Global Environmental Constitutionalism

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Introduction

Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation . . . the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.

Juan Antonio Oposa et al. v. *The Honorable Fulgencio S. Factoran, Jr.*[1]

So it was that in *Oposa* v. *Factoran, Jr.* the Court stated that the right to a balanced and healthful ecology need not even be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications.

Metropolitan Manila Development Authority v. *Concerned Residents of Manila Bay*[2]

Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide.[3] This book explores the evolution, deployment,

[1] *Juan Antonio Oposa et al. v. The Honorable Fulgencio S. Factoran, Jr.*, G.R. No. 101083, 224 S.C.R.A. 792 (Supreme Court of Philippines, July 30, 1993), reprinted in 33 I.L.M. 173, 187 (1994) [hereinafter *Minors Oposa*].

[2] *Metropolitan Manila Development Authority* v. *Concerned Residents of Manila Bay*. G.R. Nos. 171947–48 (Supreme Court of Philippines, December 18, 2008) [hereinafter *Manila Bay*].

[3] See generally, May, James R. and Erin Daly. "Global Constitutional Environmental Rights." In *Routledge Handbook of International Environmental Law*, by Shawkat Alam, Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury and Erika J. Techera (eds.). Routledge, 2012; May, James R. and Erin Daly. "Vindicating Fundamental Environmental Rights Worldwide." *Oregon Review of International Law* 11 (2009): 365–439; May, James R. and Erin Daly. "New Directors in Earth

and potential of environmental constitutionalism at national and subnational levels around the world.

Environmental constitutionalism is evolving globally. The constitutions of about three-quarters of nations worldwide address environmental matters in some fashion: some by committing to environmental stewardship, others by recognizing a basic right to a quality environment, and still others by ensuring a right to information, participation, and justice in environmental matters. Dozens of nations and many subnational governments have adopted constitutional guarantees to environmental rights in recent years. Indeed, most people on earth now live under constitutions that protect environmental rights in some way. And environmental constitutionalism continues to emerge and evolve in courts all around the globe, although many constitutionally embedded environmental rights provisions have yet to be energetically engaged. Despite remarkably progressive language in South Africa's constitution, for instance, there have been decidedly few significant decisions from that country's constitutional court interpreting the ample right to environmental well-being.[4] This book explores evolutionary trends, as well as why some forms of environmental constitutionalism have tended to be more consequential than others.

Much has been written about the linkages between human rights and the environment,[5] between human and environmental rights,[6] and whether there

Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide." *IUCN Academy of Environmental Law E-Journal* 1 (2011a); May, James R. and Erin Daly. "Constitutional Environmental Rights Worldwide." In *Principles of Constitutional Environmental Law*, by James R. May (ed.). ABA Publishing, Environmental Law Institute, 2011b; May, James R. "Constituting Fundamental Environmental Rights Worldwide." *Pace Environmental Law Review* 23 (2006): 113.

[4] See *Fuel Retailers Association of South Africa (Pty) Ltd.* v. *Director-General Environmental Management Mpumalanga and Others*. 2007 (10) BCLR 1059 (CC) (South Africa Constitutional Court, June 7, 2007), available at www.saflii.org/za/cases/ZACC/2007/13.html. See generally, Kotzé, Louis J. and Anél du Plessis. "Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa." *Journal of Court Innovation* 3 (2010): 157.

[5] See generally, Shelton, Dinah. "Human Rights and the Environment." *Yearbook of International Environmental Law* 13 (2002): 199; Kravchenko, Svitlana and John E. Bonine. *Human Rights and the Environment: Cases, Law and Policy*. Carolina Academic Press, 2008.

[6] See, e.g., Gormley, Paul W. *Human Rights and the Environment: The Need for International Cooperation*. Sijthoff, 1976; Thorme, Melissa. "Establishing Environment as a Human Right." *Denver Journal of International Law and Policy* 19 (1991): 301; Merrills, J.G. "Environmental Protection and Human Rights: Conceptual Aspects." In *Human Rights Approaches to Environmental Protection*, by Alan E. Boyle and Michael R. Anderson (eds.). Clarendon Press, 1996 (reconciling environmental and human rights).

is a fundamental right to a quality environment.[7] There is a growing corpus of scholarship about embodying environmental rights constitutionally,[8] and the emergence of such rights in the global order of environmental law.[9] The discussion about environmental rights also internalizes related concepts of intergenerational equity and the precautionary principle.[10] What distinguishes this book from other works is that it deploys principles of comparative constitutionalism to examine whether, and the extent to which, global environmental constitutionalism is occurring, and why. It is intended to serve as a comprehensive guide to, and examination of, current trends in environmental constitutionalism, rather than as a normative argument for environmental constitutionalism as a human or other right, or necessarily as an exponent of environmental protection in particular contexts. It is not an exègesis that contends that environmental constitutionalism does or should predominate over other legal regimes, including environmental human rights or international and domestic environmental laws. It does not argue *ipse dixit* that environmental constitutionalism suffices for achieving the dual purposes of advancing environmental protection and promoting human rights. Instead, it demonstrates that environmental constitutionalism is an important and complementary tool for advancing these aims. Moreover, we do not seek to litigate

[7] See generally, Turner, Stephen J. *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-makers Towards the Environment*. Kluwer Law International, 2008; Bruch, Carl, Wole Coker, and Chris VanArsdale. *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa.*, 2nd edn. Environmental Law Institute Research Report, 2007; Hayward, Tim. *Constitutional Environmental Rights*. Oxford University Press, 2005: 12–13; Pallemaerts, Marc. "The Human Right to a Healthy Environment as a Substantive Right." In *Human Rights and the Environment: Compendium of Instruments and Other International Texts on Individual and Collective Rights Relating to the Environment in the International and European Framework*, by Magueloone DéJeant-Pons and Marc Pallemaerts, 11–12, Council of Europe, 2002. (discussing the extent to which international law recognizes the existence of a substantive individual right to a healthy environment).

[8] See, e.g., Brandl, Ernest and Hartwin Bungert. "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad." *Harvard Environmental Law Review* 16 (1992); Shelton, Dinah. "Human Rights, Environmental Rights, and the Right to Environment." *Stanford Journal of International Law* 28 (1991): 103 [hereinafter Shelton I]; Symposium. "Earth Rights and Responsibilities: Human Rights and Environmental Protection." *Yale Journal of International Law* 18 (1993): 215–411; Sax, Joseph L. "The Search for Environmental Rights." *Journal of Land Use and International Law* 93 (1990); *cf.* Fernandez, José L. "State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?" *Harvard Environmental Law Review* 17 (1993): 333 (objecting to enforcement of constitutional environmental rights).

[9] Yang, Tseming and Robert V. Percival "The Emergence of Global Environmental Law." *Ecology Law Quarterly* 36 (2009).

[10] Hiskes, Richard P. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge University Press, 2008.

the *exact* number of constitutional provisions to enshrine a substantive, procedural, or other environmental right at the national or subnational level. There is no question that the number of such provisions is substantial and ever expanding. For example, and as examined in Chapter 2, in the mid-1990s there were about 50 constitutional provisions globally that had explicitly recognized a fundamental right to a quality environment. By 2004, one of the authors of this book reported that this number had grown to around 60. By 2008, we noted the number had increased to at least 65. By 2009, another study placed the number at 70. By 2011, our number had climbed again to about 75. And in 2012, yet another study placed the figure at about 95, including countries that impose a duty on the *government* to provide or protect a quality environment, in addition to those that guarantee an *individual* right to a quality environment. In this book, Appendix A lists 76 countries that explicitly recognize an individual right to a quality environment. It does not include countries that are *considering* whether to adopt explicit provisions, or countries that arguably have done so *implicitly* or as a constitutional function of *incorporating* other legal paradigms. Nor does it include countries that impose duties on the state to uphold environmental rights. We include these in Appendix C. Nor does Appendix A include duties imposed on individuals to protect the environment, which we list in Appendix B. Appendices D–G delineate hundreds of other manifestations of environmental constitutionalism. The exact figures are subject to both the influence of events and divergence in categorization, and will remain dynamic. The constant is that environmental constitutionalism exists in just about every nook and cranny on the globe, with growing significance.

Comparative constitutionalism plays an important role in analyzing and contextualizing environmental constitutionalism's emerging influence. Comparative constitutionalism – that is, the practice by constitutional courts of comparing and contrasting texts, contexts, and outcomes elsewhere – is a growing field. Indeed, while this has been called a "founding moment,"[11] it is probably more accurate to call it a *renaissance* in the discipline and the methodologies of comparative constitutional law, propelled by two principal factors. The first is the increasing number of constitutional democracies around the world in the past 40 years, with most new constitutions incorporating extensive catalogues of individual and social rights, including environmental rights. The second is the worldwide growth in independent judiciaries, or at least courts that have jurisdiction to hear constitutional questions.

[11] Fontana, David. "Refined Comparativism in Constitutional Law." *UCLA Law Review* 49 (2001): 539.

Indeed, many constitutional courts take seriously Justice Kennedy's reminder that "persons in every generation can invoke [constitutional] principles in their own search for greater freedom."[12] With more courts engaging in constitutional review, and issuing more opinions, the import of comparative constitutionalism grows. For instance, while Israel, South Africa, and Colombia have radically different histories, each has constitutional courts addressing the multivariate challenges of balancing public and private power, of interpreting entrenched constitutional texts, and of maintaining institutional legitimacy while ensuring the progressive development of rights.

But comparative constitutionalism may have other appeal as well. As the societies around the world evolve at an ever-faster rate, courts are increasingly faced with problems of first impression, problems that are answerable less by recourse to each country's own history and constitutional origins than to contemporary experience and reason. A single nation's own past practice is unlikely to guide a court's judgment with regard to diminishing privacy, or the threat of terrorism, or, especially, to the challenges of environmental degradation and climate change. These challenges must be answered by reference to the best practices among nations. And the development of the internet – with ready access in multiple languages to primary and secondary jurisprudential sources from around the world – has facilitated this research.

Theorists see a number of other overlapping benefits in comparative constitutional methodologies: former President of the Israeli Supreme Court Aharon Barak argues that looking to other constitutional cultures "expands judicial thinking"[13] while Vicki Jackson argues that looking abroad can produce better law at home by enhancing "one's capacity for self-reflection."[14] In particular, Jackson says, seeing differences in other constitutional cultures reveals the "false necessities" in our own system and, further, encourages us to develop "what are the normatively preferable best practices."[15] To these we add that comparative constitutional methodologies can help fill in gaps when a nation's own history and experience do not resolve the question; this is particularly likely to be useful when courts confront challenges of the modern world that constitution-drafters of even a previous generation might not have anticipated.

Comparative constitutionalism is of such unquestioned utility that neither scholars nor judges typically see the need to justify it. Within the United

[12] *Lawrence* v. *Texas*, 539 U.S. 558 (2003).

[13] Barak, A. "Response to the Judge as Comparatist: Comparison in Public Law." *Tulane Law Review* 80 (2005): 195, 197; see also Jackson, V.C. "Methodological Challenges in Comparative Constitutional Law." *Penn State International Law Review* 28 (2009): 319.

[14] Jackson, "Methodological Challenges," 320. [15] *Ibid.*, 321.

States, the debate rages both on and off the bench, but it is a mostly rhetorical debate:[16] since its inception, the Supreme Court has looked to the experience or law of other nations for insight and guidance, and all the members of the current Supreme Court have done so, including those most vociferously against the practice.[17] The concerns raised in the American debate – that it threatens American sovereignty and superiority in constitutional matters,[18] or that it allows for cherry-picking,[19] or that it evinces an implicit progressive bias – seem largely unproblematic elsewhere. It is widely accepted that comparative constitutionalism contributes to the development of a body of best practices.

Comparative constitutionalism is particularly appropriate in the field of environmental protection and governance. Since environmental law, like human rights law, emerged at the international level, there is no inherent incompatibility between the environmental norms of a nation and those of the global community. Developing the former, therefore, may well benefit from attention to the latter, and vice versa. Because each nation is now implementing a common set of environmental principles and values derived from international agreements and conventions, comparisons among national experiences are likely to reveal relevant and valuable lessons. While each nation's particular environmental problems are distinctive – because they concern unique ecosystems put at risk by particular concatenations of political, economic, and cultural threats – the need to balance environmental protection against development is common to all parts of the globe.

If the controversy within the United States has any salutary value, it is to offer reminders of the potential misuses of comparative constitutionalism. Judges should not feel bound by approach or the outcome in a foreign case because the constitutional court's obligation is, of course, to interpret and apply its nation's own constitution.[20] And judges should be especially cautious in order to avoid misreading or failing to contextualize decisions of a peer court. But

[16] See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 200 (2005) (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary) [hereinafter "Roberts Confirmation Hearing"]: "It's an American Constitution, not a European or an African or an Asian one. And its meaning, it seems to me, by definition, cannot be determined by reference to foreign law. I also think it would put us on a dangerous path by trying to pick and choose among those foreign laws that we liked or didn't like." See also, e.g., Fontana, David. "The Rise and Fall of Comparative Constitutional Law in the Postwar Era," *Yale Journal of International Law* 36(1) (2011); Jackson, Vicki C. *Constitutional Engagement in a Transnational Era*. Oxford University Press, 2010.

[17] http://dianemarieamann.com/2013/07/08/justice-scalia-cites-foreign-law

[18] See Roberts Confirmation Hearing.

