforce the constitutional-environmental right.

Three years later, in 1988, the Supreme Court of Chile established that the constitutional-environmental provisions established a substantive right in addition to creating a right of standing. n125 In *Pedro Flores y Otros v. Corporation Del Cobre, Codeloco*, residents of the village of Chanaral filed suit against a government run copper mine to restrain the company from continuing to [*388] discharge tailings on local beaches and coves. Based on a site visit, the Court found much of the shore and local waters inert. Finding that "the preservation of nature and the conservation of the environmental heritage is an obligation of the State, according to our Fundamental Constitution, and the polluting act

which the respondent voluntarily executes is arbitrary from any point of view," the Court enjoined further dumping within one year. n126

Finally, in the "**Trillium Case**," the Supreme Court of Chile clarified that direct, individual harm need not be shown to enforce the constitutional environmental right to be free of environmental contamination. n127 Enjoining a large-scale logging operation, the Supreme Court first found that the plaintiffs had standing despite not having an individualized injury. Second, considering the merits of the case, which involved both a statutory as well as constitutional components, the Court found that the necessary environmental impact assessment had not been completed. Therefore, the government could not offer sufficient evidence that the harvest was sustainable as required. With respect to the issue of standing, the Court reasoned that:

The right to live in an environment free of contamination is a human right of Constitutional hierarchy, which presents a double character: public subjective right and public collective right. The first aspect means that its exercise corresponds, as provided in article 19 of the Political Constitution, to all persons, being the duty of the authority through the regular legal suits and through the constitutional protection claim to protect that right. And regarding the second aspect, the right to live in an environment free from contamination is meant to protect social rights of a collective character, whose defense is the interest of the community as a whole, in the local level as well as in the national level, to all the country, because the very basis of the existence as a society and as a nation are comprehended, and due to the fact that in damaging or limiting the environment and natural resources, the possibilities of life and development of the present and future generations are also limited.

In this sense, the safekeeping of these rights are in the interest of the whole society, because it affects to a plurality of parties that are placed in the same factual situation, and whose damage, despite the fact that it carries an enormous social harm, does not cause a meaningful damage clearly appreciated in the individual realm. n128

The Court's understanding of the constitutional-environmental provision in a social and intergenerational context, parallels the Supreme Court of the Philippine's reasoning in *Minors Oposa v. Secretary of the Department of Environment [*389] and Natural Resources*. n129 Moreover, as a practical matter, the ruling may also permit greater enforcement of the environmental rights, consistent with the policy basis underlying the Supreme Court of India's relaxation of standing requirements. n130

IV. FUNDAMENTAL RIGHTS TO A CLEAN AND HEALTHY ENVIRONMENT IN THE UNITED STATES

The U.S. Congress, which has enacted what are arguably the strongest environmental laws yet conceived, n131 has, however, allowed each attempt to create an express individual right in environmental quality to languish. n132 Congress' reluctance, in some significant part, may have to do with the structure [*390] of the federal-state government relationship, more than any specific objection to creation of an environmental right. n133 Unlike many parliamentary systems of government, the U.S. federal government has no general plenary authority to enact laws. Aside from specific constitutional grants of authority yielded to the federal government, all authority remains with states and individuals, pursuant to the Tenth Amendment to the U.S. Constitution. n134 Indeed, the Commerce Clause, which provides for the federal government's regulation of interstate commerce, is the primary basis for the great majority of the United States' environmental regulatory systems. Commentators have, therefore, pointed out that creation of a constitutional-environmental right would create structural questions with respect to basic notions of federalism, namely the establishment of federal plenary authority. n135

Environmental constitutional provisions at the state level, however, have fared better than at the federal level. Every state constitution drafted after 1959 explicitly addresses "modern concerns" regarding pollution control and preservation. n136 Indeed, fully one-third of all state constitutions include: (1) policy statements regarding the importance of environmental quality; (2) environmental enabling language; and/or (3) language creating an individual right to a clean and healthy environment. n137 Six states have adopted this last and strongest type of provision that is the subject of this section. n138

Courts, in general, have shown reluctance to find or give expansive countenance to individual rights in the environment. While not unsympathetic to [*391] plaintiffs' petitions, n139 federal courts, with one recent exception,

n140 have declined on each of the many petitions n141 of plaintiffs to find an implied right to a clean and healthy environment in the U.S. Constitution. n142 Moreover, with the exception of a recent set of opinions by the Montana Supreme Court, state courts have tended to interpret constitutional-environmental provisions in a manner that creates substantive or procedural rights, but which also gives substantial deference to decisions of state environmental regulatory agencies. n143

This restraint, as will be discussed in greater length below, may be due to the judiciary's apprehension about playing the role of arbiter of the value-laden and technical questions: "what exactly is a clean and healthy environment?" and "what should be done to protect those who live in industrialized environments where a certain level of pollution is an accepted part of life?" This second question addresses not only issues of federalism, but also separation of powers and judicial competence to decide policy issues involving the complex calculus of sometimes competing economic, social, and environmental values.

This Part examines the three primary considerations that state courts must address when interpreting state constitutional-environmental provisions: (1) whether the provision is self-executing; (2) whether the plaintiff has standing to bring the action; and (3) the scope of the right and standard of review. In the Part's review of this last element, two cases will be examined in greater depth to elucidate the judicial management of constitutional-environmental rights.

A. WHETHER THE PROVISION IS SELF-EXECUTING

"A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supporting or enabling legislation." n144 To be self-executing, either a provision must expressly state that specific parties have a right to enforce the provision n145 or articulate a clear enough standard so [*392] that a court has law to apply. n146

Like the concurrence in *Minors Oposa* by Justice Feliciano of the Philippines Supreme Court, n147 U.S. state courts have evinced a reluctance to create environmental standards that establish how clean and healthy an environment must be to pass constitutional muster. In most cases, when a state constitutional-environmental provision creates ambiguity as to its self-executing status, judges tend to declare the provisions statements of policy or affirmations of existing legislative authority, rather than new, enforceable rights or obligations. This judicial restraint limits the creation of new rights and is especially evident in cases where private property rights are at stake. n148

In *Commonwealth v. National Gettysburg Battlefield*, n149 for example, the Commonwealth of Pennsylvania sought to enjoin construction of a 300-foot tall, steel observation tower. The tower was to be built on private property that would overlook, and interfere with the view of, the historic Civil War battlefield at which more than 51,000 Americans died in three days of intense fighting. The Commonwealth of Pennsylvania based its petition to enjoin construction on a provision in its constitution which provides that "the people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" and the state, as trustee of these values, shall "conserve and maintain them for the benefit of all the people." n150

The Pennsylvania Supreme Court, however, rejected the Commonwealth's petition. Principally, the Pennsylvania Court made a policy-based argument, identifying the need for property owners to be able to plan for the use of their property. The Court reasoned that without a more specific standard, "a property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property." n151 The Court, then, rephrased its argument in legal terms, finding that were the provision "self-executing, action taken under it would pose serious problems of constitutionality, under both the equal protection clause and the due process clause," n152 because of the lack of certainty caused by the vaguely defined standard.

