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ASPECTS OF A CONSTITUTIONAL RIGHT TO A HABITABLE ENVIRONMENT: TOWARDS AN ENVIRONMENTAL DUE PROCESS

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INTRODUCTION

Pollution is a complicated function of population, urbanization, industrialization and technology. The costs of pollution are often far removed from the benefits, and the environmental tradeoffs are very often difficult to calculate for purposes of establishing sound social policies.¹ That the problems of pollution are and will be severe, however, cannot be doubted.²

The important issue of today is to determine the best institutional approach to upgrading the quality of the environment.³ While technicians can define the consequences of adopting alternative limits on environmental degradation,⁴ they cannot tell us how high our standards for environmental quality should be.⁵ That is to say, they cannot answer

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1. For a description of the problems see J. DALES, *POLLUTION, PROPERTY AND PRICES* (1968) [hereinafter cited as DALES]; A. KNEESE, S. ROLFE & J. HARNED, *MANAGING THE ENVIRONMENT: INTERNATIONAL ECONOMIC COOPERATION FOR POLLUTION CONTROL* (1971) [hereinafter cited as KNEESE]; A. REITZE, JR., *ENVIRONMENTAL LAW* (2d ed. 1972) [hereinafter cited as REITZE]; *ENVIRONMENTAL PROTECTION* (L. Jaffe & L. Tribe eds. 1971) [hereinafter cited as PROTECTION].

2. D. H. MEADOWS, D. L. MEADOWS, J. RANDERS, W. BEHRENS III, *THE LIMITS TO GROWTH* 33 (1972) [hereinafter cited as LIMITS].

3. Tarlock, Book Review, 47 *IND. L.J.* 406, 411 (1972) [hereinafter cited as Book Review].

4. In the future, power may flow from lawyers to the technical professions because technicians have the capacity to take a more integrated view of the problems. Standards are increasingly unsuccessful not primarily because of lax enforcement, but because of insufficient scientific and engineering understanding of the issues and alternatives. *See id.*

5. For example, any water pollution program must resolve three basic issues: (1) the level of water quality desired, (2) the amount of pollutant to be removed to reach this quality level, and (3) the allocation of the burden of cleaning up the water. Ackerman & Sawyer, *The Uncertain Search for Environmental Policy: Scientific Fact-finding and Rational Decisionmaking Along the Delaware River*, 120 *U. PA. L. REV.* 419 (1972). Only the second issue involves purely scientific considerations. More narrowly, where particular power plants are challenged on the basis of environmental considera-

the question, "How much pollution shall we have?" This answer must come through our governmental institutions.

The solutions to the environmental problem are not within the province of a single part of our governmental structure. The interests which must be weighed include the whole range of human activities—the demand for energy and material goods, the desire for better health, the special need of the poor for greater wealth, the limitations of technology, etc. Moreover, any decision must also maintain the balance of the various ecosystems.⁶

There can be no doubt of the crucial importance of the political and

tions, at least three basic "legal" issues must be resolved: (1) Did the utility and authorizing agency sufficiently consider the environmental impact of the plant? (2) What is the appropriate governmental unit or combination of units which should exercise final authority over the utility's decision as to the location and design of the plant? (3) Do the utility's power projections justify the need for the plant at the time it is proposed? Tarlock, *Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 47 IND. L.J. 645 (1972) [hereinafter cited as Tarlock]. Only the third issue involves purely "factual" considerations. The existence of the regulatory structure for the power plant problem allows the issues to be more narrowly defined than is possible in the first example which involved a general water pollution program. There would seem to be at least two broad "how much" questions: (1) How much degradation should we have, and (2) how much can occur to specific components of an ecosystem before that system is threatened? Few, if any, environmentalists argue that the air must be completely "pure." See J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 162 (1971) [hereinafter cited as SAX]. The answer to (1) is a question of the highest policy, but depends in large part on the factual answer to (2). One protective approach toward the environment would be the establishment of ecological base lines beyond which the environment would be protected from more stress than the natural capacity of an ecosystem could accommodate. Caldwell, *Environment: A Challenge to Modern Society*, in *SELECTED LEGAL AND ECONOMIC ASPECTS OF ENVIRONMENTAL PROTECTION* 205 (C. Meyers & A. Tarlock eds. 1971) [hereinafter cited as ASPECTS]. Studies of several river basins indicate that the regional management approach greatly increases the effectiveness and efficiency of water quality improvement programs. See KNEESE, *supra* note 1, at 19. Streams might instead be "specialized," so that one river is given to the polluters and another is preserved for fishermen and swimmers. DALES, *supra* note 1, at 73. It is not clear that such specialization would be permitted under some constitutional claims. In addition, pollution costs might be internalized by establishing property rights in common resources based upon established pollution standards. See, e.g., ASPECTS, *supra*, at 16-19. Such a scheme of cost internalization would allow the market mechanism to efficiently allocate the use of common property resources, thus "solving" the pollution problem in an economic sense. This would not necessarily assure an acceptable pollution level from an environmental perspective. This "solution" reflects the difference in viewpoints: the economist's pollution concern is whether human use of a resource is affected; the ecologist's concern is whether an ecosystem is affected, regardless of known restraints on human uses. See Heller, *Coming to Terms With Growth and the Environment*, in *ENERGY, ECONOMIC GROWTH AND THE ENVIRONMENT* 3, 10-11 (S. Scharr ed. 1972) [hereinafter cited as Heller]. It seems apparent that bare constitutional analysis cannot approach the sophistication necessary to "solve" air and water pollution problems.

6. Allocation of pollution rights would seem to be much like FCC allocation of the electromagnetic spectrum. No one power plant may destroy the air, but many sources "interfere" with the pollution absorption capability. The problem is one of "zoning" on a massive scale. See note 152 *infra* & text accompanying.

administrative processes in solving the problems of the environment. Indeed, since environmental controversies yield many possible solutions, legislation is the superior method of resolution because no criteria exist for choosing alternatives except accommodation of interests.⁷ Legislation institutionalizes the principle of accommodation of interests.⁸

Adjudication, on the other hand, presupposes that a standard of decision exists to apply to a conflict, and the results of adjudication are most easily enforceable where a standard is neutral or accepted as legitimate. The aim is to declare and defend rights, not to accommodate interests.⁹ Yet, most environmental controversies are not susceptible to being reduced to a consistent right-duty relationship between citizens and public agencies.¹⁰ In order for a claim to be classified as a right, there must be a consensus that in a given range of conflicts the claim should be given priority. No such consensus exists with respect to environmental claims,¹¹ and as one author has written:

[C]oherent, stable —and *morally supportable* —government is possible only on the basis of consent, and . . . the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account.¹²

It may be true that the legislative and executive branches possess superior institutional capacities that make them generally better equipped to make and implement basic environmental policy decisions, such as responsiveness to the electorate's value preferences, broad information

7. Howard, *Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers*, 18 J. PUB. LAW 339, 347 (1969). The author defines adjudication as a method of peaceful conflict resolution in which parties present evidence and arguments to a neutral third party for decision according to established principles. *Id.* at 339.

8. *Id.* at 348.

9. *Id.*

10. Book Review, *supra* note 3, at 412.

11. *Id.* at 414. The response of the federal government to the current energy shortage illustrates problems of trying to factor environmental considerations into existing departmental and agency programs in the absence of any consensus about fundamental questions. Tarlock, *supra* note 5, at 662. The Arrow "impossibility theorem" inquires into the suitability of democratic decisionmaking procedures. The problem is to summarize individual preference orderings to produce a unique social ordering of priorities. The theorem holds that under certain reasonable postulates the democratic decision process (social welfare function) results in intransitivities (irrationality). Transitivity may be preserved only if there is a fair cultural uniformity as to values and standard of judgment. Where such uniformity is lacking, majority rule will often result in intransitivities, with the result that the social decision is imposed. Absent a consensus, even the political process cannot insure unique social preference orderings. See Black, *On Arrow's Impossibility Theorem*, 12 J. LAW & ECON. 227 (1969).

12. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 20 (1962) (in the context of a discussion of the justification for judicial review).

gathering capacities, specialized expertise, and the capacity for sustained follow-through.¹³ However, the election of enlightened executives and legislators is a long run solution, and cannot bring back the dead lake or the species of life made extinct.¹⁴ It cannot provide an easy means of retreat from environmentally unsound decisions made by administrative agencies. Lawsuits cannot supply needed environmental information, but they can sharpen the issues and question the factual basis for various assertions about the environment.¹⁵ The limitations of the judicial process, the complexity of the problems, and the suitability of other institutions for expressing values and devising solutions are worthy of the most serious consideration in determining the existence and scope of any constitutional right to a habitable environment. But such considerations do not necessarily preclude the right's existence nor, at this point, delimit its scope.

This article suggests that the courts and the Constitution can provide some answers to the right to a habitable environment. After making several necessary observations about the nature of the environmental problem, this article will examine various constitutional doctrines relating to this right, and offer suggestions for a doctrinal base on which to rest a limited constitutional right to a habitable environment. Case law in this area will also be examined.

NATURE OF THE ENVIRONMENTAL PROBLEM

Environmental degradation imposes costs on society in terms of health, psychic and economic losses, and some of these costs may have constitutional significance. Health costs are one example. While no area of the world suffers a sufficiently high mean annual air pollution level to cause continuous acute health problems,¹⁶ air pollution disasters involving massive illness and death have occurred several times in the last forty years.¹⁷ Yet health is such a complex matter that it is difficult to sort out the various factors causing illness or death,¹⁸ and environmental health

13. Ruckelshaus, *The Citizen and the Environmental Regulatory Process*, 47 *IND. L.J.* 636, 643 (1972).

14. Hanks & Hanks, *The Right to a Habitable Environment*, in *THE RIGHTS OF AMERICANS* 152 (N. Dorsen ed. 1971) [hereinafter cited as Hanks & Hanks].

15. Book Review, *supra* note 3, at 411.

16. Lave & Seskin, *Air Pollution and Human Health*, in *PROTECTION*, *supra* note 1, at 65, 66 [hereinafter cited as Lave & Seskin].

17. Such disasters have occurred in Belgium in 1930; Donora, Pennsylvania, in 1948; London, England, in 1952 and 1962; and in New York City in 1953, 1962, 1963, 1966. REITZE, *supra* note 1, ch. 3, at 1.