[19] *Roper* v. *Simmons*, 543 U.S. 551 (2005).

[20] "This Court should not impose foreign moods, fads, or fashions on Americans." See http://dianemarieamann.com/2013/07/08/justice-scalia-cites-foreign-law

most courts intuitively avoid this mistake and require little guidance. Moreover, we note here that the task of the jurist differs fundamentally from the task of those who seek to comment on, understand, and elucidate judicial opinions. Because the law takes into account judicial reasoning, it is important to know what sources influenced or inspired the judge; whether he or she borrowed from foreign or international sources or relied exclusively on domestic experience determines how the opinion is interpreted and applied in later cases and affects its expressive significance. It is, for that reason, especially important for the court to understand the nature and the character of the foreign or international source.[21] The borrowing jurist must pay particular attention to the reasoning of the foreign opinion to ensure that he or she is appropriating it fairly and accurately. By contrast, when scholars survey global jurisprudence, the very fact that a judicial opinion has construed a constitutional environmental provision or applied it in a particular way is itself worthy of note, whether or not the reasoning is particularly persuasive.

The evidence is that the trend in global environmental constitutionalism is positive and powerful, given the increasing attention that constitutions are giving to environmental rights and the growth of constitutional jurisprudence generally in all regions of the world. And the ambit of constitutional law is growing too. The cases address both collective and individual rights and emanate from common law, civil law, and mixed traditions. They concern all aspects of the environment – air, water, and soil – and many forms of environmental degradation: pollution, clear-cutting, exploitation of natural resources, over-use and over-development, as well as recklessness and simple negligence of the rights of others and of the environment. And they seamlessly implicate civil and political rights as well as social, economic, and cultural rights at both textual and subtextual levels: while some cases discussed in this book vindicate an explicit right to a quality environment, other cases demonstrate that the right can be inferred from the rights to life, health, dignity, property, family, cultural integrity, and even the right against cruel and unusual punishment. Indeed, courts are incorporating into their national jurisprudence

[21] There is an abundant and growing literature on how courts should engage in comparative work. See, e.g., Hirshl, Ran. "The Question of Case Selection in Comparative Constitutional Law," *American Journal of Comparative Law* 53 (2005): 125; Jackson, "Methodological Challenges," 319; Fontana, "Refined Comparativism"; Saunders, Cheryl. "The Use and Misuse of Comparative Constitutional Law," *Indiana Journal of Global Legal Studies* 13 (2006): 37; Frankenberg, Günter. "Comparing Constitutions: Ideas, Ideals, and Ideology – toward a layered narrative." *International Journal of Constitutional Law* 4 (2006): 439; Annus, Taavi. "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments," *Duke Journal of Comparative and International Law* 14 (2004): 301.

international norms – thereby contributing to the hardening of otherwise soft international law. And because the cases come from every region of the world including cases from both developed and developing countries, environmental constitutionalism has given rise to borrowing from national and transnational common law and other general principles of environmental law, some of which have been codified at the national level, while others remain subject to development and elucidation by constitutional courts.

While comparative constitutionalism is a legitimate means for evaluating the emergence of global environmental constitutionalism, it is not without its limitations. First, because the jurisprudence is global, describing and respecting the integrity of localization can be challenging. Throughout this book, we examine in detail the arguments that favor and disfavor adjudication of environmental claims in domestic constitutional fora; we suggest at this juncture simply that national courts are better suited to implement the norms that have been articulated at the international level, given their ability to translate those universal values into the local vernaculars and to do so with authority and impact. National courts offer each country the opportunity to determine for itself the appropriate balance of development and sustainability, the ways in which the nation will mitigate or adapt to climate change, the means it will use to protect the environment for the benefit of mankind or for nature itself, and the particular ways it will balance the often competing needs of present and future generations. Although most countries adhere to international declarations and conventions affirming their commitment to environmental protection, one country might do so by treating environmental protection as a public good, while another might prefer to use the revenues produced from private exploitation of natural resources for education or social security. These are complex policy choices that are best made at the national level by institutions that are operating within the local society, familiar with local conditions, and accountable within the local political climate. And courts, more than the tribunals and commissions that operate regionally and internationally, are more accessible to the local population and more able to effectively enforce their orders against local officials.

Localization of environmental protection is particularly important for several additional reasons, too. It is undoubtedly true that, although some environmental problems transcend national borders, most are rooted in local spaces, whether a bay, a forest, or a particular part of a mountaintop. And the manifestations of environmental degradation are experienced by the local residents as loss of access to nature, deterioration of health, and so on. Likewise, the solutions are most likely to be implemented locally. Responsibility for the choices made must be taken by actors who are politically accountable.

The ability to implement environmental values in a local context also helps to avoid some of the most contentious charges made against international environmental law – namely, those embodied in claims of western hegemony and cultural imperialism. Judiciaries in countries that resist the global environmental ethos can move more slowly or not at all, while others can push the boundaries of international law into new and unchartered territories, as, for instance, Ecuador and Bolivia have done in protecting the rights of nature, and many countries have done in explicitly encouraging environmental rights litigation and in tying environmental protection to the protection of life and human dignity.

But while the situs of environmental issues are ordinarily contextually specific, their implications are transcendent, involving almost all aspects of life. National courts, like international summits, have recognized that pollution can affect individual and social health: lack of water can diminish girls' opportunities to attend school; climate change can produce environmental refugees; irresponsible exploitation of natural resources can devastate entire cultures; and, as the water wars of the 1990s in Bolivia suggest, failure to balance environmental and human needs can even threaten rule of law and democratic governance. The Rio+20 United Nations Conference on Sustainable Development recognized the inextricable link between sustainable development and the eradication of poverty. "We therefore acknowledge the need," the outcome document, *The Future We Want*, said, "to further mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their inter-linkages, so as to achieve sustainable development in all its dimensions."[22] But to recognize the social and economic implications of a problem is to admit that it is primarily a national issue: the causes of environmental degradation are often rooted in national political and economic history and in the choices that have been made at the national level, whether to develop land, to privatize water, to allow mining or clear-cutting, and so on. These are questions of national policy that should be made within each country's unique political and legal culture. Comparative constitutionalism thus allows one to keep an eye on the generality of cases, while appreciating the local context of each.

Another limitation to comparative constitutionalism is that it assumes that different constitutions are legitimately subjects of level comparison. But, as we shall see, comparative constitutionalism assumes the existence of positive law and available case law to a great extent. Every constitution is the result of years

[22] UN Conference on Sustainable Development. "The Future We Want, A/CONF.216/L.1*." June 20–22, 2012, para. 3.

and sometimes generations of customs, traditions, and social structures that are anything but homogenous. They can encapsulate principles that can evade precise exposition, like socialist law, Islamic (and other theocratic) law, and customary (such as indigenous) law. Official translations can be non-existent or inconsistent. And of course oral constitutions passed down through millennia that are common in indigenous traditions are largely out of reach to a study such as this.

The challenges inherent in any comparative approach have particular salience with regard to emerging (and what can be evanescent) ideals like environmental protection. For example, because the legal boundaries of environmental protection are often not well defined, courts engaging constitutional claims may find themselves not only defining the scope of legally enforceable rights but also propounding social values. Values, more than rights, may inform public discourse and infiltrate social consciousness that, in turn, can help to change the behavior of both public and private actors. A court that persistently emphasizes the importance of sustainability and of maintaining a balance with nature will help to inculcate environmental values into the culture: people will demand that public officials act in ways that respect nature, and will do so not only through litigation but in all forms of political discourse and even private activity. As a result, judicial articulation of environmental values may be as instrumental in promoting environmental protection as the legal pronouncements on the scope of the rights asserted.

Comparing the constitutional environmental jurisprudence of countries around the world yields insights into the ways different legal cultures have responded to similar problems. The panoply of cases discussed in these pages illustrates the profound commitment to environmental protection that some courts have shown, and the inexhaustible creativity that they have evidenced in trying to resolve complex, polycentric problems that implicate these diverse interests. Through the comparative project, we can see how, by borrowing and learning from one another, courts are developing a rich and varied set of responses to the challenges of environmental protection through the means of environmental constitutionalism.

Some limitations of the comparative constitutional project partake of both practical and theoretical considerations. We emphasize decisions issued by apex or constitutional courts in certain countries; with few exceptions, we have not analyzed decisions by lower courts in most countries, nor those of green courts or other specialized tribunals because these decisions are less accessible in a medium that can be cite-verified, they are subject to subsequent revision by apex courts, and they are less likely to have a social impact that is as profound. And because we are most interested in the *constitutional*

dimensions of domestic environmental rights, we have not generally considered decisions involving common or civil law environmental issues, nor the decisions of regional bodies, such as the African Commission on Human and People's Rights, the Inter-American Commission on Human Rights, or the European Court of Human Rights (ECHR), except to the extent they engage environmental constitutionalism.

Other limitations of comparative constitutionalism are epistemic. Most constitutions lack a constitutional record that might help to explain what the framers of a provision had in mind. Only rarely does one gain a glimpse into the machinations of constitutional reform. For example, in 2012, Fiji considered adopting a constitution with various environmental provisions. In an explanatory document, the framers wrote that: "Fiji's natural beauty and its clean environment are not just important for the well-being of the people but for its economy as well, especially because of the importance of tourism to the country. Like other rights, this one applies not just against the state but against other people and against companies and businesses. The Constitution also makes it clear that the environment is an important responsibility of everyone."[23] Similarly, Nepal's Constituent Assembly Committee for Fundamental Rights and Directive Principles is the primary source of the explanations behind the wording of its recently amended constitution.[24] These sorts of evidentiary footprints of intent are exceptions, however.

Moreover, a constant of environmental constitutionalism is how quickly it changes. Indeed, in the past decade alone, more than a dozen countries have adopted or substantially modified substantive environmental rights provisions in their constitutions, including Armenia, Bolivia, Dominican Republic, Ecuador, Egypt, France, Guinea, Hungary, Jamaica, Kenya, Madagascar, Maldives, Montenegro, Myanmar, Nepal, Rwanda, Serbia, South Sudan, Sudan, and Turkmenistan.[25] And at any given point, environmental constitutionalism is

[23] Fiji, *Draft Constitution: The Explanatory Report*. The Constitution Commission 527 (2012), available at www.fijileaks.com/uploads/1/3/7/5/13759434/thursday_the_explanatory_report_two-4.pdf

[24] See generally, Nepal's Constituent Assembly Committee for Fundamental Rights and Directive Principles: "A Report on Thematic Concept Paper and Preliminary Draft 2066 (2009–10 AD)," available at www.constitutionnet.org/files/concept_paper_fundamental_rights_directive_principles.eng_.pdf

[25] See generally, May, "Constituting Fundamental Environmental Rights Worldwide," 113 (sixty countries affording subjective fundamental rights to a quality environment as of early 2005); Boyd, David R. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. UBC Press, 2012 (ninety-two countries with constitutional recognition of rights to a quality environment as of early 2012).

under consideration (or was until very recently, as of this writing) elsewhere, including Fiji, Iceland, Sri Lanka, and Tunisia. It is a moving target.

The final caveat is that, given that the scope of this book is the global landscape of environmental constitutionalism rather than an in-depth study of any particular country, we focus on what the constitutional texts and judicial opinions *say*. We generally do not presume to explicate what each judicial decision can *mean* in a particular political and cultural context or the social implications of each case. It is a separate question, and one that we generally avoid, as to whether or not a particular case has resonated throughout society or become an icon of the potential for judicial engagement (for good or ill). Nor as a general matter do we presume to analyze the political ramifications and sequelae of each case: How was it received? Was it implemented? Has the river or forest or mountaintop returned to a pristine state? Because of the fragility of the environment and the enormous forces that militate against protection (development, population growth, conflict, culture, corruption or greed, and so on), it is likely that the environmental interest that is protected in a given case may not remain protected for long. Depending on location, circumstances, timing, and other factors, a judicial pronouncement can contain powerful, showy but unenforceable prose that ultimately advances the human condition in unremarkable ways, if at all. On the other hand, some judicial opinions that appear to advance justice only parochially or incrementally can ultimately harbor emerging rights for present and future generations.

In fact, environmental constitutionalism can hardly on its own cause wholesale transformation of domestic environmental policy. In most countries, constitutional and apex courts have spoken seldom if at all about environmental constitutionalism. And yet, it is our contention that even these sporadic assertions are important because they are indicative of a growing worldwide awareness of the potential of environmental constitutionalism. The mere fact that top national courts are focusing on the constitutional dimensions of environmental issues makes it more likely that environmental awareness will seep into the cultural consciousness here and now for the living, and there and then for generations to come. Viewing these developments comparatively keeps their ramifications in perspective. Thus, despite all the caveats, comparative constitutionalism is important in and of itself, particularly when it ventures into new territory like environmental constitutionalism.

Part I explains the nature of environmental constitutionalism, the advantages and disadvantages of express constitutional rights to a quality environment, and the extent to which countries have adopted them. What we see is that environmental constitutionalism can serve as a proxy to most matters affecting the human condition, including rights to life, dignity, health, food,

housing, education, work, poverty, culture, non-discrimination, peace, children's health, and general well-being – as well as the quality of the earth's water, ground, and air. It encompasses both human and non-human phenomena and therefore draws from both environmental rights movements and human rights movements. And we explain the vast extent to which nations around the globe have chosen to embody environmentalism constitutionally.

