GREENING CONSTITUTIONS: A CASE FOR JUDICIAL ENFORCEMENT OF CONSTITUTIONAL RIGHTS TO ENVIRONMENTAL PROTECTION

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I. Introduction

Environmental protection concerns have joined the catalogue of domestic constitutional rights all over the world. As of recent counts, over 145 countries have included environmental protection provisions in their new constitutions or have amended existing ones to include them.[1] While some of these provisions have been drafted to be judicially unenforceable,[2] be it by specifically stating so or by classifying them as 'aspirational' or directive principles of State

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[1] David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment 47 (2012). *See also* James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 Pace Envtl. L. Rev. 113, 129-33, 146-82 (2006).

[2] Boyd, *supra* note 1, at 53-57 (identifying ninety-two constitutions with substantive environmental rights).

policy,[3] the highest courts in more than a dozen countries have interpreted their respective constitutional environmental rights to be enforceable.[4] In fact, some courts have enforced environmental protection rights, even though they are not explicitly recognized in their constitutions,[5] or they are drafted as unenforceable directive principles.[6]

What about the United States? During the period of creation of modern environmental protection law during the latter parts of the 1960s and the early 1970s, several proposals for a federal constitutional amendment to recognize a right to a healthful environment were presented before Congress.[7] When these failed,

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[3] Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 26A STAN. ENVTL. L.J. 3, 26 (2007); May, *supra* note 1, at 136. Spain's Constitution, for instance, includes a right to a healthy environment, but another provision states that such a right is not self-executing. RAÚL CANOSA USERA, CONSTITUCIÓN Y MEDIO AMBIENTE (2000); DEMETRIO LOPERENA ROTA, EL DERECHO AL MEDIO AMBIENTE ADECUADO (1st reprint, 1998); MAR AGUILERA VAQUÉS, EL DESARROLLO SOSTENIBLE Y LA CONSTITUCIÓN ESPAÑOLA (2000).

[4] *See, e.g.*, Alberto Ricardo Dalla Via, *Derecho ambiental en Argentina: La reforma constitucional de 1994 y el Medio Ambiente*, *in* DERECHO COMPARADO DEL MEDIO AMBIENTE Y DE LOS ESPACIOS NATURALES PROTEGIDOS 285 (Gerardo Ruiz-Rico Ruiz coord., 2000) (Argentina); Merideth D. Delos Santos, *Is There a Right to a Healthful Environment?*, *in* SOCIAL JUSTICE AND HUMAN RIGHTS IN THE PHILIPPINES 384 (Alberto T. Muyot ed., 2003) (Philippines); José Antonio Ramírez Arrayás, *Derecho ambiental en Chile: Principales elementos de la institucionalidad e interpretación jurisdiccional de la evolución ambiental*, *in* DERECHO COMPARADO DEL MEDIO AMBIENTE Y DE LOS ESPACIOS NATURALES PROTEGIDOS, *supra* note 4, at 201 (Chile); JULIO CÉSAR RODAS MONSALVE, FUNDAMENTOS CONSTITUCIONALES DEL DERECHO AMBIENTAL COLOMBIANO 31-107 (1995) (Colombia); ÁLVARO SAGOT RODRÍGUEZ, LOS PRINCIPIOS DEL DERECHO AMBIENTAL EN LAS RESOLUCIONES DE LA SALA CONSTITUCIONAL (2000) (Costa Rica).

[5] Clíona Kimber, *Public Environmental Law in Ireland*, *in* PUBLIC ENVIRONMENTAL LAW IN THE EUROPEAN UNION AND THE UNITED STATES: A COMPARATIVE ANALYSIS 247, 250 (René J.G.H. Seerden, Michiel A. Heldeweg, Kurt R. Deketelaere, eds., 2002) (Ireland); Martin Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 285 (Alan E. Boyle & Michael R. Anderson eds., 1998) (Pakistan); Massimiliano Montini, *Public Environmental Law in Italy*, *in* PUBLIC ENVIRONMENTAL LAW IN THE EUROPEAN UNION AND THE UNITED STATES: A COMPARATIVE ANALYSIS, *supra* note 5, at 283-84 (Italy).

[6] VASANTHI NIMUSHAKAVI, CONSTITUTIONAL POLICY AND ENVIRONMENTAL JURISPRUDENCE IN INDIA 67-157 (2006); P LEELAKRISHNAN, ENVIRONMENTAL LAW IN INDIA 193-226 (2nd ed. 2005); BIJAY SINGH SIJAPATI, ENVIRONMENTAL PROTECTION LAW AND JUSTICE (WITH SPECIAL REFERENCE TO INDIA & NEPAL) 37-46 (2003); Deepa Badrinarayana, *The Emerging Constitutional Challenge of Climate Change: India in Perspective*, 19 FORDHAM ENVTL. L. REV. 1, 17-27 (2009); Kelly D. Alley, *Legal Activism and River Pollution in India*, 21 GEO. INT'L ENVTL. L. REV. 796-97 (2009); D.M. Dharmadhikari, *Development and implementation of environmental law in India*, *in* JUDGES AND THE RULE OF LAW: CREATING THE LINKS: ENVIRONMENT, HUMAN RIGHTS AND POVERTY 23 (Thomas Greiber ed., 2006); Michael R. Anderson, *Individual Rights to Environmental Protection in India*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra* note 5, at 199.

[7] H.R.J. Res. 1205, 91st Cong. (1970); S.J. Res. 169, 91st Cong. (1970); H.R.J. Res. 1321, 90th Cong. (1968); H.R.J. Res. 954, 90th Cong. (1967). Proposals for amendments were again presented at other moments in the 1970s and 1980s, and are still regularly presented before the House of Representatives.

environmental groups invited federal courts to acknowledge the existence of such a right under the Fifth, Ninth and Fourteenth Amendments, with equally unsuccessful results.[8]

H.R.J. Res. 33, 111th Cong. (2009); H.R.J. Res. 33, 110th Cong. (2007); H.R.J. Res. 33, 109th Cong. (2005); H.R.J. Res. 33, 108th Cong. (2003); H.R.J. Res. 33, 107th Cong. (2001); H.R.J. Res. 519, 102nd Cong. (1992). For a discussion many of these, and additional efforts, *see* Rebecca M. Bratspies, *The Intersection of International Human Rights and Domestic Environmental Regulation*, 38 GA. J. INT'L & COMP. L. 649, 659 (2010); Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 14-15 (1992); Richard O. Brooks, *A Constitutional Right to a Healthy Environment*, 16 VT. L. REV. 1063, 1063-64 (1991-1992) (hereinafter, Brooks, *A Constitutional Right*); Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment*, 1 DUKE ENVTL. L. & POL'Y F. 1, 2 (1991); Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 120-22 (1997); Daveed Gartenstein-Ross, *An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation*, 14 DUKE ENVTL. L. & POL'Y F. 185, 191 (2003); Dan L. Gildor, *Preserving the Priceless: A Constitutional Amendment to Empower Congress to Preserve, Protect, and Promote the Environment*, 32 ECOLOGY L.Q. 821, 823 (2005); Barry E. Hill, Steve Wolfson & Nicholas Targ, *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT'L ENVTL. L. REV. 359, 389-90 (2004); John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 330 (1996); Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in US and in our Posterity*, 68 MISS. L.J. 565, 611-13 (1998); Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 346-47 (1996); J.B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, 11 NAT. RESOURCES & ENV'T. 46, 46-47 (1996-1997) (hereinafter Ruhl, *An Environmental Rights Amendment*); J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 247-50 (1999) (hereinafter Ruhl, *The Metrics of Constitutional Amendments*); Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVTL. L. 93, 93 n.3 (1990); Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181, 183 (1994); Barton Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 157-58 (2003); Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 175-76 (1993); Robert McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 124-25 (1990).

[8] Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1429-30 (9th Cir. 1989); Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971); *In Re* Agent Orange, 475 F. Supp. 928, 934 (E.D.N.Y. 1979); Fed. Employees for Non-Smokers' Rights v. United States, 446 F. Supp. 181, 183-85 (D.D.C. 1978); Hawthorne Envtl. Preservation Ass'n v. Coleman, 417 F. Supp. 1091, 1095 (N.D. Ga. 1976), *aff'd* 551 F.2d 1055 (5th Cir. 1977); Pinkney v. Ohio Envtl. Protection Agency, 375 F. Supp. 305, 309-11 (N.D. Ohio 1974); Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061, 1064-65 (N.D. W. Va. 1973); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 534-38 (S.D. Tex. 1972); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, 738-39 (E.D. Ark. 1971). For discussions of the arguments presented, and the court pronouncements in these cases, *see* Brandl & Bungert, *supra* note 7, at 21-23; Brooks, *A Constitutional Right*, *supra* note 7, at 1068-70; Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L. LEGAL PERSP. 185, 211-14 (2001); Gallagher, *supra* note 7, at 109-19; Gartenstein-Ross, *supra* note 7, at 191 n.27, 193-98; Hill, Wolfson & Targ, *supra* note 7, at 390-91; Horwich, *supra* note 7, at 330; Ledewitz, *supra* note 7, at 608-11; Barton H. Thompson, Jr., *Environmental Policy and State*

Parallel to and sometimes even predating these efforts, most state and territorial constitutions have been amended or drafted to include environmental protection clauses or provisions. In fact, forty-five states now have some type of constitutional environmental provision,[9] ranging from clauses that recognize abstract, substantive rights to a clean or healthy environment; 'public trust' provisions; resource specific environmental protection sections; and 'directive principles' clauses that expound some type of affirmative governmental policy or duty for the protection of the environment; and many others.[10] Yet, while success has been achieved in writing these provisions into state constitutions, efforts to have courts enforce them have not yielded the same results. Most state courts have declined invitations to interpret their respective constitutional environmental protection provisions so as to create judicially cognizable claims or as to limit public or private actions that affect the environment.[11] Even many state courts that have acknowledged the possibility of

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Constitutions: The Potential Role of Substantive Guidance, 27 RUTGERS L.J. 863, 919 (1996); Cusack, *supra* note 7, at 176-79; McLaren, *supra* note 7, at 125; Oliver A. Pollard, III, Note, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351, 352-53 (1986).

[9] ALA. CONST. art. I, § 24, amend. 543; ALASKA CONST. art. VIII; ARIZ. CONST. art. XVII; ARK. CONST. amends. 35, 75; CAL. CONST. arts. I, § 25, X, XA, XB; COLO. CONST. arts. XVI, XVIII, §§ 2, 12b, XXVII; FLA. CONST. arts. II, § 7, X, § 16; GA. CONST. art. III, § VI ¶ II(a)(1); HAW. CONST. arts. IX, § 8, XI; IDAHO CONST. arts. VIII, § 3A, XV; ILL. CONST. art. XI, §§ 1-2; IOWA CONST. arts. I, § 24, VII, § 9; KAN. CONST. arts. XI, § 9, XV, § 9; LA. CONST. arts. VII, IX; ME. CONST. arts. I, § 1, IX, § 23; MASS. CONST. arts. XLI, § 143, XLIX, § 179; MICH. CONST. arts. IV, § 52, IX, § 35-36, X, § 5; MINN. CONST. arts. X, § 2, XI, § 10-11, 14; MISS. CONST. art. IV, § 81; MO. CONST. arts. III, § 37(b), IV, §§ 40(a), 47; MONT. CONST. arts. II, § 3, IX, §§ 1-4, X, §§ 2, 4, 11; NEB. CONST. arts. III, § 20, VIII, § 2, XV, § 4; NEV. CONST. art. X, § 1; N.H. CONST. part. II, art. V; N.J. CONST. arts. VIII, §§ 1-2, 5; N.M. CONST. arts. XVI, §§ 1-3, XX, § 21; N.Y. CONST. arts. I, § 7, XIV; N.C. CONST. arts. V, § 9, XIV, § 5; N.D. CONST. arts. X, XI, § 3; OHIO CONST. arts. II, § 36, VIII, § 20; OKLA. CONST. art. X, § 39; OR. CONST. arts. XI-D-XI-E, XI-H-XI-I, XV, § 4; PA. CONST. arts. I, § 27, VIII, §§ 15-16; R.I. CONST. art. I, § 17; S.C. CONST. art. XII, § 1; S.D. CONST. arts. XIII, § 14, XXI, §§ 6-7; TENN. CONST. art. XI, §§ 8, 13; TEX. CONST. arts. XVI, § 59, XVII, § 1; UTAH CONST. arts. XVII, § 1, art. XVIII, § 1; VT. CONST. ch. II, § 67; VA CONST. art. XI, §§ 1-3; WASH. CONST. arts. VIII, § 10, XV, § 1-3, XVII, § 1-2, XXI, § 1; W. VA. CONST. art. VI, § 53; WIS. CONST. arts. VIII, §§ 1, 10, IX, §§ 1-3; WYO. CONST. arts. I, § 31, VIII, §§ 1-5, XIII, § 5. *See, e.g.*, *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73, 74 (2002) ("Most state constitutions contain provisions expressly addressing natural resources and the environment. In total, our research has uncovered 207 state constitutional provisions relating to natural resources and the environment in 46 state constitutions."). Although that article counts forty-six states as having constitutional provisions, it only cites clauses from forty-four states, and it does not include Georgia's constitutional provision, an express grant of power to the Legislative Branch (General Assembly) to restrict land uses "in order to protect and preserve the natural resources, environment, and vital areas of [the] state." GA. CONST. art. III, § VI, ¶ II(a)(1).

[10] *Environmental and Natural Resources Provisions in State Constitutions*, *supra* note 9, at 74-75 (identifying nineteen different substantive areas covered by state environmental constitutional provisions and eleven different types of clauses).

[11] *See* City of Elgin v. County of Cook, 660 N.E.2d 875 (Ill. 1996); Robb v. Shockoe Slip Foundation, 324 S.E.2d 674 (Va. 1985); Payne v. Kassab, 361 A.2d 263, 272 (Pa. 1976); Commonwealth v. National Gettysburg Battlefield Tower, 311 A.2d 588, 593 (Pa. 1973).

enforcement, like Louisiana, have established highly deferential standards of review and thus, have yet to find violations to their provisions.[12]

This article focuses on the debates about providing judicial enforcement for constitutional environmental protection provisions in the United States.[13] While some scholars and environmental activists continue to advocate for the constitutionalization and judicial enforcement of environmental protection rights,[14]

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[12] *See* Save Ourselves v. Louisiana Environmental Control Commission, 452 So.2d 1152 (La. 1984). There are, however, some exceptions. For instance, the Montana Supreme Court has held that the state's constitutional environmental protection rights provisions not only are enforceable, but also that state or private actions that implicate those rights are subject to strict scrutiny analysis. Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1246 (Mont. 1999); Cape-France Enterprises v. Estate of Peed, 29 P.3d 1011, 1016-17 (Mont. 2001). *But see* Lohmeier v. Gallatin County, 135 P.3d 775, 778 (Mont. 2006); N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs, 288 P.3d 169, 174-75 (Mont. 2012). Pennsylvania and Alaska are two other state jurisdictions which have given their respective constitutional provisions new life as enforceable constitutional commitments. See Robinson Twp., Washington Cty. v. Com., 83 A.3d 901 (Pa. 2013) (holding that Article 1, section 27 of the Pennsylvania Constitution is self-executing); Sullivan v. Resisting Envtl. Destruction on Indigenous Lands (REDOIL), 311 P.3d 625, 637 (Alaska 2013) (holding that the State has a constitutional duty to take a hard look at a project's cumulative environmental impacts).

As I will discuss, I believe that these cases serve as examples of how courts can shift from weak to strong judicial enforcement of certain rights, as they gain experience and confidence adjudicating constitutional claims that implicate those rights. *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 263-64 (2008) (arguing that "weak-form review can be replaced by strong-form review when enough experience has accumulated to give us–judges, legislators, and the people alike–confidence that giving the judges the final word will not interfere with our ability to govern ourselves in any significant way").

[13] While this article is dedicated to the debates related to judicial enforcement of existing constitutional environmental rights in state constitutions, some of the discussions are also relevant for the debates about constitutionalizing and enforcing environmental protection rights at the federal level.

A related consideration deals with whether a political case can be made for the constitutionalization of environmental protection rights in liberal constitutional democracies. While this is an interesting and important issue, *see, e.g.,* DEMOCRACY AND GREEN POLITICAL THOUGHT: SUSTAINABILITY, RIGHTS AND CITIZENSHIP (Brian Doherty & Marius de Geus eds., 1996); TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS (2005) (hereinafter HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS); JOHN HANCOCK, ENVIRONMENTAL HUMAN RIGHTS: POWER, ETHICS, AND LAW (2003); GRAHAM SMITH, DELIBERATIVE DEMOCRACY AND THE ENVIRONMENT (2003), I do not address it in this paper. Rather, for the purposes of the paper, I assume that a strong case can be made for inclusion of environmental protection rights as part of the catalogue of 'fundamental rights,' and focus instead on the objections to judicial enforcement of said rights.

[14] Brooks, *A Constitutional Right*, *supra* note 7; Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1, 16-18 (1991) (hereinafter Brooks, *A New Agenda*); Caldwell, *supra* note 7; Robert Kundis Craig, *Should there be a Constitutional Right to a Clean/ Healthy Environment?*, 34 ENVTL L. REP. 11013 (Dec. 2004); Eurick, *supra* note 8; Eric T. Freyfogle, *Essay on the Bill of Rights: Should we Green the Bill?*, 1992 U. ILL. L. REV. 159 (1992); Gallagher, *supra* note 7; Gildor, *supra* note 7; Ledewitz, *supra* note 7; Sax, *supra* note 7; Schlickeisen, *supra* note 7; John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299 (2000); John A. Chiappinelli, Comment, *The Right to a Clean and Safe Environment: A Case for a Constitutional Amendment Recognizing Public Rights in Common Resources*, 40 BUFF. L. REV. 567 (1992); McLaren, *supra* note 7.

little emphasis has been placed in addressing the objections brought forward by courts and other legal academics. These objections, which I lay out and discuss in the following section, range from claims about ambiguity and technicality of these rights, their classification as positive, collective, and third generation rights, as well as with concerns about democracy and the institutional capacity of courts to entertain these types of claims.[15] After extensive discussion of all of these topics, I argue that, while some of these objections are significant, they only serve to limit the extent to which these rights can be enforced in a liberal constitutional setting.