18. Lave & Seskin, *supra* note 16, at 67.

hazards develop so slowly that the harm may be far removed from the cause.¹⁹

Property damage is another cost which is almost too obvious to cite.²⁰ Moreover, those who suffer most from pollution are those whom society has already rejected as social outcasts—the aged, the poor and the minorities who are trapped in the inner city.²¹ The urban poor tend to live, work and play in the inner city, living closer to streets with high concentrations of traffic and exhaust fumes. They breathe highly polluted air twenty-four hours per day compared to the wealthier classes who spend more time where the air is cleaner.²²

There is no indication that these costs will decrease. Indeed, the contrary is more likely. The American labor force for the next twenty years is already born and intends to work. Absent a deliberate policy of unemployment, this fact is also of enormous significance. For over 100 years productivity has been rising at 2 to 3 per cent per year, and the profit motive promotes daily private decisions favoring higher productivity.²³ Moreover, increased productivity is essential since we aren't really so affluent when one half of all households earn less than \$8,500 per year.²⁴ Given increases in both productivity and the size of the labor force, production should increase at about 4 per cent per year for the foreseeable future.²⁵ This means more electric power, smoke, cans and steel, and consequently, more air and water pollution.

19. REITZE, *supra* note 1, intro., at 2-3.

20. ENVIRONMENTAL QUALITY: THE FIRST REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, in REITZE, *supra* note 16, ch. 3, at 3-4.

21. *Id.*, ch. 3, at 9.

22. KNEESE, *supra* note 1, at 14. Because the city tends to be warmer than the countryside, the resulting air circulation patterns intensify the entrapment of air pollution. This is called the "heat island effect." REITZE, *supra* note 1, ch. 3, at 1.

23. Dale, *The Economics of Pollution*, in PROTECTION, *supra* note 1, at 17 [hereinafter cited as Dale].

24. *Id.* at 17. Given the present extent of poverty, crime and other social ills, growth may be a necessary condition for social advance—for improving the quality of the total environment. Heller, *supra* note 5, at 10, 11.

25. Dale, *supra* note 23, at 19. At a 4% growth rate total production would double every eighteen years. United States GNP grew at 3.4% per year during the period 1961-1968. LIMITS, *supra* note 2, at 49. It should also be noted that government spending also induces increased environmental degradation. Sewage plants require more steel and electric power; government employees require paper to do their work, and they are paid and consume; increases in welfare spending increase the consumption of the poor. The shift from private to public spending would thus have little impact on the waste total, except to the extent that spending is for services rather than goods. Dale, *supra* note 23, at 20.

It should also be apparent that pollution is always economically beneficial to some people to some extent, if only that it reduces the price of products. *Id.* at 7. See also, Tarlock, *supra* note 5. For example, conversion from the gasoline piston engine would put an enormous drain on many of the nation's energies. Also, the growing energy crisis

The second outstanding characteristic of the environmental problem is the complex balance among the various "ecosystems." Plants, animals and microorganisms living in the same area are biologically interconnected. These interdependent biological and physical components make up an ecosystem.²⁶ The more complex ecosystems are more stable.²⁷ Perhaps the most subtle and dangerous threat to our existence is the potential destruction, by man's activities, of the ecological systems upon which the human species depends.²⁸

The systems nature of the environment means that solutions to pollution problems often increase or create other pollution problems. For example, carbon monoxide and hydrocarbon emissions are reduced by high compression engines operating at high temperatures, but carbon dioxide and nitrogen oxide production are thereby increased.²⁹ Pittsburgh cleaned up its air by dumping its residuals in the Ohio River.³⁰ These complexities are compounded by the fact that even the waste materials interact. Sometimes wastes are harmful in themselves, sometimes harmful effects cancel out and sometimes harmless wastes combine to be harmful.³¹

A final observation about the nature of the environmental problem involves the associated structural economics.³² Our economic system favoring free markets holds consumer and producer sovereignty as fundamental value premises.³³ Our policy is to allow the personal wants of individuals in society "to guide the use of resources in production, distribution, and exchange."³⁴ Under ideal conditions a competitive market structure would result in a Pareto Optimal allocation of resources.³⁵ Under such conditions, the most efficient solution to the resources allocation problem would be to limit the government to decisions about income distribution, rules of property and enforcement of competition.³⁶ How-

poses the problem of minimizing pollution costs without sacrificing economic benefits. See KNEESE, *supra* note 1, at 73-81.

26. ASPECTS, *supra* note 5, at 200, quoting P. EHRLICH & A. EHRLICH, POPULATION, RESOURCES, ENVIRONMENT: ISSUES IN HUMAN ECOLOGY 157-59 (1970).

27. ASPECTS, *supra* note 5, at 201.

28. *Id.*

29. REITZE, *supra* note 1, ch. 3, at 58.

30. Book Review, *supra* note 3, at 413 n.33. There could be a net gain in pollution abatement through a social decision to shift to goods requiring less energy production however. See Heller, *supra* note 5, at 6-8.

31. DALES, *supra* note 1, at 6. See also KNEESE, *supra* note 1, at 212-16 which describes the reactions brought about by excess carbon dioxide emissions.

32. See ASPECTS, *supra* note 5, at 1-19, 205-10 & articles cited therein.

33. Davis & Kamien, *Externalities and the Quality of Air and Water*, in ASPECTS, *supra* note 5, at 3 [hereinafter cited as Davis & Kamien].

34. KNEESE, *supra* note 1, at 6.

35. Davis & Kamien, *supra* note 33, at 5.

36. KNEESE, *supra* note 1, at 6.

ever, the market system fails to control the use of "public goods," such as the pollution assimilation capacities of air and water.³⁷ Common property is degraded because pollution appears costless to producers and individuals since these scarce assets are not individually owned and managed.³⁸ There is no way to express desires for clean air through our market mechanism for allocating resources. Such values must be expressed through our social institutions responsible for public policy.³⁹

Unrestricted use of common property leads to social, political and economic frictions because individuals have no legal rights with respect to such property. When the government fails to restrict the use of common property, the policy appears neutral, but, in fact, always favors the polluter: swimmers cannot harm polluters, but polluters can harm swimmers. When rights to common property are undefined, those who use it in ways causing degradation inevitably triumph over those who don't.⁴⁰ Government cannot express a policy of neutrality through inaction.⁴¹

THE CONSTITUTIONAL SETTING

The advocates of a constitutional right to a habitable environment face a heavy burden of demonstration, not the least of which is that of definition. The "right" has been variously advanced as the "right to a habitable environment,"⁴² the "right of freedom from ecocide"⁴³ and the "right to be free of unreasonable environmental degradation."⁴⁴ Such

37. *Id.* at 48.

38. *Id.* at 8. Strictly, the failure is because property rights in such assets are not defined. Such rights are difficult to define because of difficulties in excluding others from the use of the resource. See Goetz, *Public v. Private Goods*, in ASPECTS, *supra* note 5, at 10-16. Public ownership would be acceptable in the economic model if property rights could be defined.

39. KNEESE, *supra* note 1, at 48.

40. DALES, *supra* note 1, at 67. See also Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105 (M. Baldwin & J. Page eds. 1970).

41. This says nothing about whether government should be, or is required to be, neutral. Government inaction may reflect no intent, but merely ignorance or inattention to the facts. If so, inaction expresses no *policy* at all.

42. Hanks & Hanks, *supra* note 14, at 146.

43. Pettigrew, *A Constitutional Right of Freedom from Ecocide*, 2 ENV. L. 1 (1971) [hereinafter cited as Pettigrew]. Ecocide is defined as the substantial destruction of an integral part of a particular ecosystem or the unreasonable degradation of the environment in general.

44. Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970) [hereinafter cited as Note]. The author proposes such a standard to allow a court to balance environmental needs against demands for material progress. Part of the difficulty is the attempt at definition in the abstract, for which the author should not be condemned, but which may explain the general absence of attempts to find policies supporting the definitions given. Thus, the "unreasonableness" standard would seem to have at least two aspects, procedural and substantive: (1) procedural insofar as the

definitions are overbroad and hopelessly devoid of policy guidance,⁴⁵ since the term "environment" includes both (1) the complex of physical and biological factors acting on an organism or ecosystem, and (2) the aggregate of political, economic, social and cultural conditions that influence individual and group behavior.⁴⁶

The better (and easier) approach is to ignore this definitional phase altogether and ask instead whether any interests are protected from particular types of environmental degradation.⁴⁷ The question should be not whether there is a right to a habitable environment, but whether health, life, property, nearly extinct animal species or aesthetic interests, etc. are protected from environment-altering activity.⁴⁸ In this way, one asks, for example, whether the Constitution guards against specific environmental effects on human beings rather than a more generalized harm to entire ecosystems.⁴⁹ One also asks whether the Constitution prohibits harm to ecosystems apart from perceived effects on human beings.

Rights relating to the environment may be derived through two conceptually distinct methods. One approach is to attempt to find environmental rights within specific constitutional guarantees, each guarantee viewed independently of all others. This approach would be institutionally advantageous to the Supreme Court because it follows a traditional analysis and because the right would bear a traditional name. For example, particular cases would hold that on the facts there was a violation of due process, rather than holding that environmental rights were infringed. However, this method seems so narrow as to foreclose any broad rights for the preservation of ecosystems as such. The second approach, more consistent with the rights sought by ecologists, is to consider the Constitution as a whole, including the preamble,⁵⁰ and to derive environ-

outcome is affected by the current state of the art; (2) substantive where the state of the art is irrelevant, *e.g.*, under the most severe threats to health. The definitions are not, for the most part, policy oriented so as to provide any analytical approach to such cases.

45. A problem which the authors Hanks recognize. Hanks & Hanks, *supra* note 14, at 146.

46. *Id.*

47. The substantive arguments of many authors do precisely this, although they do not explain their abandonment of the definitional approach.

48. This is not to suggest the traditional case-by-case approach. Here, the question is more general—*e.g.*, assuming that air pollution threatens human health, is there any right to be free of such a threat. If such a right exists, one might then formulate policies for deciding when the threat is "unreasonable."

49. This is the question whether the Constitution implements the economist's or the ecologist's concern about pollution. See note 5 *supra* & text accompanying. See Pettigrew, *supra* note 43; Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, in *LAW AND THE ENVIRONMENT* 134 (M. Baldwin & J. Page eds. 1970) [hereinafter cited as Roberts].