Part II examines judicial outcomes in constitutional environmental cases and special issues that arise in the litigation and enforcement of such claims. It examines pronouncements by apex and constitutional courts in cases vindicating environmental claims of constitutional pedigree. It provides an overview of this evolving judicial culture across the globe and suggests ways to capitalize on the energy that courts so far have expended on constitutional environmental claims. Indeed, national courts have issued rulings to protect the last stands of ancient forests in the Philippines, remaining cold-climate forests in Patagonia, the Ganges River in India, the Acheloos River in Greece, the celebrated woodlands of Hungary, and rare water supplies in Africa, among many other valuable natural resources worldwide. Yet courts in some countries are reticent to engage constitutional environmental rights. This may be due to concerns about the absence of a limiting principle entailed in enforcing such a right, or about their own impotence in forcing compliance with orders to remedy environmental degradation. Nonetheless, courts play a necessary if not sufficient role in implementing environmental constitutionalism.

Part III considers emerging issues in environmental constitutionalism, such as procedural environmental rights, water rights, and subnational environmental rights, as well as less common constitutional issues concerning rights of nature, sustainability, climate change, and the relationship of environmental rights to other emerging constitutional norms on the horizon. What we see is that environmental constitutionalism is branching out into new and unexplored constitutional territory.

The book ends with final thoughts about environmental constitutionalism's potential to advance environmental and human conditions in an ever-changing planet. We conclude that environmental constitutionalism is worth the coin for present and future generations. This is a normative claim, but it is a limited one. We do not advocate *for* the constitutionalization of environmental rights across the globe both because there is still insufficient evidence that their existence *ipso facto* enhances the environment, and because many countries without constitutional environmental rights have managed to promote environmental protection and basic rights to a quality environment. Nonetheless, we intend for this book to help demonstrate the value of environmental constitutionalism in the slow but steady entrenchment of environmental values worldwide.

1

The nature of environmental constitutionalism

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.

UN Conference on the Human Environment, Stockholm, 1972[1]

Throughout human history and all over the world, humans have sometimes lived in tension with nature and at other times in harmony with it, alternatively reforming and revering the natural environment around them. The constitutional law of nations around the world has recently taken note of this legacy: in one case from Sri Lanka, for example, the court referred "to the irrigation works of ancient Sri Lanka, the Philosophy of not permitting even a drop of water to flow into the sea without benefiting humankind," and emphasized that for several millennia sustainable development had been already consciously practiced with much success in Sri Lanka.[2] On the other side of the globe, the same sentiment is echoed in the 2008 constitution of Ecuador, which guarantees the rights of nature by recalling the values of the local indigenous civilizations, referring to nature as Pacha Mama, or Mother Earth, in the language of the Achuar people of the Amazon.

What is new too – at least in the past few decades – is growing concern about severe and deepening environmental challenges, including increased pollution, loss of speciation and biodiversity, and global climate change, to name just a few. And with it, greater attention to how to protect the environment

[1] Declaration of the United Nations Conference on the Human Environment, Stockholm Conference, Princ. 1 at para. 2, UN Doc. A/CONF.48/14/rev.1 (adopted June 16, 1972).

[2] *Bulankulama and Six Others* v. *Ministry of Industrial Development and Seven Others*. S.C. Application No 884/99 (F.R.) (Supreme Court of the Democratic Socialist Republica of Sri Lanka), published in *South Asian Environmental Reporter* 7(2) (June, 2000).

through law, and, in particular, through law that is most deeply entrenched in the legal system of nations.

Environmental constitutionalism offers one way to engage environmental challenges that fall beyond the grasp of other legal constructs. It can be coalescent, merging governmental structures and individual rights modalities in furtherance of "an overarching legal-normative framework for directing environmental policy."[3] It can be deployed to protect local concerns, such as access to fresh food, water, or air, or global concerns like biodiversity and climate change that share elements of both human rights and environmental protection. Environmental constitutionalism offers a way forward when other legal mechanisms fall short.

The potential reach of environmental constitutionalism is staggering: it implicates most matters affecting the human condition. These include rights to life, dignity, health, food, housing, education, work, poverty, culture, non-discrimination, peace, children's health, and general well-being – as well as the quality of the earth's water, ground, and air.[4] It encompasses both human and non-human phenomena and therefore draws from both environmental rights movements and human rights movements, both of which have ballooned over the last few decades; both areas of law, it has been said, "house . . . a hidden imperial ambition; both potentially touch upon all spheres of human activity, and claim to override or trump other considerations."[5] The grand scope of environmental constitutionalism suggests that it offers complex and multilayered constitutional value. But environmental constitutionalism's ambition may also be its greatest weakness: the nearly limitless application of

[3] Hayward, Tim. *Constitutional Environmental Rights*. Oxford University Press, 2005.

[4] See UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment, *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment* prepared by Fatma Zohra Ksentini, U.N. Doc. E/CN.4/Sub.2/1994/9 at para. 248 (July 6, 1994), concluding:

> Environmental damage has direct effects on the enjoyment of a series of human rights, such as the right to life, to health, to a satisfactory standard of living, to sufficient food, to housing, to education, to work, to culture, to non-discrimination, to dignity and the harmonious development of one's personality, to security of person and family, to development, to peace, etc.

See also MacDonald, Karen E. "Sustaining the Environmental Rights of Children: An Exploratory Critique." *Fordham Environmental Law Review* 18 (2006): 5. "Others have even argued that environmental harm can result in a breach of the right to security of the person (non-intervention)."

[5] Anderson, Michael R. "Human Rights Approaches to Environmental Protection: An Overview." In Boyle and Anderson, *Human Rights Approaches*.

human and environmental rights makes it difficult for constitutional drafters to choose appropriate language by which to protect the environment, and may dampen judicial enthusiasm for their vindication.

Several questions present themselves at the outset: because the environment exists in our immediate environs *and* all over the globe, is it best protected at the international or domestic level? Both offer means to address environmental protection. Is the best strategy to build on environmental or human rights legal frameworks to promote environmental interests? Indeed, human and environmental rights are distinct yet synergistic. Arguably, environmental and human rights are complementary and synergistic. And whatever the appropriate paradigm, how do we best define the environment that merits legal protection? The "environment" has any number of interpretations and applications. And how can courts, with their carefully bounded but often tenuous authority, vindicate these important yet amorphous interests? Each judicial system is the product of distinct structural, practical, and philosophical frameworks. Some countries have a strong rule of law tradition, which can lend credibility to environmental rights, while others do not, which can render them ephemeral.

This chapter examines the extent to which international environmental and human rights laws, and common domestic legislative and regulatory legal mechanisms, address environmental rights. It posits that environmental constitutionalism can serve to fill gaps left by these legal regimes and help to move forward a worldwide yet locally grounded environmental agenda.

THE LIMITATIONS OF INTERNATIONAL LAW

At first glance, the international level may seem best suited to addressing environmental challenges because they so often transcend national boundaries. The allocation of water resources often straddles national frontiers, the consequences of climate change affect people from the equator to both poles, minerals and other natural resources have international markets, just as certain specific places, such as the Amazon River basin and the Great Barrier Reef, enjoy global economic and environmental significance. These are just a few examples to demonstrate the environment's global dimensions. As the Indian Supreme Court has said, "To meet the challenge of current environmental issues, the entire globe should be considered the proper arena for environmental adjustment. Unity of mankind is not just a dream of the enlightenment but a biophysical fact."[6] Relegating environmental protection

[6] *Karnataka Industrial Areas Development Board* v. *C. Kenchappa and Others*. AIRSCW 2546 at para. 71 (Supreme Court of India, 2006).

to the national level could limit its efficacy and result in haphazard and conflicting rules and responses to the same core issues.

Typically, there are two strands of argument that environmental rights are better protected at the international level under existing international environmental law accords or under human rights regimes.[7] The first argument is that environmental rights are adequately protected under the existing environmental law framework of international treaties and agreements that already address environmental issues like biodiversity, climate change, desertification, and marine pollution. Collectively, this body of international environmental law is a loose affiliation of treaties, principles, and customs that define and describe norms, relationships, and responses among and between states to meet these many global ecological challenges.[8] International environmental law is influenced by many stakeholders, including nation-states, international institutions, such as the United Nations Environment Programme (UNEP); non-governmental organization (NGOs), such as the World Wildlife Fund; hybrid international intergovernmental organizations like the International Union for the Conservation of Nature (IUCN);[9] corporate associations; individuals and academics concerned for future generations.[10] On the other hand, skepticism about the efficacy of international treaty systems is abundant. Anne Peters, for one, remarks:

> The international legal order is overall *minimalist and soft*. In important issue areas, such as in environmental protection, including global warming and animal rights, the international legal standards are too low, too vague, formally nonbinding, or are altogether lacking. Especially the increasing resort to international soft law in the form of summit declarations and the like instead of binding covenants is a symptom of lacking political consensus and a lack of commitment. . . . *Enforcement* of international law is deficient. Moreover it is often handled unevenly in the sense that weaker states are forced to comply with international law, for example human rights or

[7] See Abate, Randall S. "Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights." *Stanford Journal of International Law* 43A (2007): 3, 10 (discussing the relationship between human rights and environmental protection).

[8] See generally, Sands, Philippe. *Principles of International Environmental Law*, 2nd edn. Cambridge University Press, 2003.

[9] The IUCN is composed of more than eighty sovereign states (including the United States), some 120 governmental ministries and about a thousand international and national NGOs. See www.iucn.org/about

[10] See generally, Weiss, Edith Brown. *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*. United Nations University, 1989.

> investment law, notably through economic sanctions. In contrast, stronger states can hardly be pressured by sanctions . . .[11]

International environmental law is especially soft.[12] The congress of international environmental accords has fallen short of expectations for protecting environmental rights. Despite the abundance of treaties and conventions, there is no independent international environmental rights treaty. The Stockholm Declaration, Rio Declaration, and Ksentini Report are hortatory. The Aarhus Convention provides for procedural but not substantive rights. Other regional instruments have experienced only idiosyncratic substantive traction at the domestic level.[13] Nor is there, as of yet, any global environmental constitution.[14] Thus, existing international environmental law regimes do not afford an enforceable right to a quality environment. Moreover, as Ben Cramer observes, "multilateral or regional agreements that do exist are also largely lacking in enforcement mechanisms and rely on signatory states to enact their own internal legislation, which has only occurred in some countries," although, he notes that at the domestic level, "some components of environmental human rights activism have found their way into national statutes and constitutions."[15] Various international environmental accords recognize human rights to a healthy environment. These include the Stockholm Declaration on the Human Environment,[16] the Rio Declaration

[11] Anne Peters. "Are we Moving towards Constitutionalization of the World Community?" In *Realizing Utopia: The Future of International Law*, by Antonio Cassese (ed.), 126. Oxford University Press, 2012, available at http://law.huji.ac.il/upload/Peters_Constitutionalization_in_Cassese.2012.pdf. See also, J. Klabbers, A. Peters, and G. Ulfstein. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009.

[12] Burhenne, W.E. (ed.). *International Environmental Soft Law. Collection of Relevant Instruments*. International Council of Environmental Law. The Netherlands. Kluwer Academic, 1993.

[13] Pedersen, Ole W. "European Environmental Human Rights and Environmental Rights: A Long Time Coming?" *George Washington International Law Review* 21 (2008): 73, available at SSRN: http://ssrn.com/abstract=1122289

[14] Kotzé, Louis J. "Arguing Global Environmental Constitutionalism." *Transnational Environmental Law* 1(1) (2012): 199 (arguing in favor of global environmental constitution).

[15] See Cramer, Benjamin W. "The Human Right to Information, the Environment and Information About the Environment: From the Universal Declaration to the AARHUS Convention." *Communication Law and Policy* 14 (2009): 73, 86.

[16] "Both aspects of a man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights and the right to life itself." Declaration of the United Nations Conference on the Human Environment; "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 . . ." *Ibid.*, at Principle 1.

on Environment and Development,[17] the United Nations' and the Aarhus Convention.[18] With the exception of the Aarhus Convention, none of these conventions, however, is designed to be enforced to resolve disputes concerning human rights to a healthy environment.

Indeed, enforcement of international environmental law is often lackluster: the major transgressors often do not agree to the terms, and the patchwork of enforcement mechanisms can have limited jurisdictional authority and are chronically underfunded. Furthermore, because interest in environmental issues can be diffuse, relegating them to international resolution can make it less likely that individuals or coalitions of interested groups will assert the rights that these treaties ostensibly create.

Next, international human rights laws are often enlisted as a proxy for protecting environmental quality.[19] Forty years ago, the Universal Declaration of Human Rights (UDHR) first recognized that human rights are worthy of protection at the international level.[20] More recently, the Ksentini Report addressed the intersection of human and environmental rights as a global concern.[21] Furthermore, regional instruments have drawn a line from human to environmental rights. For example, the African Charter on Human and

[17] "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 1, UN Doc.A/CN.17/1997/8 (1992); "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply." *Ibid.*, Principle 11.

[18] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 United Nations Treaty Series (UNTS), 447 (opened for signature June 25, 1998).