Three years later, in *Payne v. Kassab*, n153 however, the Pennsylvania Supreme Court reached exactly the opposite result, finding the constitutional provision [*393] self-executing. In that case, local residents sought an injunction to prevent the Commonwealth from realigning and broadening a street in a manner that would place the new thoroughfare in a neighborhood park, creating noise, increasing pollution, and limiting recreational opportunities. Based on their constitutional guarantee of a clean and healthy environment and the Commonwealth's Pennsylvania's obligation as trustee to conserve and maintain specified values, the residents argued that injunctive relief was appropriate to stop the proposed action. n154

While noting the earlier holding reached in the *National Gettysburg Battlefield Tower* case, the Supreme Court found that there is:

no need, in this case, to explore the difficult terrain of whether the amendment is or is not "self-executing". That question may be of paramount importance when the Commonwealth as trustee is seeking to curtail or prevent the otherwise entirely legal use of private property. . . . Here, however, the shoe is on the other foot, as it were. There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. n155

Although ultimately denying the plaintiffs' petition on the merits, the Court recognized, for the first time, an actionable constitutional-environmental right owed to residents of Pennsylvania by their state government. By limiting the constitutional-environmental right to actions brought only against state entities, the Court interpreted the provision in a manner that helps ensure stability of private property rights and avoids potentially troubling Fourteenth Amendment issues. n156 Thus, by limiting the applicability of the constitutional-environmental provisions to matters involving public decisions, the Court fashioned a judicially manageable decision-making framework.

B. WHETHER THE PLAINTIFF HAS STANDING TO BRING THE ACTION

The law of standing has several functions. On one hand, standing satisfies the U.S. Constitution's Article III provision, which limits "the judicial power" to hearing only "cases or controversies." n157 U.S. courts do not render policy advice [*394] or advisory opinions. To satisfy constitutional standing requirements, plaintiffs must assert an "injury-in-fact" and demonstrate that the injury is fairly traceable to the challenged action. n158

On a broader level, however, the law of standing helps regulate the boundary between the typically non-elected judiciary and the two other democratic, policy-oriented branches of government, the executive branch and the legislative branch. It does this by ensuring, for example, that environmental regulatory agencies consider minority (i.e., less powerful) interests and by allowing individual citizens to help ensure the execution of protective environmental laws through private rights of action. However, while policing the boundary between itself and the two other branches of government, the judiciary is frequently mindful not to intrude into the realm of public policy decision-making which is the province of the legislative and executive branches of government.

States may enact constitutional-environmental provisions solely, or largely, for the purpose of expanding state residents' right to bring actions on the public's behalf, expanding standing beyond traditional limitations. States enact these provisions recognizing that the executive branch may not be as aggressive as necessary to maintain a clean and healthy environment. n159 In Illinois, for example, the constitutional right to a clean and healthful environment carries with it no substantive authority nor does it create any new cause of action. n160 Instead, the provision equips individuals with executive branch authority, giving "standing to an individual to bring an environmental action for a grievance common to members of the public," n161 even in cases where a resident may not be able to show a "particularized" harm in the usual sense.

Like the framers of the Stockholm Declaration, the Illinois Court limited the scope of the environmental rights protected to those strictly related to human health. In *Glisson v. City of Marion*, n162 for example, the Illinois Court found that the constitutional-environmental provision was not broad enough to grant standing to an individual who sought review of the construction of a dam that would impact on two state-listed endangered species. Finding that the plaintiff lacked standing on matters of biodiversity, the Illinois Court took notice of the fact that three separate state attorney generals had considered the matter and found it unobjectionable. Thus, the court expanded standing to address environmental concerns while protecting legislative and executive branch authority in other areas.

[*395] C. WHAT IS THE SCOPE OF THE RIGHT AND THE STANDARD OF REVIEW

Once a court has determined that a constitutional-environmental provision is self-executing and the plaintiff has standing, it must determine the standard against which it will review the complained of action. With the exception of the State of Hawaii, which defines "healthful," using standards established by state and federal law, n163 state constitutional provisions affording a right to a clean and healthy environment provide little specific guidance as to the appropriate standard of review.

Adjudicating cases under broadly-worded standards is not new for judges. Courts must regularly, and on a case-by-case basis, define what constitutes "reasonable," "fair," or "equitable" conduct. However, some commentators have questioned whether legally trained, non-technical judges are the appropriate arbiters of a clean and healthy environment

and whether the judicial branch of government, for that matter, is the appropriate venue for resolving these value-laden, science-based environmental decisions. n164

A number of judges have expressed similar concerns about the institutional capacity and propriety of court involvement in environmental decision-making. Writing in the early 1970's in response to a plaintiff's claim for damages relating to alleged injuries sustained by exposure to toxic emissions at the notoriously polluted Houston Ship Channel, a federal district court judge considered whether an implied constitution-environmental right existed. The district court found that the U.S. Constitution provides for no such right and that courts are not equipped to manage such disputes by stating that:

From an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative process. Furthermore, the inevitable trade-off between economic and ecological values presents a subject matter which is inherently political, and which is far too serious to relate to the ad hoc process of government by lawsuit'. . . . n165

Courts in a majority of states have reconciled the need to establish a functional standard of review with judicial/court limitations by evaluating administrative actions under a fairly deferential constitutional standard. In most cases, with the exception of the State of Montana, state courts will employ either a loose balancing of interests (e.g., plaintiff's interest in environmental quality versus the [*396] public's interest in economic growth, transportation, waste management, etc.) or a more formalized multi-part test. n166

1. The Louisiana Three-Part Balancing Test

Developed through a constitutional codification of the State of Louisiana's public trust doctrine, n167 which closely resembles the right to a clean and healthy environment, the Louisiana Supreme Court developed a three-part test in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission and the Louisiana Department of Natural Resources*. n168 In that case, the Court considered a petition for review brought by citizens who objected to the State's permitting a hazardous waste landfill near the Mississippi River in an area colloquially known as "Cancer Alley." Specifically, plaintiffs claimed that the facility, under the permits granted, would endanger the river and the water supply of neighboring populations, including that of the City of New Orleans, in violation of their constitutionally protected environmental rights. n169