50. The preamble is often used for purely rhetorical comments. See, *e.g.*, McGau-

mental rights which would be conceptually independent of existing guarantees, though supported in part by the policies of such guarantees.⁵¹ This would allow the development of an "environmental due process" analysis not confined to conventional analysis.⁵² This article will explore these constitutional theories in greater detail, and suggest a middle path, but first there should be an examination of the limitations to the existence or scope of rights which might be found, the most important of which is the requirement of state action.⁵³

State Action

It is well-settled that the fifth amendment is a limitation on the powers of the federal government only,⁵⁴ and that the fourteenth is directed at actions of the states, rather than those of individuals.⁵⁵ Therefore, it is ordinarily necessary to determine whether the requisite governmental action is present in order to assert a constitutional right unless the right to be free of air pollution does not require such action.

Most air pollution tonnage is generated by private individuals and corporations who are unregulated by the government, although some of their activities may be licensed. The mere issuance of a license, however, is not sufficient government involvement for there to be "state action" under the fourteenth amendment,⁵⁶ nor, presumably, under the fifth.

tha v. California, 402 U.S. 183, 246 n.17 (1971); Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335 (W.D. Mich. 1970). The preamble is not a source of substantive power conferred on any department of the government of the United States. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The extent to which it may limit the exercise of substantive powers is not clear.

51. This is the approach most used by environmentalists, but they usually look only to certain rights provisions and ignore the governmental powers provisions, labeling the result a ninth amendment right. See, e.g., Roberts, *supra* note 49, at 162-63; Note, *supra* note 44. Others base their arguments entirely upon the ninth amendment. See Pettigrew, *supra* note 43, at 5. The ninth amendment is considered in more detail below.

52. *Griswold v. Connecticut*, 381 U.S. 479 (1965), seems to permit such an approach.

53. *Corrigan v. Buckley*, 271 U.S. 323 (1926).

54. *Civil Rights Cases*, 109 U.S. 3 (1883). This is not totally accurate since some rights such as the right of travel affect individuals directly, as does the ninth amendment. See notes 104 & 105 *infra* & text accompanying.

55. See notes 14-17 *supra* & text accompanying.

56. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). The Court held that the mere issuance of a liquor license to a private club is not such state involvement with the club's activities as to make the club's racially discriminatory practices forbidden by the equal protection clause. The Court reasoned that to hold state action exists whenever private discriminators receive any benefits or services at all from the state would be to emasculate the state-private conduct distinction. *Id.* at 173. The licensees were regulated in detail as to their facilities and were required to maintain extensive financial and membership records, but none of these regulations were perceived as fostering discrimination. Dissenting Justices Douglas and Marshall agreed that mere licensing would be insufficient state involvement for purposes of the equal protection clause, but argued that there was sufficient state involvement since only a limited number of licenses could be

On the other hand, the issuance of certificates of public convenience and necessity, which often amount to a grant of monopoly, may be sufficient governmental involvement. This theory would make the activities of most power companies government action.

*Public Utilities Commission v. Pollak*⁵⁷ involved government regulation under such a certificate. The Commission regulated the service and equipment of a private street railway company in the District of Columbia. The company received and amplified radio programs through loudspeakers in its passenger vehicles, and the Commission, after full hearings on the matter, concluded that the radio service was not inconsistent with the public convenience, comfort and safety. Some passengers complained that continuation of the service violated their rights under the first and fifth amendments. The Supreme Court held that there was a sufficiently close relationship between the government and the radio service to require a consideration of the constitutional claims on the merits, although it specifically declined to rely on the mere fact that the company operated under the authority of Congress and thereby enjoyed a monopoly of the street railway and bus transportation in the District.⁵⁸ Rather, the Court relied on the fact that the Commission had investigated the particular question and had refused to interfere with the radio service. This analytical approach is consistent with the Court's general practice of narrowing constitutional questions. The case does not reject the theory that the authorization of a monopoly, through the issuance of certificates of public convenience and necessity, would be enough to constitute the licensee's actions state action. In this case, the Commission's action amounted to direct authorization of the challenged activity, and therefore the holding indicates only a sufficiency condition rather than a necessary condition.

issued and the majority had been issued to private clubs, raising the probability that Blacks and Whites would not have equal access to liquor in the county. *Id.* at 180-83. Interestingly, the majority held a particular license condition requiring all clubs to follow their bylaws to be state discrimination, since the club's bylaws discriminated. *Id.* at 178-79. This analytical segregation of the various license conditions suggests a search for "causation" of the discrimination and, more importantly, when linked to the other holding discussed above, indicates that there is to be no doctrine of "pendent state action" even within the context of a single regulatory scheme of a single licensing agency. In *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), the Chief Justice, writing for himself and Justices Stewart and Rehnquist, held that a broadcast licensee's refusal to accept a paid editorial advertisement is not "government action" for first amendment purposes, on the ground that the licensee policy challenged was within the discretion allowed by Congress in its journalistic role and the FCC had not fostered the policy, but merely allowed the exercise of such discretion. *Id.* at 118-19. See also P. FREUND, ON LAW AND JUSTICE 14-20 (1968).

57. 343 U.S. 451 (1952).

58. *Id.* at 462.

However, in *Moose Lodge No. 107 v. Irvis*⁵⁹ the Court held that certain liquor licensing regulations did not sufficiently involve the state in fostering the racially discriminatory practices of a licensed private club. Although the licensing and regulatory schemes in *Moose Lodge* were not as comprehensive as those associated with the regulation of a power company, this case suggests that the existence of a more comprehensive regulatory pattern and even the granting of a business monopoly would *not* be sufficient government involvement in the emission of air pollutants. This is so because overconsumption of the air's pollution assimilative capacity results from individual perception of the air as a free resource, and not because of factors inherent in the monopoly grant. While the monopoly, because of its grant, may be in a better economic position to unilaterally employ antipollution measures, its failure to reduce emissions cannot transform its polluting activity into governmental action; it would have the constitutional duty to reduce emissions only if those emissions were government action in the first instance.

Power company rate structure and plant siting are regulated by government agencies, and both types of regulation arguably affect emission levels directly to an extent sufficient to make such emissions governmental action within the principles of *Pollak* and *Moose Lodge*.⁶⁰ However, such factors as discount rates to high volume consumers, advertising expenses for the promotion of power consumption and price increases for antipollution technology affect the environment by increasing consumption. In addition, plant siting affects the overall concentration of pollutants in the air and water near the plant. An agency's attempts to maintain lower prices to power consumers does not prevent these regulatory activities from being considered sufficient government action for purposes of the due process clauses. Moreover, just because an agency has not been particularly concerned with environmental matters does not prevent its actions from affecting the environment in a manner that would constitute direct governmental involvement.⁶¹

59. 407 U.S. 163 (1972); see note 56 *supra*.

60. In *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), the FCC had rejected the claims of DNC and concluded the challenged licensee policy was not inconsistent with the public interest. Chief Justice Burger distinguished *Pollak* on the grounds that the FCC regulatory licensing scheme is not as pervasive as that in *Pollak* and that journalistic discretion is preserved under the Communication Act, subject only to overall performance in the public interest. *Id.* at 120. Thus, licensee decisions are, to a larger extent than in *Pollak*, free of government supervision.

61. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In that case, state action was found when the owner of a restaurant which was leased from a state-owned parking garage discriminated on the basis of race. However, the Court in *Moose Lodge* characterized the state-lessee relationship as symbiotic because income from the lease was necessary to support the parking building. *Moose Lodge No. 107 v. Irvis*,

It is sometimes urged that economically powerful private corporations should be subject to constitutional limitations as the state itself is, chiefly because such enterprises have sufficient power to invade constitutional rights and because the government relies upon the corporate system to perform economic functions for which the people hold the government ultimately responsible.⁶² This argument, however, begs the question of whether private action *can* amount to governmental action. On occasion, private organizations have been deemed clothed with sufficient public responsibility, with or without statutory mandate, to be subject to constitutional limitations.⁶³

There are other ways in which the government is involved with private pollution activities. As discussed above, an "anything goes" policy always favors the private environmental degrader over the environmental preserver, thereby permitting the private polluter to view the consumption of common resources as costless.⁶⁴ This "policy" can be characterized as a kind of environmental "zoning" which is a governmental function.⁶⁵

407 U.S. 163, 175 (1972). Moreover, the agency had the power to require service on a nondiscriminatory basis. NEPA now mandates the consideration of environmental values, but even without this statute one could surely not accept a claim that no government action is involved—so that constitutional rights are not at stake—merely because no statute directly authorizes consideration of constitutional rights. To accept such a claim, where environmental rights are at stake, would be to allow such rights to be abridged merely because no one considered them.

62. See Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933 (1952).

63. See *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) (shopping center open to public); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company owned town); *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192 (1944) (labor unions); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960) (private bus company). For an article treating the evolution and direction of the state action concept, see Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963). See also text accompanying notes 32-41 *supra*.

64. For this to be deemed *government* involvement, there would have to be some government responsibility toward common resources. There appears to be a government responsibility under the public trust doctrine, especially as articulated in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). See notes 72-81 *infra* & text accompanying. Neither government ignorance of the theory that market competition *necessarily* leads to over consumption of common resources by producers who are acting as profit maximizers, nor ignorance that this behavior has in fact been a major cause of the pollution problem, has any bearing on the issue of government action. However, this again is not to say that the "anything goes" policy is unconstitutional, even if there are environmental rights. The discussion here is only of government action and not of the merits.

65. Where the Court invalidated on equal protection grounds an amendment to the California constitution which provided that the state could not deny the right of a person to convey residential real estate in his absolute discretion, Mr. Justice Douglas addressed the state action question as follows:

Zoning is a state and municipal function. . . . When the State leaves that function to private agencies or institutions which are licensees and which practice racial discrimination and zone our cities into white and black belts . . . it suffers a governmental function to be performed under private auspices in a way the State itself may not act.

Moreover, government has contributed significantly to the rapid growth of private automobile use through extensive highway construction. This result stems from a "systems" view which regards roads and cars as components of the nation's transportation system. Racial minorities who have been confined by government policies to central urban areas have special claims that government action has subjected them to particularly severe threats to health and life from air pollution, even if there is insufficient government involvement in the pollution itself.