Some final clarifications are necessary. A good deal of discussion on environmental rights deals with whether their content should be anthropocentric, and thus be limited to 'human' rights, or whether they should be extended to all living organisms in the planet,[16] or even those, human or others, that might come to existence in the future.[17] Although I do not wish to underestimate the importance of these debates, I intend to focus here on the anthropocentric component of environmental

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[15] *See, e.g.*, CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: THE LAST GREAT SPEECH OF FRANKLIN DELANO ROOSEVELT AND AMERICA'S UNFINISHED PURSUIT OF FREEDOM (2004) (hereinafter SUNSTEIN, THE SECOND BILL OF RIGHTS); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 234 (2001) (hereinafter SUNSTEIN, DESIGNING DEMOCRACY); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993) (hereinafter SUNSTEIN, THE PARTIAL CONSTITUTION); David M. Beatty, *The Last Generation: When Rights Lose Their Meaning*, *in* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 321 (David M. Beatty ed., 1994); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001); Dennis M. Davis, *The Case Against the Inclusion of Socio-Economic Rights in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475 (1992) (hereinafter Davis, *Directive Principles*); Jose L. Fernández, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVT'L. L. REV. 333 (1993); Daniel Reeder, *Federalism Does Well Enough Now: Why Federalism Provides Sufficient Protection for the Environment, and no Other Model is Needed*, 18 PENN ST. ENVTL. L. REV. 293 (2010); Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 47-49; Ruhl, *The Metrics of Constitutional Amendments*, *supra* note 7; Cass R. Sunstein, *Against Positive Rights*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225 (András Sajó ed., 1996) (hereinafter Sunstein, *Against Positive Rights*); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYR. L. REV. 1 (2005) (hereinafter Sunstein, *Why Does the American Constitution*); A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 225-26 (2004).

[16] HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 32-36; Tim Hayward, *Constitutional Environmental Rights: A Case for Political Analysis*, *in* MORAL AND POLITICAL REASONING IN ENVIRONMENTAL PRACTICE 109, 111 (Andrew Light & Avner de-Shalit eds., 2003) (hereinafter, Hayward, *A Case for Political Analysis*); James A. Nash, *The Case for Biotic Rights*, 18 YALE J. INT'L L. 235 (1993); SMITH, *supra* note 13, at 107; Joshua J. Bruckerhoff, Note, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615 (2008). *But see* Ledewitz, *supra* note 7, at 586 ("The right to a healthy environment is one of clear human welfare-not a right in nature itself.").

[17] EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1988). Schlickeisen, *supra* note 7, at 190-97. *See also* Oposa v. Factoran, 224 SCRA 792 (July 29, 1993) (Phil.). *But see* Trevor R. Updegraff, *Morals on Stilts: Assessing the Value of Intergenerational Environmental Ethics*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 367 (2009).

protection rights.[18] Additionally, while some of the cases and constitutional provisions cited here address the questions about whether the rights are enforceable against private parties, I only focus here on judicial enforcement or constitutional rights to environmental protection against governmental entities.

Finally, some of these sources I discuss here deal with the constitutionalization of social and economic rights, a category that sometimes is said to exclude environmental protection rights.[19] I will criticize the reliance on these classifications to distinguish among different rights in this article, but suffice it to say that here no scholar that is opposed to the constitutionalization of socioeconomic rights feels different about environmental protection rights, and their arguments in opposition to the former seem equally extensive to the latter. Given that the literature on constitutionalization and judicial enforcement of environmental protection rights is not as developed as the one for socioeconomic rights, I believe that my discussion of these sources will enrich the debates for this topic.

II. Objections to judicial enforcement of environmental protection rights

Professor Jeanne M. Woods argues that "[s]ocio-economic rights pose a significant conceptual challenge to the liberal construct, in which rights are deemed individual entitlements that are antagonistic to and super[s]ede the common good, thus mandating a limited-government paradigm."[20] Indeed, similar statements can

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[18] Like Graham Smith, I believe that "[t]he first step . . . for the project of constitutional environmentalism must surely be to ensure the entrenchment of *human* environmental rights." SMITH, *supra* note 13, at 107. *See also* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 35-36; Hayward, *A Case for Political Analysis*, *supra* note 16, at 111 (advocating for the constitutionalization of anthropocentric rights, because he believes those are "more likely to be enhanced than hindered by certain entrenched rights," and that once they are established, "practical jurisprudence and wider social norms will develop progressively to support more ambitious aims.").

[19] *See* MERCEDES FRANCO DEL POZO, EL DERECHO HUMANO A UN MEDIO AMBIENTE ADECUADO 11-16 (2000) (discussing the emergence of the third generation cultural and environmental rights discourse, tied to the concept of 'solidarity,' as opposed to first and second generation rights, which are linked to freedom and equality, respectively); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 122-25 (1991) (describing, but criticizing these distinctions). *But see* Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27 (including environmental rights within the category of socioeconomic rights); Jeanne M. Woods, *Emerging Paradigms of Protection for "Second-Generation" Human Rights*, *in* PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY 267, 286-87 (Clare Dalton ed., 2007) (hereinafter Woods, *Emerging Paradigms of Protection*) (discussing examples of judicial enforcement of environmental rights within her discussions about the justiciability of socioeconomic rights).

[20] Woods, *Emerging Paradigms of Protection*, *supra* note 19, at 267. *See also* Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763 (2003) (hereinafter Woods, *Justiciable Social Rights*).

be and have been said about environmental protection rights,[21] given that their implementation might require measures that could also be seen as counter to the 'limited-government paradigm.'

This awkward fit between socio economic rights and environmental rights, on one hand, and liberal theories of democracy, on the other, has led some scholars to argue that these 'rights' are not on equal footing, in terms of normative scope and enforceability, with traditional civil and political rights and, thus, they should not receive the same constitutional treatment, if they are to receive any at all. Others bring forth theoretical concerns about democracy, constitutionalism, and adjudication as forceful claims against constitutionalizing or, at the very least, judicially enforcing these rights.

In this section, I will discuss most of these objections to judicially enforcing constitutional environmental protection rights. First, I will address claims related to the classification of these rights as second or third-generation, positive and collective rights, as opposed to the traditionally enforceable first-generation, negative, individual categories of rights. After that, I will examine arguments related to the difficulties of defining the content of environmental protection rights, given their scientific and abstract nature. Finally, I will evaluate the concerns about the impact that judicial enforcement of environmental protection rights would have on notions of democracy, judicial review, and the proper role of courts and constitutional adjudication in the United States.

A. Objections based on the classification of environmental protection rights

i. Generational classification of human rights

It is common to see scholarly attempts at classifying existing and developing rights, whether it serves political, historical, practical, or even juridical purposes. One of the most prevalent of these exercises involves classifying rights among 'generations', which are defined by historical and theoretical characteristics.[22] According to this view, there are currently three generations of rights. The first generation is comprised of civil and political rights, like freedom of speech, freedom of religion and privacy, which "define a sphere of personal liberties into which the

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[21] *See* Robyn Eckersley, *Greening Liberal Democracy: The Rights Discourse Revisited*, *in* DEMOCRACY AND GREEN POLITICAL THOUGHT: SUSTAINABILITY, RIGHTS AND CITIZENSHIP, *supra* note 13, at 212. In fact, Woods discusses examples of judicial enforcement of environmental protection rights as part of her piece on enforcement of 'second generation' social and economic rights. Woods, *Emerging Paradigms of Protection*, *supra* note 19, at 286-87.

[22] Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309, 317 (1998); FRANCO DEL POZO, *supra* note 19, at 11-16; Shelton, *supra* note 19, at 122.

government cannot enter."[23] Freedom and liberty from government intrusion are the core principles that define this generation of rights.[24] Thus, these rights are couched as individual, negative rights, because they prohibit government conduct that intrudes onto these liberties. According to this classification, these rights do not require the State to perform any action in order to protect them.[25] The prevailing view is that the United States' Constitution only protects these types of negative rights, and not those belonging to the second and third generations.[26]

The second generation is composed of social and economic rights, like rights to housing, health, education and social security.[27] Contrary to first generation rights, these rights are positive in nature, because they require governments to implement affirmative measures in order to achieve their 'realization.'[28] They also have a redistributive component, given that they are particularly targeted at improving the standard of living of the poorest sectors of society.[29] Thus, it is said that the concept of equality constitutes the theoretical basis for these rights.[30]

Finally, the third generation of rights generally includes cultural and environmental rights, like language rights and rights to self-determination, rights to development, the right to peace, and environmental protection rights.[31] These rights "may both be invoked against the State and demanded of it; but above all (and herein lies their essential characteristic) they can be realized only through the concerted efforts of

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[23] Shelton, *supra* note 19, at 122. *See also* Taylor, *supra* note 22, at 317-18.

[24] FRANCO DEL POZO, *supra* note 19, at 16; Taylor, *supra* note 22, at 318.

[25] Cross, *supra* note 15, at 864 (distinguishing positive and negative rights). As a commenter on the subject has described it:

> The Constitution does not merely delineate the government's political powers and limitations; it also declares the government's ethical obligation not to interfere with its citizens' rights. From a deontological standpoint, this duty extends only to government actions: Government inaction, even in the face of extreme injury or indifference by state actors, is not a morally culpable deprivation of liberty by the government.

Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best not to Prune*, 3 U. PA. J. CONST. L. 750, 754 (2001) (citing David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986)).

[26] *See* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.) ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.").

[27] Louis Henkin, *Economic-Social Rights as Rights*, 2 HUM. RTS. L.J. 223 (1981); Taylor, *supra* note 22, at 318.

[28] Shelton, *supra* note 19, at 122; Taylor, *supra* note 22, at 318.

[29] Gov't of the Republic of S. Afr. v. Grootboom, (2001) (1) SA 46 (CC) (S. Afr.).

[30] FRANCO DEL POZO, *supra* note 19, at 16; Taylor, *supra* note 22, at 318. *But see* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 205 (asserting that socioeconomic rights should be argued "in the name of liberty, not equality").

[31] Shelton, *supra* note 19, at 122; Taylor, *supra* note 22, at 318-19.

all the actors on the social scene: the individual, the State, public and private bodies and the international community."[32] These new rights are founded on the concept of solidarity, because they arise out of existing political and social conditions, and they are linked by their collective nature; that is, that contrary to civil and political rights, they do not belong to individuals, but to a collective, or even to the entire human race.[33] Therefore, their 'realization' not only depends on positive governmental action; it requires positive action by all.[34]

Some scholars have questioned the historical basis for these classifications, arguing that, "in the domestic law of some countries and to a certain extent in international law, economic and social rights and their corresponding imposition of duties were the 'first generation,' preceding the recognition of civil and political rights."[35] I have little interest here in debating the importance –or lack of it– of classifying rights according to some chronological scale within the international and domestic human rights discourses.[36] However, some scholars use this classification in order to assert claims about the unenforceability of second and third generation rights.[37] These authors argue that the 'positive' and 'collective' nature of second and third generation rights makes them unsuitable for judicial enforcement, given that, contrary to negative, first generation rights, they require that a State allocate substantial amounts of funds to ensure their realization.[38]

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[32] Shelton, *supra* note 19, at 122. *See also* Taylor, *supra* note 22, at 319 ("Their primary characteristics are that they are essentially collective in dimension and require international cooperation for their achievement.").

[33] FRANCO DEL POZO, *supra* note 19, at 16; Taylor, *supra* note 22, at 319.

[34] FRANCO DEL POZO, *supra* note 19, at 16; Taylor, *supra* note 22, at 319.

[35] Shelton, *supra* note 19, at 122 n.77.

[36] *See* Sunstein, *Why Does the American Constitution*, *supra* note 15, at 8-9 (discussing the claim that the United States Constitution was ratified at "a time when constitutions were simply not thought to include social and economic guarantees," but arguing that it is not a sufficient explanation for why it still lacks such rights.)

[37] Some of these authors also question whether second and third generation rights are indeed rights. This topic, however, lies outside of the scope of this article.

[38] CHRISTOPHER LINGLE, THE ENVIRONMENT: RIGHTS AND FREEDOMS 5-6 (1992); Cross, *supra* note 15. Other authors oppose the constitutionalization and enforcement of positive rights for different reasons. Some argue that, generally, courts are not suitable forums for adjudicating positive rights claims and that they should nevertheless decline to enforce them for democratic and separation of powers concerns. Ulrich K. Preuß, *The Conceptual Difficulties of Welfare Rights*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION, *supra* note 15, at 211. Others assert that positive rights are too abstract or vague, and that they cannot be defined by courts of law. Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VAL. U. L. REV. 359, 370 (1988). An additional obstacle deals with the possibilities that under enforcement, or lack of enforcement of constitutional positive rights, might lead courts to "debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies an unreviewable privilege of indefinite postponement of a declared constitutional right." Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 16 (2003) (hereinafter Michelman, *The Constitution*);

ii. The positive/negative rights objections

In his eloquent piece in defense of distinguishing between positive and negative rights and opposing the constitutionalization and enforcement of the former, Professor Frank B. Cross describes the distinction between both as "intuitive": "One category is a right to be free from government, while the other is a right to command government action. A 'positive right is a claim to something . . . while a negative right is a right that something not be done to one.'"[39] He then uses this distinction to assert that the rights contained in the United States Bill of Rights are negative, and that social, economic and environmental rights are positive in nature.[40] Yet, while it does seem intuitive to distinguish between protection against state encroachment on rights and the imposition of positive governmental obligations to satisfy certain rights, it does not seem that such a distinction is particularly helpful to distinguish between first, second and third generation rights.[41]

Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663, 683 (2008) (hereinafter Michelman, *Explaining America Away*). Finally, some critics of judicial enforcement for positive rights, particularly advanced in the context of social and economic rights, question "whether the many constitutions containing social and economic rights have made any difference at all 'on the ground'--that is, there is real doubt about whether such rights have actually led to more money, food, or shelter for poor people." Sunstein, *Why Does the American Constitution*, *supra* note 15, at 15. I will address all of these claims at different points in this paper. For now, however, I am only concerned with claims that civil and political rights are negative rights and economic, social and environmental rights are positive rights.

[39] Cross, *supra* note 15, at 864. *See also* Bryan P. Wilson, Comment, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627, 635 (2004).

[40] Cross, *supra* note 15, at 858-63.

[41] Nonetheless, this classification of rights has exerted an influence over some justices when confronted with the question of whether a state constitutional environmental right is self-executing:

> Unlike the first twenty-six sections of Article 1, s 27, the one which concerns us in the instant case, does not merely contain a limitation on the powers of government. . . . .
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> . . . [T]he remaining provisions of Section 27, rather than limiting the powers of government, expand these powers. These provisions declare that the Commonwealth is the 'trustee' of Pennsylvania's 'public natural resources' and they give the Commonwealth the power to act to 'conserve and maintain them for the benefit of all the people.' Insofar as the Commonwealth always had a recognized police power to regulate the use of land, and thus could establish standards for clean air and clean water consistent with the requirements of public health, s 27 is merely a general reaffirmation of past law. It must be recognized, however, that up until now, aesthetic or historical considerations, by themselves, have not been considered sufficient to constitute a basis for the Commonwealth's exercise of its police power.
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> Now, for the first time, at least insofar as the state constitution is concerned, the Commonwealth has been given power to act in areas of purely aesthetic or historic concern.

In response to the positive/negative rights distinction, many authors have explained that all rights, even traditional civil and political rights, impose affirmative, and costly, obligations on governments.[42] These positive commitments are primarily related to the maintenance of political, judicial, security and defense institutions, which are necessary for the exercise of individual freedoms.[43] Free speech, for

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Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 311 A.2d 588, 592 (Pa. 1973). *See also* Robb v. Shockoe Slip Foundation, 324 S.E.2d 674, 676 (Va. 1985) (relying on the assertion that Virginia's constitutional environmental provision "is not prohibitory or negative in character," to conclude that it is not self-executing); Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 302 A.2d 886, 896 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973) (Mencer, J., concurring and dissenting).

[42] SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 222-23 (citing STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999)) ("Even conventional individual rights, . . . require governmental action. . . . So-called negative rights are emphatically positive rights. In fact all rights, even the most conventional, have costs."); SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 198-202; TUSHNET, *supra* note 12, at 233-34; Víctor Abramovich & Christian Courtis, *Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales*, *in* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES 284-87 (Martín Abregu & Christian Courtis, compilator 1997); Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT'L L. & POL. 1, 11-12 (2007); Roberto Gargarella, Pilar Domingo & Theunis Roux, *Courts, Rights and Social Transformation: Concluding Reflections*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 257-59 (Roberto Gargarella, Pilar Domingo & Theunis Roux, eds. 2006); Hayward, *A Case for Political Analysis*, *supra* note 16, at 119; Michelman, *The Constitution*, *supra* note 38, at 16; Wiktor Osiatynski, *Social and Economic Rights in a New Constitution for Poland*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION, *supra* note 15, at 233; Preuß, *supra* note 38, at 211; Shelton, *supra* note 19, at 123; Sunstein, *Why Does the American Constitution*, *supra* note 15, at 6-8; Woods, *Justiciable Social Rights*, *supra* note 20, at 764-65. Additionally, Professor Sunstein questions the assertion that civil and political rights do not have substantial budgetary implications:

> All constitutional rights have budgetary implications; all constitutional rights cost money. If the government plans to protect private property, it will have to expend resources to ensure against both private and public intrusions. If the government wants to protect people against unreasonable searches and seizures, it will have to expend resources to train, monitor, and discipline the police. If the government wants to protect freedom of speech, it must, at a minimum, take steps to constrain its own agents; and these steps will be costly. It follows that insofar as they are costly, social and economic rights are not unique.

Sunstein, *Why Does the American Constitution*, *supra* note 15, at 7. *See also* In re Certification of the Constitution of the Republic of South Africa, (1996) (4) SA 744 (CC) at ¶ 77 (S. Afr.) ("[E]ven when a court enforces civil and political rights . . . the order it makes will often have [budgetary] implications. A court may require the provision of legal aid or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits.").

