

## CONSTITUTIONAL LAW

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### 1. Introduction

What role could and should a constitution play in national environmental policy? It has been suggested that legitimate constitutions in general serve one or more of several purposes, any of which could provide justification for including some specific coverage of the environment within constitutional text (see Author's Note 1). First, a constitution provides the charter for the fundamental modes of government operations. Clearly, the method of translating environmental policy into enforceable environmental law requires some form of constitutive framework for the arms of government involved in the process. Second, a constitution may act as the guardian and reference point for fundamental rights. Because the constitution is regarded as supreme authority, it captures the rights regarded as essential for effective participation of citizens in the polity. If a particular level of environmental protection is associated with the rights of citizens in a society, then perhaps a statement thereof should be included explicitly in

constitutional form. Third, constitutions provide an opportunity to memorialize social covenants, symbols, and aspirations that are intended to have enduring effects on social norms. If, as surely appears to be the case in many societies, there are well-developed norms regarding environmental protection, perhaps they should be communicated for present and future members of the society through constitutional statements. Overall, therefore, good reason exists to ask whether and how a polity may wish to include a statement about the environment in its constitutive governance document.

Notwithstanding those observations about the potential roles for constitutionalism in environmental policy, it must be quickly observed that there need not be any role at all. For example, few nations rely more than does the United States on a constitution as the foundation of governance, the repository of democratic rights, and the symbol of overarching social ideals. Yet, it would be difficult for any nation to rely *less* than does the USA on a constitution for governance and policy making regarding environmental protection. Words familiar to environmental policy—environment, ecosystem, clean air, natural resources, clean water, etc.—do not so much as appear in the United States Constitution, much less form any body of constitutional law through judicial interpretation of more general text, and they probably never will. To put it bluntly, beyond deciding basic institutional issues such as the source and scope of federal power, the United States Constitution has been irrelevant to establishing environmental law in USA. Are constitutions thus inappropriate as instruments to embody and effectuate a nation's or state's environmental protection norms and rights?

In examining the question, it would be dangerous to extrapolate from the U.S. experience to draw general conclusions about the role constitutions *should* play in environmental law. Indeed, many other nations have constitutional provision addressing the environment, and even many states in USA have similar provisions in their respective constitutions. These provisions usually address one or more of three distinct purposes: (1) authorizing the legislature to enact legislation protecting the environment; (2) directing the government to adopt a specified policy regarding environmental protection; and (3) granting citizens rights to secure and defend specified levels of environmental quality. It has been observed that, by and large, these provisions have thus far had little tangible effect on environmental law in the respective jurisdictions, but the trend may be toward greater impact. Indeed, in civil law systems, as opposed to common law systems such as USA's, some direct expression of environmental rights and policy in the jurisdiction's constitution may be prerequisite to statutory promulgations and judicial recognitions thereof.

Moreover, with over two thirds of the national constitutions in existence having been written since 1980, and many of the newer ones containing specific environmental provisions, there is no reason to believe the U.S. experience will be replicated in all or even many jurisdictions. The trend toward inclusion of environmental rights and policy language in explicit constitutional text thus may open the doors to increased environmental legislation and litigation in some nations and states. And the courts of several national and state jurisdiction have shown increasing willingness to construe environmental norms even from general constitutional text, obviating the need for a specific environmental provision. The U.S. experience thus may provide less instructive

value for the future as other sovereign states experiment with the constitutional dimension of environmental law.

Yet even with these emerging trends, there may be limits as to how far any constitutional instrument can carry environmental law. The very nature of environmental policy may make it difficult to express environmental rights and norms in much detail through the constitutional medium, or, if it is so expressed, to follow and enforce the constitutional provision with the full force and effect that is normally afforded constitutional embodiments. Environmental policy is by nature complex, involving many trade-offs and open questions of science, technology, and economics. Uncertainty is inherent in environmental policy decision-making. The subject matter of environmental law, therefore, is regulation not merely of human behavior, but rather of human behavior *as it affects the environment*, and the environment operates outside of any political governance instrument, constitutional or otherwise. It may also be that it is simply too difficult to express environmental norms and rights in a constitution without sacrificing what it is about the constitution that makes it “constitutional,” i.e. a foundation norm for social and political conduct.