If, in the absence of comprehensive regulation, government involvement in private pollution activities is deemed insufficient, there are serious state action problems where the degradation in ambient air quality is due to multiple source emissions, most, but not all, of which are private. Is there government action with respect to the overall degradation where the government action source, acting alone, would not consume the atmosphere's pollution assimilative capacity? Such a source at least promotes the overall problem. If so, may there be a remedy—either damages⁶⁶ or an injunction—against only the governmentally involved source? Aside from the difficulties in allocating damages to the government source, such a limitation of defendants would make the environmental right itself of little use. Could there be a doctrine of "pendent government action," so that private polluters could be joined as defendants with the government action source? It seems not,⁶⁷ but then why bother to hold that there is insufficient governmental action involved in the private pollution activities?

If the environmental right is not incorporated into the due process clauses of the fifth and fourteenth amendments—*i.e.* if the right is found under the ninth amendment or is deemed to stand on its own, then arguably, the right could serve to limit private activities as well as those of the government. Such a right would not be unique.⁶⁸ However, Mr. Justice

Reitman v. Mulkey, 387 U.S. 369, 384 (1967) (concurring opinion). In its narrowest sense, *Shelley v. Kraemer*, 334 U.S. 1 (1948), which held that judicial enforcement of private racially restrictive covenants violates the equal protection clause, might be viewed as analogous to zoning cases.

66. There might be a right of action for damages against either the regulating agency itself or its officials who make the regulatory decisions. Cf. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), holding that the violation of fourth amendment rights against unreasonable searches and seizures by a federal agent acting under color of his authority gives rise to a cause of action for damages against the agent.

67. There would seem to be problems of due process toward the defendants under such an approach, which smacks of guilt by association. Besides, the rejection of a "pendency" theory even as to independent actions of a single government agency seems to preclude the bringing in of private defendants whose actions are, by hypothesis, independent of government action. See note 56 *supra*.

68. See *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *United States v. Guest*, 383

Harlan has stated his opposition to such a concept:

As a general proposition it seems to me very dubious that the Constitution was intended to create certain rights of private individuals as against other private individuals. The Constitutional Convention was called to establish a nation, not to reform the common law. Even the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority, not other individuals.⁶⁹

Justice Harlan is surely correct as to his general proposition, for the Constitution as a whole is concerned with the allocation of public powers to various institutions. In our society many private interactions were intended to occur free from a pervading governmental interest which would exist if the Constitution regulated such activities. The existence of the state action-private action distinction indicates this much. Indeed the policies developed in deciding particular state action questions should be relevant to the issue of whether any environmental right extends to purely private conduct.⁷⁰ A polluter's claim to privacy for his polluting activities would seem to be of minimal significance; but to answer whether this is sufficient to overcome Mr. Justice Harlan's objections would be the merest speculation, and the point is not further pursued.

THE PUBLIC TRUST DOCTRINE

The first constitutional doctrine affecting the environment which I intend to discuss is the public trust doctrine.⁷¹ This doctrine contains

U.S. 745 (1966). In these cases, statutes prohibiting conspiracies were upheld, at least in part, on the theory that the right to travel runs against private individuals, but conspiracies rather than individual actions were involved.

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

70. *See Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968).

71. I do not intend to treat the fifth amendment "taking" doctrine in depth, although it should be mentioned. Where government action results in the "taking" of an "air easement" over private property, the owner's loss is compensable under the fifth and fourteenth amendments. *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946). The "taking" may be accomplished by a nuisance which substantially deprives the owner of the use of his land. *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962) (noise nuisance). If polluting activities, regulated or not, are deemed government actions, this theory seems rather easily extendable to holding the polluters liable for the property damage they inflict, at least to the value of a pollution easement. If the polluting activities causing property damage are deemed private actions and if the landowner cannot get an injunction, then some would argue that this remedy limitation is equivalent to allowing an unconstitutional private power of eminent domain. Unfortunately, this is also equivalent to maintaining that, as a constitutional principle, "property" may never be imperfectly defined in terms of exclusivity, *i.e.*, that whenever an interest would be deemed "property" for constitutional purposes, the interest necessarily includes the absolute right to exclude all others from any

three general principles: (1) certain interests, such as the air and the sea, are so important to the citizenry that it would be unwise to make them the subject of private ownership; (2) these interests partake so much of the bounty of nature, rather than of individual enterprise, that they should be freely available to the entire citizenry without regard to economic status; and (3) a principal purpose of government is to promote the interests of the general public rather than to distribute public goods to restricted private benefit.⁷² The doctrine has very little to say about the distribution of the benefits of trust resources, nor does it prohibit government disposition or use of trust property as long as public rights are protected.⁷³ The American trust doctrine has never determined that common property resources must be held in reserve from all private development or that they must be maintained in their traditional purity.⁷⁴ The public trust theory involves a close judicial scrutiny of public resource disposition, but provides no standards for a court to decide that any but extreme uses of natural resources violate public rights.⁷⁵ Public trust law is "a technique by which courts may mend

sort of intrusion. This argument ignores the still serious concern with the state action limitation, it ignores Mr. Justice Harlan's point that the Constitution is not designed to be a common law of private relations, and further ignores the fact that under traditional nuisance law some damage short of substantiality is permitted without even a damage remedy. "Property" is not a physical attribute, but a matter of definition. Limiting the owner's remedy to damages is equivalent to a definition of what the owner's "property" is. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

72. SAX, *supra* note 5, at 165. Professor Tarlock argues that these three principles cannot be derived from the public trust doctrine for it cannot determine what level of environmental quality should be maintained. Book Review, *supra* note 3, at 412. It appears that the Sax principles cannot determine what level of quality should be maintained, whatever may be the case with the doctrine itself. Rather, the three principles seem aimed at determining which resources should be subject to the trust and not, in themselves, to answer "how much" questions. No case was discovered which applied the doctrine to air.

73. Book Review, *supra* note 3, at 412-13.

74. SAX, *supra* note 5, at 167. Courts have reviewed transfers for developmental purposes on a standard which requires that the grant be for a use which is consistent with the protection of the public rights for which the trust was imposed. ASPECTS, *supra* note 5, at 220. The doctrine functions more to delay development rather than to provide standards to constrain it. *Id.* at 240.

75. Book Review, *supra* note 3, at 413. The leading case is *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). The 1869 Illinois legislature gave the railroad fee title to much of the submerged bed of Lake Michigan. The 1873 legislature repealed the 1869 statute. The state won a quiet title action to the submerged land over the railroad's claims that it held a vested property right. The Supreme Court held that the lands were subject to a public trust and that the state could not grant the lands so as to substantially impair the public interest in lands and waters remaining. The state could not abdicate its trust over property in which the whole people are interested, so as to leave them entirely under the use and control of private parties. This case would seem to indicate that the government has the necessary ultimate responsibility for trust resources, so that there could be government action in the government's silence about air

perceived imperfections in the legislative and administrative process a medium for democratization."⁷⁶

The Constitution has been construed as imposing a trust on public property,⁷⁷ usually for the purpose of upholding restraints imposed by Congress on the use of such property. The trust is apparently applicable to any public asset capable of disposition as property belonging to the United States. In *Ashwander v. TVA*,⁷⁸ shareholders of a private corporation challenged, on ninth and tenth amendment grounds, the power of Congress to authorize the TVA to contractually dispose of surplus electric energy to their company. The Court held that Congress' power over public property under Article IV, Section 3, is not limited to territory, but extends to all property, both real and personal, that rightfully belongs to the United States. Electric energy generated at the TVA dam was deemed susceptible of disposition as property belonging to the United States. The plaintiffs' claims were rejected on the ground that Congress' power under Article IV, Section 3, is plenary, but as to the method of disposing of common property, the Court said:

[It] must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation prin-

pollution. See note 116 *infra* & text accompanying. If the air is subject to a public trust, this case suggests that government cannot, beyond some level, allow its continued degradation. The constitutional doctrine developed under article IV, section 3 does not seem to go so far in restricting the alienation of trust property, though cases of perceived abandonment of trust responsibilities of the magnitude in *Illinois Central* have seldom been litigated under that clause.

76. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509 (1970) [hereinafter cited as *Public Trust*].

77. U.S. CONST. art. IV, § 3; several cases illustrate this point. *Light v. United States*, 220 U.S. 523 (1911), held that the United States was entitled to injunctive relief against a farmer who grazed his cattle on a forest reservation without acquiring a permit from the Secretary of Agriculture as required by statute. The Court reasoned that (1) all public lands of the United States are held in trust for the people, (2) it is not for the courts to say how the trust shall be administered, and (3) Congress may preserve the lands or disestablish the preserve and devote the property to some other national and public purpose. *Ruddy v. Rossi*, 248 U.S. 104 (1918), upheld, in a suit by a judgment creditor seeking to levy execution on the debtor's homestead, prohibitions in the Homestead Act of 1862 against levies for prior debts, reasoning that Congress has plenary power to dispose of the public lands upon such terms and conditions as the public interests require. *United States v. City & County of San Francisco*, 310 U.S. 16 (1940), held the United States entitled to an injunction to restrain the city from disposing of electric power to private utilities in violation of restraints imposed in a grant of access to Yosemite National Park. The Court said, "Congress [is] in effect trustee of public lands for all the people . . ." and reasoned that the congressional power under article IV, section 3 is without limitations and that Congress may limit the disposition of the public domain in a manner consistent with its view of public policy. *Id.* at 28.

78. 297 U.S. 288 (1936).

ciples of our dual system of government and must not be contrived to govern the concerns reserved to the states.⁷⁹

One perhaps seldom thinks of air as "property" of the United States in the sense of any proprietary interest. In economic terms, it is common property and seems to fit ideally within Professor Sax's three principles. However, even if air, or the atmosphere's pollution assimilative capacity, were brought within this constitutional doctrine, the environmentalists should still be troubled. The Court has indicated that Congress has plenary power over the disposition of the trust, at least so long as the disposition is for a public purpose. The use of the air as a dump to promote industrial growth and national wealth would seem to satisfy the public purpose limitation. Congress may not have affirmatively expressed such a policy, though a belief in growth might be said to be an American characteristic, but environmentalists would not want the claimed right destroyed by a statute. The preservation of the air for human health could not be said to be the sole reason for imposing the trust,⁸¹ although this use is significant. At best, health would have to be balanced against other uses of the trust under the doctrine. This would be a rather minimal doctrinal advance over ignoring the uses of the atmosphere, although it would perhaps be of greater significance with respect to the degradation of other ecosystems. Certainly there would be constitutional protection not now afforded such systems, but this would hardly elevate human health to the preeminent constitutional concern which the environmentalists seek. They seek to elevate the environmental rights to the status of the Bill of Rights; a status which the public trust doctrine is not designed to convey.