[43] Abramovich & Courtis, *supra* note 42, at 285-86; *see also* G.J.H. van Hoff, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, *in* THE RIGHT TO FOOD 97 (Philip Alston & K. Tomasevski, eds. 1984).

example, "will not be protected unless taxpayers are willing to fund a judicial system willing and able to protect that right" and, perhaps, to devote resources to open "certain areas where speech can occur, such as streets and parks."[44] Additionally, the rights to jury trial in both civil and criminal cases, and to counsel in criminal prosecutions, serve as examples of positive, and costly, rights imposed by the United States Constitution.[45]

On the other hand, second and third generation rights have both positive and negative components.[46] In the context of the right to housing, for example, Louise Arbour argues that "'forced' eviction (that is, eviction that is arbitrary or does not respect minimum guarantees) requires the same type of immediate action and redress as does the prohibition of torture."[47] A great deal has also been said about how the Supreme Court came close to constitutionalizing social and economic rights in a series of decisions in which the Court prohibited states from imposing a one-year waiting period before new citizens could receive welfare benefits,[48] a one-year residence requirement for receiving state-funded medical care,[49] and from removing welfare benefits from people without complying with due process requirements,[50] all negative applications of social and economic rights.[51]

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[44] SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 234. *See* Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939) (Roberts, J.) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."); Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) (identifying streets and parks as "quintessential," or traditional, "public forums"). *See also* TUSHNET, *supra* note 12, at 229 (making a similar case about the effects of the public forum doctrine and the time, place and manner regulations).

[45] U.S. CONST. amend. VI-VII. *See* Sunstein, *Why Does the American Constitution*, *supra* note 15, at 6-7.

[46] Gargarella, Domingo & Roux, *supra* note 42, at 258-59. *See also Certification of the Constitution*, 1996 (4) SA at ¶ 78 ("At the very minimum, socio-economic rights can be negatively protected from improper invasion."); Michelman, *The Constitution*, *supra* note 38, at 17-18; Albie Sachs, *Enforcing Socio-Economic Rights*, *in* SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW 69 (Marie-Claire Cordonier Segger & C.G. Weeramantry, eds., 2005); Wilson, *supra* note 39, at 639-40.

[47] Arbour, *supra* note 42, at 11. *See also* Michelman, *The Constitution*, *supra* note 38, at 17-18.

[48] Shapiro v. Thompson, 394 U.S. 618 (1969).

[49] Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

[50] Goldberg v. Kelly, 397 U.S. 254 (1970).

[51] SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 159-62; Sunstein, *Why Does the American Constitution*, *supra* note 15, at 20-21. Of course, the Supreme Court did not end up constitutionalizing social and economic rights, a development that Professor Sunstein believes was primarily a consequence of the election of Richard Nixon as President of the United States in 1968 and the subsequent change in the Court's composition. SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 162-71; Sunstein, *Why Does the American Constitution*, *supra* note 15, at 21-23.

Constitutional environmental protection rights can also have negative features.[52] We could conceivably draft a constitutional provision to protect individuals against State intrusions on their substantive rights to a clean or healthy environment,[53] one that would allow individuals to challenge state actions that they believe degrade the quality of the environment.[54] Additionally, environmental protection rights can be linked to other constitutional rights,[55] like the right to life,[56] the rights to equal protection of the laws,[57] and the right to

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[52] Brooks, *A Constitutional Right*, *supra* note 7, at 1108-09 (arguing that recognizing constitutional environmental rights "reframes the issue as one in which a government project or a failed government regulation violates an individual's environmental rights within an ecosystem."); *see also* Bruckerhoff, *supra* note 16, at 627 (arguing that environmental rights should be viewed as negative rights); Wilson, *supra* note 39, at 639-40 (suggesting that "[t]hough the right to a clean and healthful environment is usually considered to be a positive right, the right may in fact be a negative one.").

[53] *See* Bruckerhoff, *supra* note 16, at 627 (arguing that "the government does not necessarily provide a healthy environment to its citizenry; instead, it must restrain from acting in ways that harm the environment."); Wilson, *supra* note 39, at 640 ("Unless it is taken by the government or some other party, a person theoretically possesses the right to a clean environment just as he or she possesses a right to speak.").

[54] This, of course, would raise another set of objections related to the ambiguity of said substantive right, and the adequacy of courts to define its content and adjudicate controversies in which it is implicated. I will deal with those later in this paper.

[55] The Constitutional Court of Colombia has devised a paradigmatic example of how these links work. Although environmental protection rights are included in several provisions of the Colombian Constitution, CONST. COLOM., Arts. 79-81, 334, 366, *available at* http://pdba.georgetown.edu/constitutions/colombia/col91.html (last visited May. 23, 2018), they are not included as fundamental rights, but rather as collective rights. Thus, environmental plaintiffs would seem to be precluded from using procedural remedies like the "acción de tutela", designed for violations of fundamental rights. However, in a series of cases decided shortly after the ratification of the Constitution in 1991, the Constitutional Court decided that whenever non-fundamental rights, such as environmental protection rights, could be "connected" to fundamental rights, they could take advantage of the "acción de tutela", as well as any other remedy created for this category of rights. OSCAR DARÍO AMAYA NAVAS, LA CONSTITUCIÓN ECOLÓGICA DE COLOMBIA: ANÁLISIS COMPARATIVO CON EL SISTEMA CONSTITUCIONAL LATINOAMERICANO 145-212 (2002); SANDRA LUCÍA RODRÍGUEZ ROJAS & NARYAN FERNANDO ALONSO BEJARANO, MECANISMOS JURÍDICOS DE LA PROTECCIÓN AMBIENTAL 41-93 (1997); RODAS MONSALVE, *supra* note 4, at 31-107; José María Borrero Navia, *Derecho Ambiental y Cultura Legal en América*, *in* JUSTICIA AMBIENTAL: CONSTRUCCIÓN Y DEFENSA DE LOS NUEVOS DERECHOS AMBIENTALES CULTURALES Y COLECTIVOS EN AMÉRICA LATINA 63-64 (Enrique Leff, coordinator, 2001); Claudia Mora Pineda, *La Defensa Judicial del Medio Ambiente en Colombia*, *in* JUSTICIA AMBIENTAL: CONSTRUCCIÓN Y DEFENSA DE LOS NUEVOS DERECHOS AMBIENTALES CULTURALES Y COLECTIVOS EN AMÉRICA LATINA, *supra* note 49, at 110-19.

[56] The highest courts in several countries, such as India and Pakistan, have followed this route to elevate environmental protection rights to fundamental rights status. Anderson, *supra* note 6, at 213-15; Martin Lau, *supra* note 5. In India, the Supreme Court has used these newly created rights to prevent the State from conducting certain operations that they have interpreted to be hazardous to the environment. NIMUSHAKAVI, *supra* note 6, at 193-226; SINGH SIJAPATI, *supra* note 6, at 37-46; Anderson, *supra* note 6, at 213-15; D.M. Dharmadhikari, *supra* note 6, at 28-29.

[57] *See* Abramovich & Courtis, *supra* note 42, at 299-300; 310-11 (arguing that prohibitions against discrimination form part of the negative component of social, economic and cultural rights).

health,[58] to oppose State activities that implicate these rights. For instance, a constitutional environmental protection right could be interpreted to include an environmental justice component, and could allow poor communities to challenge what they believe are disproportionate and discriminatory allocations of polluting State operations near their dwellings.[59]

A final component of judicial enforcement of constitutional environmental protection rights, one that transcends the positive/negative rights distinctions and is particularly relevant in the United States, is that these provisions can serve as a basis for legislative and executive action, as well as a source for interpretation of existing and new environmental statutes. In recent years, courts have begun to question whether several federal environmental statutes are sufficiently linked to interstate commerce so as to constitute valid exercises of Congress powers under the Commerce Clause, or have any foundation in any of the enumerated constitutional powers of Congress.[60] Where a constitutional environmental protection right drafted or read into the United States Constitution, it could very well provide a safer basis for congressional exercise of its legislative authority.[61] As for state environmental protection rights, several courts have used their respective constitutional provisions to uphold legislative and executive environmental measures.[62]

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[58] Similar to the examples about the right to life, the highest courts in some countries, such as Ireland and Italy, have constitutionalized environmental protection rights by linking them to their respective constitutional rights to health. *See* Kimber, *supra* note 5, at 250 (Ireland); Guerino D'Ignazio, *La tutela del Ambiente y la protección de las Áreas Naturales en Italia*, *in* DERECHO COMPARADO DEL MEDIO AMBIENTE Y DE LOS ESPACIOS NATURALES PROTEGIDOS, *supra* note 4, at 151 (Italy); Montini, *supra* note 5, at 283-84 (Italy).

[59] Abramovich & Courtis, *supra* note 42, at 299-300; 310-11. *But see* M. Patrice Benford, Note, *Life, Liberty and the Pursuit of Clean Air Fight for Environmental Equality*, 20 T. MARSHALL L. REV. 269, 275-281 (1995) (discussing the failed efforts and doctrinal difficulties with bringing "environmental racism" claims under the Equal Protection Clause of the Fourteenth Amendment).

[60] Richard J. Lazarus, THE MAKING OF ENVIRONMENTAL LAW 36-38 (2004) (hereinafter, Lazarus, THE MAKING); Richard J. Lazarus, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 VA. ENVTL. L.J. 231, 243-59 (2005) (hereinafter Lazarus, *Human Nature*); Robert V. Percival, *"Greening the Constitution" Harmonizing Environmental and Constitutional Values*, 32 ENVTL. L. 809, 842-44 (2002).

[61] Caldwell, *supra* note 7, at 3-5; Craig, *supra* note 14, at 11019-20; Gildor, *supra* note 7, at 830-47. In fact, in light of the Supreme Court's decision in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), some environmental statutes could be at an increased risk of being challenged on Commerce Clause grounds. *See* James R. May, *Healthcare, Environmental Law, and the Supreme Court: An Analysis Under the Commerce, Necessary and Proper, and Tax and Spending Clauses*, 43 ENVTL. L. 233 (2013).

[62] Douglas v. Judge, 568 P.2d 530, 532-33 (1977) (relying on environmental provision to conclude that a tax was levied for a public purpose); State v. Bernhard, 568 P.2d 136, 138 (Mont. 1977) (upholding state criminal statute by using constitutional environmental provision to recognize state police power to "preserve or enhance aesthetic values"); Askew v. Game and Fresh Water Fish Commission, 336 So.2d 556, 560 (Fla. 1976) (using environmental provision to conclude that legislation is constitutional, in a situation where, if not existent, the statute would be unconstitutional); Michigan

Professor Cross does not address the claim that positive rights also have negative components. However, he states that the argument that all rights have positive components because they require a governmental structure to be enforced "is too facile:"

> The notion of a legal right necessarily implies law, which implies government enforcement. The claim that legal rights require legal enforcement is tautological and does not automatically render all rights positive. One might accurately say, as Holmes and Sunstein do, that all rights, including negative ones, require government enforcement, but this does not mean that we cannot distinguish among types of rights.[63]

He instead proposes the following test to distinguish between positive and negative rights: "if there was no government in existence, would the right be automatically fulfilled?"[64] He argues that a negative right "is not dependent upon government in the sense that the abolition of government would intrinsically satisfy the right. In other words, if there is no government, it cannot establish a religion, pass a law denying free speech, or deprive its citizens of life, liberty, or property without due process."[65] Thus, "[w]ithout a state, one is definitionally free from intrusive state actions."[66]

Besides objecting to his stateless baseline because it is unrealistic, something that Professor Cross acknowledges,[67] its reasoning seems to assume that these rights would be respected under an anarchist State. It is true that if governments did not exist, there would be no need to have protections against state intrusions on rights. However, under this scenario, governments would not constitute "the greatest risk to individual freedom of action;"[68] private individuals would, particularly those with power. Finding themselves unconstrained by government, these individuals

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State Highway Commission v. Vanderkloot, 220 N.W.2d 416 (Mich. 1974) (concluding that the Highway Condemnation Act is constitutional, even though it did not have 'environmental provisions,' because it interprets it in a manner compatible with the environmental clause, and states that it is limited by the substantive provisions on another act, the Environmental Protection Act).

[63] Cross, *supra* note 15, at 865 (paraphrasing HOLMES & SUNSTEIN, *supra* note 42, at 43).

[64] *Id.* at 866.

[65] *Id.*

[66] *Id.* at 867.

[67] *Id.* at 878 ("In any event, the pragmatic critique of my distinction does not necessarily deny my theoretical difference between positive and negative rights but maintains that the difference is one without a justifiable distinction in today's world."). It is interesting to note that if we were to choose a more (albeit still not completely) realistic hypothetical like, say, 'if courts were not allowed to provide relief against rights violations by the State, would the right be automatically fulfilled?,' the distinctions between positive and negative rights would not hold.

[68] *Id.* at 868 (identifying this as a justification for his stateless baseline test).

could very well seek to impose their will on the weaker members of society, limiting their 'negative' civil and political rights.[69] Given these circumstances, the claim that negative rights would be fulfilled under a stateless hypothetical would seem as nothing more than a hollow promise.

All of the aforementioned do not mean that there is no difference between rights in relation to the costs of their respective positive enforcements. As Wiktor Osiatynski asserts, "[i]n the case of civil and political rights, the claim against the state is limited to the creation of a general mechanism which facilitates the implementation of rights. Social and economic rights, by contrast, imply an entitlement to a specific benefit."[70] Thus, Professor Sunstein concedes that "it is possible that [social and economic] rights are unusually costly."[71] He explains:

> For example, to ensure that everyone has housing, it will be necessary to spend more than must be spent to ensure that everyone is free from unreasonable searches and seizures. But any such comparisons are empirical and contingent; they cannot be made on an a priori basis. We could imagine a society in which it costs a great deal to protect private property, but not so much to ensure basic subsistence. Of course, most societies are not like that. In most societies, the management of a social welfare system is more expensive than the management of a system to protect property rights. This kind of distinction--quantitative rather than qualitative in nature--is probably the central one.[72]

In this sense, the positive/negative differences between rights are only matters of degree, and particularly dependent on the social, economic, and political circumstances of a specific country.[73] Therefore, while the theoretical positive/negative rights distinction does not constitute a valid objection to judicial enforcement of economic, social and environmental rights, an argument could be made that, as a matter of policy, courts should not enforce the positive components of these rights,[74] given their substantial budgetary implications. As I will discuss later in this paper, while this policy concern is significant, it is not insurmountable, as courts can devise

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[69] This is, of course, also speculative, but it is no more than a description of what social darwinist tendencies could lead to.

[70] Osiatynski, *supra* note 42, at 239. In this regard, environmental protection rights would seem to fall under the 'entitlement' category.

[71] Sunstein, *Why Does the American Constitution*, *supra* note 15, at 7. *See also* TUSHNET, *supra* note 12, at 234 (describing Professor Sunstein's claim).

[72] Sunstein, *Why Does the American Constitution*, *supra* note 15, at 7-8.

[73] *Id. See also* Abramovich & Courtis, *supra* note 42, at 286-87.

[74] Thus, the negative components of constitutional environmental protection rights would not be affected by this objection.

remedies that could prevent them from frequently imposing costly obligations on governments. In short, while the existence of positive components to environmental rights does not, by itself, preclude their enforcement, courts should take the potential and particular impacts of enforcement of positive rights into account when evaluating the types of remedies that they can grant in those cases.

iii. The individual/collective rights objections

A similar claim can be made about the usefulness of distinguishing between individual and collective rights as a basis for making arguments against enforcement of the latter. While environmental protection rights certainly have collective components, they can also be couched in individual terms.[75] An individual who lives close to a military base could challenge the conduction of military training exercises on environmental grounds, claiming that some of the operations will pollute the surrounding environment and impair his or her health. Whether or not he or she prevails depends on various circumstances, but it is enough here to note that the person would be raising individual claims.

However, some authors argue that enforcing the collective component of rights in favor of particulars who took their claims to the courts would lead to inequalities in the manner in which the rights are granted between those who prayed for judicial relief and those who are in identical situations but did not seek judicial enforcement.[76] This might be true, but it is no less true for environmental rights than of civil and political rights. A pregnant woman may have a qualified right to an abortion, and may desire to get one, and yet, in some places, whether or not she gets one has all to do with whether or not she prays for judicial relief.[77]

Some scholars also assert that contrary to individual civil and political rights, enforcement of collective rights provides benefits for some people at the expense of others.[78] According to this view, which has already been relied on as a basis for

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[75] Abramovich & Courtis, *supra* note 42, at 301. *See also* Shelton, *supra* note 19, at 124-25 (arguing that "[a]ll human rights involve correlative duties for individuals, groups, and governments.").

[76] Abramovich & Courtis, *supra* note 42, at 299.

[77] This, in turn, raises concerns about the inequalities of litigation as a mechanism for rights protection or even social justice. Given the substantial costs associated with litigation, some individuals would not be able to use it in order to advance their claims. While an in depth study of this important issue lies outside the scope of this paper, I will make some brief remarks on the subject later on.

[78] Osiatynski, *supra* note 42, at 239. Professor Sunstein provides a good description of this objection:

> A more severe objection would be that rights to decent minimum conditions are actually violative of rights, simply because they call for redistribution or resources. On this view, the second bill should be rejected because it compromises rights, properly conceived. The second bill would force some people to assist others through the coercive taking of their resources. To ensure that everyone has a "useful and remunerative job," "adequate food and clothing and recreation," or "a decent home," it will be necessary for many Americans to pay

not addressing questions about the meaning of a state constitutional environmental provision,[79] enforcing social and environmental protection rights "is likely to result in zero-sum or negative-sum policy outcomes: while some groups benefit, others must necessarily lose. In general, individual liberties in the form of private property rights and freedom of exchange will be restricted."[80]

Although the objection might be overstated,[81] there is some force to it. Undoubtedly, in some cases, the enforcement of constitutional environmental protection rights could have considerable impacts on the level of protection of other peoples' rights. However, this is not a feature exclusive to judicial enforcement of these rights, but to all methods of enforcement. Indeed, when the political branches of government enact and implement environmental protection statutes, they are also potentially limiting specific rights. In this regard, this is not an objection against

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> for others. Perhaps this is a violation of rights. In the words of one critic, the first bill "reflects an individualist political philosophy that prizes freedom, welfare rights a communitarian or collectivist one that is willing to sacrifice freedom."

SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 204-05.