[19] See, e.g., Gormley, *Human Rights and the Environment*; Thorme, "Establishing Environment"; Merrills, "Environmental Protection and Human Rights," 25 (reconciling environmental and human rights); Anderson, "Human Rights Approaches: An Overview." In Boyle and Anderson, *Human Rights Approaches*, 1–24; Boyle, Alan E. "The Role of International Human Rights Law in the Protection of the Environment." In Boyle and Anderson, *Human Rights Approaches*, 6, 43–70; Pallemaerts, Marc. "The Human Right to a Healthy Environment as a Substantive Right." In *Human Rights and the Environment: Compendium of Instruments and Other International Texts on Individual and Collective Rights Relating to the Environment in the International and European Framework*, by Maguelonne DéJeant-Pons and Marc Pallemaerts, 11–12, Council of Europe, 2002.

[20] Universal Declaration of Human Rights, GA Res 217 (AIII), UN GAOR, UN Doc. A/810 (December 10, 1948), 3rd session., 1st plenary meeting; see generally, Weiss, *In Fairness to Future Generations*; Churchill, Robin. "Environmental Rights in Existing Human Rights Treaties." In Boyle and Anderson, *Human Rights Approaches*, 89.

[21] See UN Economic and Social Council [ECOSCO], U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment, *Review of Further Developments*.

Peoples' Rights and the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights[22] both promote environmental rights as an incident of basic human rights. The member states of the Association of Southeast Asian Nations adopted the ASEAN Human Rights Declaration, which declares that citizens of member states have "a right to an adequate standard of living, including the right to a safe, clean and sustainable environment."[23] The Arab Charter also explicitly creates a right to a healthy environment.[24] Only the European Convention on Human Rights does not explicitly provide for a right to a healthy environment.[25] Anderson notes:

> As a result of these and other multilateral treaties, some have argued in recent years that while the environment should be protected primarily at the international level, it should be pursued under international human rights law instead of international environmental law.[26]

Hayward, Boyle, and others argue that protecting environmental rights within the architecture of international human rights laws has the primary advantage of making environmental rights actionable by individuals through some of the mechanisms of international human rights law enforcement. Indeed, the global and regional human rights frameworks involve elaborate enforcement infrastructures that have been growing exponentially over decades. The Human Rights Council has some responsibility over matters relating to the environment, including food, water, indigenous peoples' rights, and the obligations of transnational corporations. The Committee on Economic, Social and Cultural Rights (which protects social and solidarity rights, including the right to water) has a new optional protocol that allows for individual enforcement of the latter convention rights, which tend to bear more closely on environmental issues.[27]

[22] African (Banjul) Charter on Human and Peoples' Rights. *I.L.M.* 21 (1982): 58, available at www.achpr.org/instruments/achpr

[23] ASEAN Human Rights Declaration (adopted November 18, 2012), available at www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration

[24] Article 38: "Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights."

[25] See Pontin, Ben. "Environmental Rights under the UK's 'Intermediate Constitution.'" *Natural Resources and Environment* 17 (2002): 21. The UK has incorporated this interpretation to a certain extent through domestic legislation. *Ibid.*, 22–3 (discussing the UK Human Rights Act's incorporation of the ECHR).

[26] Anderson, "Human Rights Approaches: An Overview." In Boyle and Anderson, *Human Rights Approaches*, 1.

At the transnational regional level, there are active adjudicative bodies, such as the ECHR and the European Court of Justice, the Inter-American Court of Human Rights and the African Commission on Human and Peoples Rights, all of which have decided important cases respecting the environment.[28] Beyond these hard law obligations, some, including Hayward, argue that customary international law envelops a fundamental human right to an "adequate environment," and amounts to *opinio juris* and accepted state practice because so many countries recognize it as a normative principle.[29] Weston and Bollier argue that environmental rights would be advanced if the legal framework and institutions of international human rights, as well as their moral suasion, were used to greater effect.[30] Whether or not these views are correct, there is still, as Boyle contends, much potential for international human rights law to protect environmental norms.[31]

The availability of human rights bodies has led to a boom in legal activity at the juncture of human rights and environmental protection: "The late twentieth century has witnessed an unprecedented increase in legal claims for both human rights and environmental goods. Never before have so many people raised so many demands relating to such a wide range of environmental and human matters. And never before have legal remedies stood so squarely in the centre of wider social movements for human and environmental protection."[32] This trend has contributed to some early landmark decisions, such as *Lopez Ostra* v. *Spain*, in which the ECHR seemed to accept the notion that the Convention's protection of human rights incorporates a right to a healthy environment.[33]

[27] GA resolution A/RES/63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (December 10, 2008), Article 2: "Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party."

[28] Kravchenko and Bonine, *Human Rights*; Pedersen, "European Environmental Human Rights," 73.

[29] See Hayward, *Constitutional Environmental Rights*, 25–58. But see, e.g., Daniel Bodansky, *The Art and Craft of International Environmental Law*. Harvard University Press, 2009: 198–99 (explaining the difficulties of establishing customary law.)

[30] Weston, Burns H. and Bollier, David, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*. Cambridge University Press, 2013 (Table of contents and Prologue), University of Iowa Legal Studies Research Paper No. 13–13, available at http://ssrn.com/abstract=2207977

[31] Boyle, Alan E. "Human Rights and the Environment: Where Next?" *European Journal of International Law* 23 (2012): 613–42.

[32] Anderson, "Human Rights Approaches: An Overview." In Boyle and Anderson, *Human Rights Approaches*.

[33] *Lopez Ostra* v. *Spain*. 20 Eur. Ct. H.R. 277 (European Court of Human Rights, 1995).

The growth of human rights case law has been accelerating recently, providing some familiar content and boundaries to the enforcement of claims deriving from environmental degradation. As a conceptual matter, linking human and environmental rights makes sense insofar as environmental rights *are* human rights; they exist for the benefit of humans and the harms caused by environmental degradation are violations of well-recognized human rights, such as the right to life, to health, and to dignity. In the human rights context, environmental concerns are not the cause of action or the injury itself, but the source of the injury: illegal dumping becomes actionable not because it endangers the environment but because it causes cancer in the local population and therefore implicates the right to health; clear-cutting a forest becomes actionable not because of the harm to the trees but insofar as it diminishes the property values of the local residents; using water for irrigation or development is actionable when the diminution in the available supply for personal consumption and sanitation impairs a person's right to live in dignity.

Adjudicating environmental harms as violations of human rights requires no controversial extensions or distortions of established human rights law because most rights implicated by environmental degradation are already protected against infringement, *however* the violations occur.[34] Given the existing broad protection for human rights, the argument goes, there is no need to create additional environmental human rights, lest these new rights dilute the efficacy of existing rights.[35] Furthermore, limiting recognition of environmental interests to these instances of actionable human rights violations will avoid the primary objection to environmental rights – that their definition is "too uncertain a concept to be of normative value."[36]

Another advantage of using the established human rights framework to protect environmental rights is that, in the words of Alan Boyle, it focuses attention on the core problem: "The virtue of looking at environmental protection through other human rights, such as life, private life, or property, is that it focuses attention on what matters most: the detriment to important, internationally protected values from uncontrolled environmental harm."[37] This is true – assuming that what matters most is the well-being of human beings. But advocates of pursuing environmental rights protection through international environmental treaties would, of course, argue that "what matters most" is not necessarily the already recognized *human rights* values, such as life and property, but *environmental* values including sustainable

[34] Boyle, Alan E. "Human Rights and the Environment: A Reassessment." *Fordham Environmental Law Review* (revised 2010): 471.
[35] *Ibid.* [36] *Ibid.* [37] Boyle, "Human Rights and the Environment," 33.

development, biodiversity, and protection against or mitigation of climate change. Simply put, if the purpose of environmental protection exists solely because of its utility and meaning to humans, using a human rights framework might be sufficient; however, if the end is conceived more broadly in terms that are not exclusively anthropocentric, then a human rights framework can be limiting.

Even with this limited ambit in mind, international human rights mechanisms have proven to be ineffective at protecting environmental rights more than idiosyncratically.[38] As Hill *et al.* observe:

> [W]hile 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.[39]

And even to the extent that frameworks exist, human rights regimes are incomplete means for advancing environmental protection and environmental human rights. As Peters observes:

> The main problem of the current international human rights protection scheme is not a lack of formal acceptance but its deficient enforcement. Many states have ratified human rights covenants mainly for opportunistic reasons, in order to gain standing in the international community and obtain material benefits, without a real intention to implement them domestically. The international monitoring mechanisms, including the Universal Periodic Review through the UN Human Rights Council, are very weak.[40]

There are many reasons that human rights regimes that are truly international and trans-regional do not necessarily protect environmental rights effectively. The first is that international human rights regimes are not designed to address environmental rights. Dorsen notes that global (as distinct from regional) "human rights systems do not include any direct right to a healthy or satisfactory environment. In fact, most important global human rights treaties were put

[38] Dorsen, Norman, Michel Rosenfeld, András Sajó and Susanne Baer. *Comparative Constitutionalism: Cases and Materials*. St. Paul, MN: West Group, 2003, 1313–14; see also, Hodkova, Iveta. "Is There a Right to a Healthy Environment in the International Legal Order?" *Connecticut Journal of International Law* 7 (1991): 65, 67 (skeptical); Thorme, "Establishing Environment," 317.

[39] Hill, Barry E., Steve Wolfson and Nicholas Targ. "Human Rights and the Environment: A Synopsis and Some Predications." *Georgetown International Environmental Law Review* 16 (2004): 361.

[40] Peters, "Are we Moving towards Constitutionalization of the World Community?" 121.

into force prior to the institution of environmental protection nationally or globally."[41] Ansari et al. observes that "early human rights instruments were drafted at a time when environmental issues were not a matter of universal concern, and thus they did not have adequate explicit provisions for protection of right to pollution free environment and other environment-related rights, e.g. right to information pertaining to the environment, right to participation in environment-related matters, and access to justice."[42] Indeed, the right to a clean or healthy environment is one of the few rights widely recognized in constitutions today that have no ancestral claim in either of the human rights covenants and only a tenuous claim to the UDHR.

Second, as a practical matter, to be taken seriously in existing human rights regimes, environmental rights must be tethered to another recognized right. As Shelton observes, "the scope of protection for the environment based on existing human rights norms remains narrow because environmental degradation is not itself a cause for complaint but rather must be linked to an existing right."[43] For example, the ECHR has held that a state's failure to control industrial pollution, like excessive noise pollution resulting from the expansion of Heathrow Airport, may impact not environmental rights *per se*, but the privacy and family rights protected by the European Convention.[44]

Third, international human rights regimes, although formally enforceable, "suffer . . . from weak institutional and compliance mechanisms."[45] Domestic courts have largely declined to find that human rights are customary normative law subject to domestic enforcement,[46] although there are some exceptions. In fact, many commentators conclude that global human rights regimes are underperforming as means to achieve traditional human rights ends, let alone environmental protection ends.

Last, even incorporating human rights conventions by reference does little to advance environmental rights. For example, because the ECHR lacks

[41] Dorsen *et al.*, *Comparative Constitutionalism*, 1313–19.

[42] Ansari, Abdul Haseeb, Abdulkadir B. Abdulkadir and Shehu Usman Yamusa. "Protection of Environmental Rights for Sustainable Development: An Appraisal of International and National Laws." *Australian Journal of Basic and Applied Sciences* 6 (2012): 258–72.

[43] Shelton I, 112–113, 116.

[44] *Lopez Ostra* v. *Spain* (European Court of Human Rights, 1995). But see *Hatton and Others* v. *the United Kingdom*, 36022/97 Eur. Ct. H.R. 338 (European Court of Human Rights, 2003) (no violation).

[45] Dorsen *et al.*, *Comparative Constitutionalism*, 1313–19.

[46] See, e.g., *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003) (finding customary international law does not include a "right to life" or "right to health").

explicit environmental rights, the UK Human Rights Act of 1998 – which gives it "further effect" – does not explicitly advance environmental rights.[47]

Thus, despite good intentions and salutary objectives, human rights instruments do not obviate the need for constitutionally recognized rights to a quality environment, although they may support and promote them.

If we care about the environment for its own sake and for the sake of future generations, independent of its value to living humans, a legal framework to protect the environment *per se* would seem worthwhile. Arguing that rights reflect how we structure relations, Nedelsky observes:

> [T]he process of discernment of wise relations with our environment will be inadequate if it is driven entirely by instrumental reasoning, that is, by asking only the question what is good for humans. . . . Insight into the complex web of interdependence that characterizes human interaction with our environment (as with each other) will be fostered by the kind of attentiveness and responsiveness that comes from care and respect, and is much less likely to be yielded by objective, instrumental reasoning that treats the rest of the world (universe) as objects to serve the needs and pleasures of humans.[48]

Thus, it may be essential to develop a body of enforceable environmental law at the international level, building on Stockholm and Rio and other manifestations of an international consensus to protect the world's environment. Only in this way, it is contended, can the international community give environmental protection the attention it deserves. A body of international environmental law also highlights important environmental issues, such as biodiversity or climate change, because they matter in and of themselves, not necessarily because or when environmental degradation implicates specific human rights that have been recognized in other contexts.

In one sense, the debate between protecting the environment as a matter of environmental law or as a matter of human rights law is of little consequence – as long as it gets *some* recognition in one framework or the other. But the two strands are not necessarily coextensive. They have different political bases and different adjudicative mechanisms. And there are situations when a particular harm is protected under one framework and not the other. The draining of a wetland that neither threatens life nor constitutes a violation of the right to

[47] Morrow, K. "Worth the Paper that They are Written on? Human Rights and the Environment in the Law of England and Wales." *Journal of Human Rights and the Environment* 1 (2010): 66; Pedersen, O. "A Bill of Rights, Environmental Rights and the British Constitution." *Public Law* (2011): 577.