Noting that a court would ordinarily review a state administrative decision under the deferential arbitrary and capricious standard specified by the Louisiana Administrative Procedure Act, the Court found that the Louisiana constitutional-environmental rights provision requires a more probing inquiry. n170 The Supreme Court reasoned that while deference is owed to the state's environmental agency, because of its statutory delegation of authority and expertise, "the regulatory scheme provided by constitution . . . mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties," and includes both procedural and substantive components. Specifically, the Louisiana Supreme Court found that a court should review a state agency decision that implicates a protected environmental right to determine whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental protection. . . . If the decision was reached procedurally, without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the courts' responsibility to [*397] reverse." n171 Thus, the Supreme Court of Louisiana found that the constitutional-environmental guarantee requires the state to develop a written record of decision that demonstrates both its analytic reasoning and the basis of its decision so that a reviewing court may determine whether the substantive rights afforded were considered.

Next, addressing the substantive issues that an environmental agency must consider as a result of the constitutional-environmental requirement, the Louisiana Supreme Court enumerated the elements of the constitutional test by stating that: "In determining whether the proposed project fully minimizes adverse environmental effects, the commission necessarily must consider whether alternate projects, alternate sites, or mitigative measures would offer more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits." n172

The Court remanded the permits back to the environmental regulatory agency. However, it declined to reject the agency's decision based on a finding of substantive error. Rather, the Court found that the agency violated the

procedural arm of the constitutional-environmental provisions. Specifically, the Louisiana Supreme Court found that "the commission did not assign reasons for its decision, and its factual findings do not sufficiently illumine its decision-making process. . . . Thus from the present record we cannot tell whether the agency performed its duty to see that the environment would be protected to the fullest extent possible consistent with the health, safety, and welfare of the people." n173

The use of multi-part tests and, more generally, balancing tests, sharpens the inquiry that the State of Louisiana must undertake under constitutional-environmental provisions. The approach gives substantive meaning to the provision and offers increased protections, while respecting the existing environmental statutory process that the legislature has established. Further, by creating a procedural requirement for record review, courts may confine their inquiry and give deference to the technical and political expertise of the executive branch, and at the same time increase the transparency of the decisionmaking process.

[*398] 2. Montana's Application of Strict Scrutiny

The Montana Supreme Court has recently applied the highest level of scrutiny to matters implicating residents' constitutional right to a clean and healthy environment. In *Montana Environmental Information Center v. Department of Environmental Quality*, n174 two environmental groups representing local communities sought injunctive relief to halt the state's Department of Environmental Quality from exempting a mining company from releasing arsenic-laced waste-water into the pristine Blackfoot and Landers Fork Rivers without first performing an environmental review. Importantly, these rivers provide drinking water, fishing, and recreation for the proximate rural communities, placing the health and well-being of the plaintiffs at issue.

The mining company, Seven-Up Pete, sought to open a pit mine for extraction of gold in the headwaters of the two rivers. n175 Needing to pump and dispose of the tainted groundwater to prevent the mine from becoming inundated by shallow, proximate aquifers, the company applied for permits from the state. The state granted the permits to discharge into the alluvium of the rivers during the test phase of the project. Moreover, and the substantive crux of the suit, the state granted the permits without requiring a rigorous "nondegradation review," pursuant to, at that time, a recently enacted exemption for, *inter alia*, all water wells or monitoring wells, regardless of the amount or toxicity of water released.

Based on the plaintiffs' constitutional challenge to the exemption, as applied, the Court asked two related questions: (1) did the plaintiffs have standing?; and (2) what was the appropriate standard of review? With respect to the first question, the environmental groups argued that they did not need to make the difficult evidentiary showing that the discharge created physical *harm* to them. Rather, the plaintiffs contended that they had standing to bring the action based on the mere showing that *elevated* arsenic levels would result in waters on which they fish, recreate, and obtain drinking water, and that the elevated levels resulted from the unreviewed discharges. n176

The Court agreed with the plaintiffs and ruled that evidence of particularized harm from the water need not be shown to obtain standing. The Court found that the right to a clean and healthy environment was meant to be "anticipatory and preventative." n177 Articulating what could be characterized as a form of the "precautionary principle", the Court found that the framers of the constitutional-environmental provision "did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on [*399] the surface of our state's rivers and streams before its farsighted environmental protection can be invoked." n178 Therefore, on a showing that the State of Montana had permitted a known carcinogen to enter the water without a non-degradation review, the Court found that plaintiffs had standing.

The Court was no less expansive in its ruling on the appropriate standard of review. The Court began by reviewing the record of debate surrounding the establishment of the constitutional provision and by examining the structure of the State Constitution. Identifying the environmental provision to be in the "declaration of rights," and, therefore, a "fundamental right," the Court established that strict scrutiny must apply. Under this standard, a provision of law can "survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." n179

Under this highest standard of review, the Court found that enactment of the categorical exemption, "without regard to the nature or volume of the substance being discharged," as applied, violated the plaintiffs' environmental rights. While remanding the case to the trial court for a factual determination, the Court held that the legislature acted "arbitrarily" by creating the blanket exemption.

The Montana Supreme Court's decision has been described by one scholar as "stunningly breathtaking in both its potential reach and its potential to change the face of environmental law." n180 Another scholar suggested that the Court "either withdraw the MEIC [Montana Environmental Information Center] opinion or otherwise repudiate it." n181 In any event, it is certain that with time the Montana Supreme Court will consider more complex cases, such as that faced by the Louisiana Court and cases involving the balancing of other interests guaranteed under the State Constitution. As with the trend among other state courts, it is likely that the Montana Supreme Court will create a balancing test and/or limit the rights implicated by the constitutional-environmental provision. Unless it does so, the MEIC decision will result in Montana courts, on a case-by-case basis, undoing the deliberative decisions reached by the two democratic branches of government, and, at the same time, taxing the state judiciaries' technical competencies.