[79] In addressing the question whether the environmental provision included in Article I, section 27 of the Pennsylvania Constitution is self-executing, various justices of the Pennsylvania Supreme Court relied on this objection to conclude in the negative:

> If we were to sustain the Commonwealth's position that the amendment was self-executing, a property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property. The fact that the owner contemplated a use similar to others that had not been enjoined would be no guarantee that the Commonwealth would not seek to enjoin his use. Since no executive department has been given authority to determine when to move to protect the environment, there would be no way of obtaining, with respect to a particular use contemplated, an indication of what action the Commonwealth might take before the owner expended what could be significant sums of money for the purchase or the development of the property.
>
> We do not believe that the framers of the environmental protection amendment could have intended such an unjust result, one which raises such serious questions under both the equal protection clause and the due process clause of the United States Constitution. In our opinion, to insure that these clauses are not violated, the Legislature should set standards and procedures for proposed executive action.

Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 311 A.2d 588, 593-94 (Pa. 1973). *See also* Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 302 A.2d 886, 895 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973) (Bowman, J., concurring).

[80] LINGLE, *supra* note 38, at 5-6. *See also* Lazarus, THE MAKING, *supra* note 60, at 25 (explaining that "[e]nvironmental law is riddled with controversy because there is almost always a mismatch in the allocation of those distributional costs and benefits. Those who receive the benefits will often not be required to absorb the related costs.").

[81] Whether judicial enforcement of constitutional environmental protection rights will affect the rights of other parties depends on the nature of the case and the remedies prayed for and granted by courts, among many other factors.

judicially enforcing these constitutional values, but a substantive claim that these rights do not belong in a constitution, or that they at least should be always superseded by certain individual liberties.[82]

Additionally, while constitutional environmental rights might have an impact on the protection of other peoples' rights, the same can be said about enforcement of civil and political rights. Residential[83] and abortion clinic[84] picketing cases, for example, involve clashes between individuals and groups' freedom of speech rights, on one side, and individuals privacy rights, on the other. Whichever party comes out on the losing side in those cases might feel as if their rights are not being fully protected. Given that whether or not enforcement of constitutional environmental protection rights implicates other constitutional rights in particular cases is also a matter open to judicial interpretation, the losing party in these cases will feel like the losing party in the picketing cases.

A final objection to collective rights remains. As applied to the United States, this objection is intrinsically related to standing concerns. It is sometimes stated that, since environmental protection rights involve collective, rather than individual, interests, they are not justiciable claims, because they do not fit within the "injury-in-fact" requirement of the Supreme Court's standing doctrine.[85]

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[82] Professor Sunstein provides a compelling response to this objection:

> Those who possess a great deal do so because laws and institutions, including public institutions, make their holdings possible. Without public support, wealthy people could not possibly have what they own. Their holdings are protected by taxpayer-funded agencies, including the police and the courts. The same is true of liberty itself. In the state of nature –freed from the protection of law and government– how well would wealthy people fare?

SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 205.

[83] Frisby v. Schultz, 487 U.S. 474 (1988); Carey v. Brown, 447 U.S. 455 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

[84] Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Center, 512 U.S. 753 (1994).

[85] *See, e.g.*, Summers v. Earth Island Institute, 129 S.Ct. 1142, 1149 (2009) (standing requires that a plaintiff petitioning injunctive relief "show that he is under threat of suffering 'injury in fact' that is concrete and particularized;"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Sierra Club v. Morton, 405 U.S. 727 (1971). *But see* Massachusetts v. EPA, 549 U.S. 497 (2007); Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000). *See also* Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact after* Lujan v. Defenders of Wildlife, 12 UCLA J. ENVTL. L. & POL'Y 345, 362-66 (1994); Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 239-46 (2008); Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of* Lujan v. Defenders of Wildlife, 22 COLUM. J. ENVTL. L. 169, 191-93 (1997); Martin A. McCrory, *Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication*, 20 STAN. ENVTL. L.J. 73, 106-08 (2001); Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENVTL. L. & POL'Y F. 119, 120 (2001).

Part of this objection can be easily disposed of by specifically drafting constitutional environmental protection rights that relax standing requirements. A few states have already done so,[86] something that state courts dealing with these provisions have acknowledged without much controversy.[87]

However, some might see this relaxation as an affront on the adversarial juridical system or on important notions about separation of powers and the type of justiciable claims that are suitable for constitutional adjudication.[88] While these are important concerns, it should be noted that the Supreme Court's standing doctrine, particularly its "injury in fact" analysis and foundations, has been the subject of powerful criticisms.[89] On the other hand, Professor Richard J. Lazarus argues

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[86] *See, e.g.*, HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2.

[87] Fiedler v. Clark, 714 F.2d 77, 79-80 (9th Cir. 1983) (holding that Article XI, section 9 of the Hawaiian Constitution was intended "to remove barriers to standing to sue, not to enlarge the subject matter jurisdiction of the federal courts."); City of Elgin v. County of Cook, 660 N.E.2d 875, 891 (Ill. 1996) (holding that Article XI, section 2 of the Illinois Constitution "does not create any new causes of action but, rather, does away with the "special injury" requirement typically employed in environmental nuisance cases."); Life of the Land v. Land Use Commission, 623 P.2d 431, 437-41 (Haw. 1981) (holding that an environmental organization and its members had standing to challenge a land reclassification, even though they were neither owners nor adjoining owners of said land). *But see* Glisson v. City of Marion, 720 N.E.2d 1034, 1042-45 (Ill. 1999) (holding that Article XI, section 2 of the Illinois Constitution did not grant standing to bring actions to force the government to protect endangered or threatened species, because that is not included in the phrase "healthful environment").

[88] As the Supreme Court has stated:

> In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation 'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'
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> *Summers*, 129 S.Ct. at 1148. See *Laidlaw*, 528 U.S. at 209 (Scalia, J., dissenting); *Lujan*, 504 U.S. at 559-60; Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1 (2001); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). *But see* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) (arguing that separation of powers concerns require that the courts defer to Congressional grants of standing to sue).

[89] *See, e.g.*, David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79 (2004); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Sam Kalen, *Standing of its Last Legs:* Bennett v. Spear *and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1 (1997); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002); Percival & Goger, *supra* note 85; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27 (2003).

that the Court's actual standing doctrine fails to take into account the "expansive temporal and spatial dimensions of ecological cause and effect," as well as the "kinds of causal connections sought to be vindicated by modern environmental protection law."[90]

B. Objections based on the content of the rights

Apart from taking issue with the 'positive' and 'collective' nature of constitutional rights to environmental protection, opponents of their constitutionalization and enforcement place particular emphasis on the difficulties with defining the content of these rights. Scholars here advance two specific objections. First, it is said that environmental protection rights are too abstract or vague, so that it is very difficult, if not impossible, to define them. This objection stresses the inherent difficulties with providing a workable substantive content for a substantive constitutional right to environmental protection. It is suggested that it is impossible to provide a juridical

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[90] Professor Lazarus explains:

> Article III of the Federal Constitution provides for federal court jurisdiction only over "cases and controversies," which the Supreme Court has ruled requires that the party bringing the lawsuit establish a "concrete" and "imminent" injury. The nature of cause and effect within the ecosystem--because of how cause and effect are so spatially and temporally spread out--makes it very hard, however, for environmental plaintiffs to establish that their injury is "concrete" or "imminent."
>
> The expansive temporal and spatial dimensions of ecological cause and effect defy traditional notions of concreteness and imminence as defined by the Court's precedent. Environmental plaintiffs can harbor sincere, strong feelings about species that they may in fact never physically visit, but the injury they suffer from their extinction is no less intense or legitimate. Justice Scalia may, as he did writing the opinion for the Court in *Lujan v. Defenders of Wildlife*, mock such a connection as based on a "Linnaean leap." But, for many Americans whose life experiences demonstrate such a connection with distant species, it is no leap at all.
>
> The real disconnect is instead between the Court's precedential touchstone for identifying the requisite injury for Article III standing and the kinds of causal connections sought to be vindicated by modern environmental protection law. It is incumbent upon the Court itself to bridge that gap and return to Article III's basic requirement of ensuring an adequately adversarial judicial proceeding, lest the Constitution be unfairly read as presenting an insurmountable obstacle to the enforcement of important federal environmental mandates.

Lazarus, *Human Nature*, *supra* note 60, at 260 (footnotes omitted). *See also Morton*, 405 U.S. at 755-56 (Blackmun, J., dissenting) ("Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"). I have made a similar claim with regards to Puerto Rico's environmental standing case law. Luis José Torres Asencio, *A las puertas del Tribunal*, 46 REV. JUR. UIPR 333 (2012).

definition of these rights, labeling all efforts to define them as arbitrary or political in nature.[91]

The second objection deals with claims that, given the scientific and technical nature of environmental decision-making processes, courts are not adequate forums for adjudicating environmental claims, due to their lack of specialized knowledge on these issues.[92] Thus, courts tend to defer to the judgments of the administrative agencies that are given the responsibility of enforcing these constitutional mandates.[93] I will address these two objections separately.

i. The vagueness objection

Several scholars assert that courts are incapable of adequately defining constitutional rights to environmental protection, given their abstract or vague nature. This claim seems to be particularly directed at substantive rights to environmental protection.[94] These authors claim that there is no general consensus as to what a 'clean,' 'healthy,' 'adequate,' 'decent,' or 'sustainable' environment really means, much less what actions does a right to live in such an environment

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[91] FRANCO DEL POZO, *supra* note 19, at 65; HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 95; SMITH, *supra* note 13, at 108; Abramovich & Courtis, *supra* note 42, at 298; Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra* note 5, at 11-12; Brandl & Bungert, *supra* note 7, at 88-89; Brooks, *A Constitutional Right*, *supra* note 7, at 1071; Caldwell, *supra* note 7, at 2; François Du Bois, *Social Justice and the Judicial Enforcement of Environmental Rights and Duties*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra* note 5, at 157; Eckersley, *supra* note 21, at 229-30; Fernández, *supra* note 15, at 381; Gallagher, *supra* note 7, at 123; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117; Hill, Wolfson & Targ, *supra* note 7, at 395; Pollard, III, *supra* note 8, at 376-77; Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 48; Thompson, Jr., *supra* note 7, at 187-90; Thompson, Jr., *supra* note 8, at 897-98; Cusack, *supra* note 7, at 200. *See also* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 210 (describing the same claim, but in the context of social and economic rights); Christian Courtis, *Judicial Enforcement of Social Rights: Perspectives from Latin America*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?, *supra* note 42, at 171 (same).

[92] Anderson, *supra* note 91, at 11; Caldwell, *supra* note 7, at 3; Du Bois, *supra* note 91, at 169; Eckersley, *supra* note 21, at 230; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117-18; Hill, Wolfson & Targ, *supra* note 7, at 395; Thompson, Jr., *supra* note 7, at 189-90, 193-94. *See also* Sachs, *supra* note 46, at 68 (describing the same claim, but in the context of social and economic rights).

[93] Hill, Wolfson & Targ, *supra* note 7, at 395; Thompson, Jr., *supra* note 8, at 902.

[94] HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 95; SMITH, *supra* note 13, at 107-08; Anderson, *supra* note 91, at 11-12; Brandl & Bungert, *supra* note 7, at 88-89; Caldwell, *supra* note 7, at 2; Gallagher, *supra* note 7, at 123; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117; Hill, Wolfson & Targ, *supra* note 7, at 395; Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 48; Thompson, Jr., *supra* note 8, at 897-98, 901-02.

require governments to perform.[95] Thus, they argue, these issues should be left for consideration by the political branches of governments.[96] As with the positive/negative rights distinction, some courts have also relied on this objection to hold both that existing constitutional rights to environmental protection are not self-executing or enforceable,[97] and that such rights should not be interpreted from other constitutional provisions.[98]

At the outset, the reader should note the limited scope of this objection. Adducing that substantive constitutional environmental provisions are vague seeks to prevent courts from evaluating whether specific actions or omissions, or

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[95] *See* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 95 (discussing difficulties with defining 'adequate environment'); SMITH, *supra* note 13, at 108 (acknowledging difficulties with defining 'clean' air or water); Anderson, *supra* note 91, at 4 (discussing problems with defining 'decent environment'); Brandl & Bungert, *supra* note 7, at 88-89 (stating that "[t]he terms 'environment,' 'protection,' 'healthy,' and 'beautiful' are broad and indeterminate"); Caldwell, *supra* note 7, at 2 ("Defining a practicable and generally acceptable definition of 'decent' would likely prove an impossible task."); Gallagher, *supra* note 7, at 123 (asserting that the ambiguity of phrases like 'decent' and 'healthful environment' was one of the reasons that doomed the 1968-1970 environmental amendment proposals in the United States); Hayward, *A Case for Political Analysis*, *supra* note 16, at 117 (discussing problems with defining 'decent' or 'adequate' environment); Horwich, *supra* note 7, at 361-62 (describing the terms 'clean' and 'healthful' as vague, within the context of interpreting Montana's constitutional environmental provisions); Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 48 (questioning the content of a right to "clean and healthful air"); Thompson, Jr., *supra* note 8, at 897-98 (discussing abstract nature of general terms like 'healthful' environment).

[96] SMITH, *supra* note 13, at 108; Fernández, *supra* note 15, at 387; Horwich, *supra* note 7, at 361-65.

[97] In *Commonwealth v. National Gettysburg Battlefield Tower*, a plurality of the Pennsylvania Supreme Court partially relied on this objection to conclude that their constitutional environmental provision was not self-executing, so it could not authorize the state government to present an action to enjoin the construction of an observation tower near Gettysburg Battlefield:

> '[C]lean air,' 'pure water' and 'the natural, scenic, historic and esthetic values of the environment,' have not been defined. The first two, 'clean air' and 'pure water,' require technical definitions, since they depend, to some extent, on the technological state of the science of purification. The other values, 'the natural, scenic, historic and esthetic values' of the environment are values which have heretofore not been the concern of government. To hold that the Governor needs no legislative authority to exercise the as yet undefined powers of a trustee to protect such undefined values would mean that individuals could be singled out for interference by the awesome power of the state with no advance warning that their conduct would lead to such consequences.

Commonwealth v. National Gettysburg Battlefield Tower, 311 A.2d 588, 593 (Pa. 1973). *See also* Robb v. Shockoe Slip Foundation, 324 S.E.2d 674, 676-77 (Va. 1985) (asserting that Virginia's constitutional environmental provision's "language invites crucial questions of both substance and procedure," questions that "beg statutory definition"). For a criticism of the courts' reliance on the vague nature of these provisions to conclude that they are not self-executing, *see* Fernández, *supra* note 15, at 371-75; Horwich, *supra* note 7, at 339-41; McLaren, *supra* note 7, at 132-37.

[98] Tanner v. Armco Steel Corp., 340 F. Supp. 532, 536-37 (S.D. Tex. 1972). *See also* Pinkney v. Ohio Envtl. Protection Agency, 375 F. Supp. 305, 311 (N.D. Ohio 1974).

existing norms, run afoul of certain environmental quality standards imposed by the constitution. This, however, does not rule out the possibility of interpreting that the environmental provisions allow interested parties to present suits seeking to enforce non-compliance with existing statutes and regulations, when these norms otherwise do not have judicial enforcement provisions. In these cases, the laws or regulations in question provide the substantive content of the environmental claim, and the constitutional provision only serves as a source for jurisdictional authority for the case.[99]

As for the objection, I agree with the claim that constitutional rights to some modality of an improved environment are, at the very least, vague. However, I do not believe that vagueness, or general substantive difficulties in defining the content of these rights, should, *per se*, constitute an impediment for judicial enforcement.

As several authors have shown, the vagueness or ambiguity related to the definition of a constitutional right to environmental protection is no more significant than that of the content of several traditional constitutional rights.[100] Professor Sunstein cites several examples to explain this argument, in the context of social and economic rights:[101]

> As we have seen, many old-fashioned rights seem equally vague. The right to "freedom of speech" could mean any number of things. Does free speech encompass commercial advertising, libel, sexually explicit speech, bribery, criminal solicitation, and nude dancing? Courts try to answer this question notwithstanding the vagueness of the text, and in doing so, they typically concede that the right itself is far from self-defining. Or consider the right to be free from "unreasonable searches and seizures." Is that right really more

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[99] Several courts have declined to interpret substantive constitutional environmental rights provisions as creating new causes of action. *See* Fiedler v. Clark, 714 F.2d 77, 79-80 (9th Cir. 1983) (holding that Article XI, section 9 of the Hawaiian Constitution was intended "to remove barriers to standing to sue, not to enlarge the subject matter jurisdiction of the federal courts."); City of Elgin v. County of Cook, 660 N.E.2d 875, 891 (Ill. 1996) (holding that Article XI, section 2 of the Illinois Constitution "does not create any new causes of action but, rather, does away with the "special injury" requirement typically employed in environmental nuisance cases.").

[100] FRANCO DEL POZO, *supra* note 19, at 65-66; HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 95-96; Abate, *supra* note 3, at 15-16; Anderson, *supra* note 91, at 4; Brooks, *A Constitutional Right*, *supra* note 7, at 1071; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117; Hill, Wolfson & Targ, *supra* note 7, at 395; Thompson, Jr., *supra* note 8, at 898; McLaren, *supra* note 7, at 136. *See also* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 210 (making this same argument in the context of social and economic rights); Courtis, *supra* note 90, at 171-72 (same).

[101] It should be noted that Professor Sunstein has referred to environmental rights within the context of social and economic rights. *See* Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27 (including environmental rights within the category of socioeconomic rights).

> vague than the right to health care? The same question can be asked about most of the original bill of rights.[102]

Yet "[t]his difficulty has never resulted in the conclusion that 'classical' rights are not rights, or that they are not judicially enforceable."[103] To the contrary, "it has led to ongoing work on the specification of their content and limits, though a series of mechanisms aimed at defining their meaning, such as the development of statute law, administrative regulation, and case law."[104]

However, while environmental rights might be no different than conventional rights in terms of their clarity, several commentators point out that they are differentiated by the amount of experience courts have had with enforcing them. Whereas courts have been protecting citizens from government intrusions on traditional civil and political rights for a long time, and have developed a considerable body of case law to determine their content, they have done very little, if anything at all, in dealing with environmental rights.[105] Therefore, according to this view, courts would do well to decline invitations to enforce these relatively new rights, at least until the political branches of government begin to delineate the content of these provisions.[106]

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[102] SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 210. *See also* Abate, *supra* note 3, at 15-16 ("[C]ourts have always added meaning to what constitutional protections mean in practical effect, such as with First Amendment liberties, so there does not appear to be a reason for environmental provisions in constitutions to be treated differently."); Brooks, *A Constitutional Right*, *supra* note 7, at 1071 ("[O]ther rights, such as freedom of speech, face similar complications and their limits can only be defined over time."); Thompson, Jr., *supra* note 8, at 898 ("Courts, of course, must frequently make difficult policy determinations in implementing other broad constitutional rights such as freedom of speech or procedural due process."); McLaren, *supra* note 7, at 136 ("[I]n constitutional law, courts frequently interpret imprecise terms such as due process, equal protection, and cruel and unusual punishment.").