[48] Nedelsky, Jennifer. *Law's Relations: A Relational Theory of Self, Autonomy and Law*. New York: Oxford University Press, 2011: 197.

health or property or other human right should nonetheless be cognizable as a violation of an environmental right. To limit environmental claims to established human rights defines them in purely anthropocentric terms. Defining claims in terms of their environmental harms may enlarge the range of enforceable claims beyond the already expansive reach of human rights law but reinforces the independent importance of nature, thereby focusing attention on what many say matters most – that is, the global environment. On the other hand, international law does not reach every situation of environmental damage: the diminution in access to clean water may have environmental causes, but its significance is to the human right to life, health, and dignity.

Regardless of the outcome of this debate, there are problems with the international regulation of the environment that appertain to whether the rights are protected through environmental law or through human rights law. First, there is the problem of cultural relativism: environmental protection, "particularly from a North-South perspective [lacks] the universal value normally thought to be inherent in human rights."[49] Although it cannot seriously be maintained that developed nations are unilaterally imposing progressive environmentalist values on the rest of the world (because they do not appear to have particularly robust environmentalist values), it may well be that the cultural influence of the North is nonetheless affecting how, and to what extent, environmental values are promoted in the rest of the world. Indeed, it seems clear that the terms of the global debate have to a significant degree been shaped by Northern priorities: the fast pace of global environmental degradation and the slow pace of its protection reflect the Northern commitment to industrial development, its addiction to non-renewable resources, and its cultural disconnection from the natural world. Moreover, the cultural values of the world's richer countries are being felt in the rest of the world through such instrumentalities as the International Monetary Fund and the World Bank, which have so far favored privatization and development over ecological and cultural values.

A second problem with the internationalization of environmental interests concerns the locus of the problem. Although the environment is global, it is experienced locally and, ultimately, the argument goes, protection should happen most energetically at the local or national level. In his examination of landmark environmental litigation, Oliver Houck has written, "there is little doubt that the real concern, for both lawyer and client, was always the place. The fight was really about protecting some part of nature – a river, a forest or a

[49] Boyle, "Human Rights and the Environment," 33.

landscape – representing a remnant of paradise."[50] What is at stake is always a particular corner of the earth that has special significance to someone. The particularity of environmental litigation suggests that localization is essential to the protection of nature.

Other arguments are made in opposition to further development of the internationalization of environmental rights. One problem is indeterminacy or the difficulty of defining the scope of the environmental right or interest. "Indeterminacy is an important reason, it is often argued, for not rushing to embrace new rights without considering their implications."[51] Kiss and Shelton "accept the impossibility of defining an ideal environment in abstract terms" but would alleviate the problem by having "human rights supervisory institutions and courts develop their own interpretations, as they have done for many other human rights."[52] But the record of implementation at the international level is not reassuring. Individual enforcement of social and economic environmental rights is only now becoming possible, and, while individual enforcement of international civil and political rights has been available for decades, this has rarely extended to environmental rights outside Europe. On the other hand, the ECHR has issued dozens of binding environmental decisions, and as of this writing the Aarhus Compliance Committee has received nearly ninety communications.[53]

Nonetheless, global institutions charged with giving meaning to and defining the content of environmental rights have hardly been effective in developing a common international environmental law that reaches environmental rights. While the situation is better at the regional level, particularly in Europe and the Americas, other areas of the world have not been enthusiastic or effective protectors of the environment. The involvement of some national courts in these areas – including especially those in Africa and parts of Southeast Asia, as well as Israel – has thus been essential for many people living in these regions of the world.

Other problems are borne out of the practical challenges and costs associated with implementation. Implementation of the Aarhus Convention, for example, has left something to be desired. As Reid and Ross observe about the UK:

[50] Dannenmaier, Eric. "Environmental Law and the Loss of Paradise." *Columbia Journal of Transnational Law* 49 (2011): 463, 467, reviewing Oliver A. Houck, *Taking Back Eden: Eight Environmental Cases that Changed The World*, 1st edn. Washington: Island Press, 2011.

[51] Boyle, "Human Rights and the Environment," 33.

[52] *Ibid.* (citing A.C. Kiss and D. Shelton, *International Environmental Law*, 2nd edn. New York: Transnational Publishers, 2000, 174–8.)

[53] See www.unece.org/env/pp/pubcom.

> Complying with the Aarhus Convention is at the heart of the shared difficulty across the UK. Whereas the Convention requires that the public should have access to remedies that are fair, equitable, timely and not prohibitively expensive, the cost of litigation in the UK is notoriously high, exacerbated by the rule that the losing party must pay the costs of the successful opponent. The high cost of preparing one's own case, plus the risk of being liable for the other side's costs if one loses is a major disincentive to litigation. . . .The Aarhus Convention Compliance Committee has already stated that the position in the UK does not meet the required standards.[54]

Even if implementation were adequate, the question would remain whether the responsibility for defining an ideal environment and protecting it should, as a theoretical and normative matter, lie primarily with supervisory institutions and courts at the international or national level. Courts around the world are showing that environmental rights are better advanced through constitutional law at the national level.

DOMESTICATING ENVIRONMENTAL RIGHTS

The line between national and international law is, of course, increasingly blurred, as international law exerts an ever-more powerful influence on domestic constitutional law in both hard and soft ways. Several countries have adopted constitutional environmental rights provisions at least in part in response to international law; perhaps the most prominent examples are those provisions in furtherance of the principles set out in the Aarhus Convention relating to procedural environmental rights.[55] Other constitutions, such as South Africa's, adopt international environmental law values and language or require courts to adhere to, or at least consider, relevant international law.

But, in many countries, international norms are followed not because they are obligatory but because they reflect a growing global consensus on a particular issue. The Israeli Supreme Court has explained that, even with regard to an international covenant that has "not been incorporated into our legal system through legislation, it comprises a guiding and directing value not

[54] Reid, C. and Ross, A. "Environmental Governance in the UK." In *Environmental Protection in Multi-layered Systems: Comparative Lessons from the Water Sector*, by M. Alberton and F. Palermo (eds.). Leiden: Martinus Nijhoff 2012: 161–85 (Studies in Territorial and Cultural Diversity Governance) (internal quotations and citations omitted).

[55] Boyd, *Environmental Rights Revolution*, 106. For a general assessment of the incorporation of international human rights norms into domestic constitutions, see Zachary Elkins, Tom Ginsburg and Beth Simmons, "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice," *Harvard International Law Journal* 54(1) (2013): 61–95.

only on an international level but also in the interpretation of internal legal matters."[56] The Pakistani Supreme Court in 1994 was even more elaborate about the powerful influence of international law on domestic institutions:

> Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor do they bind down any party. This is the legal position of such documents, but the fact remains that they have a persuasive value and command respect. The Rio Declaration is the product of hectic discussion among the leaders of the nations of the world and it was after negotiations between the developed and the developing countries that an almost consensus declaration had been sorted out. Environment is an international problem having no frontiers creating transboundary effects. In this field every nation has to cooperate and contribute and for this reason the Rio Declaration would serve as a great binding force and to create discipline among the nations while dealing with environmental problems.[57]

Thus, domestic constitutional law is increasingly absorbing the values and principles of international law, including both environmental and human rights law.[58] Conversely, and in part because of this convergence, international and supra-national tribunals are increasingly looking to domestic constitutional practice in interpreting their own charters and conventions. That many countries and their subnational instruments have robust environmental statutory schemes, regulations, and common law traditions does not mean constitutional entrenchment of environmental values is superfluous.[59] Rather, the international and regional turn toward environmental protection may buttress and help to promote these values at the national level. This may be done, of course, through legislative and regulatory efforts, but, for numerous reasons, environmental constitutionalism offers advantages over non-constitutional means of advancing environmental protection.

[56] *Abu Masad* v. *Water Commissioner.* Civil App. No. 9535/06, 26 (Israel Supreme Court, 2011).

[57] *Shelhla Zia* v. *WAPDA.* Human Rights Case No. 15-K of 1992, P L D 1994 Supreme Court 693 (Supreme Court of Pakistan, February 12, 1994).

[58] See, e.g., J.L. Larsen. "Importing Constitutional Norms from a 'Wider Civilization': *Lawrence* and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation," *Ohio State Law Journal* 65 (2004): 1283, and Ralph G. Steinhardt. "The Role of International Law as a Canon of Domestic Statutory Construction," *Vanderbilt Law Review* 43 (1990): 1103.

[59] These include Australia, Austria, Belarus, Bermuda, Canada, China, Czech Republic, France, India, Italy, Jamaica, Japan, Mexico, the Netherlands, Poland, Russia, Singapore, South Korea, Ukraine, the United Kingdom, the United States, and the European Union. See generally, Schlickman *et al.* (eds). *International Environmental Law and Regulation.* Butterworth Legal Publishers, 1995, Vol II (discussing the national environmental statutory and regulatory laws in these countries).

First, constitutionally embodied environmental provisions are more durable than non-entrenched rights. Brandl and Bungert observe that:

> Constitutional implementation enables environmental protection to achieve the highest rank among legal norms, a level at which a given value trumps every statute, administrative rule or court decision. For instance, environmental protection might be considered a fundamental right retained by the individual and thus might enjoy the protected status accorded other fundamental rights. In addition, addressing environmental concerns at the constitutional level means that environmental protection need not depend on narrow majorities in legislative bodies. Rather, environmental protection is more firmly rooted in the legal order because constitutional provisions ordinarily may be altered only pursuant to elaborate procedures by a special majority, if at all.[60]

Second, environmental constitutionalism provides a normative function that is superior to other domestic legal approaches because "as supreme law of the land, constitutional provisions promote a model character for the citizenry to follow, and they influence and guide public discourse and behavior."[61] As Brooks explains:

> The fundamental purpose of a constitutional right to a healthful environment is to frame the description of the pollution event in terms of a public assault upon an individual's substantive right to life and health. [These] values are nationally shared. From this point of view, a federal constitutional right to a healthful environment makes sense.[62]

Third, and perhaps because of constitutionalism's normative superiority, the public is more likely to respond to environmental constitutionalism than environmental regulation: "On a practical level, the public tends to be more familiar with constitutional provisions than specific statutory laws. Citizens tend to identify with, and in turn are identified by, the form of their national constitution."[63] Because constitutionalism bespeaks of shared national values rather than more narrowly conceived limitations on the activities of private enterprise, the likelihood of compliance with constitutional directives increases while the resistance and challenges to such obligations may decrease.

Fourth, the existing legal architectures of many countries do not protect a broad individual right to a quality environment. As Bruch et al. note: "Even

[60] Brandl and Bungert, "Constitutional Entrenchment," 4–5. [61] *Ibid.*

[62] Brooks, Richard O. "A Constitutional Right to a Healthful Environment." *Vermont Law Review* 16 (1992): 1109.

[63] Brandl and Bungert, "Constitutional Entrenchment," 4–5.

countries with advanced environmental protection systems find that their laws do not address all environmental concerns." Although, as Bruch et al. say, "this problem is more pronounced in nations that are still developing environmental laws and regulations,"[64] it is prevalent worldwide. None of the vaunted environmental laws in the United States, for example, guarantee a right to a quality environment. Even the United States' most heralded environmental law achievements, the National Environmental Policy Act or "NEPA,"[65] falls short in this regard. NEPA has been widely copied,[66] finding analogues in national and subnational statutes and regulations worldwide and in some international environmental accords.[67] The purpose of NEPA is:

> to declare a national policy which will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damages to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological system and natural resources important to the Nation.[68]

Notwithstanding this expansive language, NEPA does not promote substantive environmental rights. Among other things, NEPA requires federal agencies to assess the environmental impact of activities likely to significantly affect the quality of the human environment. While the US Supreme Court has said that NEPA requires federal agencies to take a "hard look" at environmental consequences,[69] and has acknowledged that the statute is intended to be "action forcing,"[70] the Court has interpreted NEPA to be primarily a procedural statute, allowing for a process prior to decision making but not one that provides a cause of action to vindicate environmental rights. This renders it void of substantive moment. As a general matter, statutory and civil code laws worldwide concerning environmental protection are not designed to protect substantive environmental rights, and those that are concerned only with selected environmental problems.

Fifth, even in countries that have robust statutory environmental protection laws, litigants must still satisfy a retinue of procedural or constitutional requirements (such as standing) and demonstrate the matter is justiciable.

[64] Bruch *et al.*, "Constitutional Environmental Law," 134. [65] 42 U.S.C. § 4321–4347 (NEPA).
[66] Nicholas Yost writes: "NEPA may well be the most imitated law in American history." *The Nepa Litigation Guide*, 2nd edn. American Bar Association, 2012.
[67] See, e.g., the Antarctic Environment Protocol, 30 ILM 849 (1992). [68] *Ibid.*, section 2.
[69] *Kleppe* v. *Sierra Club*. 427 US 390 (Supreme Court of the United States, 1976).
[70] *Robertson* v. *Methow Valley Citizens Council*, 490 US 332 (Supreme Court of the United States, 1989).