NINTH AMENDMENT

The ninth amendment⁸² is many things to many people, but what it is to the Supreme Court is not entirely clear.⁸³ It is variously a source of

79. *Id.* at 338.

80. See note 77 *supra*.

81. The trust theory is to protect the majority from the will of the minority—the opposite of the concern in Bill of Rights problems. Thus, public trust problems should not be considered constitutional issues for resolution by the courts where there has been a clear legislative determination of the uses to be made of trust resources. *Public Trust*, *supra* note 76, at 559-65.

82. "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

83. It may be clear to Mr. Justice Douglas. Dissenting in *Palmer v. Thompson*, 403 U.S. 217, 231 (1971), which held that the closing of all public swimming pools in Jackson, Mississippi, did not violate the equal protection clause, he said:

There is, of course, not a word in the Constitution . . . concerning the right of the people to education or to work or to recreation by swimming or

natural justice rights;⁸⁴ a rule of construction for securing unenumerated rights⁸⁵ (but not a source of rights⁸⁶); a grant of standing to argue public rights;⁸⁷ a source of public rights;⁸⁸ and solely a protector of individual, personal rights.⁸⁹

Arguments for the creation of new substantive rights through ninth amendment adjudication tend to fall into two categories: (1) claims that the amendment is itself a source of rights,⁹⁰ and (2) claims that the amendment is only a rule of construction allowing an examination of the Constitution as a whole in a search for new rights.⁹¹ The distinction may be a mere technicality, since the language of the amendment certainly does not suggest policies independent of the Constitution as a whole, but the former view may theoretically allow a more searching inquiry into materials beyond the text of the Constitution. In effect, both arguments authorize a "substantive due process" approach.⁹²

Both the language and the history of the ninth amendment appear to support an argument that at least some of the rights found must limit the states, as well as the federal government. Indeed, "fundamental" rights, as concepts of natural law, could hardly be so labeled if the states

otherwise. Those rights, like the right to pure air and pure water, may well be rights "retained by the people" under the Ninth Amendment.

Id. at 233-34.

84. See Roberts, *The Right to a Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674, 691 (1970) [hereinafter cited as *Decent Environment*].

85. Pettigrew, *supra* note 43, at 11.

86. Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 MARQ. L. REV. 121, 134 (1968) [hereinafter cited as Kutner]; Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966).

87. Mr. Justice Harlan suggested this possibility, perhaps somewhat tongue-in-cheek, in his dissent in *Flast v. Cohen*, 392 U.S. 83, 129 n.18 (1968).

88. See Ritz, *The Original Purpose and Present Utility of the Ninth Amendment*, 25 WASH. & LEE L. REV. 1 (1968) [hereinafter cited as Ritz].

89. B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 58 (1955) [hereinafter cited as NINTH AMENDMENT]. Patterson offers the most comprehensive treatment of the history of the ninth amendment, but extensive discourse on the history may also be found in Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Kutner, *supra* note 86; Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962); Ritz, *supra* note 88.

90. Patterson contends that the amendment preserves natural justice rights, such as the right of privacy, the right to acquire property, and the right to the fruits of one's labor, because it expresses the general 18th century American political philosophy of the social compact. NINTH AMENDMENT, *supra* note 89, at 55, 69. Others view the amendment as preserving, on its own force, those "fundamental" rights originating in the history and traditions of our people. See, e.g., Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 U. CIN. L. REV. 777 (1968); Note, *Ninth Amendment Vindication of Unenumerated Fundamental Rights*, 42 TEMP. L.Q. 46 (1968).

91. See, e.g., Pettigrew, *supra* note 43, at 43.

92. See NINTH AMENDMENT, *supra* note 89, at 36-41.

were not restrained.⁹³ By its terms the amendment applies to the entire Constitution, rather than just the first eight amendments, and the Constitution prohibits certain actions by the states.⁹⁴ Moreover, ninth amendment rights are unenumerated, so that there is no reason to suppose that only the federal government is limited.⁹⁵

In any case, one might ask whether the ninth amendment does anything which the fifth and fourteenth amendments do not do, aside from possibly legitimating "substantive due process." It has been suggested that the fifth and fourteenth amendments apply to "persons" in their individual capacities, whereas the ninth preserves rights of the "people" as the people,⁹⁶ *i.e.*, that it provides public rights either in lieu of or in addition to private rights. This assertion may be correct if Madison's proposed first amendment, understood to be a bill of rights, survives in the ninth amendment, for its prime purpose was to safeguard rights of the people *qua* the people.⁹⁷ If a right to "happiness and safety"⁹⁸ is such a right, and if "safety" includes "health," and "happiness" includes "aesthetically pleasing surroundings," then arguably there is a public right to be free of environmental degradation which threatens human life or unique natural phenomena. This seems equivalent to stating that our air resources are subject to a public trust, at least insofar as the public's health is protected. However, finding this right in the ninth amendment (or any other) specifically limits the disposition of the trust, rather than merely providing a factor to be considered in determining whether the trust is being used for a public purpose.

Even if the ninth amendment only legitimates "substantive due process," as the language and history of the amendment seem to suggest, this could be of significant value to the Supreme Court's institutional

93. See U.S. CONST. art. I, § 10.

94. The ninth amendment was the tenth clause of Madison's proposed fourth amendment. Madison's fourth amendment was to have been inserted in article I, section 9, which seems to apply only to Congress. However, Madison's proposed first amendment was to have applied to the entire Constitution and was called a "bill of rights." Madison indicated that at least one purpose in drafting the tenth clause of his fourth amendment was to counter the objection that a "bill of rights" would disparage unenumerated rights. NINTH AMENDMENT, *supra* note 89, at 115-16. The proposed first amendment failed to pass, but this should not alter the conclusion as to the intended scope of the ninth amendment. *Id.* at 110-16.

95. Ritz, *supra* note 88, at 12. But see NINTH AMENDMENT, *supra* note 89.

96. Ritz, *supra* note 88, at 3.

97. *Id.* at 14. The three rights are: (1) the right to acquire and use property; (2) the right to pursue and obtain happiness and safety; and (3) the right to reform or change the government. See note 159 *infra*.

98. Ritz suggests that the right to happiness and safety arises whenever the government becomes impotent or for other reasons fails to carry out its obligation in this regard. Ritz, *supra* note 88, at 15. He does not discuss environmental rights.

position. No longer would the Court be open to a charge of bestowing power "on The Court by the Court"⁹⁹ merely because it resorts to such analysis, although the responsibility to articulate principled decisions would remain.¹⁰⁰ Mr. Justice Goldberg, speaking for himself, Justice Brennan and Chief Justice Warren, considered the ninth amendment not to be an independent source of rights. They held, in *Griswold v. Connecticut*,¹⁰¹ that its language and history imply the existence of unenumerated fundamental rights which are contained in the traditions and collective conscience of our people. In that case, Justice Harlan asserted that judicial restraint requires respect for the teachings of history, recognition of the basic values that underlie our society, and an appreciation for the doctrines of federalism and separation of powers in establishing and preserving American freedoms.¹⁰² These "standards" add nothing of significance beyond the due process clauses. Whether these standards are adequate to support principled decision, or sufficient to find environmental rights, is discussed below.

DUE PROCESS

Fifth and Fourteenth Amendments

For over 75 years the due process clauses¹⁰³ have been employed by the courts as a constitutional reservoir of values to support a broad spectrum of limitations upon conduct-regulating and enforcement policies of the state and national governments.¹⁰⁴ The Supreme Court has not clearly delineated the constitutional function of the due process clause,¹⁰⁵ but differences between "substantive" and "procedural" due process have been noted.¹⁰⁶

To find substantive due process rights, it is said that one must examine the history, the traditions and collective conscience of our people, the role of federalism and the separation of powers, as well as the emana-

99. This was the charge of Mr. Justice Black in *Griswold v. Connecticut*, 381 U.S. 479, 507, 520 (1965) (dissenting opinion).

100. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 57-58 (1962) [hereinafter cited as BICKEL].

101. 381 U.S. 479, 486 (1965) (concurring opinion).

102. *Id.* at 499.

103. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1049 (1968) [hereinafter cited as Ratner].

104. *Id.*

105. As Professor Bickel notes, procedural due process is generally concerned with structure and method, rather than ends, though some procedural rules foreclose effective pursuit of substantive policy as a practical matter. BICKEL, *supra* note 100, at 233. The Court is able to regulate the area of procedural due process because of its expertise as a court. See *Shaughnessy v. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

106. See, e.g., *Pettigrew*, *supra* note 43, at 18.

tions of specific guarantees.¹⁰⁷ However, the Court has not always distinguished substantive and procedural due process in setting forth such standards.¹⁰⁸ The Court has maintained, in effect, that the due process clause empowers the judiciary to impose natural law limitations upon the conduct-regulating and enforcement authority of government.¹⁰⁹ The terms "sense of justice," "fundamental principles," "traditions and conscience of the people," "concept of ordered liberty," and "basic civil rights," are modern designations for the natural rights of man; they are labels, not standards for decision.¹¹⁰

Where there is a question of substantive due process, the Court should evaluate not the comparative utility of competing policies, but the minimal utility of the policy adopted.¹¹¹ Due process implements our philosophy that government may restrict human activity only for a socially useful purpose;¹¹² greater restrictions on human activity are not socially useful when lesser restrictions will do the job.¹¹³ Thus, our substantive due process inquiry might be two-fold: (1) whether there are any environmental rights, and (2) what restrictions may be placed upon the rights found. However, we must first deal with the question whether the due process clause on its *face* affords any protection against environmentally degrading activities. When a specific constitutional guarantee exists, there is no need for a substantive due process inquiry.

Assuming that there is the requisite government action involved in air pollution activities, the due process clauses may provide limitations on those activities if "life" includes "health" and "deprive" includes

107. Whether double jeopardy in violation of the fifth amendment is also a violation of the fourteenth depended on whether it is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.). To determine whether comment on a defendant's failure to testify violates the fourteenth amendment, one looked to the whole proceedings to determine whether they offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples." *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring). Also, "[d]ue process bars Congress from enactments that shock the sense of fair play . . ." Galvan v. Press, 347 U.S. 522, 530 (1954) (Frankfurter, J.).