[103] Courtis, *supra* note 91, at 171.

[104] *Id.* at 171-72.

[105] Brooks, *A Constitutional Right*, *supra* note 7, at 1099 ("[T]he [United States Supreme] Court does not have readily available an official history or an accepted ethos" for constitutional environmental rights); Caldwell, *supra* note 7, at 3 ("The environment is a relatively new policy focus; . . . . Difficulties are inevitable in reconciling new environmental concepts with traditional legal assumptions."); Fernández, *supra* note 15, at 377-80 ("[L]ong-established rights as due process and freedom of speech, for example, have a far more secure historical foundation than recently developed rights such as the right to a clean environment."); Thompson, Jr., *supra* note 8, at 898 ("In the case of longstanding constitutional rights, moreover, decades of precedent have examined and developed a substantive jurisprudence, while environmental policy provisions would require the courts to confront and generate a totally new framework in a complex field."). *See also* Courtis, *supra* note 91, at 171-74 (describing this claim the context of social and economic rights).

[106] A related consideration deals with the degree of societal consensus that environmental rights generate, as compared to traditional constitutional values. In this regard, some scholars argue that courts should not enforce constitutional environmental provisions, absent a strong system of

Taken to an extreme, this objection seems somewhat circular. If courts can only enforce rights with which they have had prior experience, then they should never enforce rights. Following this rationale, one might wonder what was the justification behind beginning to enforce traditional civil and political rights in the first instance. However, those who assert this claim only seem to state it in the context of economic, social and environmental rights.[107] Therefore, part of this objection could be viewed as a masked substantive argument for only constitutionalizing and enforcing civil and political constitutional rights.

On the other hand, taken as a pragmatic claim based on the particular difficulties of enforcing relatively unexplored rights, this objection provides powerful reasons for limiting judicial enforcement for environmental protection rights. While courts could surely devise imaginative interpretations to fill out the content of these rights, one could very well argue that courts would not constitute the best forums for conducting such an enterprise.[108] Indeed, it could be asserted that public officials and

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environmental law, out of democratic concerns. They assert that, given that there is a considerable amount of controversy related to these rights, courts should allow democratic and political processes to deliver on these issues until some sort of consensus is finally reached. Fernández, *supra* note 15, at 377-82; Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 47-48; Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27. I will deal with this claim when I discuss the democratic objection to enforcement of constitutional rights to environmental protection.

[107] Limiting this claim to enforcement of social, economic and environmental rights might also be somewhat arbitrary and unfair. In replying to these same arguments within the context of debates about enforcing social rights in Latin America, Professor Christian Courtis explains:

> The absence of a coherent body of legal regulations, case law and jurisprudence in the area of social rights does not follow from any metaphysical impossibility. Rather, it has ideological origins: symbolic and material resources were disproportionately allocated to the development of the legal basis of the nineteenth-century capitalist market structure, which still dominates the core legal academic curriculum in Latin America. Even if part of the development or nineteenth-century legal culture focused on the development of a legal basis for the welfare state, the lack of development of constitutional and statutory law on social rights, together with a body of case law and jurisprudence, is partly the result of a self-fulfilled prophecy: the ideological operation of the theory of social rights as 'programmatic' rights.

Courtis, *supra* note 91, at 172. It should be uncontroversial to state that Professor Courtis' description of this phenomenon in Latin America applies with equal force to the development of social and environmental rights in the United States.

[108] As Professor Courtis puts it:

> It seems clear that, in the absence of clarity on the content of a right, and the identity of the right holder and the duty bearer, judicial enforcement becomes a difficult task. The adjudication of a right presupposes a relatively clear 'rule of decision' enabling the judge to assess compliance or non-compliance with the obligations stemming from the right. Absent this 'rule of decision', it may be impossible to distinguish adjudication from impermissible judicial law making.

Courtis, *supra* note 91, at 171.

agencies charged with implementing the constitutional environmental mandates are in a better position to define the content of these rights. Given that these arguments relate to the next topic, I will put them aside for the moment and reassess them at the end of the next section.

ii. The technical/scientific content objection

A second objection based on the content of constitutional environmental protection rights deals with claims about the technical and scientific nature of these rights. According to this objection, since environmental issues involve a great deal of ethical, aesthetic and scientific questions,[109] they should be primarily addressed by persons and institutions that possess such knowledge.[110] Courts, therefore, should not be relied on to find solutions to these complex issues, and when they do face these cases, they should defer to the reasoned judgments of expert public officials.[111]

This objection seemed to play a significant role in several of the cases in which environmentalists asked federal courts to recognize a constitutional right to a healthy environment under the Fifth, Ninth and Fourteenth Amendments of the United States

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[109] In describing some of the difficulties in the implementation and enforcement of the existing environmental protection regime, Professor Richard J. Lazarus identifies the "dominant characteristics of environmental protection laws" as "complexity, scientific uncertainty, dynamism, precaution, and controversy." LAZARUS, THE MAKING, *supra* note 60, at 16-28. All of them also serve as potent obstacles to judicial enforcement of constitutional environmental rights.

[110] SMITH, *supra* note 13, at 107-08 (describing that "the concrete content of these claims cannot be established independently both of some specification of the material culture of those on behalf of whom the claim is made and of the bio-physical sustaining conditions of that culture"); Anderson, *supra* note 91, at 11 ("[P]recise qualitative and quantitative dimensions of environmental protection are not readily translated into legal terms."); Du Bois, *supra* note 91, at 169; Eckersley, *supra* note 21, at 230; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117 (arguing that the nature of environmental issues is such "that their causes are often difficult or impossible to identify with the degree of accuracy necessary to support legal action against specific alleged polluters; it is correspondingly difficult to assign specific duties to individuals or firms that are directly correlative with the right to an adequate environment."); Hill, Wolfson & Targ, *supra* note 7, at 395-96; Thompson, Jr., *supra* note 7, at 189-90, 193-94. For similar discussions in the context of social and economic rights, *see* Sachs, *supra* note 46, at 68.

[111] Hill, Wolfson & Targ, *supra* note 7, at 395-96; Thompson, Jr., *supra* note 8, at 902. In order to circumvent these claims, some authors propose the creation of specialized environmental courts to hear both constitutional and statutory environmental claims. HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 111-14; Hayward, *A Case for Political Analysis*, *supra* note 16, at 118. In fact, some countries, like Australia, are already experimenting with these courts. For a discussion of some of the debates and experiences related to one of these courts, the New South Wales Land and Environment Court in Australia, *see* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 111-14; Paul Stein, *A Specialist Environmental Court: An Australian Experience*, *in* PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW 258, 258-62 (David Robinson & John Dunkley eds., 1995); Paul Stein, *Why Judges are Essential to the Rule of Law and Environmental Protection*, *in* JUDGES AND THE RULE OF LAW: CREATING THE LINKS: ENVIRONMENT, HUMAN RIGHTS AND POVERTY, *supra* note 6, at 53.

Constitution.[112] Particularly, in denying these claims in *Tanner v. Armco Steel Corp.*, the federal district court judge stated that:

> [F]rom an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes. Furthermore, the inevitable trade-off between economic and ecological values presents a subject matter which is inherently political, and which is far too serious to relegate to the ad hoc process of "government by lawsuit" in the midst of a statutory vacuum.[113]

While the technical and scientific nature of environmental litigation certainly poses intricate challenges, such complexities do not require that courts abstain from entertaining these suits. As a matter of fact, judges already have to deal with scientific and technical issues in several cases.[114] Medical malpractice litigation, for instance, requires courts to deal with similarly complex issues. Additionally, courts have had almost five decades of experience dealing with cases involving the modern version of the United States environmental law regime, so this subject is not completely unknown to them.[115] If judges are able to adjudicate these cases, particularly with the help of expert submissions by the parties and several procedural and evidentiary mechanisms, it does not seem that they would be unable to do the same with constitutional environmental cases.[116]

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[112] *See supra* note 8, and sources cited there.

[113] Tanner v. Armco Steel Corp., 340 F. Supp. 532, 536-37 (S.D. Tex. 1972). *See also* Pinkney v. Ohio Envtl. Protection Agency, 375 F. Supp. 305, 311 (N.D. Ohio 1974) ("[T]he task of defining a 'deprivation' as that term relates to the interest in a healthful environment is beyond the competence of the courts and is instead a task characteristically performed by the legislative branch.").

[114] *See* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 111 ("[C]ourts do routinely—and not only in environmental cases—have to deal with testimony from experts in order to arrive at judgments.").

[115] For an excellent discussion of the development of our "modern environmental law" system in the 1970s, as well as the role that courts played, given that most of the federal environmental laws had citizen suit provisions, *see* LAZARUS, THE MAKING, *supra* note 60, at 67-97.

[116] Hayward, *A Case for Political Analysis*, *supra* note 16, at 118. Some scholars also suggest that courts should apply the precautionary principle, which requires that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation." SMITH, *supra* note 13, at 110-11; HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 103-06; Eckersley, *supra* note 21, at 231-32; Hayward, *A Case for Political Analysis*, *supra* note 16, at 118. Graham Smith explains:

> Given the condition of uncertainty and risk surrounding many environmental interventions, reasonable evidence of potential damage, rather than absolute scientific proof, is enough to

On the other hand, while it is wise to note the difficulties with addressing the complex scientific components of constitutional environmental protection rights, we should not forget that these are also constitutional rights. As Justice Albie Sachs, of the Constitutional Court of South Africa, has said in the context of enforcing social and economic rights, "[j]udges know about fundamental rights, about constitutional law."[117] While he acknowledges that the technical components of social and economic rights "require[] a corresponding judicial modesty,"[118] he notes that in dealing with fundamental constitutional rights judges "may be even better equipped than the experts, who are, and correctly so, animated by more bureaucratic and operational considerations."[119] He explains:

> Indeed, the very nature of judicial decision-making is different from theirs. Decisions made by officials and legislatures have to build in compromise; there is nothing inherently wrong with that, compromise is good in public light. It is right that elected officials be directly responsive to the electorate, but judges cannot and should not be, especially when defending fundamental rights. Thus, the compromises bureaucrats appropriately effect, when reconciling different interests are different in nature from the balancing judges set out to achieve when harmonizing competing principles.[120]

Going back to the claims discussed in the last section, we can now see that, while agencies and public officials might be in a better position to ascertain the technical, scientific content of environmental rights, courts are better suited to develop the content of these rights within a constitutional framework,[121] theoretically apart from

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require the protection of environmental rights. The principle would act as a procedural norm in the policy-making process and would also benefit citizens seeking legal redress (one of the suggested procedural rights) against decisions that generate serious potential environmental risk, because the burden of proof would be on the defendant to show why preventative action is not necessary.

SMITH, *supra* note 13, at 110-11.

[117] Sachs, *supra* note 46, at 68.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] In the context of enforcing social and economic rights, Christian Courtis explains:

> [W]hen judges examine whether a right has been violated, they do not necessarily prescribe the specific course of conduct that the state or individual must follow. Judges usually assess the action required of the duty-bearer in terms of legal standards, such as 'reasonableness', 'proportionality', 'adequacy', 'appropriateness' or 'progressive realisation'. These standards are not alien to the tradition of judicial review of decisions of the political branches. Judges also do not necessarily substitute their views for those of the political branches in deciding

the different policy and political interests which imbue legislative and executive affairs. This, however, does not mean that courts are to develop their own substantive standards for environmental protection out of thin air, or that no deference will be given to the reasoned policy choices of the agencies charged with the implementation of environmental laws.

No serious proposal for judicial enforcement of constitutional rights to environmental protection argues that courts should impose substantive standards with complete disregard to those articulated in existing environmental laws and regulations. Quite the opposite, many authors who advocate in favor of enforcement note that the content of substantive rights should be developed over time, and that "the main work in defining the content and extent of rights should be carried out by the legislative branch and, subsequently, through administrative regulation."[122] Courts would thus serve a supervisory role, "to ensure that the state is both more responsive to, and responsible for, the ecological welfare of its citizens and for the welfare of the new environmental constituency."[123]

In short, the scientific and complex nature of constitutional environmental rights, combined with the brief history they have had as part of the constitutional discourse, limits, but does not preclude, their judicial enforcement. This would probably require that, as courts begin to face constitutional environmental claims, they would be inclined to construe the content of these rights by considering the substantive provisions in existing statutes and regulations as well as the policy judgments of the agencies in charge of implementing these statutes. However, as they gather experience dealing with claims that government actions or omissions run afoul of these rights, and they begin to develop a body of constitutional environmental case law, courts could very well move towards less deferential modes of judicial enforcement. As I will discuss later in this Article, I believe the Montana Supreme Court's enforcement

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> how a right should be fulfilled, but often examine the effectiveness of the chosen measures in achieving their stated goals. Although the state's margin of appreciation may be wide, certain types of conduct, such as the exclusion of specially protected groups, the failure to satisfy needs associated with the minimum core content of a right, or the adoption of retrogressive measures, are likely to be subjected to judicial review in terms of 'reasonableness' or similar standards.

Courtis, *supra* note 91, at 174.

[122] *Id.* at 172. *See also* Hayward, *A Case for Political Analysis*, *supra* note 16, at 118 ("Risk standards should be specified further at the national level through democratic legislative and regulatory processes, in light of current scientific knowledge and fiscal realities. Thus the substantive meaning of the right may be possible to determine over time.").

[123] Eckersley, *supra* note 21, at 230. *See also* Du Bois, *supra* note 91, at 154 (asserting that enforcement of these rights "should aim at ensuring that the legislative and executive branches of government strike an impartial balance between the 'green' conception of a worthwhile life and rival conceptions. Courts may not be able to implement the necessary environmental policies themselves, but they can and should police their impartiality.").

of its constitutional rights to environmental protection demonstrates how this gradual development can take place.

C. Institutional, separation of powers objections[124]

Moving away from the objections to judicial enforcement of constitutional environmental rights related to their content and classification, we encounter new concerns about the proper role for the judiciary under the Unites States' model of liberal constitutional democracy. According to these claims, judicially enforcing second and third generation rights will pave the way for an "over-extension of the judiciary,"[125] that is, to force judges to perform functions that are more akin to the political branches of government.[126] As Professor Frank I. Michelman has aptly described it in the context of the constitutionalization of socioeconomic rights:

> By constitutionalizing social rights, the argument often has run, you force the judiciary to a hapless choice between usurpation and abdication, from which there is no escape without embarrassment or discredit. One way, it is said, lies the judicial choice to issue positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against prevailing political will. The other way lies the judicial choice to debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies an unreviewable privilege of indefinite postponement of a declared constitutional right.[127]

Inasmuch as this objection relies on claims about judiciaries imposing costly "positive enforcement orders" on governments, and that they lack the relevant experience or knowledge to deal with the policy issues behind constitutional environmental protection rights, this objection is nothing much than a restatement of the ones I have already discussed. As we have seen, while those claims present compelling arguments for limiting the scope of enforcing these rights, they do not preclude it.

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[124] The names for the two next objections, the institutional and democratic objections, are taken from Professor Frank Michelman's article, *The Constitution, Social Rights, and Liberal Political Justification*. Michelman, *The Constitution*, *supra* note 38, at 13.

[125] Michelman, *The Constitution*, *supra* note 38, at 15.

[126] SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 222-24; SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 210-11; Arbour, *supra* note 42, at 11-13; Courtis, *supra* note 91, at 174-75; Du Bois, *supra* note 91, at 156, 169; Eckersley, *supra* note 21, at 228-29; Gargarella, Domingo & Roux, *supra* note 42, at 259-60; Hayward, *A Case for Political Analysis*, *supra* note 16, at 120-21; Sachs, *supra* note 46, at 59, 67-69.

[127] Michelman, *The Constitution*, *supra* note 38, at 16. *See also* Michelman, *Explaining America Away*, *supra* note 38, at 683.

However, many proponents of judicial enforcement for social, economic, and environmental protection rights concede that the extent of such enforcement cannot equal to that of traditional civil and political rights.[128] Some authors argue that this disparity in enforcement could lead courts to the weakening of judicial enforcement for traditional constitutional rights, and running the risk of having the constitution become "a mere piece of paper."[129] Thus, they object to enforcement of social, economic, and environmental rights on these new grounds.

Yet, these claims seem speculative, and no studies about how this rights-debasement phenomenon is manifested are presented in its support.[130] Quite to the contrary, Professor Mark V. Tushnet cites and discusses the experience of the Hungarian Constitutional Court in enforcing social and economic rights as an example of how the level of protection of these rights has not led to a reduction in the protection of traditional civil and political guarantees.[131] It seems, then, that "concerns about the spillover effects—that citizens [will] come to regard all constitutional provisions as mere words on paper—of nonenforcement of social and economic rights [are] misplaced."[132]

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[128] Michelman, *Explaining America Away*, *supra* note 38, at 683 ("In a country like the United States, given both our embrace of popular government and the irreducible uncertainty, contestability, and contingency affecting choices in the field of socioeconomic policy, any constitutionalized socioeconomic commitment inevitably must be couched in abstract, best-efforts terms, South African style."); SMITH, *supra* note 13, at 108, 111; SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 234; SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 227-28; Sachs, *supra* note 46, at 64 ("A society does not ration free speech or the vote, but does ration access to resources.").

[129] Sunstein, *Against Positive Rights*, *supra* note 15, at 229. *See also* TUSHNET, *supra* note 12, at 234 (describing the claim).