Last, such common law measures are subject to legislative preemption.[71] For example, the UK Constitution's "principle of legality" envelops common law "natural" rights and is applied on a case-by-case basis.[72] Indeed, the UK has enacted a Human Rights Act that embraces rights provided under the ECHR.[73] This law, however, "preserves the Parliament's discretion to authorize any interference with environmental rights."[74] Thus, a fair observation is that national and subnational legislation and regulation do not necessarily displace the need for such environmental constitutionalism.

Nor does the existence of environmental provisions in subnational constitutions argue against nationalized environmental constitutionalism. As is discussed in Chapter 7, at least thirty states in the United States address environmental matters.[75] Of these, five explicitly and eleven implicitly recognize a right to a clean environment.[76] Yet, as we shall see, subnational constitutional environmental rights have proven to be perhaps the least enforceable constitutional environmental right.[77]

Accordingly, when these international and domestic mechanisms fail, environmental constitutionalism can provide a "safety net" for addressing environmental issues,[78] and can be an efficient and effective national mechanism for inculcating environmental ethics: "A thing is right," wrote Aldo Leopold, "when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."[79] As such, constitutional environmental rights can be the last best hope for protecting both basic human rights and biodiversity.[80]

[71] See Douglas-Scott, S. "Environmental Rights in the European Union: Participatory Democracy or Democratic Deficit?" In Boyle and Anderson, *Human Rights Approaches*, 109–28.

[72] Pontin, "Environmental Rights under the UK's 'Intermediate Constitution,'" 21.

[73] *Ibid.*, 21–3, 64–5. [74] *Ibid.*, 64.

[75] See Tucker, John C. "Constitutional Codification of an Environmental Ethic." *Florida Law Review* 52 (2000): 299 (discussing development in Florida).

[76] See Weiss, Edith Brown. *International Environmental Law and Policy*. Aspen Law and Business, 1998: 416 (identifying Illinois, Hawaii, California, Florida, Massachusetts, Montana, Pennsylvania, Rhode Island, and Virginia.).

[77] For a discussion of the interconnectedness between human rights and the environment at the subdivision level, see generally, Deimann, Sven and Bernard Dyssli (eds.). *Environmental Rights: Law, Litigation and Access to Justice*. Gaunt, 1995.

[78] Bruch *et al.*, "Constitutional Environmental Law," 134.

[79] Leopold, Aldo. *A Sand County Almanac*. Random House Digital Inc., 1986, 224–5.

[80] Wilson, Edward O. "The Current State of Biodiversity." In *Biodiversity*, by Edward O. Wilson, 12–13. Washington: National Academic Press, 1988 (noting that humans have multiplied current rates of species extinction by 1,000 to 10,000 times the pre-human-intervention rate).

That environmental constitutionalism can serve to fill gaps left by existing international and national legal orders raises the question as to which rights constitutions should recognize and whether environmental rights are among them.

THE VALUE OF CONSTITUTIONALISM

In turning to the value of constitutionalism, one must concede that the absence of constitutionalism does not mean the absence of environmental protection. For example, environmental law across the UK – which lacks a formal written constitution – is predominantly a statutory matter.[81] Moreover, the absence of constitutionalism does not mean the abject absence of means to achieve overarching policy norms in the service of environmental values, such as sustainable development.[82] The absence of a constitution does, however, suggest a void, particularly as applied to environmental rights. Reid and Ross sum it up this way:

> The absence of a written constitution means that there is no place for broad statements of objectives or individual rights in relation to the environment (or indeed any other pervasive social objectives), and the British tradition in legislating is to avoid establishing general purposes or goals. Thus, although there are provisions setting out the purposes and functions of the environment agencies of National Parks and of other authorities and legal regimes, these are not of general application and do not provide a coherent set of environmental goals. Instead there is a patchwork of detailed provisions relating to individual authorities and their specific powers and duties.[83]

Moreover, as Reid and Ross observe about the UK: "Although some common law doctrines such as tort and delict can apply in environmental contexts, especially the law of nuisance, the role of the courts has predominantly been one of statutory interpretation or of determining the limits of the discretionary powers conferred by statute on a range of authorities, especially in relation to the impact of EU law."[84]

[81] Bell, S. and D. McGillivray. *Environmental Law*, 7th edn. Oxford University Press, 2008: 94–5.

[82] For example, for role of legislation in pursuit of broad and pervasive objectives regarding sustainable development, see Ross, A. "Why Legislate for Sustainable Development?" *Journal of Environmental Law* 20 (2008): 35–68; Ross, A. "It's Time to Get Serious – Why Legislation is Needed to Make Sustainable Development a Reality in the UK." *Sustainability* 2 (2010): 1101–27, available at www.mdpi.com/2071–1050/2/4/1101

[83] Reid and Ross, *Environmental Governance* (internal quotations and citations omitted).

[84] *Ibid.*

Constitutionalism has been around since antiquity. Schochet explains:

> The *veneration* of "constitutionalism" is among the enduring and probably justified vanities of liberal democratic theory. Struggles for personal freedoms and for escape from arbitrary political rule have been among the conspicuous features of the history of Western Europe and America since the sixteenth century. Constitutionalism's fundamental principles of limited government and the rule of law . . . emerged as the operative ideals of these struggles.
>
> The *tradition* of constitutionalism is much older, extending through the Middle Ages to antiquity . . . The "constitution" – in all its historical forms – has always been a standard of legitimacy, for it has been seen as embodying the defining character of its civil society . . . [Constitutions are] related to conceptions of human nature, for the constitution can never be divorced from human capacities, needs, and deficiencies.[85]

Constitutionalism has various advantages, particularly in capturing emerging concepts like environmental constitutionalism. In describing the structure of government, constitutions distribute power and allocate authority among governing bodies. In many countries, governing bodies consist of coordinate branches that make, enforce, and interpret laws. Constitutions also describe individual and collective political rights, such as rights to vote, speak, or assemble, and civil rights, such as those to life, liberty, and property; increasingly, they also describe social and solidarity rights, such as rights to medical care, pensions, work, and, most recently, rights to a healthy environment. The import of constitutionalism lies in the supposition that the other constraints on power have failed to prevent political overreaching.[86] Constitutionalism also reflects human nature, inseparable from human capacities, needs, and deficiencies. While constitutionalism is not the answer to every question, having written rules for society is thought to be an improvement over the absence of them. In the end, as Buchanan observes, "we are all constitutionalists . . ."[87]

The composition and adoption of a constitution can be a singular national achievement. Written constitutions can memorialize society's most ineluctable relationships and rules.[88] As Borgeaud wrote in the nineteenth century, "The typical written constitution, as conceived by those who adopted it as the

[85] Schochet, Gordon J. "Introduction: Constitutionalism, Liberalism, and the Study of Politics," in *Nomos* XX 1, edited by J. Roland Pennock and John W. Chapman. New York University Press, 1979: 1–2.

[86] *Ibid.*, 5.

[87] Buchanan, James M. "Why do Constitutions Matter?" In *Why Do Constitutions Matter?*, by Niclas Berggren *et al.* (eds.), 1, 12. New Brunswick, NJ: Transaction Publishers, 2000.

[88] Bryce, Viscount James. *Constitutions*. Oxford University Press, 1905: 37–8.

basis of the modern state, is democratic, the expression of the sovereign will of the nation."[89] Constitutions can embody the "fundamental and paramount law,"[90] and can declare priorities of rights, obligations, and responsibilities.[91] As Finer et al. said, "Constitutions are codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and officers of government, and to define the relationship between these and the public."[92] Most importantly, constitutions have "always been a standard of legitimacy."[93] As Borgeaud summed up, "A Constitution is the fundamental law according to which the government of a state is organized and the relations of individuals with society as a whole are regulated. . . . They are the great pages in the life of the nations."[94] Indeed, capturing the essence of constitutionalism, the preamble of the Algerian constitution declares that the constitution assures "the juridical protection and the control of action by the public powers in a society in which legality reigns and permits the development of man in all dimensions."[95]

Written constitutions, however, reflect paradoxes. While they can be the product of a convulsive reform advocated by the political or popular majority, rights provisions can contain anti-majoritarian features designed to protect certain individual rights against the tyranny of the majority. And while constitutions usually emerge from a particular historical moment, they often seek to embody principles and values that are meant to endure over time and benefit future generations. Constitutions ultimately describe relationships, between the parts of government and between governments and people, in the present and in the future.

Constitutional rights promote liberty and freedom and are ordinarily intended to offset action taken without the consent of underrepresented individuals or interests. They tend to protect abjured rights and grant to "the individual a subjective or personal guarantee," including rights to speech, religion, education, health, and dignity.[96] Buchanan notes that:

[89] Borgeaud, Charles. *Adoption and Amendment of Constitutions in Europe and America*. Edited by John Martin Vincent. Charles Downer Hazen trans. New York: Macmillan, 1895: 35.

[90] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (Supreme Court of the United States, 1803).

[91] Bruch *et al.*, *Constitutional Environmental Law*, 138.

[92] Finer, S.E., Vernon Bogdanor and Bernard Rudden. *Comparing Constitutions*. Oxford University Press, 1995.

[93] Schochet, *Introduction*, 1–2. [94] Borgeaud, *Adoption and Amendment*, xv–xviii.

[95] Algeria Constitution, Preamble.

[96] Brandl and Bungert, "Constitutional Entrenchment," 9–15 (explaining classical–liberal, institutional, value-oriented, or objective, democratic, and social theories supporting fundamental rights).

> Support for the imposition of constraints on the operation of the political process may stem exclusively from the fear that a coalition of other persons may act, in the name of the collective unit with powers of enforceability, in ways that harm her own interests. Constitutional constraints are, in this setting, aimed at limiting the range and scope of actions that may be taken by others without the consent of the person in question but actions to which the person is locked in by the fact of collective unity. This reason for rules arises in any collective organization that allows actions to be taken without any explicit consent of the individuals who are affected.[97]

On the other hand, there are arguments opposing constitutionalism, or at least taking a more skeptical view. Some maintain that prefiguring constitutional rights, such as environmental rights, can be normatively ineffective and economically inefficient.[98] As Buchanan observes, "Constitutional rules have the effect of increasing the costs of taking certain actions . . . Constitutional structure and strategy must be informed, first, by a definition of those patterns of outcomes that are deemed undesirable, and second, by an implementation of limits on the procedures or results designed to forestall such patterns."[99]

Critiques of general complaints about constitutionalizing rights begin with accepting that written constitutional responses to societal challenges matter most when fatigue with other legal approaches descends: "In one sense, constitutions must be seen to matter because, otherwise, we find ourselves, willy-nilly, in a setting of constitutional drift, where inattention to rules and rules' structures may allow patterns of results to emerge that are preferred by no one, then, now, and in the future."[100] On the other hand, Boyd has shown that the reverse is more likely: constitutional protection for the environment tends to foster statutory and regulatory frameworks for managing environmental resources.[101]

Other arguments disfavoring constitutionalizing rights, including environmental rights, also fall short. Some contend that reducing rights that are innate to the human condition trivializes the right.[102] But the ubiquity of rights-containing constitutions belies this concern: it cannot be said that the inclusion of due process, equality, and free speech rights trivializes them or diminishes their significance. There is also an argument that constituting rights has the

[97] Buchanan, "Why do Constitutions Matter?" 3.
[98] See *ibid.*, 21–50.
[99] See *ibid.*, 14.
[100] Peczenik, Aleksander. "Why Constitution? What Constitution? Constraints on Majority Rule." In Berggren *et al.* (eds.). *Why Constitutions Matter*, 36.
[101] Boyd, *Environmental Rights Revolution*, Chapters 6–10.
[102] See Dicey, Albert Venn. *Introduction to the Study of the Law of the Constitution*, 10th edn. Palgrave Macmillan, 1959.

anti-majoritarian effect of elevating individual rights over the interests of others. A principal criticism of constitutionalism is "that it represents power given to the majority against a polluting minority, rather than a guarantee of minority rights."[103] But this argument conflates political minorities with economically powerful minorities that already have a hold of the levers of power that environmental constitutionalism serves to balance. Peczenik says, "[I]t can be said that constitutions can, should, and often do include rules making it difficult for the parliamentary representation of the majority to restrict political and human rights. Such rules are the constraints on the power of the majority."[104]

Further, some contend that the amount of light each constitutional right catches is inversely proportional to how many other rights the constitution confers; the more "rights" there are, the less enforced each, including environmental rights, becomes.[105] "The weakness and fragility of a written constitution vary directly as the number of its articles."[106] But, again, there is no empirical support for this claim, and the increasing number and length of constitutions would seem to suggest the opposite. Moreover, this concern would seem to apply to all of law, especially in countries that operate under a civil code system. Constitutions are "a set of instructions for making decisions about the design and operation of society"; one either has rules or one does not.[107] Thus, the issue is whether a right should be recognized under the constitutional framework the country has established. Borgeaud responds to criticism of constituting fundamental rights this way: "The error [with arguments against constitutionalism] . . . that there is any incompatibility between what is fundamental and what is written . . . When a people frame for itself a constitution, it formulates its public law . . . so as to render it a real safeguard against all attempts to undermine popular liberties."[108]

Environmental rights skeptics also argue that all constitutional rights lose their normative value when they are underenforced or unenforceable. And yet, this all-or-nothing approach does not reflect current reality. It is undeniable that some constitutional rights are more amenable to enforcement than others,

[103] Brandl and Bungert, "Constitutional Entrenchment," 88.