V. CONCLUSION

Similar to environmental justice and sustainable development, the right to a clean and healthy environment appears to be moving, slowly but surely, to a [*400] higher degree of relevance. The question as to whether it is moving from the Fourth Degree to the Fifth Degree, or from the Fifth Degree to the Sixth Degree, depends upon the analysis of the international environmental lawyers, academics, or government regulators reviewing the treaties, constitutions, and reported cases. One thing that can be said for sure is that internationally, the right to a clean and healthy environment has not reached the enforceable "hard law" stage as yet. But every article, every court decision, every treaty negotiated, every pronouncement from an international body, whether pro or con, is potentially critically important to the emerging general acceptance of this human right to a clean and healthy environment. Whether or when a right to a clean and healthy environment will become recognized as a fundamental right under international law, treaty, or a particular constitution remains to be seen. Perhaps, courts and international tribunals may feel compelled to find such a human right, as the Supreme Court of India did, if legislative bodies fail to act in a timely manner. In either case, a right to a clean and healthy environment is almost certain to become enforceable "hard law," either as a basic human right or as a statutory right. As Victor Hugo observed: "An invasion of armies can be resisted, but not an idea whose time has come." n182

[*401] APPENDIX A

CONSTITUTIONAL ENVIRONMENTAL PROVISIONS

HAW. CONST. art. XI, § 9, providing, "each person has a right to a clean and healthful environment, as defined by the laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulations as provided by law."

ILL. CONST. art. XI § § 1, 2, providing, "the public policy of the State and duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy," and "each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitations and regulations as the General Assembly may provide by law."

MASS. CONST. amend. art. XLIX, providing "the people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to conservation, development and utilization of the agricultural, mineral, forest, water, air, and other natural resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights."

MONT. CONST. art. II § 3 providing, "all persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."

N.Y. CONST. art. XIV, § § 4 and 5, providing, "the policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands. . . . The legislature, in implement this policy, shall include adequate provision for abatement of air and water pollution and of excessive and unnecessary noise . . ." and, "violation of any of the provisions of this article may be restrained at the suit

of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen."

[*402] PA. CONST, art. I, § 27, providing, "the people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

R.I. CONST, ART. I, § 17, providing, "the people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter an usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resources planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state."

FOOTNOTES:

n1 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, para. 5, U.N. Doc. A/CONF.157/23 (1993), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument).

n2 United Nations, Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948), available at <http://www.un.org/0verview/rights.html>. The General Assembly provided a list of 30 human rights which included, among others: "All human beings are born free and equal in dignity and rights;" "Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;" "Everyone has the right to life, liberty and security of person;" and "No one shall be subjected to arbitrary arrest, detention or exile."

n3 Draft Declaration of Principles on Human Rights and the Environment, U.N. Hum. Rts. Comm. (May 16, 1994) [hereinafter Draft Declaration], available at <http://www.worldpolicy.org/globalrights/environment/envright.html> (last visited Feb. 22, 2004).

n4 See, e.g., *Gonzaga Univ. v. Doe*, 536 U. S. 273 (2002).

n5 UNITED NATIONS POPULATION DIVISION, WORLD URBANIZATION PROSPECTS: THE 1994 REVISION 87 (1995).

n6 UNITED NATIONS ENVIRONMENT PROGRAM, GLOBAL ENVIRONMENT OUTLOOK 3: PAST, PRESENT AND FUTURE PERSPECTIVES 240 (2002).

n7 UNITED NATIONS POPULATION DIVISION, *supra* note 5, at 86-87, 102-03.

n8 *Id.*

n9 UNITED NATIONS ENVIRONMENT PROGRAM, *supra* note 6, at 244.

n10 Guillermina Guillen, *Over 11 Million Lack Drinking Water -- The U.N. Calls for Better Water and Sanitation Services in Cities*, MIAMI HERALD (Int'l Edition), Oct. 7, 2003, at A3.

n11 John C. Dernback, *Why Should Lawyers Care*, ENVTL. F., July/Aug. 2002, at 30.

n12 VITRUVIUS, THE TEN BOOKS ON ARCHITECTURE 241-42 (Morris Hicky Morgan trans., Dover Publications 1960).

n13 WORLD HEALTH ORGANIZATION, THE RIGHT TO WATER 3 (2003), *available at* http://www.who.int/entity/water_sanitation_health/en/rtwintro.pdf.

n14 UNITED NATIONS, INTERNATIONAL YEAR OF FRESHWATER 2003 (2002), *available at* <http://www.un.org/events/water/brochure.htm>.

n15 KOFI A. ANNAN, WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY para. 297 (2000) (commonly referred to as the "Millennium Report"), *available at* <http://www.un.org/millennium/sg/report/full.htm>.

n16 DeNeen L. Brown, *Haiti's Never-Ending Thirst-Lack of Potable Water Is Chief Among Woes*, WASH. POST, Feb. 10, 2004, at A13.

n17 UNITED NATIONS ENVIRONMENT PROGRAM, UNITED NATIONS CHILDREN'S FUND AND WORLD HEALTH ORGANIZATION, CHILDREN IN THE NEW MILLENNIUM: ENVIRONMENTAL IMPACT ON HEALTH (2002).

n18 Guillen, *supra* note 10, at A3.

n19 *Id.*

n20 Marc Cooper, *Behind Globalization's Glitz*, THE NATION, Sept. 22, 2003, at 17.

n21 *Id.* at 18.

n22 *Id.*

n23 Guillen, *supra* note 10, at A3.

n24 Guillermina Guillen, *Dozens of Cities Face Mounting Water Crisis*, MIAMI HERALD (Int'l Edition), Oct. 9, 2003, at A3.

n25 *Id.*

n26 U.S. ENVIRONMENTAL PROTECTION AGENCY, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE, (Working Draft, Sept. 8, 2003), available at <http://www.epa.gov/compliance/recent/ej.html>.

n27 The literature is rife with independent research documenting the disproportionate exposure to environmental harms and risks of minority and/or low-income communities. See, e.g., B.M. Baden, *The Locality of Waste Sites Within The City of Chicago: A Demographic, Social, and Economic Analysis*, RES. & ENERGY ECON., Feb. 2002, at 53-93; Michael Taquino et al., *Units of Analysis and the Environmental Justice Hypothesis: The Case of Industrial Hog Farms*, 83 SOC. SCI. Q. 298 (2002); John C. Pine, *An Examination of Accidental Release Scenarios from Chemical-Processing Sites: The Relation of Race to Distance*, 83 SOC. SCI. Q. 317 (2002); Julie S. Brainard & Andrew P. Jones, *Modeling Environmental Equity: Access to Air Quality in Birmingham, England*, ENV'T & PLAN., Apr. 2002, at 695-716; M.E. Hodgson et al., *Subsidized Inequities: The Spatial Patterning of Environmental Risks and Federally Assisted Housing*, 22 URBAN GEOGRAPHY 29, 29-53 (2001); D. Wong & K. Sexton, *Residential Proximity to Industrial Sources of Air Pollution: Interrelationship Among Race, Poverty, and Age*, 51 J. OF THE AIR AND WASTE MGMT. ASS'N 406 (2001); Nicolas W. Hengartner & Ronald D. Fricker, *Environmental Equity and the Distribution of Toxic Release Inventory and Other Environmentally Undesirable Sites in Metropolitan New York City*, 8 ENVTL. & ECOL. STAT., 33, 33-52 (2001).