[130] *See* TUSHNET, *supra* note 12, at 262 ("As a matter of legal analysis, there is no reason why an approach adopted for one category of cases (social and economic rights), for reasons specific to that category (such as concerns about fiscal impact), will leak over into another category (traditional civil liberties and civil rights), where those reasons are irrelevant."). In one of his early publications on the subject of judicial enforcement of 'positive' rights, Professor Sunstein acknowledged this point, but asserted that the risk of debasement was too high. Sunstein, *Against Positive Rights*, *supra* note 15, at 230. He has since endorsed the South African model of enforcement of social and economic rights as one that does not run afoul of the traditional non-substantive objections:

> By requiring reasonable programs, with respect for limited budgets, the court has found a way of assessing claims of constitutional violations without requiring more than existing resources will allow. In so doing, the court has provided the most convincing rebuttal yet to the claim that judicial protection of the second bill could not possibly work in practice. We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights without placing an undue stain on judicial capacities.

SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 228-29.

[131] TUSHNET, *supra* note 12, at 235-37.

[132] *Id.* at 237.

Nonetheless, some scholars also assert that courts lack the necessary tools to adjudicate the types of cases in which they are involved.[133] For example, Professor Courtis acknowledges that conventional trials "do not constitute the best forum for deciding some of these issues, not least because they involve a multiplicity of actors and interests."[134] Professor Sunstein adds that "[c]ourts lack the tools of a bureaucracy. They cannot enforce government programs. They do not have a systematic overview of government policy."[135]

These structural limitations combine with a stronger version of the institutional objection. Professor Michelman argues that the risks posed by the institutional objection take on a new dimension when we consider that "judicial constitutional review really does serve as a linchpin of constitutional legality" in the United States.[136] Thus, he argues that the "seriously intrusive" form of judicial review prevalent in the United States might serve as a moral impediment to the constitutionalization of these rights.[137] In short, according to this claim, given that judicial enforcement of constitutional rights takes the strongest of forms in the United States, proposals for 'watered-down' versions of judicial enforcement of certain

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[133] SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 223 (citing Davis, *supra* note 15) ("[S] coioeconomic rights are beyond judicial capacities. On this view, courts lack the tools to enforce such guarantees."); SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 211 ("The broader problem is that in order to implement the second bill, government officials have to engage in resource allocation and program management. Courts are not in a good position to oversee those tasks."); Courtis, *supra* note 91, at 175-76; Sachs, *supra* note 46, at 59.

[134] Courtis, *supra* note 91, at 175.

[135] Sunstein, *Against Positive Rights*, *supra* note 15, at 229. *See also* Cross, *supra* note 15, at 891. An additional objection avers that judicial enforcement of constitutional rights to environmental protection would open the floodgates of litigation, and unduly constraining the courts dockets with cases that are probably not best suited to adjudicate. Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 47-49 ("It is not hard, particularly in this age of aggressive rights enforcement, to envision a litigation *tsunami* emanating from the environmental rights amendment.").

Even assuming that the recognition of a new constitutional right to environmental protection would entice citizens, communities and environmental organizations to bring new cases to courts, a wholly speculative endeavor, this objection does not defeat the judicial enforcement argument by itself, given that there are mechanisms to prevent this 'litigation tsunami.' Article III standing to sue limitations, for example, either under the current articulated Supreme Court standards or under a flexible environmental-controversies-sensible standard, would filter out many of these suits. *See* Hayward, *A Case for Political Analysis*, *supra* note 16, at 118. Additionally, the experience in Colombia, a country that not only has strong constitutional rights to environmental protection but also a Constitutional Court that is willing to enforce them, the number of environmental cases presented before said Court has considerably reduced and leveled off after the initial spike spurred by the ratification of the new Constitution in 1991. Beatriz Londoño Toro, *Algunas reflexiones sobre la exigibilidad de los derechos colectivos y del ambiente*, *in* PERSPECTIVAS DE DERECHO AMBIENTAL EN COLOMBIA 71 (Beatriz Londoño Toro, Gloria Amparo Rodríguez & Giovanni J. Herrera Carrascal, eds., 2006).

[136] Michelman, *Explaining America Away*, *supra* note 38, at 684.

[137] *Id.* at 685.

rights, like the ones usually found in the context of social and economic rights, might be inappropriate.[138]

From a strictly theoretical point of view, the question of whether judicial enforcement of constitutional rights to environmental protection can be achieved within a model of 'strong-form' judicial review,[139] as it exists presently in the United States,[140] lies beyond the scope of this paper. I should note, however, that Professor Michelman's argument is only addressed at the prospects of positive judicial enforcement of social, economic and environmental rights. Given that providing protection for the negative components of environmental protection rights does not require courts to impose budgetary demands on governments, or to intrude in reasonable policy setting any more than with civil and political rights, strong-form review is not an obstacle to their judicial enforcement.[141]

Additionally, the institutional, separation of powers objection as a whole cannot be taken as being opposed to interpretations of constitutional environmental provisions as creating new causes of action to bring claims against government for its lack of compliance with existing statutes.[142] Under these types of cases, parties relying on the constitutional provisions usually seek to have the Executive Branch comply with a legislative mandate. Thus, to oppose the enforceability of this component of constitutional environmental rights by relying on the institutional objection is to undermine, not reinforce, separation of powers concerns.[143]

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[138] However, Professor Michelman does acknowledge that this objection "fails to take account of recent investigations of the ways in which reviewing courts, employing so-called weak remedies, can hope to respond usefully to complaints regarding performance by governments of best-efforts-style socioeconomic commitments while avoiding both abdication and usurpation." *Id.* at 683 n.71. He does not address whether he considers that these 'weak remedies' could be available to American courts. *Id.* Thus, his analysis "simply assumes that the choice is between total judicial abstinence and seriously intrusive judicial remedies." *Id.*

[139] Professor Tushnet describes the United States' "system of judicial review" as one in which "the courts' reasonable constitutional interpretations prevail over the legislatures' reasonable ones." TUSHNET, *supra* note 12, at 21. Thus, "[c]ourts exercise strong-form judicial review when their interpretive judgments are final and unrevisable." *Id.*

[140] Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation . . . enunciated by this Court . . . is the supreme law of the land . . . ."). *See* TUSHNET, *supra* note 12, at 21-22.

[141] Additionally, as we have already discussed, constitutional rights to environmental protection can also be utilized to reinterpret environmental statutes and regulations, or to provide a sounder basis for upholding legislative and executive actions. *See supra* notes 60-62 and accompanying text. Professor Tushnet makes similar claims about the uses of nonjusticiable declaratory rights. TUSHNET, *supra* note 12, at 238-39.

[142] This is, of course, assuming that the relevant constitutional environmental provisions can be interpreted in such a manner, an issue that this article does not address.

[143] Courtis, *supra* note 91, at 175 ("A considerable number of cases involving the violation of social rights deal with situations where the executive is sued for not complying with statutory regulations

As for the positive components of these rights, the strong-form judicial review objection need not be insurmountable. Professor Tushnet argues that the United States Supreme Court has dabbled with weak forms on judicial review[144] when dealing with "core First Amendment rights," on issues that involve "relatively new social phenomena,"[145] like regulations on cable television[146] and regulations on the distribution of indecent material on the Internet.[147] He also discusses the Court's decision[148] upholding the Bipartisan Campaign Reform Act of 2002 (BCRA) as another example of the Supreme Court's use of alternative forms of review, as Justices Stevens and O'Connor's opinion upholding Titles I and II of the act concludes with the following statement: "We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day."[149] Professor Tushnet argues that this opinion came "close to explicitly

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passed by the legislature. In these cases, adjudication could be seen as reinforcing – and not undermining – the separation of powers."); Hayward, *A Case for Political Analysis*, *supra* note 16, at 120-21 ("[C]ourts have a legitimate function in a democracy. Judicial enforcement of a written constitution means, to quote a venerable source, 'that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.' If democracy requires the rule of law, judicial powers cannot be seen as straightforwardly opposed to democratic principles.").

[144] Professor Tushnet describes weak-form review in the following manner:

> Weak-form systems of judicial review hold out the promise of reducing the tension between judicial review and democratic self-governance, while acknowledging that constitutionalism requires that there be some limits on self-governance. The basic idea behind weak-form review is simple: weak-form judicial review provides mechanisms for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or the judicial appointment process.

TUSHNET, *supra* note 12, at 23. Its fundamental assumption is that "there can be reasonable disagreement over the meaning of constitutional provisions." *Id.* at 26. Therefore, contrary to strong forms of judicial review, judicial interpretations of constitutional provisions are not necessarily final and unreviewable by legislative majorities. *Id.* at 33. Instead, courts engage in constitutional dialogues with legislatures, as well as the executive and the citizenry, over the meaning and scope of constitutional provisions. *Id.* at 34.

[145] *Id.* at 262-63.

[146] Turner Broadcasting v. FCC, 520 U.S. 180 (1997). With regards to this case, Professor Tushnet stated that the Court "acknowledged the importance of giving Congress room to experiment" in this area, as a reason for upholding a regulation that would otherwise be unconstitutional had the bans been applied to "longer-established media." TUSHNET, *supra* note 12, at 262.

[147] Ashcroft v. ACLU, 542 U.S. 656 (2004). According to Professor Tushnet, while the Court here struck down some "regulations of the distribution of indecent material over the World Wide Web," it "merely approved a trial court's decisions that, given the record before it, the government had not shown that technology was inadequate to limit minors' access to such material without limiting the access of adults as well." TUSHNET, *supra* note 12, at 262.

[148] McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003).

[149] *Id.* at 224.

endorsing the idea that the substantive law of the First Amendment would be shaped by interactions among the public acting as campaign donors, Congress acting as regulator, and the Supreme Court acting as the (provisionally) final determiner of the Constitution's meaning."[150] That idea, a constitutional dialogue between these parties, "is the one that underlies weak-form judicial review."[151]

Finally, it is not entirely clear how this strong-form judicial review version of the institutional objection applies to state courts.[152] Whether or not some, or all, of these courts follow the United States fondness for strong-form review, many state courts have experimented with enforcing social, economic, and environmental rights. Professor Sunstein, for example, cites several cases of the New York Court of Appeals in which they enforced a constitutional provision that deals with governmental provision of "aid, care and support" for the needy,[153] "while also respecting reasonable judgments by the legislature."[154] On the other hand, Professor Tushnet cites two North Carolina Supreme Court cases that first "held that the state had a constitutional duty to provide children 'the opportunity to attain a sound basic education,'"[155] and then affirmed a trial court order enforcing the right and imposing weak remedies against the state, such as an "order directing the state 'to conduct self-examinations of the present allocation of resources and to produce a rational[ ], comprehensive plan which strategically focuses available resources and funds towards meeting the needs of all children . . . to obtain a sound basic education.'"[156] Thus, the Court left the state to work out most of the details, while requiring periodic progress reports.[157]

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[150] TUSHNET, *supra* note 12, at 263.

[151] *Id.*

[152] I do not propose here to conduct a detailed analysis about how certain particularities of state courts, like the fact that many of their judges are elected, play out when facing institutional, democratic, or any other objection to judicial enforcement of constitutional rights to environmental protection. Rather, I am only interested here in discussing those aspects of these objections that seem to be particularly relevant to both federal and state courts. For discussions focused solely on the impact of many these objections at the state level, *see* Fernández, *supra* note 15; Helen Hershkoff, Foreword, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Rationality Review*, 112 HARV. L. REV. 1131 (1999); Helen Hershkoff, *Rights and Freedoms Under the State Constitution*, 13 TOURO L. REV. 631 (1997); Ledewitz, *supra* note 7; Popovic, *supra* note 7; Thompson, Jr., *supra* note 8; Cusack, *supra* note 7; Matthew Thor Kirsch, Note, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169 (1997); McLaren, *supra* note 7; Pollard, III, *supra* note 8.

[153] N.Y. CONST. art. XVII, § 1.

[154] SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 212-15 (discussing Aliessa v. Novello, 754 N.E.2d 1085 (N.Y. 2001); Lovelace v. Gross, 605 N.E.2d 339 (N.Y. 1992); Tucker v. Toia, 371 N.E.2d 449 (N.Y. 1977); Barie v. Lavine, 357 N.E.2d 349 (N.Y. 1976)).

[155] TUSHNET, *supra* note 12, at 255 (citing Leandro v. State, 488 S.E.2d 249 (N.C. 1997)).

[156] *Id.* (citing Hoke County v. State, 599 S.E.2d 365, 389 (N.C. 2004)).

[157] *Id.* However, according to Professor Tushnet, the Court did offer "hints that it might later ratchet up the requirements—presumably moving from a planning order to one requiring that specific actions

An example of state judicial enforcement of constitutional rights to environmental protection in the United States also supports the notion that not only can these rights be enforced without running afoul of the institutional objection, but that they can resort to using weaker versions of judicial review. In *Save Ourselves v. Louisiana Environmental Control Commission*,[158] the Louisiana Supreme Court faced a constitutional challenge[159] to a decision of the Environmental Control Commission (ECC) issuing permits to allow construction and operation of a hazardous waste disposal facility. After addressing the relevant statutory and regulatory provisions, the Court held that the constitutional clause imposed "a rule of reasonableness which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare."[160] Thus, the Court interpreted that the constitution required "a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors."[161]

The Court then went on to hold that since the ECC was designated as the "primary public trustee of natural resources and the environment in protecting them from hazardous waste pollution," it had to "act with diligence, fairness and faithfulness to protect this particular public interest in the resources."[162] This role, then, did "not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission."[163] However, the Court added that, in discharging its duties, the ECC had discretion to determine the particular results in each case:

> The environmental protection framework vests in the commission a latitude of discretion to determine the substantive results in each particular case. Environmental amenities will often be in conflict with economic and social

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be taken." *Id.* at 256. Therefore, Professor Tushnet uses these cases as examples of how courts that impose weak remedies might nonetheless move towards imposing stronger remedies as it perceives that their initial remedies are too weak. *Id.* at 254.

[158] 452 So.2d 1152 (La. 1984). [159] The constitutional environmental provision in controversy states:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

LA. CONST. art. IX, § 1.

[160] *Save Ourselves*, 452 So.2d at 1157.

[161] *Id.*

[162] *Id.*

[163] *Id.*

> considerations. To consider the former along with the latter must involve a balancing process. In some instances environmental costs may outweigh economic and social benefits and in other instances they may not. This leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances.[164]

In the end, the Court found that it was not clear from the record that the ECC fully understood its purpose in the case, given that its factual findings and reasons were insufficient to reveal that it had conducted a decision-making process compatible with the constitutional requirements.[165] Therefore, the case was remanded to the agency.

Taken together, these state court cases defeat the notion that only strong-form judicial review is available to enforce these rights.[166] By utilizing flexible standards of review and imposing weak remedies when they found the state to be in violation of said rights, the courts avoided unduly interfering with governmental allocation of funds, required little new monies to be assigned in order to comply with the constitutional provisions, and still managed to give the rights legally cognizable meanings. Therefore, at the very least, by employing weak-form models of judicial review, and initially imposing weak remedies for violations of constitutional rights to environmental protection, courts do not run afoul of the institutional, separations of powers objection.

D. Democratic objections

A related allegation, the democratic or majoritarian objection, focuses on the limits that judicial enforcement places on the policy choices of elected government officials. According to this objection, the constitutionalization and enforcement

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[164] *Id.*

[165] Specifically, the Court stated:

> From the present record we cannot tell whether the agency performed its duty to see that the environment would be protected to the fullest extent possible consistent with the health, safety and welfare of the people. The record is silent on whether the agency considered alternate projects, alternate sites or mitigation measures, or whether it made any attempt to quantify environmental costs and weigh them against social and economic benefits of the project. From our review it appears that the agency may have erred by assuming that its duty was to adhere only to its own regulations rather than to the constitutional and statutory mandates.

Id. at 1160. For a criticism of this opinion *see* Greg L. Johnson, Comment, *Constitutional Environmental Protection in Louisiana: Losing the Reason in the Rule of Reasonableness*, 42 LOY. L. REV. 97 (1996).

[166] Additionally, the First Amendment federal cases also demonstrate that, contrary to popular assumptions, weak-form enforcement is a possibility, particularly when the Supreme Court is dealing with "relatively new social phenomena." TUSHNET, *supra* note 12, at 263. Were circumstances to allow environmental rights to reach constitutional status at the federal level, they could very well fall under this category.

of environmental protection rights "forecloses" or limits the choices and scope of the debates with regards to addressing ecological injury concerns.[167] As judicial enforcement of these rights increases or strengthens, the alternatives for reasoned public decision-making by elected majorities decrease.[168] This decrease is more often than not induced by the fact that judicial imposition of positive obligations on a State can be considerably expensive, sometimes even requiring redistribution of limited public funds between different policy interests. Thus, by enforcing these constitutional rights, we are "turning over to an unelected judiciary a share of control over policymaking that is far too extensive to be tolerable in a democracy."[169] As a result, some democratic theorists suggest that some "important goods," such as "environmental protection," "should not be recognized in the [United States] Constitution," because it is likely that they "will be adequately guaranteed through ordinary political processes."[170]

As an initial reaction, some authors question whether certain particularities of ecological problems make them inadequate to be effectively addressed in the

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[167] Sunstein, *Against Positive Rights*, *supra* note 15, at 228 ("These issues should be subject to democratic debate, not constitutional foreclosure."). *See also* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 131-33 (citing Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 O.J.L.S. 18, 20-27 (1993)); Hayward, *A Case for Political Analysis*, *supra* note 16, at 121; Preuß, *supra* note 38, at 211.

[168] A variant of this objection concerns "the placing of binding constraints on future citizens, limiting their autonomy in policymaking through principles developed on the basis of historically superseded exigencies." Hayward, *A Case for Political Analysis*, *supra* note 16, at 121. *See also* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 133-34.

[169] Michelman, *The Constitution*, *supra* note 38, at 28. *See also* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 131-33 (citing Waldron, *supra* note 168, at 20-27); LINGLE, *supra* note 38, at 5-6; Gargarella, Domingo & Roux, *supra* note 42, at 261-62. Siri Gloppen, *Theories of Democracy, the Judiciary and Social Rights*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?, *supra* note 42, at 39-40.

[170] Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27.