Whatever may be the reasons for the different experiences nations and states have had with the constitutional dimension of environmental law, the differences do seem too significant to ignore. Hence, this Article covers the topic by emphasizing the juxtaposition between a case study of the United States’ experience at the federal level and the situation of other jurisdictions.

Overall, the experiences sort into three categories. First, notwithstanding efforts on several fronts to infuse constitutional status into national environmental law in USA, the cause has not progressed an iota. No federal court has accepted the invitation to construe environmental norms or rights from the general text of the Constitution, and proposals to amend a specific environmental provision to the Constitution have gone nowhere. As one leading scholar has put it, the theme has been “not then, not now, not ever” (Rodgers, 1994). Although a few nations have similar records of “non-constitutionalism” in environmental policy, the USA sets the extreme.

By contrast, some nations and states have for a considerable time included an environmental provision directly in their respective constitutions. In some cases these “first generation” constitutional provisions on the environment have opened the door to legislative or judicial promulgations on behalf of environmental protection, but most of these jurisdictions have done little to give life to this version of environmental constitutionalism. Perhaps there is latent potency lurking in such provisions; if so, however, it is not clear in many instances how to unleash it.

In the last category of experiences, however, we find a wave of new national and state constitutions being drafted to include prominent environmental provisions. This “second generation” of environmental constitutionalism suggests that many polities, particularly those emerging into more democratic forms of governance, believe it a matter of course to include statements about environmental rights and norms in constitutional form, and to expect them to be enforced. The unfolding experience in some nations over time thus may be in full contrast to that of the USA, though it remains far too early to tell.

In any case, several points are clear from these three different experiences; First, a nation or state need not include an elaborate environmental rights and norms provision in its constitution in order to have an effective environmental law. Second, a nation or state that does include an environmental rights and norms provision its constitution will not necessarily have an effective environmental law as a result. And third, a constitutional provision on environmental rights and norms can open the door to greater legislative and judicial action with respect to environmental protection. This chapter explores why each of those statements is true, and why there can be no definitive position about the wisdom or effect of including an environmental provision in a national or state constitution without an understanding of the role the constitution plays in the larger context of the jurisdiction's governance and policy.

## **2. Non-Constitutionalism—Not Then, Not Now, Not Ever?**

### **2.1. The United States-A Case Study of the Extreme**

Environmental policy clearly was not foremost on the minds of the drafters of the United States Constitution. As John Hart Ely (1980) observed, the general approach of the U.S. Constitution is “not one of trying to set forth some governing ideology...but rather one of ensuring a durable structure for the ongoing resolution of policy disputes” (Author's Note 2). For the most part, this focus on the “operating system” as the function of the U.S. Constitution has remained intact for over two centuries, with very few social policies having been embodied in constitutional text (Author's Note 3). Environmental policy is profoundly ideological in nature and thus, like other social policy issues, has found itself a poor fit with this American version of constitutionalism. But as modern society has focused debate increasingly on competing visions of social form, social policy advocates in the USA have turned increasingly to constitutional interpretations and amendment proposals as a means of dictating their respective visions (Author' Note 4). Environmental policy has been at the core of two such waves of social policy constitutionalism—one to extract an environmental message from the general text of the Constitution, and another to inject a specific environmental provision into the Constitution by amendment. Both efforts have been dismal failures.

#### **2.1.1 Saying No to Interpretations of Environmental Policy from General Text**

Although the U.S. Constitution clearly provides Congress and the states the authority to legislate environmental policy, the provision in both cases is indirect. Congress derives federal authority to enact environmental legislation principally through its exclusive jurisdiction over interstate commerce (Author' Note 5) and federal property (Author's Note 6), and states derive their authority from the so-called police power reserved to the states under the tenth amendment (Author's Note 7). But these sources of *power* do not impose any particular *duty* on Congress or the states to act with respect to the environment. For that, one would have to look elsewhere in the Constitution—to its general language-and invent an affirmative environmental right or norm where clearly none was ever intended.

That effort began in earnest in the early 1970s, as environmental protection advocates groped through the Constitution in search of some foothold for the environmentalism

that began to emerge in USA at that time. Academics and litigants argued that affirmative rights to environmental quality emanate from the Preamble to the Constitution, which states that a purpose of the Constitution is to provide for “the General Welfare”, as well as from the guarantees of due process and equal protection found in the fifth and fourteenth amendments, and from the unenumerated rights retained by the people in the ninth amendment (Author’s Note 8). The courts have uniformly rejected all such efforts (Author’s Note 9), and the appears, for all practical purposes, a dead issue (Author’s Note 10).