n28 John Heritage, *Environmental Protection -- Has It Been Fair?* EPA JOURNAL, Mar./Apr. 1992, at 1.

n29 Deeohn Ferris, *A Challenge to EPA: An Environmental Justice Office Is Needed*, EPA JOURNAL, Mar./Apr. 1992, at 28.

n30 WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 3 (1987).

n31 See Jonathan Lash, *Towards a Sustainable Future*, 12 NAT. RESOURCES & ENV'T 83 (1997).

n32 CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, ONE SPECIES, ONE PLANET: ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT (Oct. 2002) [hereinafter CIEL], available at http://www.ciel.org/Publications/onespecies_oneplanet_22oct02.html.

n33 *Id.* at 5.

n34 J.B. Ruhl, *The Seven Degrees Of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?* 8 DUKE ENVTL. L. & POL'Y F. 273 (1998).

n35 *Id.* at 277-89.

n36 *Id.* at 288.

n37 *Id.* at 289.

n38 Exec. Order No. 12898, § 1-101, 3. C.F.R. 859, *reprinted in 42 U.S.C. § 4321* (1994). Moreover, the stated purpose of the Presidential memorandum accompanying Executive Order 12898, "is to underscore certain provisions of existing law . . . can help ensure that all communities and persons across this nation live in a safe and healthful environment." Presidential Memorandum Accompanying Executive Order 12898, 30 Weekly Comp. Pres. Doc. 279, 280 (Feb. 11, 1994).

n39 Memorandum from Gary S. Guzy, to Office of Enforcement and Compliance Assistance, the Assistant Administrators of the Office of Air and Radiation, the Office of Solid Waste and Emergency Response, and the Office of Water, (Dec. 1, 2000), *available at* [http://www.abanet.org/irr/committees/environmental/permitting_ authorities.doc](http://www.abanet.org/irr/committees/environmental/permitting_authorities.doc).

N40 *Id.*

n41 Nicholas Targ, *Environmental Justice Issues under Existing Statutory Authority*, THE ENVTL. COUNSELOR, Feb. 15, 2002, at 14.

n42 Memorandum from Christine Todd Whitman, to EPA Assistant Administrators, General Counsel, Inspector General, Chief Financial Officer, Associate Administrators, Regional Administrators, and Office Directors (Aug. 9, 2001), *available at* <http://epa.gov/compliance/resources/policies/ej/index.html>.

n43 ENVIRONMENTAL LAW INSTITUTE, OPPORTUNITIES FOR ADVANCING ENVIRONMENTAL JUSTICE: AN ANALYSIS OF U.S. EPA STATUTORY AUTHORITIES 6 (2001), *available at* <http://www.epa.gov/Compliance/resources/publications/ej/eli-opportunities4ej.pdf>.

n44 ENVIRONMENTAL LAW INSTITUTE, A CITIZEN'S GUIDE TO USING FEDERAL ENVIRONMENTAL LAWS TO SECURE ENVIRONMENTAL JUSTICE (2002), *available at* http://www.epa.gov/compliance/resources/publications/ej/citizen_guide_ej.pdf.

n45 American Bar Ass'n, Env'tl. Justice Comm., PSD Permits Reviewed by the EPA Environmental Appeals Board Involving Executive Order 12898, *at* http://www.abanet.org/irr/committees/environmental/psd_air.html.

n46 American Bar Ass'n, Env'tl. Justice Comm., UIC Permits Reviewed by the EPA Environmental Appeals Board Involving Executive Order 12898, *at* <http://www.abanet.org/UT/committees/environmental/uic.html>.

n47 American Bar Ass'n, Env'tl. Justice Comm., RCRA Permits Reviewed by the EPA Environmental Appeals Board Involving Executive Order 12898, *at* <http://www.abanet.org/irr/committees/environmental/rcra.html>.

n48 CIEL, *supra* note 32, at 6.

n49 *Id.* at 23

n50 *Id.*

n51 *See infra* Part III.A.

n52 *Id.*

n53 Declaration of the U.N. Conference on the Human Environment, princ. 1 (June 16, 1972) U.N. Doc. A/CONF.48/14/Rev.1 (1973) [hereinafter Stockholm Declaration], *available at* <http://www.unep.org/Documents/Default.asp?DocumentID=97>.

n54 Gabcikovo-Nagymaros Project (Hung. v. Slovak.), 1997 I.C.J. 97, 97-110 (Sept. 25) (separate opinion of Judge Weeramantry) [hereinafter Gabcikovo-Nagymaros Project].

n55 *See, e.g.,* Sumudu Atapattu, *The Right to a Healthy Life or the Right To Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 *TUL. ENVTL. L.J.* 65, 72-73 (2002).

n56 *Id.*

n57 U.N. Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted in* 31 *I.L.M.* 874.

n58 Atapattu, *supra* note 55, at 78 ("The Principle 1 of the Rio Declaration has also been criticized for taking a sharply anthropocentric approach."). In contrast the nonbinding 1982 World Charter for Nature recognizes the rights of nature in its own right, as distinguished from the anthropocentric focus of other instruments.

n59 Indeed, the Declaration is not the only outcome of the Rio Conference. The Conference also produced an Agenda 21, a blueprint for sustainable development. Agenda 21 reflects recognition that the path to sustainable development is an extended journey, requiring concerted effort by a wide variety of actors, including government, industry, and citizens. United Nations Conference on Environment and Development, Agenda 21: Program of Action for Sustainable Development, U.N. Doc. A/Conf. 151/4 (1992), *available at* <http://www.unep.org/Documents/Default.asp?DocumentID=52>.

n60 Draft Declaration, *supra* note 3, princ. 2.

n61 *See* Marc Paellemarts, *The Human Right to a Healthy Environment as a Substantive Right*, in *HUMAN RIGHTS AND THE ENVIRONMENT* 11, 15 (Maguelonne Dejeant-Pons & Marc Paellemarts eds., 2002).

n62 *Report of the World Summit on Sustainable Development, Plan of Implementation*, Sept. 4, 2002, annex, U.N. Doc. A/CONF 199/20, available at http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf.

n63 *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2002).

n64 28 U.S.C. § 1350(2003).

n65 *Flores*, 343 F.3d at 158.

n66 *Id.* at 161.

n67 *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Right*, U.N. Committee on Economic, Social and Cultural Rights, 29th Sess., U.N. Doc. E/C.12/2002/11 (2002), available at <http://www.unhchr.ch/html/menu2/6/gcl5.doc>.

n68 Press Release, World Health Organization, Water for Health Enshrined as a Human Right (Nov. 27, 2002), available at <http://www.who.int/raediacentre/releases/pr91/en/>.