108. Ratner, *supra* note 103, at 1053.

109. *Id.* at 1057.

110. *Id.* at 1077.

111. *Id.* at 1070.

112. [A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

NAACP v. Alabama, 377 U.S. 288, 307 (1964) (Harlan, J.).

113. Thus, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court found a right of marital privacy and held that the statute forbidding the use of contraceptives, rather than merely regulating their manufacture or sale, was overbroad in its impact on the right.

"threaten."¹¹⁴ Indeed, if property can be "taken" by a nuisance, there would seem to be little reason to hold that health cannot be, if *in fact* a person's health is injured by pollution. Assuming that the due process amendments protect only individual rights, as opposed to public rights, the question is merely one of proof. In *Virginians for Dulles v. Volpe*,¹¹⁵ the plaintiffs claimed that noise from jet aircraft injured the health of persons on the ground in violation of the fifth amendment.¹¹⁶ The court held that no fifth amendment rights had been violated since there was no case of specific personal injury causally related to the noise and since the evidence failed to establish a generalized injury to health from the noise. Implicit in the rejection of the fifth amendment claims on evidentiary grounds is an acceptance of the assertion that the fifth amendment protects health if actual injury can be demonstrated. The court's consideration of generalized injury may indicate that the establishment of such injury would make out a prima facie case for a plaintiff. On the other hand, the generalized injury may have been considered because the suit was brought as a class action. Of course, one might wish to allow the individual plaintiff to show only the existence of a generalized injury to health, but this would be the equivalent of establishing a public right. Moreover, if the plaintiff were to prevail on such a showing, though not actually injured himself, this would in effect create an entirely new constitutional right beyond the traditional concept of due process now under consideration.¹¹⁷

114. Some of the famous economic liberties cases were as significant for their constructions of the word "liberty" as for their holdings about "due process." See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (liberty of contract; failure of due process because the regulation was an unreasonable and arbitrary interference with the liberty, bearing no rational relationship to the needs of the public health); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) ("liberty" includes liberty of contract; failure of "due process" because the statute regulated contracts made and to be performed outside the state). No cases were found which construed "life."

115. 344 F. Supp. 573 (E.D. Va. 1972).

116. Plaintiffs also claimed an invasion of privacy in violation of the ninth amendment. This claim was rejected on evidentiary grounds, as was the fifth amendment claim. *Id.* at 579.

117. The creation of a new environmental due process right, not limited by traditional due process considerations, is discussed below. See note 128 *infra* & text accompanying. The present discussion is limited to the scope of due process rights under the language of the due process amendments. It is not clear that the plaintiff whose health is not actually injured would have "standing" to complain in the federal courts. At the least, article III may require that the challenged action caused the plaintiff "injury in fact." See *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970). Standing to litigate the public interest requires that the plaintiff be among the injured. See *Sierra Club v. Morton*, 405 U.S. 727 (1972). Threatened harm to the plaintiff would probably be enough; this would be the typical case for injunctive relief. Threatened health hazards to the general public might also be enough under the broader public right to be considered. But under purely traditional concepts it is difficult to understand why

Assuming that governmental action actually injured the plaintiff's health, and the injury was sufficient to constitute a "deprivation of life" within the due process clause,¹¹⁸ the question would remain whether the deprivation was without due process of law. In economic liberties cases, the question is only whether there is a rational relationship between the activity and a permissible societal objective,¹¹⁹ or the absence of demonstrable irrationality.¹²⁰ Debatable issues of business, economic and social affairs are left to legislative action, and the Court will not attempt to make comparative judgments about competing social utilities.¹²¹ Yet, precisely this type of comparison is required when the question is whether the government may promote economic growth and power consumption at the sacrifice of the health of a few individuals.

Such a comparison might be made today because growth has been encouraged without even considering health effects. Agency and legislative decisions have not balanced the needs for growth against health effects, but have reflected *no policy* at all with respect to health. This failure to even consider a significant constitutional value is a paradigm example of arbitrariness, and, as such, is violative of due process.¹²² However, even when the government has considered health effects in choosing a growth policy, there are due process considerations short of comparing utilities under a "least restrictive alternative" approach.¹²³ Under this approach, the Court might require the use of the latest antipollution or antinoise technology as a due process minimum for the policy of promoting growth.¹²⁴ Such a criterion avoids a court inquiry into such matters as where power plants should be sited and what fuel should be used for the

a plaintiff who is himself not even threatened with harm should be able to invoke any aid of the judiciary. Cf. *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

118. One might demand that the injury be such as to have actually reduced the plaintiff's life expectancy to some degree. In such a case there would be a deprivation of "life" in a sense as factually meaningful as complete extermination. This would make the "taking" of life analogous to the taking of property by a severe and continuing nuisance; whether the remedy should be compensation, completing the analogy to eminent domain, is considered below. Where there is only suffering, without permanent injury, there seems little reason to elevate the nuisance to a constitutional "deprivation."

119. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

120. See A. BICKEL, *POLITICS AND THE WARREN COURT* 178 (1965).

121. See, e.g., *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

122. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 182 (1965) [hereinafter cited as *JUDICIAL CONTROL*]. See also Berger, *Administrative Arbitrariness and Judicial Review*, 65 *COLUM. L. REV.* 55 (1965). Choices made without considering health effects are arbitrary with respect to such effects, rather than arbitrary or irrational in any absolute sense.

123. See notes 112-13 *supra* & text accompanying.

124. Such a rule would not necessarily be economically efficient because it might be cheaper to force, or allow, some industries to develop technology while allowing others to pollute. The terse answer is that "due process" doesn't always choose the cheapest way of doing things.

generation of power.¹²⁵ Even where health effects have been measured and pollution standards set, due process should require either the complete use of the best antipollution technologies or a pollution level geared to the scientifically determined health-pollution standards, whichever resulted in the lower pollution level. The health standards, therefore, would be a necessary but not a sufficient condition for the satisfaction of due process.

Environmental Due Process

The narrow due process concept developed above would not satisfy most environmentalists because even the compulsory utilization of the best technologies would not completely halt the degradation of the environment. If, on a statistical basis, air polluting activities damage the health of every *n*th resident of an urban area,¹²⁶ the "best technology" rule would not necessarily prevent this, although the size of *n* would be affected.

Environmentalists might urge that *n* must be reduced to zero on the premise, implicit in the due process amendments, that life is sacrosanct.¹²⁷ Such a rule would also avoid "comparative utility" problems and create no ad hoc balancing problems in particular cases. But it is difficult to understand why a constitutional policy favoring life and health interests goes so far as to rank these interests absolutely ahead of every other consideration under all possible circumstances, especially since such a result would effectively read "due process" out of the due process amendments. There are practical considerations suggesting that the due process right should not be carried so far. First, any decision to close down the pollution activities would have an immediate serious impact on the economic well-being of everyone. Day-to-day living would be affected by a single court decision to an extent unimaginable in other contexts. Second, this impact would result from the rankest speculation due to the limitations of the adversary process as a means of ascertaining factual truth about the harm to the affected individual. Surely one would want to know what

125. It is tempting to suggest that one might require any plant to be sited so as to minimize pollution effects. Such a rule might require that *all* United States power plants be located in northeastern Maine. Any other requirement as to siting would involve a balance of various considerations which the court should avoid, though the court might still require the government to show that health effects had been considered in the site selection. The legislature may opt for a permit-market-pricing scheme to control air pollution. See DALES, *supra* note 1, at 93-97. This step might allow all ambient air degradation to be deemed government action, and "least restrictive" due process might require prices to be high enough to insure an ambient air quality at least as good as if all polluters used the best antipollution technology available for their particular processes.

126. See Hanks & Hanks, *supra* note 14, at 149.

127. See Roberts, *supra* note 49, at 144-47. This is not an assertion that the air must be maintained in a perfectly "pure" state, but an assertion that purity must be defined in a particular way with respect to health.

caused the harm before deciding to inflict severe consequences on the other members of society. Finally, even the injured individual benefits to some extent from the polluting activity, if only by paying lower prices for some goods.¹²⁸ This should not stop the assertion of individual rights, but should be a factor to consider before creating absolutes within a social context.

On the other hand, beyond the confines of traditional due process reasoning, the proposed best technology rule is deficient in another respect: it is geared not to the ecosystem concept, which recognizes that all activities within a system affect all components of a system, but to a very narrow balancing of human health and economic growth. This analysis does not insure the consideration of environmental values other than human life at the constitutional level. This is so because the due process concern is really not the environment as such, but only human life.

What is needed, if the Constitution is to be of utility in protecting interests other than health from environmental degradation, is a principle of "environmental due process" which would operate without the analytical constraints of the due process amendments. This principle, or set of principles, would insure an institutional response to environmental problems without involving the courts in substantive comparisons of utilities. Such a principle may be developed even without new substantive environmental rights, just as procedural protections for "unprotected" speech have been developed.

Obscenity is not "speech" protected by the first amendment.¹²⁹ However, the Supreme Court has found itself developing a comprehensive system of "procedural safeguards designed to obviate the dangers of a censorship system."¹³⁰ This serves to provide some protection for obscenity because of the desire to protect the nonobscene. These procedural rules are themselves first amendment rights which do not depend on the fifth and fourteenth amendments.¹³¹ Sensitive procedural devices have been deemed necessary because first amendment freedoms need some "breathing space" to function outside the courtroom,¹³² and restrictions on the regulation of conduct have been imposed where speech and non-speech elements combine.¹³³ Similarly, health is arguably afforded some

128. See DALES, *supra* note 1, at 7.

129. *Roth v. United States*, 354 U.S. 476 (1957).

130. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

131. See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

132. *Id.* at 519-23.

133. Government regulation is sufficiently justified if: (1) the regulation of the nonspeech element is within the constitutional power of government; (2) the regulation furthers an important governmental interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction of first amend-

protection under the due process clause. We know that health is affected by *any* activity within the ecosystems, that an "anything goes" policy favors increased pollution, and that exponential economic growth means that "harmless" activity may become harmful in a veritable twinkling. Procedural safeguards with respect to *all* environmentally degrading activity would enable citizens to preserve their breathing rights. Such safeguards should exist whether or not the citizen could prove an actual impairment of or threat to health for the same reason obscenity is so protected. The risk of loss of health is too high if governmental organizations are not legally coerced into seeking adequate protective measures.