### **2.1.2 Saying No to Specific Environmental Policy Provisions**

With little hope that the courts will construe the existing U.S. Constitution to include environmental rights and norms, the effort to constitutionalize environmentalism in USA has focused more on amending the Constitution with a specific environmental provision. The resistance of American constitutionalism to expression of social norms in constitutional text has kept all such efforts at bay.

#### **2.1.2.1 Not Then**

Environmental amendment proposals first surfaced in the United States at the national level in the late 1960s and had their heyday in the early 1970s (Author’s Note 11), on the coat-tails of the environmentalism euphoria that culminated in the first Earth Day (Author’s Note 12). By the mid-1970s, however, the burgeoning regime of federal environmental protection legislation had evolved with unprecedented speed into a Juggernaut of the administrative state (Author’s Note 13). This statutory program eclipsed the notion that an environmental amendment might be needed to catalyze the translation of environmentalism into hard legal and policy frameworks. Environmental amendment proposals thus gradually fell out of favor during the late 1970s and were virtually unmentioned in the 1980s (Author’s Note 14).

#### **2.1.2.2 Not Now**

Notwithstanding the phenomenal legal and political infrastructure that has built up at all levels of government in USA around the goal of environmental protection since the first Earth Day, the push for an environmental amendment is back in full force. Since 1990, several such measures have been offered by groups as diverse as New Jersey fifth graders and well-funded environmental preservation organizations (Author’s Note 15). Most prominently, members of 37 state legislatures launched an initiative to have such a resolution introduced in Congress (Author’s Note 16). Their proposed environmental amendment declares:

The natural resources of the nation are the heritage of present and future generations. The right of each person to clean and healthful air and water, and to the protection of other natural resources of the nation, shall not be infringed by any person.

These two sentences, faithful to the U.S. Constitution’s tradition of conciseness, express an elegant message of national commitment to environmental protection and to a future of environmental sustainability.

Indeed, the revival of environmental amendment proposals as serious propositions can be traced to the emergence of a new theme of environmentalism in USA— biodiversity conservation (Author's Note 17). Within roughly the past decade, the scientific community has distilled a revised scientific paradigm of ecosystem dynamics into the discipline of conservation biology (Author's Note 18) and has percolated the new model into legal and policy proposals at all levels of government (Author's Note 19). The swiftness with which the biodiversity theme has unified environmental protection policy in USA surpasses even the speed with which the first generation of environmental legislation came on line, and environmental amendment proposals are attempts to embody this movement as nothing less than a constitutive norm for society.

History is thus, in a sense, repeating itself, as the banner holders of biodiversity rush towards environmental amendment proposals as a means of securing permanent political and moral ground much as Earth Day supporters attempted over twenty-five years ago. It is not clear, however, that history will repeat itself with the rise of a national statutory regime in support of the biodiversity theme. Congress has been unable to amend the Endangered Species Act in even the most minor detail after more than a decade of deliberation. It appears even more unlikely any comprehensive biodiversity agenda is on the horizon. Advocacy for an environmental amendment thus may not subside as it did before. The chances for an environmental amendment to the Constitution nonetheless seem marginal at best. The Brodsky-Russman proposal discussed above, for example, has met with virtually no success in state legislatures (Author's Note 20).

### **2.1.2.3 Not Ever**

Even if Congress fails to enact a comprehensive biodiversity statute to quell the sustained push for an environmental amendment, no sober appraisal of the situation gives such an amendment much chance of becoming part of the U.S. Constitution. One has to keep in mind that there have been over 10 000 proposed amendments to the Constitution (Author's Note 21). Only a handful have become law, and only one obviously unsound amendment (Author's Note 22) has made it through the Constitution's rigorous article V amendment process (Author's Note 23). Besides the environmental proposals, some very serious policy issues have been the subject of recent proposed amendments, each to no avail thus far (Author's Note 24). Article V thus appears to serve as a strong filter against decision-dictating social policy amendments, and hence there is little chance that an environmental amendment will ever find its way into the U.S. Constitution (Author's Note 25).