Former Prime Minister of Norway, Dr. Gro Harlem Brundtland has long had a central role in the evolution of the linkage between development, environment, and health. At the request of the Secretary-General of the United Nations, she chaired the World Commission on Environment and Development, which developed the concept of sustainable development, as elaborated in its report *Our Common Future* in 1987. The recommendations of this work helped lead to the Earth Summit -- the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992. Dr. Brundtland contributed to this issue in her former role as Director-General of the WHO. *Dr. Gro Harlem Brundtland, Director-General*, at <http://www.who.int/dg/bruntland/en> (last visited Jan. 30, 2004).

n69 African Charter of Human and People's Rights, June 27, 1981, art. 24, 21 *I.L.M.* 58 (1982).

n70 Atapattu, *supra* note 55, at 88.

n71 Additional Protocol to the American Convention on Human Rights, Nov. 17, 1988, art. 11, 28 *I.L.M.* 156, 161.

n72 INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997); INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN BRAZIL OEA/Ser.L/V/II.97, doc. 29 rev. 1 (1997); INTER-AM. C.H.R., THIRD REPORT ON THE SITUATION OF HUMAN RIGHTS IN PARAGUAY, OEA/Ser.L/V/II.110, doc. 52 (2001); *see also* DINAH SHELTON, HUMAN RIGHTS, HEALTH & ENVIRONMENTAL PROTECTION: LINKAGES IN LAW & PRACTICE 17 (World Health Org., background paper, 2002), available at http://www.who.int/hhr/information/en/Series_1%20%20Human_Rights_Health_Environmental%20Protection_Shelton.pdf.

n73 INTER-AM. C.H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN ECUADOR, OEA/Ser.L/V/II.96, doc. 10 rev. 1, at 89-92 (1997).

n74 *Id.* at 92.

n75 *Id.* at 89.

n76 *Id.*

n77 *Id.* at 92-93.

n78 *See, e.g.*, discussion *infra* Part III regarding *MC Mehta v. Union of India*.

n79 *Powell & Rayner v. U.K.*, 172 Eur. Ct. H.R. (Ser. A) (1990).

n80 *Lopez Ostra v. Spain*, 20 Eur. H.R. Rep. 277 (1995).

n81 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, Doc. ECE/CEP/43.

n82 EARTHJUSTICE, HUMAN RIGHTS AND THE ENVIRONMENT REPORT 23-24 (2003), *available at* <http://www.earthjustice.org/regional/international/HRE-Report-2003.pdf>

n83 *Id.*

n84 *Id.*; *see, e.g.*, Attapatu, *supra* note 55, at 85, 108-09. Some constitutions explicitly recognize a right to a healthy environment. For example, Article 24 the South African Constitution provides that:

Everyone has a right to (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and her measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

S. AFR. CONST. ch. IV, § 24.

However, the inclusion of environmental rights in constitutions is far from universal. Caribbean constitutions generally have not addressed a right to a healthy environment. REGIONAL OFFICE FOR LATIN AMERICA AND THE CARIBBEAN, U.N. ENVIRONMENT PROGRAM, CARIBBEAN ENVIRONMENTAL LAW: DEVELOPMENT AND APPLICATION 9 (2002) *available at* <http://www.rolac.unep.mx/deramb/publicaciones/CaribbeanEnvLaw.pdf>.

n85 *Id.*

n86 ENVIRONMENTAL LAW INSTITUTE, CONSTITUTIONAL ENVIRONMENTAL LAW IN AFRICA: GIVING FORCE TO FUNDAMENTAL PRINCIPLES 16 (2000) [hereinafter CONSTITUTIONAL ENVIRONMENTAL LAW IN AFRICA]. For a complete treatment of environmental provisions in the constitutions of African nations, see *id.*

n87 Atapattu, *supra* note 55, at 85-86. However, in one celebrated case, a provision in a Directive Principles Chapter was invoked in establishing a "right to a balanced and healthful ecology." *C.f.* *Minors Oposa v. Sec'y of Dept. of Env'tl. and Nat'l Res.*, 33 *I.L.M.* 173 (1994) (see discussion, Section III.C.2).

n88 See discussion *infra* Part II.A.

n89 See discussion *infra* Part III.

n90 B.N. Kirpal, *Environmental Justice in India* (2002), available at <http://www.ebc-india.com/lawyer/default.htm>.

n91 The 42nd Amendment to the Indian Constitution introduced contemporary environmental issues into the Constitution of India. Article 48A provides that the "The State shall endeavour to protect and improve the environment and safeguard the forest and wildlife of the country." INDIA CONST. art. 48A. Article 51A(g) provides that similar obligation on citizens. *Id.* art. 51A(g). Neither of these provisions are self-executing, however.

n92 *Id.* art. 21.

n93 *Naramand Bachao Andolan v. Union of India*, (2000) 10 *S.C.C.* 669, 727 (India).

n94 *M.I. Builders Pvt. Ltd v. Radhey Shyam Sahu*, *A.I.R.* 1999 *S.C.* 2468 (India); *Th. Majra Sigh v. Indian Oil Corporation*, *A.I.R.* 199 *J&K* 81. The public trust doctrine, which traces its roots to the Institutes of Justinian, provides that certain natural resources are held in common by, and for the benefit of, the general public. See ZYGMUNT PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY Ch. 8.B. (1992).

n95 Kirpal, *supra* note 90, at 5.

n96 *Id.* at 5-6.

n97 *Id.* at 5.

n98 *Id.* Under scoring this procedural theme the Supreme Court of India has explained, "public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of

persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law." Subhash Kumar v. State of Bihar, (1991) 1 S.C.R. 5 (India).

n99 Subhash Kumar v. State of Bihar, (1991) 1 S.C.R. 5 (India).