Since environmental interests are underrepresented in the present low visibility agency decisionmaking process, the new environmental due process should require a right to effective public participation in agency decisions.¹³⁴ It may be that environmental policy choices will ultimately have to be made by the legislature, but agencies are daily deciding matters with irretrievable environmental impact. Participation rights limited to voting for legislators cannot affect daily agency decisions.

This aspect of environmental due process may be regarded in part as an extension of principles adopted by the Supreme Court in other areas. In *Red Lion Broadcasting Co. v. FCC*,¹³⁵ the Supreme Court upheld an application of the "fairness doctrine" against a challenge by broadcasters that their first amendment rights were infringed. Justice White noted that broadcast frequencies are a scarce resource whose use can be regulated only by the government.¹³⁶ Some see the case as providing a citizens' right of access to mass media.¹³⁷ There is also language in the opinion to support an argument that the fairness doctrine is constitutionally required where government has undertaken the allocation of a scarce resource.¹³⁸ Environmental conflicts are also problems of resource allocations,¹³⁹ and where the government is, in effect, allocating scarce pollution assimilation resources, *Red Lion* could be extended to require the production of information about such activity. An information rule would be particularly relevant to the overuse of common resources, since there is no market pricing mechanism for these resources which would reveal allocation.

ment freedoms is no greater than essential to the furtherance of the government interest. *United States v. O'Brien*, 391 U.S. 367 (1968).

134. See Hanks & Hanks, *supra* note 14, at 152-57.

135. 395 U.S. 367 (1969).

136. *Id.* at 390.

137. See, e.g., Pemberton, *The Right of Access to Mass Media*, in *THE RIGHTS OF AMERICANS* 276 (N. Dorsen ed. 1971). But see *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

138. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400 (1969).

139. See Book Review, *supra* note 3, at 414.

There is an unusual aspect to governmental activity which affects environmental rights. Enforcement of governmental decisions depriving citizens of liberty or property do not usually occur, and perhaps may not occur, without resort to the judicial process.¹⁴⁰ Yet, this is precisely what occurs where environmental values are underrepresented or unrepresented in decisions having environmental impact. Thus, it is most important that there be adequate judicial review of such decisions. Agencies should be required to write "principled" opinions explaining the environmental impact of a decision, and they could be required to answer citizen requests for information in writing.¹⁴¹ In some cases, the court may even decide for itself that the impact would be unreasonable,¹⁴² although this approaches a level of substantive intervention shunned at the outset of this discussion. However, the court might decline to decide questions of reasonableness except where some element of an ecosystem would be severely damaged or destroyed by government activity. In light of such an impact, the court could decide if it would be reasonable to allow the activity to continue as planned, considering costs, the state of technology, as well as the probable impact on the ecosystem as a whole.

There are, of course, certain problems attendant upon the creation of public rights, enforceable at the demand of every individual. The proper functioning of the federal courts and the principle of separation of powers may be threatened.¹⁴³ Moreover, judicial review under these circumstances may tend to weaken the democratic process. However, there are at least two democratic defenses to the rights discussed above. First, the rights outlined have as their primary goal the broadening of democratic processes and the minimizing of substantive court intervention in environmental matters. Second, democratic decision processes tend to produce circularities in the ordering of social values unless there is a fair uniformity or consensus as to those values and the standards for decision.¹⁴⁴ This may justify judicial assertion of perceived constitutional values in environmental matters.

140. See JUDICIAL CONTROL, *supra* note 122, at 383.

141. See Kalodner, *The Right to Participate*, in THE RIGHTS OF AMERICANS 194, 201 (N. Dorsen ed. 1971).

142. See ASPECTS, *supra* note 5, at 351 n.34. When a "fact" is the asserted constitutional predicate for the assertion of power, the existence of the fact might be determined by the court. See *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (opinion of Justice Brennan); *Crowell v. Benson*, 285 U.S. 22 (1932).

143. See Harlan, *The Bill of Rights and the Constitution*, 50 A.B.A.J. 918 (1964); cf. *Flast v. Cohen*, 392 U.S. 83, 116 (1968) (Harlan, J., dissenting).

144. See Black, *On Arrow's Impossibility Theorem*, 12 J. LAW & ECON. 227 (1969); Riker, *Voting and the Summation of Preferences: An Interpretive Bibliographical Review of Selected Developments During the Last Decade*, 55 AM. POL. SCI. REV. 900 (1961).

Environmental activities which pose no apparent threat to human health contain no clear principle which would either establish the existence of substantive environmental rights or which could be reasonably applied to decide specific cases. A right against unreasonable impairment of health would *seem* to be principled, if only because it is supported by the language of the due process clause. Such a principle, however, provides no standard for decision in specific cases even if "unreasonableness" takes into consideration such factors as loss of jobs, effects of the poor, and forced changes in life styles. Even in the area of health, the due process clause does not begin to answer the question "how much".¹⁴⁵ The total lack of standards in this area compels me to conclude that the more limited right suggested above is a more appropriate judicial undertaking.

The Supreme Court has the responsibility to maintain the distribution and limitations of public power, primarily through special guardianship of legal procedures, and to preserve an open society whose government is to remain both responsive and responsible.¹⁴⁶ Considering this special responsibility, the purposes of government outlined in the preamble, the principles underlying the public trust concept, the high valuation of life in the due process amendments and the case law development of rights to participate in social decisions, one might be surprised if the federal courts do not develop procedural rules geared to remedy the underrepresentation of environmental values in decision making forums.¹⁴⁷

145. In *Environmental Defense Fund Inc. v. Hoernor Waldorf Corp.*, 1 E.R.C. 1640 (D. Mont. 1970), the court's reasoning about rights against air pollution was as follows: "So it seems to me that each of us is constitutionally protected in our natural and personal state of life and health." *Id.* at 1641. One is entitled to doubt the wisdom of entrusting environmental concerns to such a decision process.

146. P. FREUND, *ON LAW AND JUSTICE* 56-59 (1968).

147. Courts are acting to improve the decisionmaking process, though not at the constitutional level. In *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 225 A.2d 130 (1966), an action to condemn a right of way for a gas transmission pipeline, the court held that the defendant's voluntary consecration of the land to use as a preserve required a lesser showing of arbitrariness by the state in selecting the route than in the case of an ordinary private landowner. The court placed the burden of going forward with justification for the route on the plaintiff upon the defendant's showing of serious damage to the preserve and the existence of an apparently reasonable alternate route, though the defendant retained the ultimate burden of proving arbitrariness. The federal courts are requiring agencies to develop better records. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). Courts are also looking beyond enabling legislation for other statements of legislative policy. *Udall v. FPC*, 387 U.S. 428 (1967); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970). Where statutes address environmental concerns, agency discretion is being confined. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

When dealing with air or water in their ambient or interstate aspects there is a federal common law, to be derived in part from federal statutes, which is sufficient for "federal question" jurisdiction under 28 U.S.C. § 1331 (a) (1970). See *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Washington v. General Motors Corp.*, 406 U.S. 109 (1972). Traditionally, "standing" distinguishes the particular plaintiff from the public

ENVIRONMENTAL RIGHTS CASES

United States Constitution

Claims of constitutional rights against various forms of environmental degradation have received an uncertain reception in the federal courts. Where such claims have not been rejected outright on the merits, plaintiffs have failed to demonstrate the requisite government involvement. Claims have sometimes been phrased in such generalized terms that courts have had difficulty coming to intellectual grips with the problem, and only one court has truly confronted the lack of substantive decision standards.

Three environment rights cases have involved air pollution. *Environmental Defense Fund v. Hoerner Waldorf*¹⁴⁸ was a suit to enjoin operations of a private pulp and paper mill in Missoula, Montana. The defendant was allegedly emitting noxious sulfur and other toxic compounds into the air, thereby causing irreparable harm to plant, animal and human life. The emissions could be prevented through the application of modern technology. The court held that individuals are constitutionally protected in our natural state of life and health, but held, probably correctly under *Moose Lodge*, that there was insufficient government involvement in the polluting activity.¹⁴⁹ The mayor of Missoula and the State Planning Board had invited the defendant to the area and encouraged public acceptance of the plant, but state licensing did not include pollution regulation. The court rejected EDF's argument that the private pollution damage to a nearby national forest was an unconstitutional taking of public property, holding that the fifth and fourteenth amendments apply only to the public taking of private property.

In a second case, *In Re Motor Vehicle Air Pollution Control Equipment*,¹⁵⁰ the plaintiffs sued several private producers of gasoline and motor vehicles, claiming that the pollution resulting from the operation of motor vehicles violated their rights to clean air and a safe, healthy environment as protected by the fifth, ninth, tenth and fourteenth amend-

at large. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1036 (1968). But the notion that the constitution demands injury to a personal interest is historically unfounded. See Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969). Expanded standing of course increases the participation of environmental interests in agency decisionmaking.

148. 1 E.R.C. 1640 (D. Mont. 1970). See also *Hagedorn v. Union Carbide Corp.*, 5 E.R.C. 1755 (N.D. W. Va. 1973), which rejected, on jurisdictional grounds, fifth, ninth and fourteenth amendment claims of private parties against a private corporation and certain state and federal agencies.

149. 1 E.R.C. at 1641-42.

150. 52 F.R.D. 398 (C.D. Cal. 1970).

ments. The court "held" that the Constitution confers no such rights, but, with more assurance, refused to hold that the activities of huge private corporations are government actions. Likewise in *Tanner v. Armco Steel Corp.*,¹⁵¹ where the plaintiffs sought to recover damages from a private corporation for injuries to person and property from air pollution, the court held there was no government action and rejected the fifth, ninth and fourteenth amendment claims on the merits. This court at least gave some reasons for rejecting the fourteenth amendment claims. First, the court noted that the history of the amendment does not support environmental claims, and second, it reasoned that the fourteenth amendment provides no standards for deciding when such rights are infringed or what remedies are to be fashioned. Finally, the court concluded that constitutional litigation and the judicial process are ill-suited to solving problems of environmental control because of the delicate balance of competing social interests involved, because true solutions will require the application of specialized expertise, and because the inevitable tradeoffs between economic and ecological values should not be made through an ad hoc decision process.¹⁵²

All three of the above suits were against "private" defendants, so that the constitutional claims were clouded by the government action question.¹⁵³ Only the *Tanner* court seriously analyzed the constitutional problem, but only the *Hoerner Waldorf* plaintiffs requested a remedy consistent with the substantive due process analysis developed in this paper. Apparently, no plaintiffs offered their courts any standards which might be adopted for either the merits of the claims or a new theory of government action. The *Hoerner Waldorf* plaintiffs had a particularly unique opportunity to offer the court a narrow basis of decision because there was no difficulty in linking their defendant to any damage which might have been proved. The *Tanner* court adequately disposed of the most generalized constitutional arguments, but more narrow arguments have yet to be faced by any court.