[104] Peczenik, "Why Constitution?" 17, 21–2.

[105] J.B. Ruhl relays the following tale: "A woman is seated in a restaurant in Moscow, during Soviet rule, and is handed a menu. After a few minutes she orders the roast pork, but is told they no longer serve that dish. She orders the chicken and is told it has sold out. She orders the fish and is told it has gone bad. She orders the beef and is told it has been overcooked. Exasperated, she asks whether she has been handed the menu or the constitution." Ruhl, J.B. "The Metrics of Constitutional Amendments: and why Proposed Environmental Quality Amendments don't Measure up." *Notre Dame Law Review* 74 (1999): 245.

[106] Borgeaud, *Adoption and Amendment*, 36–7. [107] *Ibid.*

[108] *Ibid.*, 37–8.

and all constitutional cultures protect some rights more robustly than others. But to the extent that a constitution reflects national values, it is of some utility for a constitution to provide substantive rights, even if it cannot, perhaps yet, make them enforceable. The constitutionalization even of underenforced rights may be valuable, if only because some enforcement is likely to be better than none at all, and this is as true of environmental rights as any other rights. Moreover, if rights are in the constitution, they may stay underenforced only for a time and soon enough gain the attention of litigants and judges, or get developed as adjuncts to more robustly protected rights. This is indeed what is happening all over the world with respect to environmental and other rights. And there is no evidence that the amplification of constitutional rights has resulted in a reduction in enforcement; indeed, we are undeniably in a period of burgeoning enumeration *and* enforcement of human rights.

Another concern is that enshrining certain rights, such as environmental rights, can contribute to a degree of discursive dissonance when multiple rights conflict. Lazarus describes the problem this way:

> [T]here are individuals on both sides of the environmental protection debate who summarily reject any characterization of environmental lawmaking as the attempt to balance competing economic interests. Each camp views their position as being supported by absolute, not relative, rights. The right to human health. The right to a healthy environment. The rights of nature itself. The right to private property. The right to individual liberty and freedom from the will of the majority . . . Each side tends to view the other as beginning from an unacceptable moral premise.[109]

But while this may be descriptively true, a proper understanding of rights necessarily rejects absolutism and entails instead a healthy respect for balancing competing rights and accepting burdens on rights that are proportionate to the need. As Sax explains:

> the limit of one's rights is measured by the ability of his neighbor to make a reasonably productive use of his own property. Ultimately, environmental constitutionalism helps us to discern which values should be (1) enshrined in fundamental law, (2) left to negotiation and renegotiation in the democratic forum, (3) protected from majoritarian depredations, and (4) secured even for only a small or unrepresentative minority of the population.[110]

[109] Lazarus, Richard J. *The Making of Environmental Law*. London: University of Chicago Press, 2004.

[110] Sax, Joseph L. *Defending the Environment: A Strategy for Citizen Action*. New York: Alfred A. Knopf, Inc., 1971 at 159.

One last objection to the constitutionalization of environmental rights is that, perhaps ironically, it is not necessary to mention environmental rights at all because, as the Philippine Supreme Court said in the celebrated case of *Minors Oposa*, certain rights, including "the right to a balanced and healthful ecology" "need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[111] The argument here is that constitutionalizing rights is superfluous because what is most essential to orderly society is a matter of intuition, not composition. But few are willing to do without them. Even in the Philippine case, the constitutional commitment to environmental protection was not at all unnecessary but gave the court the support it needed to order the cancellation of the timber licenses at issue there. As the court explained:

> If they are now explicitly mentioned in the fundamental charter, it is because of the well founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come, generations which stand to inherit nothing but parched earth incapable of sustaining life.[112]

The fact of constitutionalization was, this language suggests, critical to the court's resolution of the controversy, even if it only restated what was already evident. Given the thriving rights culture in which we live, we conclude that there is no compelling reason to exclude environmental interests from the benefit of rights protection that other important civil, political, and social interests receive.

THE LEGITIMACY OF ENVIRONMENTAL CONSTITUTIONALISM

Environmental constitutionalism can help fill interstitial gaps left by international and national law and be incorporated into constitutional structures. As Shelton notes, "recognizing a right to environment could encompass elements of nature protection and ecological balance, substantive areas not generally protected under human rights law because of its anthropocentric

[111] *Minors Oposa* (Philippines, 1993), in his capacity as the Secretary of the Department of Environment and Natural Resources, and the Honorable Eriberto U. Rosario, Presiding Judge of the RTC, Makrati, Branch 66, respondents.

[112] *Ibid.*

focus."[113] Still, some dismiss constitutional environmental rights as magical thinking, reflecting a "combination of political idealism and scientific naivety . . . given the substantial disagreement [that] remains over the socially appropriate levels and types of environmental protection."[114] For some, the real challenge with environmental constitutionalism is with definition: "In the context of environmental rights, the more important element of constitutional review is designing an objective test to determine when constitutional review is triggered."[115] To be sure, environmental rights can induce syntactical gymnastics. Bruckerhoff remarks that "only a few national courts have held that their constitution's purported environmental right is actually enforceable. In many cases, the problem of enforcement is a product of the constitutional language itself – when the provision is passive or vague, it is difficult for courts to determine both if and how to interpret the right."[116]

One question concerns whether, as a constitutional *right*, environmental protection is necessarily defined by its impact on people; that is, whether constitutional environmental rights follow in the tradition of international human rights or of the international and regional agreements on the environment. Some maintain that international and domestic law support an exclusively anthropogenic approach. Abate observes: "Existing sources of domestic and international law embrace a human-centered approach to environmental protection and recognize the connection between human rights and environmental protection."[117] Onzivu sees environmental rights as a means to protect human health: "An emerging right to a healthy environment favors the protection of public health."[118]

Others argue that environmental rights ought to be stretched to include non-human harms and biodiversity. Bruckerhoff, for one, maintains that a "less anthropocentric interpretation of constitutional environmental rights could be one, albeit small, component of national and international efforts to protect the wonders of nature."[119]

[113] Shelton, Dinah. "Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?" *Denver Journal of International Law and Policy* 35 (2006): 163.

[114] Thompson, Barton H., Jr. "Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions," *Montana Law Review* 64 (2003): 57, 87.

[115] Bruckerhoff, Joshua J. "Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights." *Texas Law Review* 86 (2008): 638.

[116] *Ibid.*, 625–6. [117] Abate, "Climate Change," 10.

[118] Onzivu, William. "International Environmental Law, The Public's Health, and Domestic Environmental Governance in Developing Countries." *American University International Law Review* 21 (2006), 667.

[119] Bruckerhoff, "Giving Nature Constitutional Protection," 645.

Others suggest environmental rights can serve a variety of objectives. MacDonald, for instance, writes:

> [E]nvironmental rights are those rights related to environmental standards or protection that are safeguarded so as to benefit someone or something. That someone or something could be the environment itself, humans, or combinations thereof. Environmental rights thus concern the right to protect human health and private or common property (including the "natural" environment) from damage or potential damage sourced through the environment.[120]

Definitional ambiguities are shared at the national and subnational levels, particularly in the United States. Hill *et al.* note that "[w]ith the exception of the State of Hawaii, which defines 'healthful' using standards established by state and federal law, state constitutional provisions affording a right to a clean and healthy environment provide little specific guidance."[121]

To some, the ambiguities inherent in environmental constitutionalism suggest that environmental rights are so laden with policy as to be not justiciable, and therefore best left to legislative bodies. Moreover, adjudicative challenges include problems of precedential value, political will, enforcement, individual or collective standing, standing for natural objects, judicial standards, and jurisdiction, as discussed in Part II.

And yet, a growing number of countries in all parts of the world are amending their constitutions in environmentally protective ways, and a commensurate number of courts are overcoming the conceptual and political challenges and finding ways to enforce these new provisions. Indeed, it is becoming increasingly apparent that national constitutions are peculiarly appropriate loci for environmental rights. Environmental rights possess the hallmarks of universally accepted constitutional rights. To be sure, the vast majority of literature in the field endorses the legitimacy of constitutional environmental rights, maintaining that they are a natural outgrowth of canonical liberal constitutional philosophies, and thus have the same weight as other constitutional rights.

By protecting political minorities, environmental rights serve basic civil rights in the same vein as rights to life, free speech, religion, due process, and equal protection. Brandl and Bungert note that the "strongest argument in favor of an environmental fundamental right is that such a right is a mechanism for resolving conflicts . . . Inclusion of environmental rights in the constitution amounts to a declaration that such rights stand on an equal

[120] See, e.g., MacDonald, "Sustaining the Environmental Rights of Children," 1, 7.
[121] Hill *et al.*, "Human Rights and the Environment," 395.

footing with other fundamental rights and freedoms . . . [It] indicates that a nation bestows upon environmental protection the same respect it grants the right to life and physical integrity."[122]

Environmental rights also advance social norms much like other socio-economic rights including rights to education, food, shelter, and dignity.[123] Sometimes, as we explain in Chapter 2, environmental rights are inextricably intertwined with other rights, offering symbiotic opportunities to advance complementary norms.

Other arguments favor environmental constitutionalism as well. Hiskes suggests that environmental constitutionalism satisfies the benchmarks of constitutionalism insofar as it creates and fosters political communities, defines cultural identity, and is generationally timeless.[124] These features distinguish constitutional from other types of domestic law including regulatory and statutory law. First, environmental constitutionalism helps to define a political community largely in terms of geographic markers of land and water: those who live on this side of the river or mountain range are within the political community, to the exclusion of those who live on the other side (with some variance for mobile and expatriate populations). Members of the political community are not only those who have a voice in the community's affairs but those who have the most at stake in the integrity of the physical environment – those who use the rivers for fishing and commerce, or who breathe the air, or swim in the bays. It is these people whose lives depend on their environment for their work, their dignity, their enjoyment of other rights, their very lives. Conversely, it is also these members of the political community who are most likely to have an impact on their local environment, who are most likely to use its resources and develop it for their own benefit.

For the political community, then, the environment is highly valued but also potentially at risk – the two perhaps paradoxical features that Nedelsky has argued characterize constitutional rights.[125] Values that are important but not seen as being at risk are not typically constitutionally enshrined (like dignity until World War II), nor are values that are at risk but not particularly important. Environmental rights paradigmatically satisfy both requirements. They are inherently and instrumentally valuable, and since the 1970s, when they started to appear in constitutions, have been seen to be at risk by political communities around the world due to overdevelopment and overpopulation

[122] Brandl and Bungert, "Constitutional Entrenchment," 87.
[123] Hayward, *Constitutional Environmental Rights*.
[124] Hiskes, *Human Right to a Green Future*, 133. [125] Nedelsky, *Law's Relations*, 253.

and the risks associated with climate change. By that measure, environmental rights are quintessential candidates for constitutionalization.

Environmental constitutionalism is also appropriate because constitutional law is interpreted, applied, and given life by judges who are part of the political community. And although judges in most countries are notoriously immune from accountability, there is in the domestic sphere at least the greater possibility or threat of accountability than exists with international and regional tribunals. Moreover, given the enhanced concern that international tribunals have for uniformity and the deference they owe to their national constituencies, constitutional courts may be better able than their international counterparts to adjust requirements for standing, or develop different evidentiary requirements, or standards of proof for environmental claims. Domestic judges are also more likely to understand the significance of a particular environmental claim – or of the countervailing claims – because they are part of the culture from which the claims emerge.

This relates to a second feature of constitutionalism identified by Hiskes: constitutions help to create the cultural identity that distinguishes members of one constitutional community from another. Communities define themselves through the values they seek to protect in their laws and in particular their constitutions. Constitutionalizing the environmental debate (as opposed to relegating it to the international level) avoids the problems of cultural bias that internationalization presents by allowing each nation to develop its own discourse with its own vocabulary and based on its own priorities and commitments. While local control is often beneficial, it is particularly pertinent in the context of environmental regulation because many environmental questions bear on core concerns of state sovereignty and security (such as control over waterways and access to and development of mineral resources), as well as on important economic and policy matters, such as the balance between development and environmental protection or the allocation of revenues from natural resources. Each nation will want to calibrate these matters in its own ways, according to its own political calculations, cultural and economic history, and contemporary needs; each nation has a slightly different commitment to development, and ways of protecting against excessive privatization on the one hand and nationalization on the other. And each nation has its own political discourse, so the valence of environmental protection varies from country to country, even within a single global region. Every political system is its own experiment, including notions of separation and sharing of powers, federalism, and individual rights and responsibilities. Naturally, this affects public and political discourse concerning environmental protection. Ecuador (constitutionally) and Bolivia (legislatively) have recognized the rights of

nature, while Venezuela and Uruguay have not been particularly protective of environmental values, and the courts in Colombia, Chile, and Argentina fall somewhere in between. While international environmental and human rights law will inform, to some degree, the terms of the debate, the debate itself should be defined by these local distinctions.