An additional concern deals with the degree of societal consensus that environmental rights generate, as compared to traditional constitutional values. In this regard, some authors argue that courts should not enforce constitutional rights to environmental protection, absent a strong system of environmental law. They assert that, given that there is a considerable amount of controversy related to these rights, courts should allow the ordinary democratic and political processes to deliver on these issues until some sort of consensus is finally reached. Fernández, *supra* note 15, at 377-82; Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 47-48; Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27.

The problem with this objection is that courts do adjudicate constitutional claims for which there is little societal or political consensus, so it is unreasonable to subject environmental claims to a different standard. Of course, there is an argument to be made for taking all controversial or polarized issues out of the courts' dockets. While I would disagree with such a narrow view of the judiciary's role in a liberal constitutional democracy, *see* Du Bois, *supra* note 91, at 160 ("Courts, as much as legislatures, are arenas for battles over collective preferences."), the claim here seems arbitrarily limited to enforcement of constitutional environmental rights.

actual, non-constitutional state.[171] As Professor Richard J. Lazarus has stated, "[e]nvironmental law is inherently controversial, for reasons rooted in the spatial and temporal dimensions of ecological injury."[172] These dimensions mean that redressing ecological injuries requires redistribution of costs, benefits, and harms across different populations and places, and at different times.[173]

The temporal and spatial features are aggravated due to the scientific uncertainty that surrounds discussions of environmental issues. Indeed, while it seems reasonable "to accept costs when one can perceive the very real harms that would otherwise be inflicted on others," "when, as is often the case with ecological injury, the related spatial and temporal features deny the certainty of that effect and render invisible its causal mechanisms, such short-term, more immediate costs tend to be far less palatable."[174]

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[171] SMITH, *supra* note 13, at 105 ("An environmental right to a functioning ecosystem is a necessary (although not sufficient) condition for a functioning democratic polity."); Caldwell, *supra* note 7, at 1-2; Eckersley, *supra* note 21, at 214-18; Freyfogle, *supra* note 14, at 160, 169-71; Gildor, *supra* note 7, at 847-53; Ledewitz, *supra* note 7, at 681 ("[T]he right to a healthy environment, if it is recognized by the courts, will come to exist in light of a serious threat that ordinary political life is not capable of adequately addressing."); Schlickeisen, *supra* note 7, at 197-201.

[172] LAZARUS, THE MAKING, *supra* note 60, at 24. *See also* Eckersley, *supra* note 21, at 214; Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 760-61 (2000).

[173] *Id.* at 24-26. Some of the issues about climate change, and the debates about regulation of greenhouse gases (GHGs), provide an excellent example. Given that some GHGs stay in the atmosphere for hundreds of years after they are emitted, reducing the level of emissions does not mean that the overall atmospheric levels of GHGs will be reduced, but rather that they will increase at a slower rate. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1164-66 (2009), (hereinafter Lazarus, *Super Wicked Problems*). Therefore, the manner in which these gases are treated in the upcoming years will have serious implications for future generations. Also, as emissions "continue to increase, it will require exponentially larger, and potentially more economically disruptive, emissions reductions in the future to bring atmospheric concentrations down to desired levels." *Id.* at 1160. Another feature is that "by a perverse irony," the nations, like the United States, that emit the largest concentrations of GHGs into the atmosphere, are also the "least likely to suffer the most from climate change that will unavoidably now happen in the nearer term." *Id.* Something similar happens within the United States, were coastal states stand to be adversely affected by climate change to a higher extent than non-coastal states. *See* Massachusetts v. EPA, 549 U.S. 497, 522-23 (2007) (highlighting the particular risks that rising sea levels due to global warming would have on coastal states like Massachusetts as a basis for satisfying the injury in fact requirement of Article III standing). *See also* John M. Broder, *Geography Is Dividing Democrats Over Energy*, N.Y. TIMES, Jan. 27, 2009, at A1 (describing the debates concerning climate change legislation between members of the Senate representing coastal and noncoastal states).

[174] LAZARUS, THE MAKING, *supra* note 60, at 27. As Robyn Eckersley has also put it:

> Given the scientific uncertainty associated with many ecological problems, the many different perceptions of environmental risk, the difficulties in attributing blame and responsibility, the costs of the 'mopping up operation', the existence of conflicting political priorities and the short time horizons of liberal democracies (corresponding, at most, to election periods) it is hardly surprising that the environment is regularly traded-off against what appear to be more urgent and/or straightforward political demands.

Eckersley, *supra* note 21, at 215-16.

This is further exacerbated when we take into account that environmental protection endeavors usually implicate entrenched constitutional values, such as the right to property, and that federal congressional action is limited by the scope of the commerce and property clauses.[175] Given these dimensions, deliberation on these issues could very likely lead to scenarios in which perceived 'short term goals,' all within the rhetoric of economic growth and many with considerable ecological injury implications, prevail over 'long term' environmental protection concerns.[176] Thus, it might be that environmental protection concerns are not adequately addressed through ordinary democratic deliberation, but are rather reserved for 'republican moments,' that is, "a time of such heightened civic-mindedness that it is possible to overcome substantial institutional and political obstacles to potentially radical social change."[177] If this is true, and it is only during those short lapses that adequate deliberation can be achieved in order to address complex environmental protection concerns, then constitutional environmental rights could be used as tools to promote, not constrain, adequate democratic deliberation and policy setting.[178] However, even assuming that ecological injury concerns can be addressed through ordinary political processes, allowing courts to enforce constitutional environmental protection rights does not foreclose democratic choice and deliberation.

As I discussed in the previous section, courts can and should use flexible models of review, as well as impose weak remedies for constitutional violations, when dealing with claims about infringement of environmental protection rights. By relying on these remedies, courts will not be immersed in matters that are the

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[175] *Id.* at 36-38. *See also* Caldwell, *supra* note 7, at 3-5; Craig, *supra* note 14, at 11019-20; Gildor, *supra* note 7, at 830-47; Percival, *supra* note 60, at 842-44; Lazarus, *Human Nature*, *supra* note 60, at 243-59.

[176] LAZARUS, THE MAKING, *supra* note 60, at 40-42. *See also* Eckersley, *supra* note 21, at 215 ("The upshot is that the longer-term public interest in environmental protection is systematically traded-off against the more immediate demands of capital and (sometimes) labour."). Another obstacle to adequate deliberation in environmental protection law might lie in the economic disparities between its supporters and its powerful adversaries. LAZARUS, THE MAKING, *supra* note 60, at 40 ("Clearly, because of its inherently redistributive nature, environmental protection law tends to be most threatening to those who currently have many of the economic resources.").

[177] LAZARUS, THE MAKING, *supra* note 60, at 43-44. *See also* Lazarus, *Super Wicked Problems*, *supra* note 174, at 1155-56; Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L. J. 619 (2006) (hereinafter Lazarus, *Congressional Descent*); Christopher H. Schroeder, *The Political Origins of Modern Environmental Law: Rational Choice vs. Republican Moment*, DUKE ENVTL. L. & POL'Y F. 29 (1998); Daniel A. Farber, *Taking Slippage Seriously: Non Compliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 (1998); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992).

[178] This topic requires further research. However, at least one scholar has begun to document the recent shortcomings of Congress to address the pressing environmental issues of our time. Lazarus, *Congressional Descent*, *supra* note 178.

province of the political branches of government, like reallocation of state budgets and definition of policy priorities. I have also argued that, initially, judges should look to existing statutes and regulations for substantive guidance when asked to define the content of constitutional rights to environmental protection.[179] I believe that, instead of curtailing democratic deliberation on important environmental protection issues, this framework for enforcement can promote it. Two South African Constitutional Court's cases[180] concerning their social and economic constitutional rights provisions[181] exemplify this point.

The first of these two cases, *Government of Republic of South Africa v. Grootboom*,[182] involved a group of about nine hundred people living in desperately poor conditions at an informal settlement named Wallacedene. They had applied for low-cost housing, but they were placed on a waiting list and had no real prospect of obtaining it in the near future.[183] Tired of waiting, they moved, and settled in an unoccupied tract of privately owned land that "had been earmarked for low-cost housing."[184]

The owner of the land sued and obtained an "ejectment order" against them. After some additional proceedings, the municipality forcibly evicted them, and their shacks and possessions were destroyed. They then settled at a sports field in Wallacedene, under even worse living conditions that they initially were in. Unsatisfied, they sued, claiming violation of their constitutional rights.[185]

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[179] As I will discuss in the next section, as courts begin to gain experience in adjudicating constitutional environmental claims, they might feel compelled to use stronger models of judicial review.

[180] Minister of Health v. Treatment Action Campaign, (2002) (5) SA 721 (CC) (S. Afr.); Government of Republic of South Africa v. Grootboom, (2001) (1) SA 46 (CC) (S. Afr.).

[181] S. AFR. CONST. 1996 §§ 26-27. The articles deal with the rights to "have access to adequate housing," and to have access to "health care services," "sufficient food and water," and "social security." Both articles have equal provisions that assert that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the rights. *Id.*

The South African Constitution also has an environmental provision. S. AFR. CONST. 1996 § 24. It grants "everyone" the rights to "an environment that is not harmful to their health or well-being," and "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures" that "prevent pollution and ecological degradation," "promote conservation," and "secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development." Although the Constitutional Court has issued some decisions interpreting section 24, it has not adopted a particular standard for examining claims of violations of the constitutional right to "an environment that is not harmful to their health or well-being." *See* Eric C. Christiansen, *Empowerment, Fairness, Integration: South African Answers to the Question of Constitutional Environmental Rights*, 32 STAN. ENVTL. L.J. 215, 253-66 (2013) (discussing the South African Constitutional Court's environmental case law).

[182] 2001 (1) SA 46 (CC) (S. Afr.).

[183] *Id.* at ¶¶ 7-8.

[184] *Id.* at ¶ 8.

[185] *Id.* at ¶¶ 9-11. The evictees not only claimed that their constitutional rights to access to adequate housing were violated, but also that their children's rights to "basic nutrition, shelter, basic health care

The Constitutional Court interpreted that the plaintiffs' rights of access to adequate housing were judicially enforceable,[186] and ruled in the plaintiffs' favor. The Court first declined interpreting section 26 as establishing a "minimum core" or level of protection, which the state must always provide, because enough information to make a minimum core determination was not presented.[187]

Addressing the substance of the right of access to adequate housing, the Court stated that "there is a difference between . . . those who can afford to pay for housing . . . and those who cannot."[188] With regards to the first, "the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance."[189] On the other hand, the state's obligation towards the poor is different, for they "are particularly vulnerable and their needs require particular attention."[190]

The analysis then moved on to ascertaining the meaning of the state's obligation to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right." According to the Constitutional Court, this required the establishment and implementation of a comprehensive, coherent program directed at achieving the progressive realization of the right, subject to the government's available resources. Yet, the Court was not about to define "[t]he precise contours and content" or the program, or the 'legislative and other measures' to be adopted, for that is "primarily a matter for the legislature and the executive."[191] All that is required is that the measures are "reasonable."[192] Such reasonableness would be measured taking into account the "social, economic and historical context" of housing problems and the particular needs of all 'segments' of society.[193] Particularly, the Court interpreted that the measures needed to primarily address the needs of those in the most precarious of situations:

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and social services," all under Section 28 of the Constitution, S. AFR. CONST. 1996 § 28, were also being infringed. The High Court ruled in their favor, based on its interpretation that Section 28 "creates a freestanding, absolute right [to housing] on the part of children," and that the childrens' parents were also entitled to housing, as part of the childrens' section 28 right to "family care or parental care." *See* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 221.[186] *Grootboom*, 2001 (1) SA 46, at ¶ 20.

[187] *Id.* at ¶¶ 29-33.

[188] *Id.* at ¶ 36.

[189] *Id.*

[190] *Id.*

[191] *Id.* at ¶ 41.

[192] *Id. See* SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 234 (arguing that, in United States' terms, the Constitutional Court basically established "an *administrative law model of socioeconomic rights*," and that, under such a standard, courts "are hardly unwilling to invalidate an agency's choice as arbitrary.").

[193] *Grootboom*, 2001 (1) SA 46, at ¶ 43.

> To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[194]

This last requirement spelled doom for the existing government program, which did not have particular provisions for those people in desperate need of housing.[195]

The Court's order did require the government "shift [its] priorities to some extent,"[196] given that it was to revise its program to make particular provisions for those in desperate need.[197] However, no particular relief was given to the plaintiffs and no additional obligations were imposed on the state.[198]

The second case, *Minister of Health v. Treatment Action Campaign*,[199] involved the government's refusal to make an antiretroviral drug called nevirapine[200] available at public hospitals, even though its manufacturer was willing to supply as much of it as was needed at no cost.[201] The government purported to make the drug available at specific test sites, about two per province, given that it felt there was not enough information on the long-term effects of the drug, and because its administration also was to be accompanied by counseling by trained medical personnel, something it was not able to provide at the moment.[202]

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[194] *Id.* at ¶ 44.

[195] *Id.* at ¶¶ 63-69.

[196] TUSHNET, *supra* note 12, at 244.

[197] *Grootboom*, 2001 (1) SA 46, at ¶ 99.

[198] TUSHNET, *supra* note 12, at 244 n.55. Sadly, a newspaper article informed about Ms. Grootboom's passing. Pearly Joubert, *Grootboom dies homeless and penniless*, MAIL & GUARDIAN, Aug. 8, 2008, available at http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless (last visited May 23, 2018). It seems that the first plaintiff in the case never received the relief she asked for.

[199] 2002 (5) SA 721 (CC) (S. Afr.).

[200] The drug was known to substantially reduce the possibility of mother to child transmission of HIV or AIDS. *Treatment Action Campaign*, 2002 (5) SA 721 at ¶ 2 n.3. *See also* TUSHNET, *supra* note 12, at 245.

[201] *Treatment Action Campaign*, 2002 (5) SA 721 at ¶¶ 2-4 n.5.

[202] *Id.* at ¶¶ 10, 14-15.

Before reaching the merits of the case, the Constitutional Court addressed a question left open in *Grootboom*: whether socioeconomic rights had an enforceable minimum core content. It held they did not, relying on many of the objections to judicial enforcement of these rights I have discussed here.[203] Thus, the Court again relied on the reasonableness test to determine whether the social and economic right in question was infringed.[204]

But did the Court really apply a 'reasonableness' test? As Professor Tushnet argues, the Court's "examination of the government's justifications for restricting the drug's availability was quite searching, and nothing in the relevant sections of the opinions indicates that the Court was giving any real deference to the government's judgments."[205] Such particular scrutiny led the Constitutional Court to reject all of the government's asserted justifications, and to conclude that its limited nevirapine provision program was unreasonable.[206] Thus, the government was ordered "without delay" to remove the restrictions on the availability of the drug at public hospitals and clinics.[207]

Taken together, these cases exemplify how courts can employ weak judicial enforcement for constitutional rights without running afoul of the democratic objections.[208] Discussing both opinions, Professor Sunstein argues that the South

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[203] *Id.* at ¶¶ 37-39. Specifically, the Court stated:

> It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. . . .
>
> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.

Id. at ¶¶ 37-38.

[204] *Id.* at ¶ 36.

[205] TUSHNET, *supra* note 12, at 246. However, the searching nature of the Court's analysis might have well been related to the fact that the government's stance had been considerably relaxed since the case began. *Treatment Action Campaign*, 2002 (5) SA 721 at ¶¶ 111-16. *See also* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 228 (arguing that the case "must be understood in the context of the South African government's palpably inadequate response to the HIV crisis—a response bred partly by the irresponsible denial, among high-level officials, that HIV is responsible for AIDS at all.").

[206] *Id.* at ¶ 93-95.

[207] *Id.* at ¶ 135.

[208] *See* TUSHNET, *supra* note 12, at 242-47 (discussing *Grootboom* and *Treatment Action Campaign* as examples of weak-form judicial review for weak and strong substantive rights).

African Constitutional Court has, in fact, provided an approach that gives significant enforceable content to socioeconomic rights while avoiding intrusions into democratic policy setting and budget allocation:[209]

> The broader point is that a constitutional right to shelter or health care can strengthen the hand of those who might be unable to make much progress in the political arena, perhaps because they are unsympathetic figures or are disorganized and lack political power. Provisions in the second bill of rights can promote democratic deliberation, not preempt it, by directing political attention to interests that would otherwise be disregarded in ordinary political life. By requiring reasonable programs, with respect for limited budgets, the court has found a way of assessing claims of constitutional violations without requiring more than existing resources will allow. In so doing, the court has provided the most convincing rebuttal yet to the claim that judicial protection of the second bill could not possibly work in practice. We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights without placing an undue stain on judicial capacities.[210]

The same argument can be made about applying this model for enforcing constitutional rights to environmental protection. Like the South African Constitutional Court has shown in the context of socioeconomic rights, judicial enforcement of environmental protection rights can be tailored to foster, rather than limit, balanced democratic deliberation on these issues. Governments may be required to develop and implement reasonable comprehensive plans to improve the overall quality of the environment and to design strategies to prevent and reduce unreasonable degradation of natural resources, targeting regions with the highest pollution concentrations first. The object of such a model for judicial enforcement would not be to determine the specific outcomes of environmental decision-making processes, but rather, to ensure that those outcomes reflect, among other, sometimes competing values, the underlying substantive constitutional rights to environmental protection. In this regard, by augmenting the status of these rights in the United States, these constitutional rights could serve as 'rhetorical trumps' in debates, arguments that will require the government to adequately balance the different aspects implicated in environmental issues.[211]

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[209] SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 227-29.

[210] *Id.* at 228-29. *See also* SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 235.

[211] Anderson, *supra* note 91, at 12-13 ("Often, the real value of a human right is that it is available as a moral trump card precisely when legal arrangements fail."); Hayward, *A Case for Political Analysis*, *supra* note 16, at 111. Of course, this stems from dworkian notions about rights. *See* Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153 (J. Waldron ed. 1984). However, while I have

E. The limited promise of judicial enforcement

Now, some might question whether judicial enforcement of constitutional rights to environmental protection will make any positive difference with regards to the overall quality of the environment, or to further their stated goals and policies in general.[212] After all, relying on weak remedies for enforcement of the right of access to adequate housing did not do much, if anything, for Ms. Irene Grootboom, who passed away while still waiting for the realization of her 'right.'[213] In short, there is no evidence that these rights, "when included in constitutions or similar documents, have materially improved anyone's life."[214]

As Professor Jeanne M. Woods has asserted, "[j]udicial enforcement of economic, social and cultural rights is an inherently flawed and inadequate enterprise."[215] Indeed, enforcing these rights will not have major redistributive effects.[216] Thus, political environmental advocacy and community organization, and not justiciable constitutional environmental rights, will continue to be more effective mechanisms for advancing environmental protection goals.