*Guthrie v. Alabama By-Products Co.*¹⁵⁴ was an action under § 1983 by lower riparian landowners against nineteen industrial corporations for damages and injunctive relief for alleged water pollution. The plaintiffs claimed the defendants' wastes were harmful to fish, wildlife, live-

151. 340 F. Supp. 532 (S.D. Tex. 1972).

152. *Id.* at 536-37.

153. See notes 54-70 & text accompanying.

154. 328 F. Supp. 1140 (N.D. Ala. 1971), *aff'd*, 456 F.2d 1294 (5th Cir.), *cert. denied*, 410 U.S. 946 (1972). The Fifth Circuit did not discuss the constitutional claims, expressly holding only that there is no private right of action under the Refuse Act of 1899.

stock and human beings, all in violation of the fifth and fourteenth amendments.¹⁵⁵ Alabama had issued permits for the waste discharges, but the court held this insufficient "state action" for purposes of the fourteenth amendment, even though the issuing agency had the power to regulate or prohibit the discharges. The case seems incorrect as to its "state action" holding, but the result was probably influenced by the plaintiff's reliance on riparian rights alone and the court's conclusion that such rights are not protected by § 1983.¹⁵⁶

Three cases involved the construction of buildings or dams. In *Ely v. Velde*,¹⁵⁷ local residents sought to enjoin the construction of a penal facility in their county on the ground that the area is of such historical importance to all the people of the United States that the construction on the site selected would unnecessarily and unreasonably degrade the environment in violation of the ninth and fourteenth amendments.¹⁵⁸ The court rejected the constitutional claims,¹⁵⁹ saying that the state interest in building on the particular tract must also be considered. However, the court did not consider why the state had to build on that particular site, and, in effect, the plaintiff's arguments were rejected *per se*. In *United States v. 247.37 Acres*,¹⁶⁰ the court rejected claims that the government's taking of land for flood control use violated plaintiff's ninth amendment rights to have their property and its surrounding environs preserved in their natural state, saying that extensions of the ninth amendment must be left to the Supreme Court. Finally, in *Environmental Defense Fund v. Corps of Engineers*,¹⁶¹ the plaintiffs sued to enjoin work in furtherance of a plan to construct a dam, contending:

The right to enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of

155. The plaintiffs also asserted a cause of action under the Refuse Act of 1899. The fourteenth amendment claim was alleged under 42 U.S.C. § 1983 (1970), but of course depended on the fourteenth amendment for success. 328 F. Supp. at 1143.

156. The court held, more narrowly, that the statute is intended to protect only personal liberties, not property rights. There was no discussion of the alleged harm to human beings. The court held that the fifth amendment limits only the federal government. *Id.*

157. 321 F. Supp. 1088 (E.D. Va. 1971).

158. Plaintiffs also argued that the Law Enforcement Assistance Administration (LEAA) failed to consider the impact of the facility on the area as required by NHPA and NEPA. The district court held that the LEAA need not look beyond its enabling statute, but the Fourth Circuit held that LEAA must consider the requirements of both NEPA and NHPA, 42 U.S.C. §§ 4321-47 (1970), 16 *id.* §§ 470-470n. *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971).

159. The Fourth Circuit affirmed on this point, but noted that the plaintiffs offered very little in the way of argument beyond the bare assertion of rights. *Id.* at 1139.

160. 3 E.R.C. 1098 (S.D. Ohio 1971).

161. 325 F. Supp. 728 (E.D. Ark. 1971).

life, is part of the liberty protected by the Fifth and Fourteenth Amendments . . . and is also one of those unenumerated rights retained by the people . . . as provided in the Ninth Amendment¹⁶²

The court responded by quoting Judge Learned Hand:

“Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.”¹⁶³

State Constitutions

Few cases have been decided under the recent state constitutional amendments providing protection for the environment. Of the few, two were resolved in terms of burden of proof and one in terms of the public trust doctrine.

*Commonwealth v. National Gettysburg Battlefield Tower*¹⁶⁴ was an action based on an amendment to the Pennsylvania Constitution providing protection for the environment,¹⁶⁵ by the State of Pennsylvania to enjoin the erection of a steel tower near the Gettysburg National Military Cemetery and the Gettysburg National Military Park. The U.S. Department of the Interior had sanctioned the tower at the proposed site, and this was an important factor leading the court to conclude there would be no irreparable harm to historical values as a result of constructing the tower. The court also concluded that there was no irreparable harm to scenic, esthetic or natural values, considering the redeeming educational and economic significance of the tower. The injunction was denied because Pennsylvania had failed to demonstrate irreparable harm to any of the values expressed in the state constitution. The court failed to explain why the state has the burden of proof and failed to articulate decision criteria beyond the sense impressions of the particular judge.¹⁶⁶ In addition, it is not clear why “irreparable harm” is the criterion for an injunction where constitutional values are at stake. Perhaps the judge only meant that there would be no harm if the tower is constructed, using present day Gettysburg as the standard for comparison, although the rationale for this is unclear.

In *Seadade Industries, Inc. v. Florida Power & Light Co.*,¹⁶⁷ the

162. *Id.* at 739.

163. *Id.*, quoting *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1944) (L. Hand, J.).

164. 3 E.R.C. 1270 (C.P. Pa. 1971).

165. PA. CONST. art. 1, § 27.

166. 3 E.R.C. at 1275.

167. 245 So. 2d 209 (Fla. 1971).

question was whether a utility could condemn Seadade's unimproved marshland for a drainage canal prior to securing approval from federal, state and local authorities for the project. Seadade argued that probable damage to the ecology of Biscayne Bay from the thermal discharges would preclude approval of the project, but the utility argued that the canal was needed for cooling to avoid that very problem. The court noted that Florida's constitution declares protection of natural resources to be the public policy of the state,¹⁶⁸ and held that where condemnation affects natural resources and where independent authorities guarding the public interest must approve the project before it can be put into operation, then the court may require the condemnor to demonstrate the safety to the public interest.¹⁶⁹ The attempt was to balance protection of the public interest with the need to complete public projects without undue delay. Accordingly, the condemnor was required to show that the requirements for project approval could be met and that taking in advance of approval would not irreparably damage the natural resources and environment should the project be disapproved. The court held the utility's proof sufficient.¹⁷⁰ In a sense, the Florida court did what courts do well: manipulate the burden of proof in a complex situation. But, on the facts of the case, the court merely protected the condemnee, rather than the environment; there was no argument that the canal itself would be harmful. One effect should be to insure that projects are well planned in advance. But the court is apparently not prepared to rule on the validity of the regulations themselves under the Florida constitution. If this is correct, this significantly weakens the constitutional protection because the ultimate decision remains with agencies which may not harken to the voice of the environmentalist.

*People ex rel. MacMullan v. Babcock*¹⁷¹ was a suit to enjoin private landowners from filling submerged lands adjacent to their property fronting on Lake St. Clair. The court held there are no riparian rights with respect to submerged lands in the Great Lakes area, for such lands are subject to a public trust imposed by the Michigan constitution.¹⁷² Under

168. It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.

FLA. CONST. art. II, § 7.

169. 245 So. 2d at 214.

170. *Id.* at 216.

171. 38 Mich. App. 336, 196 N.W.2d 489 (1972).

172. The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from

the trust, the court ruled that such lands may be disposed of only when the Department of Conservation determines that the lands are of no substantial public value for hunting, fishing, swimming, boating or navigation and that the general public interest will not be impaired.¹⁷³ Again, there is substantial deference to an administrative agency, but it is to an agency charged with special responsibility for administering the public trust, rather than to an agency charged with responsibility for some form of economic development. Moreover, the court is apparently prepared to require specific findings by the agency as to the impact of any disposition of the trust, though one might not expect a very thorough review of such findings once made. This seems a plausible interpretation of the Michigan constitution which, after all, favors development as well as conservation of the natural resources of the state. The court's role seems to be to insure that the development is planned by public bodies, rather than left to private initiatives.

CONCLUSION

As developed herein, the only apparent constitutional concern is the threat to the lives and health of the citizens. This concern may be broadened to encompass the destruction of ecosystem components more remotely linked to human survival, through "environmental due process," because man's effect on himself is necessarily suffered through his effect on the balance of all ecosystems of which he is a part. It seems to me that nothing in the Constitution prevents Congress' paving over the Grand Canyon if it chooses to do so, absent a demonstration that such a project would harm the health of the citizens. But government is limited, if only by the due process amendments, in its power to kill or condemn the health of its citizens. Killing through environmental degradation is substantively indistinguishable, in constitutional terms, from killing through the criminal process, though different procedural protections might be afforded.

The courts are ill suited to make substantive decisions about environmental quality. They should not decide how good our environment should be because jobs, economic growth and the relative affluence of the poor also affect the quality of life—and that life must function outside the courts. But the courts are perhaps the best suited of our institutions at perceiving defects in our decision mechanisms. As such, they should in-

pollution, impairment and destruction.

MICH. CONST. art. 4, § 52.

173. *People ex rel. MacMullen v. Babcock*, 38 Mich. App. 336, —, 196 N.W.2d 489, 497 (1972).

sure that environmental voices are heard and that the decision making institutions recognize the significance of the choices they make. Surely the Constitution, as a document and as a philosophy which allocates the responsibilities for social choices, mandates no less than this if human life is to be of any constitutional significance.

If environmental degradation is viewed as a problem of balancing the effects of human activities on the various ecosystems of this "space-ship earth," then it is clear that every activity by individuals and institutions affects the well-being of us all. It strikes me as absurd to believe that the Constitution says nothing at all about such a social problem—that it, alone, is removed from the ecosystems of which every citizen of the United States is a part. The Constitution does not strike the ecosystem balance, but it does demand that a balance be struck, and that citizens be informed and involved in the striking.