n100 *Id.*

n101 Shyam Divan, *Legislative Framework and Judicial Craftsmanship* (2000), available at <http://www.indiaseminar.com>.

n102 Kirpal, *supra* note 90, at 12.

n103 PHIL. CONST, art. II, § 16.

n104 Minors Oposa v. Sec'y of Dept.of Env'tl. & Nat'l Res., 33 *I.L.M.* 173, 184 (1994).

n105 *Id. at 184.*

n106 A number of Latin American countries have also addressed the intergenerational aspect of a right to a clean environment. For example, the Supreme Court of Costa Rica ruled in 1988, that, "although man has the right to use the environment for his own development, it has also the obligation to protect it and preserve it so that future generations can use it." See Adriana Fabra & Eva Arnal, *Review of Jurisprudence on Human Rights and the Environment in Latin America*, Joint UNEP-OHCHR Expert Seminar on Human Rights in the Environment (Geneva, Switzerland Jan. 14-16, 2002), at 5, available at <http://www.unhchr.ch/environment/bp6.pdf>.

n107 *Minors Oposa*, 33 *I.L.M.* at 203-04 (Feliciano, J., concurring).

n108 *Id. at 205.*

n109 The majority of Latin American and South American countries have adopted constitutional provisions the help secure a right to a healthy environment. Fabra & Arnal, *supra* note 106, at 2-11. The background paper identifies seven constitutional approaches adopted by one or more Latin or South American country. These approaches include: "Right to a Health Environment" in Argentina, Colombia, Costa Rica, and Guatemala; "Right to a Healthy Environment and Future Generations" in Argentina, Colombia, Chile, Costa Rica, and Guatemala; "Right to Life and Health" in Argentina, Chile, Colombia, and Costa Rica; "Right to Culture" in Chile; "Right to be Free from Intrusions in the Rights of Privacy from Environmental Nuisances" in Colombia; and the "Right to Environmental Information" in Peru. *Id.*

n110 COLOM CONST. art. 11 (1991).

n111 Fabra & Arnal, *supra* note 106, at 3.

n112 An "amparo" is a legal action brought to enforce a constitutional guarantee.

n113 Fabra & Arnal, *supra* note 106, at 3-4 (discussing *Fundepublico v. SOCOPAV, Ltda.* Case No. T-101, Judgment No. T-415 (Constitutional Court, June 17, 1992)).

n114 *Id.* at 3.

n115 *Id.*

n116 *Id.*

n117 Atapattu, *supra* note 55, at 73-74 (discussing the formulation of a right to a healthy environment under the Stockholm Declaration). Compare also the interpretation given to the right by the Court in *Fundepublic v. Mayor of Bugalagrande* to that of the Supreme Court of the State of Illinois in *Glisson v. City of Marion*, 720 N.E.2d 1034, 1041 (Ill. 1999), discussed *infra* at 40.

n118 See Fabra & Arnal, *supra* note 106, at 34 (discussing *Victor Ramon Castrillon Vega v. Federacio Nacional de Algodoneros y Corporation Autonoma Regional del Cesar* (1997) Case No. 4577 (Colom.)).

n119 *Id.*

n120 CHILE CONST. art. 19 § § 1, 8.

n121 *Id.* art. 19, § 8. Article 19 also establishes that certain individual right may be restricted to protect the environment. *Id.*

n122 *Id.* art. 20.

n123 *Comunidad de Chanaral v. Codeco Division el Saldor* (1988) S/Recurso de Proteccion. Corte Suprema (Chile).

n124 *Id.*

n125 See Pedro Flores y Otros v. Corporacion Del Cobre, Codeloco, Division Salvador. Recurso de Proteccion, (1988) 12.753.FS. 641 (Chile), *summary available at* <http://www.unescap.org/drpad/vc/document/compendium/chl.htm>.

n126 *Id.* (as translated in Heidi Montero. Chile's Constitutional Approach to Environmental Rights (Spring 1999) (unpublished manuscript on file with authors)).

n127 See The "**Trillium** Case," Decision No. 2.732-96, Sup. Ct. of Chile, (Mar. 19, 1997), *available at* <http://www.elaw.org/resources/printable.asp?id=156>.

n128 *Id.* Part 2, 12-13.

n129 See *infra* Part III.C.2.

n130 See *infra* Part III.C.1.

n131 In 1970, the Congress enacted one of the first modern environmental, regulatory statutes, declaring in section 4331(c) of the National Environmental Policy Act (NEPA) that "each person should enjoy a healthy environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." NEPA is the principle environmental law of the United States. National Environmental Policy Act, (NEPA) 42 U.S.C. § 4321-4370(d) (2003). NEPA has not been found to confer any substantive rights: it is a procedural statute. NEPA requires detailed environmental impact statements for federal government projects and established the Council on Environmental Quality to oversee compliance with the Act. According to section 4331(b):

It is the continuing responsibility of the Federal Government to use all practical means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

- (1) fulfill the responsibilities of each generation as trustee of the environmental for succeeding generation;
- (2) assure for all American safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable of depletable resources.

NEPA's six specific goals are comprehensive in scope and provide clear objectives. The environmental impact statement procedure is designed specifically to ensure that these goals and objectives can be achieved. Courts have also begun to review agencies' environmental justice analysis under the "arbitrary and capricious" standard. See, e.g., *Communities Against Runway Expansion, Inc. v. Federal Aviation Administration*, 355 F.3d 678 (D.C. Cir. 2004). For a review of the role of NEPA in the environmental justice context, see Barry Hill & Nicholas Targ, *Natural Resources and Environmental Justice* (2001), *available at* http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcealr/28_1/01_TXT.htm.

n132 Senator Gaylord Nelson in 1968 proposed a constitutional amendment that would establish an "inalienable right" of every person "to a decent environment." H.R. J. Res. 1321, 90th Cong. (1968). Representative Richard Ottinger, two years later, proposed a broader constitutional-environmental right. HR. J. Res. 1205, 91st Cong. (1970). Most recently, and presently pending, Representative Jesse Jackson, Jr. proposed

a constitutional amendment "respecting the right to a clean, safe, and sustainable environment." H.R.J. Res 33, 108th Cong. (2003).

n133 See ROBERT MELTZ, RIGHT TO A CLEAN ENVIRONMENT PROVISIONS IN STATE CONSTITUTIONS, AND ARGUMENTS AS TO A FEDERAL COUNTERPART, CRS Report No. RS20084, (Feb. 23, 1999), n. 25 and accompanying text, available at <http://www.NCSEonline.org/nle/crsreports/risk/>.