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referred to 'rhetorical trumps,' in the sense that they help overcome the inequalities in deliberation on environmental concerns, I prefer the approach suggested by Professor Martha Minow, who argues that rights are not "trumps," but instead, "the language we use to try to persuade others to let us win this round." Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1876 (1987).

[212] *See* Sunstein, *Why Does the American Constitution*, *supra* note 15, at 15 (questioning "whether the many constitutions containing social and economic rights have made any difference at all 'on the ground'—that is, there is real doubt about whether such rights have actually led to more money, food, or shelter for poor people.").

[213] *See supra* note 199, and sources cited therein.

[214] Sunstein, *Against Positive Rights*, *supra* note 15, at 230. *See also* Cross, *supra* note 15, at 896-98. Additionally, there are concerns about relying on litigation as a mechanism for advocating for rights protection. Given the substantial costs associated with litigation, using it as a strategy for rights protection furthers inequalities, because the poorest individuals would not be able to use it in order to advance their claims. Cross, *supra* note 15, at 880-87 (citing CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998)).

While the inequalities of litigation, and the overall lack of a "support structure" for successful rights advocacy are important concerns, Professor Tushnet explains that they "can be alleviated a bit." TUSHNET, *supra* note 12, at 253. This is due to the fact that "[c]ivil society," taking the form of nongovernmental organizations, public interest and pro bono practitioners, etc., "can sometimes provide the support structure." *Id.* While this might not be enough to alleviate the inequalities, it seems unreasonable to argue that courts should be closed for all cases implicating these rights only based on this. After all, these inequalities also constrain the ability of vulnerable communities and individuals to use courts as agents for advancing social justice concerns in cases involving civil and political constitutional rights.

[215] Woods, *Emerging Paradigms of Protection*, *supra* note 19, at 291. *See also* Eckersley, *supra* note 21, at 233 (arguing that environmental rights are not "a panacea for the green movement or for democracy").

[216] Woods, *Emerging Paradigms of Protection*, *supra* note 19, at 291.

However, that does not mean that constitutionalizing and enforcing environmental rights cannot play an independent, albeit limited, role in environmental protection. The availability of weak-form judicial review for violations of constitutional environmental rights gives citizens unsatisfied with governmental efforts a juridical tool to press for compliance. Also, the mere availability of the remedy can exert influence over governmental decision-making procedures, either as a deterrent for highly polluting actions, or as an incentive to develop and implement green initiatives. Therefore, these remedies could very well serve as safeguards for assuring that constitutional environmental concerns are being pursued in earnest.[217]

Finally, one could question the efficacy of relying on weak remedies for enforcement of these rights. Such remedies might not be as effective as strong ones to deter polluting activities or to encourage the development of new environmental protection measures. If that's the case, governmental deliberation for environmental issues would change very little, if at all.

There might be some truth to these assertions. However, it remains to be seen whether strong-form review should be available for enforcing rights with which courts have not had a considerable body of experience with to rely on, as well as whether, from a practical perspective, courts would feel compelled to assume that new role, with these unexplored rights, within a liberal constitutional democracy.

On the other hand, as Professor Tushnet has argued, it might very well be that "weak-form review can be replaced by strong-form review when enough experience has accumulated to give . . . judges, legislators, and the people alike[ ] confidence that giving the judges the final word will not interfere with our ability to govern ourselves in any significant way."[218] In this regard, the Montana Supreme Court's experience interpreting and enforcing its constitutional environmental provisions might provide a good example of how courts can shift towards stronger forms of judicial enforcement of these rights as they become comfortable with dealing with these types of cases.

Montana's Constitution, passed in 1972, not long after the birth of modern environmental law,[219] has several provisions related to the environment.[220] My focus here is on how the Montana Supreme Court has interpreted two provisions. The first one, Article II, Section 3, is part of the "Declaration of Rights," and the particular section is entitled "inalienable rights:"

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[217] *Id.* at 292 ("Notwithstanding its inherent limitations, rights ideology is a powerful transformative force, and the demand for judicial enforcement of second- and third-generation rights can play a galvanizing role in the organization and mobilization of the marginalized and disempowered.").

[218] TUSHNET, *supra* note 12, at 263-64.

[219] Thompson, Jr., *supra* note 7, at 173 ("When the Montana electorate ratified the state Constitution in June 1972, environmental law was in its infancy, and Congress had only begun to federalize the field.").

[220] MONT. CONST. arts. II, § 3, IX, §§ 1-4, X, §§ 2, 4, 11.

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.[221]

The second provision is that included under Section 1 of Article IX, which is entirely devoted to "Environment and Natural Resources:"

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.[222]

In the first years after the passage of the Constitution, the Montana Supreme Court declined invitations to give strong effects to the Constitution's environmental protection provisions.[223] In *Montana Wilderness Association v. Board of Health & Environmental Sciences*,[224] and *Kadillak v. Anaconda Co.*,[225] the Court was presented with controversies in which environmental advocates prayed for reinterpretations of existing statutes and regulations, related to the obligations of state agencies and departments to prepare environmental impact statements, in light of the state's new constitutional environmental protection provisions. Particularly, in *Kadillak*, the plaintiffs sought revocation of an operating permit issued to a mining company and argued that Montana's constitutional environmental provisions required the state to depart from the federal standards with regards to the types of actions that require the preparation of an environmental impact statement, as well as with the content of that document, and adopt stringent requirements.[226] The Court held that the provisions did not have that effect:

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[221] MONT. CONST. art. II, § 3.

[222] *Id.* art. IX, § 1.

[223] Thompson, Jr., *supra* note 7, at 167 ("In the years immediately following passage of the 1972 Montana Constitution, the Montana Supreme Court . . . pursued a conservative interpretation of the Constitution's environmental provisions.").

[224] 559 P.2d 1157 (Mont. 1976).

[225] 602 P.2d 147 (Mont. 1979).

[226] *Id.* at 153-54.

> This argument, however, does not have sufficient merit to compel this Court to abandon the rationale of [the federal norm]. Both the MEPA and the HRMA predate the new constitution. There is no indication that the MEPA was enacted to implement the new constitutional guarantee of a "clean and healthful environment." This Court finds that the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this constitutional guarantee. If the legislature had intended to give an EIS constitutional status they could have done so after 1972. It is not the function of this Court to insert into a statute "what has been omitted." The ordinary rules of statutory construction apply. An EIS was not a requirement at the time Permit 41A was granted.[227]

The only use given by the Court to the constitutional rights to environmental protection during these initial stages was that they were relied on as a source for upholding state legislation. For instance, in *State v. Bernhard*,[228] the Supreme Court upheld a conviction based on a state statute that made it a crime to operate a motor vehicle wrecking facility without a license by using the constitutional environmental rights provisions to conclude that they recognized the state's police power to "preserve or enhance aesthetic values."[229] Additionally, in *Douglas v. Judge*,[230] the Court used the constitutional rights to hold that a tax created in lieu of an act seeking the development of renewable resources in Montana was levied for a "public purpose."[231] Thus, apart from serving as a strong basis for legislative authority, it seemed that Montana's constitutional environmental protection provisions were not going to have the strong impact that their texts seemed to suggest.

After these initial developments, the environmental provisions went "quiescent."[232] According to an environmental practitioner in Montana during those times, environmental and natural resources public interest groups were reluctant to take the constitutional issues to the Supreme Court because they perceived that "the Court's track record on the few environmental disputes that it addressed in the 1970s and 1980s was not encouraging."[233] However, this all changed in 1999, when the Supreme Court was faced with a new major environmental case, *Montana Environmental Information Center v. Department of Environmental Quality*.[234]

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[227] *Id.* at 153.

[228] 568 P.2d 136 (Mont. 1977).

[229] *Id.* at 138.

[230] 568 P.2d 530, 532-33.

[231] *Id.* at 532-33.

[232] Thompson, Jr., *supra* note 7, at 168 ("For the next twenty years, the environmental provisions in the Montana Constitution were quiescent.").

[233] Jack Tuholske, *The Legislature Shall Make No Law . . . Abridging Montanans' Constitutional Rights to a Clean and Healthful Environment*, 15 SOUTHEASTERN ENVTL. L.J. 311, 324 (2007).

[234] 988 P.2d 1236 (Mont. 1999).

The case involved a challenge of the constitutionality of a legislative measure that exempted "discharges of water from water well or monitoring well tests" from a nondegradation of high quality waters policy and review requirement.[235] Although the original act predated the 1972 Constitution, and therefore, the Court's previous pronouncements in *Kadillak* about the effects of the constitutional provisions in that context were at stake, the plaintiffs argued that the original "nondegradation policy for high quality waters" was "reasonably well designed to meet the constitution's objectives" and that it was "the minimum requirement which must be satisfied for a discharge which degrades the existing quality of Montana water."[236] The Supreme Court agreed.

In denying a standing challenge, the Court held that the plaintiffs had standing to sue because the constitutional environmental provisions were meant to be "both anticipatory and preventative,"[237] Particularly, the Supreme Court asserted that the delegates to the Montana Constitutional Convention "did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. [The] constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked."[238]

With regards to the constitutional analysis under the constitutional environmental provisions, the court held that:

> [T]he right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.[239]

Additionally, the Court held that even though Article IX, Section 1 of the Constitution was not part of the "Declaration of Rights" and, as such, it would seem that "[s]tate action" that implicated the rights contained in that provision "would normally not be subject to strict scrutiny," "the right to a clean and healthful environment guaranteed by Article II, Section 3, and those rights provided for in Article IX, Section 1 were intended by the constitution's framers to be interre-

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[235] *Id.* at 1243-44.

[236] *Id.* at 1243.

[237] *Id.* at 1249.

[238] *Id.*

[239] *Id.* at 1246.

lated and interdependent and that state or private action which implicates either, must be scrutinized consistently."[240] Thus, the Court said that it would "apply strict scrutiny to state or private action which implicates either constitutional provision."[241]

Turning to the specific issues involved in the case, the Court held that the original nondegradation policy for high quality waters was "a reasonable legislative implementation of the mandate provided for in Article IX, Section 1," and that to the extent that the new legislation "arbitrarily exclude[d] certain 'activities' from nondegradation review without regard to the nature or volume of the substances being discharged, it violate[d] those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution."[242]

Authors have both criticized,[243] and celebrated[244] the Supreme Court's opinion in *Montana Environmental Information Center*. Yet, my purpose here is not to address whether the Court's interpretation of the constitutional environmental provisions in question was correct, but merely to demonstrate how courts can move from providing little enforcement for these 'weak' rights to reinterpreting them as 'strong' ones, even subject to strict judicial scrutiny. The reasons for this transformation are many. Indeed, this shift in constitutional interpretation could be very well due to the ideological preferences of the justices that composed the Supreme Court at two separate periods in time, separated by more than twenty years. Without pretending to discard any explanation, I suggest here that the passage of time and the gaining of experience with environmental litigation can serve as powerful agents in this transition to stronger models of judicial review.

As Professor Barton H. Thompson, Jr. has said, "[w]hen the Montana electorate ratified the state Constitution in June 1972, environmental law was in its infancy, and Congress had only begun to federalize the field."[245] Indeed, as the first constitutional environmental cases began to reach the Supreme Court, the judiciary's role in environmental issues was barely beginning to take form. While some courts and judges embraced an active role in assuring governmental compliance with the new

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[240] *Id.*

[241] *Id.* Given that this case involved a challenge against a state action, it would seem that the Court's pronouncements with regards to private parties was dictum. However, in *Cape-France Enterprises v. Estate of Peed*, 29 P.3d 1011 (2001), the Supreme Court reaffirmed that the provisions, and strict scrutiny analysis, applied to challenges against actions by private parties. *Id.* at 1016-17.

[242] *Montana Environmental Information Center*, 988 P.2d at 1249.

[243] John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 MONT. L. REV. 269 (2001); Thompson, Jr., *supra* note 7.

[244] Tuholske, *supra* note 234; Cameron Carter & Kyle Karinen, Note, *A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision*, 22 PUB. LAND & RESOURCES L. REV. 97 (2001); Wilson, *supra* note 39.

[245] Thompson, Jr., *supra* note 7, at 173.

environmental regime,[246] others hesitated to intervene.[247] During those early days of modern environmental law, the Montana Supreme Court was an example of the latter.

However, by 1999, courts had developed a robust body of environmental case law out of thirty years of experience. Additionally, several authors in Montana had spurred the scholarly debate on the proper avenues of interpretation and content of the state's constitutional environmental provisions.[248] Thus, while environmental issues remained highly polarized subjects,[249] many of the objections behind the court's initial reluctance to enforce these provisions had been lessened. In this regard, then, the Court's newfound receptivity for constitutional environmental protection claims can be seen as a reflection of these changes. In short, when it handed down its opinion in *Montana Environmental Information Center*, the Court also announced that it was ready to take on a new, stronger role in environmental decision-making. Aside from ideological considerations, there is no reason to think that the same phenomenon cannot occur as other courts are asked to enforce their pertinent constitutional environmental protection rights.[250]

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[246] *See, e.g.*, Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1111 (D.C. Cir. 1971) ("Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.").

[247] *See, e.g.*, Tanner v. Armco Steel Corp., 340 F. Supp. 532, 536-37 (S.D. Tex. 1972) ([F]rom an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control.").

[248] *See, e.g.*, Deborah Beaumont Smith & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 411 (1990); Horwich, *supra* note 7; Thompson, Jr., *supra* note 8; Tammy Wyatt-Shaw, Comment, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something"*, 15 PUB. LAND L. REV. 219 (1994). That tendency has continued after the Supreme Court issued its Opinion in *Montana Environmental Information Center*. *See* Horwich, *supra* note 244; C.B. McNeil, *A Clean and Healthful Environment and Original Intent*, 22 PUB. LAND & RESOURCES L. REV. 83 (2001); Rob Natelson, *Montana Constitution Project Unveiled at UM: Project 'May Change Way We Think' About Intent*, 33 MONT. LAW. 14 (May 2008); Thompson, Jr., *supra* note 7; Tuholske, *supra* note 234; Carter & Karinen, *supra* note 245; Chase Naber Note, *Murky Waters: Private Action and the Right to a Clean and Healthful Environment*, 64 MONT. L. REV. 357 (2003); Wilson, *supra* note 39.

[249] *See* Thompson, Jr., *supra* note 7, at 198 (arguing that "[a]lthough environmental protection is critically important, enough disagreement remains over the socially appropriate levels and types of environmental protection that constitutional enshrinement of any particular environmental policies seems premature.").

[250] For instance, after holding in Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 311 A.2d 588, 593-94 (Pa. 1973), that Article I, section 27 of the Pennsylvania Constitution was not self-executing, the Pennsylvania Supreme Court changed course forty years later in Robinson Twp., Washington Cty. v. Com., 83 A.3d 901 (Pa. 2013), and relied in that clause to declare several provisions of a state oil and gas law that facilitated the development of natural gas from the Marcellus Shale. See generally, John C. Dernbach et. al., *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS U.L. REV. 1169 (2015).

III. Conclusion

Constitutional environmental rights can be fully enforceable within constitutional liberal democracies. While some of the traditional objections to judicial enforcement of constitutional rights to environmental protection have force, they only go as far as to limit some aspects of enforcement for these rights. By initially relying on weak-form models of review, and imposing weak remedies for constitutional environmental rights violations, courts can adequately address these objections and still provide significant content to these rights. Therefore, courts should not hesitate to rely on these models for enforcing their respective environmental rights clauses.[251] As time passes and courts begin to feel comfortable with enforcing these provisions with experimental models of review, courts could very well feel compelled to rely on stronger forms of review and stronger remedies. While, questions of the legitimacy of judicial enforcement might resurface at that moment, they should not prevail, given that many of the objections to enforcement will be weakened by the courts' experiences in dealing and defining the content of these rights.

Constitutional environmental rights are, of course, no panacea. While much can be said about environmental law's redistributive component,[252] the rights discourse within liberal democracies has often failed to deliver on its promise to address existing social inequalities and, in many instances, it prioritizes its legal, technical content over its inherent political nature.[253] Yet, inasmuch as environmental issues are mostly adjudicated in the 'vast hallways' of the environmental administrative state, their political and redistributive components are already submitted to the technical and bureaucratic controls. In this regard, I fully agree with Robyn Eckersley's assertion that,

> [I]n so far as trade-offs must be made, it is better that they be made solemnly, reluctantly, as a matter of 'high principle' and last resort, and under the full glare of the press gallery and law reporters rather than earlier in the public decision-making process, via the exercise of bureaucratic and/or ministerial

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Additionally, the Alaska Supreme Court recently held that the State has a constitutional duty to take a hard look at a project's cumulative environmental impacts. *See* Sullivan v. Resisting Envtl. Destruction on Indigenous Lands (REDOIL), 311 P.3d 625, 637 (Alaska 2013).

[251] Of course, this paper does not deal with constitutional interpretation of particular clauses, so while I would argue for interpretation of some existing constitutional environmental rights in a manner compatible with my analysis, issues of constitutional design, and particular social, economic, political, or juridical circumstances might prevent courts from so doing. I would hope, however, that some parts of the general discussions found here are relevant for these endeavors.

[252] LAZARUS, THE MAKING, *supra* note 60, at 24-28.

[253] *See generally* Duncan Kennedy, *The Critique of Rights in CLS*, in LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley, eds. 2002), at 178-228.

> discretion that is presently extremely difficult for members of the public to challenge.[254]

Thus, at the very least, judicial enforcement for constitutional environmental rights can provide much needed visibility and spur political debates about the proper place of environmental protection concerns in liberal constitutional democracies. And at its best, these rights can become crucial tools for environmental stakeholders, ones that can at least deter some of the most pervasive elements of extractive economic systems. Therein lies the limited promise, and need, for judicial enforcement of constitutional environmental rights.

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[254] Eckersley, *supra* note 21, at 229. *See also* Hayward, *A Case for Political Analysis*, *supra* note 16, at 120-21 (agreeing with Eckersley).