Whether or not they explicitly protect the environment, modern constitutions typically establish judicial institutions to give effect to constitutional rights and norms, whether in specialized constitutional courts, environmental tribunals, or through diffuse systems of judicial review. More than their international counterparts, these tribunals tend to be more easily accessible to putative plaintiffs, who are more likely to have better access to local lawyers who, in turn, are more likely to have expertise in the relevant legal fields and to know the legal and political landscape against which judges make their decisions. National courts are dedicated to enforcing constitutional values and yet, as noted, operate within their national political culture rather than outside of it, as is the case with international or regional bodies. As a result, the judicial response to an environmental claim, even if on some occasions it is outside the mainstream, is likely to be within the realm of local political possibility. This contributes to a more coherent and culturally relevant development of the law that in turn is more likely to be followed by other judges and to be accepted by the relevant stakeholders. Consequently, constitutionalism's promise of cultural resonance means that constitutional courts are more likely to be able to enforce environmental rights than are international tribunals, although even at the domestic level enforcement of environmental norms remains a challenge. But enforcement by international tribunals is even less certain: international enforcement of environmental rights can be easy for national authorities to ignore or discount in part because the tribunals are remote, their rulings are compromised by incomplete knowledge of local conditions, and their ability to enforce their judgments is limited by fiscal and political constraints.

The third essential feature of constitutions identified by Hiskes is that they are, quintessentially, intergenerational compacts. They are agreements that one generation makes both to bind and benefit future generations. To give the most well-known example, the United States constitution is ordained and established for the explicit purpose of securing the blessings of liberty "to ourselves and our Posterity."[126] Many other constitutions make the same point in implicit and explicit ways. The very purpose of a constitution is to bind

[126] US Constitution, Preamble, available at http://constitutionus.com

future generations to the values identified by the present one. This is not unique to constitutions, and, in fact, intergenerational equity can be found in many parts of the law, which not uncommonly speak across the ages with the intent to bind one to the values of another. Respecting a will simply means that the present generation is bound to the values of a past one; creating a pension system binds one generation of workers to the next. In the case of environmental rights, Hiskes shows that this effort is especially apt because future generations are particularly – and uniquely – vulnerable in terms of their ability to secure environmental rights. The present generation has already shown itself capable of inflicting significant and quite likely irreversible environmental harm on generations yet to come; indeed, this is the dominant way we leave our mark on the future. Future generations cannot protect themselves against these harms except by recourse to the present to protect them by entrenching limits on what their predecessors can do to the environment. Constitutional environmental rights are the best defense that future generations have against the harm that is being done presently.

Even if we view constitutions as constraining democratic practice, we can see that they temporalize these constraints. To constitutionalize a right is to express a preference for long-term values over the decisions that a majority or a minority may make for short-term gain. The value of free speech is guaranteed over time against the short-sighted inclinations of those who transiently hold power to punish unpleasant or threatening epithets; the value of due process holds even against those who would, for short-term gain, convict without trial. Likewise, the health of the global environment is a long-term value that should be held to constrain those who would allow environmental degradation to gain a perceived short-term benefit. Indeed, provisions in certain constitutions that are unamendable are called "eternal" to emphasize their power for all time. As Hiskes maintains, combining the attributes of political community and cultural identity with constitutionalism's intergenerational quality reveals that "constitutions provide this link across time that connects all citizens both to their enduring governmental institutions and to the community they share with all past and future citizens. . . . [They are] what makes citizens recognize themselves and each other across time as fellow members of the same community."[127] Thus, environmental constitutionalism "offers an opportunity to promote environmental concerns at the highest and most visible level of legal order, where the impact on laws and the public could prove to be quite dramatic."[128]

[127] Hiskes, *Human Right to a Green Future*, 128.
[128] Brandl and Bungert, "Constitutional Entrenchment," 4–5.

THE VALUE OF ENVIRONMENTAL CONSTITUTIONALISM

Environmental constitutionalism is an essential node in the web of national management of the environment, along with national statutory schemes such as environmental impact assessments and water framework legislation, adherence to international, multilateral, and regional treaties and norms, and dialogue with subnational and local governments. As a result, it can provide an imprimatur to ensure and promote complementarity of different regimes at the various levels of governance.

Beyond its role in connecting disparate legal regimes, environmental constitutionalism suggests a *new way of thinking* about the relationship among individuals, sovereign governments, and the environment with the overall goal of prompting governments to more aggressively protect environmental resources for the benefit both of humans, present and future, and of the environment itself. Constitutional law provides a holistic approach to the challenge of environmental protection because it encompasses almost every tool of which law can avail itself. It can hold government officials accountable and even increase the political pressure on them; it can use procedural rights to give people more access to information and to judicial and political process; it can impose fines and award damages; it can require action or forbearance; it can punish for harm done or prevent threatened harm; it can entrench common law principles, promote values, or establish new rules of engagement. Its legal responses can be structural and systemic or individual and incremental. It thus makes available to individuals and organizations the full range of legal process to ensure governmental responsibility for the protection of the environment.

Constitutionalism encompasses law creation, law implementation, and enforcement. And its reach is plenary because it brings together all the constituencies within and sometimes outside the nation: it can speak for one majority or minority group, or speak for the plurality; it can listen to indigenous and marginalized communities, for corporate or development interests, or to lower, middle, or upper classes of the nation. It can influence and is in turn informed by structural features outside of environmental regulation such as civil and political rights that exist in name or in practice in the country, as well as social and economic attributes of the population within the nation. And it speaks in the language of constitutionalism generally, invoking ideas about the respect for human dignity, principles of separation of powers and parliamentarism, rule of law and due process (however understood in the particular nation), public participation and democratic legitimation, and so on. Flavored by the power of politics on the one hand and claims of justice on the other, it occupies all the spaces in which law exists. All of these influences inform how

the government and others may be held to account for responsible and sustainable management of the environment. And because constitutionalism speaks mainly through a supreme, apex, or constitutional court, it speaks with all the authority and legitimacy of the sovereign. It thus puts the sovereign entity at the center of the conversation among all the different voices speaking about environmental protection.

This, of course, begs the question of just what the impact of environmental constitutionalism might be. There can be little question that the constitutional incorporation of environmental rights, protections, and procedures has salutary effects that transcend judicial outcomes. Boyd, for example, concludes "that nations with constitutional provisions related to environmental protection have superior environmental records," including leaving smaller per capita ecological footprints, ranking higher on several indicators of environmental performance, being more likely to ratify international environmental agreements, and lowering pollutant emissions, including greenhouse gases.[129]

There is also some evidence that environmental constitutionalism promotes domestic environmental laws and regulations. Boyd concludes that a majority of nations with substantive constitutional rights to a quality environment have "taken the important step of incorporating" such rights into domestic legislation aimed at environmental protection.[130] For example, South Africa enacted Section 24 of its post-apartheid constitution in 1996, which provides that everyone has the right "[t]o have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that . . . [s]ecure ecologically-sustainable development and use of natural resources while promoting justifiable economic and social development." This provision no doubt informed legislative enactment of Section 1 of the National Environmental Management Act 107 of 1998 (NEMA), which provides: "[d]evelopment must be socially, environmentally and economically sustainable."

Yet there is also evidence that environmental constitutionalism is the culmination of, and not the precursor to, domestic environmental laws. For example, Brazil has been home to a fairly extensive retune of environmental protection legislation since the 1970s. Nonetheless, in 1988 it adopted among the world's most intricate and complex constitutional features for advancing environmental protection. The capstone is Article 225 of the national constitution, which both recognizes an individual's right to "an ecologically

[129] Boyd, *Environmental Rights Revolution*, 276. [130] *Ibid.*, 251.

balanced environment," and imposes a duty upon the government and its citizens to "defend and preserve it for present and future generations." The constitution then fortifies these rights by acknowledging environmental concerns as an economic consideration (Article 170), and the value of ecosystem services (Article 186). Subnational environmental constitutionalism in Brazil is also among the most sophisticated in the world. And then in 1991, Colombia followed suit by recognizing rights to a healthy environment, and by requiring governmental institutions to adopt policies that promote sustainable development, despite the existence of a substantial structure of federal environmental laws.

Moreover, the experience of Zimbabwe shows how environmental constitutionalism in post-colonial Africa can serve as a culmination of prior environmental protection measures. Prior to colonialism, natural resources were managed sustainably at the subsidiary level in Zimbabwe.

> Management of natural resources was centrally vested in the chiefs and village heads. Through customary beliefs and metaphysics, concepts of the sacred forest and totems which regulated the consumption of wildlife products, citizens conserved the environment. Thus, the utilization of environmental resources was achieved in a sustainable way.[131]

During the period of European rule, however, natural resources were viewed more as commodities for the benefit of the colonialists:

> In the nineteenth-century, the scramble and partition of Africa began. The colonialists were guided by philosophies of dispossessing the indigenous black populations of their resources while exploiting these resources for selfish ends. . . . In essence, environmental representation during the colonial period was based on racial grounds, always aimed at making sure that only the Europeans benefited from the use of natural resources.[132]

While the entrenched colonial regime enacted environmental laws, these laws largely underserved traditional interests:

> Although it created modern environmental administration and legislative structures, the colonial regime brought about environmental suppression upon

[131] Chirisa, Innocent and Muzenda, Archimedes. "Environmental Rights as a Substantive Area of the Zimbabwean Constitutional Debate: Implications for Policy and Action." *Southern Peace Review Journal* 2(2) (September 2013): 104–21, available at www.researchgate.net/publication/258299172_Environmental_Rights_and_the_Zimbabwean_Constitutional_Debate_Implications_for_Policy_and_Action

[132] *Ibid.*

> the black majority who consequently lost control over the environment and their natural resources which they had been using for their survival.[133]

Following independence in 1980, the majority government instituted wide and varied legislative measures to re-institute traditional means of environmental management. These efforts culminated in the Environmental Management Bill of 2002, which, among other things, recognized an individual's right to a quality environment, and to have access to information on environmental matters.

Yet these legislative efforts were viewed to fall short, and auger in the push for constitutional reform:

> Service delivery failure has been cited as one condition that led to the violation of environmental rights of the local people in Zimbabwe in the post-colonial times. . . . There is no doubt, that the eventualities of outbreaks of cholera and related diarrhoeal diseases (typhoid, dysentery and diarrhoea) created a serious awareness among citizens for inclusion of the agenda in the constitution-making.[134]

Thus, the push to constitutionalize environmental rights gained force throughout Zimbabwe, aided by "outside forces," and influenced by constitutional developments elsewhere, particularly in South Africa:

> In the environmental rights lobbying platform the outside forces have been acting as watchdogs assessing transparency and equality of participation in comparison to global practice. Local participation in debates and fora has been facilitated by members of parliament, state bureaucrats and councillors, at least from the side of modern institutions. Village Development Committees and Ward Development Committees as grassroots structures have organised their communities in participating in the constitution making process that ultimately saw the inclusion of environmental rights. With respect to traditional institutions, the traditional leadership – village heads, headman and chiefs have played a vital role especially in rural areas. Ideally, the chiefs are overseers of resource management at local level.[135]

Buoyed by these external and internal forces, Zimbabwe amended its constitution to afford a right to a quality environment, and to afford participatory rights in environmental matters. Whether this provision will withstand the test of time in the courts remains to be seen. As the experience in Zimbabwe evinces, environmental constitutionalism can serve as a means of restoring traditional sustainable practices.

[133] *Ibid.* [134] *Ibid.*, 7. [135] *Ibid.*, 6–7.

Environmental constitutionalism seems to be the culmination of environmental protection efforts elsewhere. New Zealand has recognized environmental rights legislatively since 1991. Common law there recognizes indigenous Maori traditions whereby humans are considered part of and descended from the (personified) natural world, and therefore are seen as having a duty of guardianship towards it.[136] Despite these existing laws and traditions, as of this writing New Zealand is considering amending its constitution to recognize an environmental right either as a new instrument, along the lines of the French Charter for the Environment, or as a Bill of Rights. These case studies suggest that the relationship between constitutional environmental rights and environmental laws and regulations is often correlative rather than causative.

There is also the argument that environmental constitutionalism can *thwart* environmental protection. Despite the thrust of global environmental constitutionalism over the past four decades, it is also fair to observe that it has not been the corrective to an ever-growing body of environmental challenges. Gatmaytan argues in fact that while environmental constitutionalism is intellectually and emotionally fulsome, it has had little practical effect on advancing either environmental protection or advancing the human condition. He contends that it can be counterproductive because it can lull legislators and agencies into a false sense of complacency, feeling as though courts will address transgressions.

Yet the thrust of environmental constitutionalism is that it is diffuse across the population (such as rights relating to climate change or air pollution) but may not otherwise affect any particular individual or group strongly enough to justify the effort and expense of lobbying or litigation. Certain types of environmental rights – particularly those relating to environmental justice – can set a constitutional floor that helps to secure basic conditions necessary for everyone to live with dignity, while constitutional protection from environmental racism and toxification is especially important for those who lack resources and who are politically and socially marginalized because they are more susceptible to the adverse effects of environmental degradation. Indeed, environmental claims are starting to be made on behalf of interests that have no possibility of protecting themselves politically, including children, future generations, and nature itself.

[136] For example, the NZ Resource Management Act 1991 includes a duty to consider the Maori concept of *kaitiakitanga* (guardianship) and the "ethic of stewardship" in making all decisions under the Act.

In sum, there is much to commend the human rights protection scheme, the international legal order, domestic legal structures, and global environmental constitutionalism. We do not attempt here to resolve whether one legal paradigm ought to predominate over another. Instead, we conclude that environmental constitutionalism is integral, not substitutive: it supports and scaffolds existing international and national legal systems. It advances constitutionalism generally and is a fitting subject in the evolution of national constitutions around the globe.