n134 The Tenth Amendment to the U.S. Constitution declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. CONST, amend. X. For a contemporary application of the Tenth Amendment, see *United States v. Lopez*, 514 U.S. 549 (1995) (finding a federal gun control law, which created gun-free zones around schools, unconstitutional because it failed to have a sufficient connection with issues of interstate commerce).

n135 U.S. CONST, amend. X.

n136 Barton Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003).

n137 For a listing of all environmental provisions in state constitutions, see Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73 (2002).

n138 States with constitutional provisions providing for a right to a clean and health environment include: Hawaii, Massachusetts, Montana, New York, Pennsylvania, and Rhode Island. HAW. CONST. art. XI, § 9; ILL. CONST. art. XI § § 1, 2; MASS. CONST. amend, art. XLIX; MONT. CONST. art. II § 3; N.Y. CONST., art. XIV, § § 4 and 5; PA. CONST. art. 1, § 27; R.I. CONST. art. I, § 17. For the full text of state environmental provisions, see Appendix A. It must be noted that a number of other states, including California and Louisiana, have constitutionalized the "public trust doctrine," a common law doctrine that bears many similarities to a right to a clean and healthful environment. The doctrine provides that each state holds certain rights in rivers and streams in trust for its residents (e.g., access, fishing, boating, or recreation). As trustee, the state may not alienate these rights without making certain findings. In addition, as the beneficiary, residents typically have standing, beyond what the courts would ordinarily permit, to require court review of state actions that affect rivers and streams. See generally, *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

n139 See, e.g., *Envtl. Def. Fund v. Corps of Eng'r of U.S. Army*, 325 F. Supp. 728, 739 (E.D. Ark. 1971) (rinding that "such claims, even under our present Constitution are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition.").

n140 *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767 (E.D. Mich. 2001) (denying defendants' motion to dismiss). The court also recognized the existence of a constitutional right to "personal security and bodily integrity" under the Fourteenth Amendment, and it found that this right would protect an individual from environmental impacts that "shock the conscience of the court." *Id.* at 700. The court noted that "Where . . . an official has the opportunity to deliberate over a matter, the judiciary will be shocked' if that official acts in a way that exhibits the deliberate indifference to others' rights." *Id.*

n141 See, e.g., *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971); *Hawthorn Env'tl. Pres. Assoc. v. Coleman*, 417 F. Supp. 1091, 1095 (N.D.Ga. 1976); *Env'tl. Def. Fund v. Corps of Eng'r of U. S. Army*, 325 F. Supp. 728, 739 (E.D. Ark. 1971).

n142 Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 174 (1993).

n143 See Thompson, *supra* note 136, at 158.

n144 16 C.J.S. *Constitutional Law* § 46 (1984).

n145 The state constitutional provisions of Illinois, Hawaii, and New York are expressly self-executing. See ILL. CONST., art. X § 2; HAW. CONST. art. XI, § 9; N.Y. CONST., art. XIV, § 4.

n146 See, e.g., *Advisory Opinion to the Governor*, 706 So.2d 278, 281 (Fla. 1997) (holding that the environmental provision of Florida's Constitution is not self-executing, lacking a sufficiently clear standard).

n147 See *infra* note 105 and accompanying text.

n148 Contrary to the majority of states, the Montana Court found that its state's constitutional guarantee to a clean and healthy environment applies both to private and public entities. *Cape-France Enterprises v. Estate of Peed*, 29 P.3d 1011, 1016 (Mont. 2001).

n149 *Commonwealth v. National Gettysburg Battlefield*, 311 A.2d 588 (Pa. 1973).

n150 PA. CONST. art 1, § 27.

n151 *National Gettysburg Battlefield*, 311 A.2d, at 593.

n152 *Id.* at 595.

n153 *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976).

n154 *Id.* at 273.

n155 *Id.*

n156 The Fourteenth Amendment of the U.S. Constitution provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

n157 *Id.* art. III, § 2.

n158 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-71 (1992).

n159 "Because the wrong here has reached crisis proportions and because it affects individuals in so fundamental a way, the Committee is of the view that the special injury' requirement for standing is particularly inappropriate and ought to be waived." ILL. COMP. STAT. ANN., CONST. art. XI § 2, Constitutional Commentary, at 277 (West 1971).

n160 *City of Elgin v. County of Cook*, 660 N.E.2d 875 (Ill. 1995).

n161 *Glisson v. City of Marion*, 720 N.E.2d 1034, 1041 (Ill. 1999).

n162 *Id.* at 1044-45.

n163 See HAW. CONST. art XI, § 9.

n164 See, e.g., Thompson, *supra* note 136, at 187-90.

n165 See *Tanner v. Armco Steel*, 340 F. Supp 532 (S.D. Tex. 1972).

n166 Cusack, *supra* note 142, at 192.

n167 The provision of the Louisiana Constitution at issue provides, "the natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy." LA. CONST. art. IX, § 1.

n168 *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So. 2d 1153, 1160 (La. 1984).

n169 *Id.*

n170 While the weighing of costs and benefits required under the *Save Ourselves* decision has been interpreted as a "rule of reasonableness," the Court and subsequent courts have noted that "the DEQ's role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for

adversaries appearing before the Secretary; the rights of the public must receive active and affirmative protection at the hands of DEQ." *In re American Waste and Pollution Control Co.*, 642 So.2d 1258, 1262 (La. 1994) (quoting *Save Ourselves, Inc.*, 452 So.2d, at 1157).

n171 *Save Ourselves, Inc.*, 452 So.2d, at 1159.

n172 *Id.* at 1157. Subsequent courts have refined this analysis in the form of a specific three-part test. A reviewing court must determine whether:

- (1) the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible;
- (2) a cost benefit analysis of the environment impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and
- (3) there are alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.

See, e.g., In re Rubicon, Inc., 670 So. 2d 475, 483 (La. Ct. App. 1996) (articulating the holding in *Save Ourselves* as the above three-part test).

n173 *Save Ourselves, Inc.*, 452 So.2d at 1160.

n174 *Montana Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 988 P.2d 1236 (Mont. 1999).

n175 For factual recitation of the case, see *id.* at 1242-43.

n176 *Id.* at 1243.

n177 *Id.* at 1249.

n178 *Id.*

n179 *Id.* at 1246.

n180 Thomson, *supra* note 136, at 175.

n181 John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 MONT. L. REV. 269, 299 (2001).

n182 VICTOR HUGO, HISTOIRE D'UN CRIME (1877).