## **2.2 Other Examples**

It would be difficult to more resolutely resist constitutionalizing environmental policy than has the United States, but the situation in a few other nations, particularly in common law nations, is almost as extreme as in the United States. Of course, Britain takes non-constitutionalism a step further, in that it has no written constitution at all. But Canada, for example, has no environmental provision in its national constitution, and operates under a division of federal enumerated powers and provincial general powers that provides both levels of government broad general powers to legislate on matters

involving the environment (Author's Note 26). Historically, the result has been that the provinces have taken the lead with respect to environmental initiatives.

### 2.3 The Consequences of Non-Constitutionalism

As the United States illustrates, a national constitution that is devoid of provisions dealing specifically with environmental protection does not necessarily mean the jurisdiction will lack an effective national environmental policy. Rather, the challenge for jurisdictions adopting the United States' non-constitutional approach to environmental policy, or anything close to it, is to find some way to enable federal authority to regulate for environmental protection in matters of national concern. In the United States' system of enumerated federal powers, several are sufficiently broad to confer broad authority to promulgate federal environmental law. Thus Congress has authority to enact environmental protection legislation on federal lands under its enumerated plenary power to control federal property (Author's Note 27). Congress also may direct federal agencies to conform to national environmental policies. The more difficult issue arises with respect to nonfederal lands and actors, but it is well established that Congress can regulate in that realm for a variety of purposes, including the environment, through its exclusive jurisdiction over interstate commerce (Author's Note 28). Hence, by relying on a grab-bag of general enumerated authorities, Congress has captured substantial breadth and depth of authority to regulate for environmental protection.

Similarly, in Canada the problem of no specific federal constitutional provision regarding the environment was solved by appeal to broader principles of enablement of federal power. In the *Crown Zellerbach* case, (Author's Note 29) the issue was whether federal legislation regulating ocean dumping of waste could apply to waters in provincial territory. To defend the exercise of such power, the federal government pointed to no specific enumerated power, such as the powers to deal with navigation or fisheries, but rather the general power to legislate for the peace, order, and good government of Canada.

The trial court dismissed criminal charges brought for violation of the legislation in the provincial marine waters on the grounds that the legislation was ultra vires of Parliamentary power, but the Supreme Court of Canada reversed. The Court relied on the "national concern" doctrine, which includes an examination of whether there exists "provincial inability" cooperatively to address the matter of national concern. The Court found that marine pollution, even in provincial waters, is a concern within the scope of federal constitutional power to regulate.

Yet another example of this patching together of broad federal powers into authority to regulate for the environment is found in Australia, which shares with the United States and Canada the division of power between national and state government, where the High Court of Australia found the Commonwealth government could regulate construction of an electricity-generating dam project in Tasmania that the Tasmania state government had authorized (Author's Note 30). The Court ruled that the federal government's broad enumerated powers over external affairs and corporations were sufficient to support the federal legislation.

While such resort to general sources of authority can effectively establish national authority to develop environmental policy without need to specific constitutional provision, the concern remains that power does not imply duty, and that the overall legislative and judicial attitude toward the environment may succumb too often to political tides and narrow judicial doctrine.

In the United States, for example, the divisive national politics of the 1990s prevented Congress from enacting much meaningful environmental legislation notwithstanding broad agreement that reforms are needed on many fronts. Moreover, the Supreme Court displays conscious indifference, in some cases almost hostility, to environmental issues compared to other social issues of arguably no greater importance (Author's Note 31).

The Court rarely accepts cases involving substantive issues of environmental law; rather, most of the Court's cases that do involve environmental laws are before the Court to resolve general issues of administrative and constitutional law (Author's Note 32). When the Court does engage in one of its rare cases involving environmental law as the principal issue for resolution, it generally decides the matter as one of the rote legislative interpretation with no predictable jurisprudence of *the environment* in mind (Author's Note 33).

But perhaps the most chronic problem that arises when federal power to legislate for the environment depends on broadly enumerated constitutional sources of power, is that the federal environmental power thus evolves not as an independent constitutional matter but only in response to changing interpretations of the scope of those general sources of authority.

For example, over the past two decades the Supreme Court has slowly but steadfastly revised its constitutional doctrine regarding the extent to which the constitution protects private property from government regulation (Author's Note 34) and the extent to which the federal government's power to regulate interstate commerce provides power to legislate social and economic regulation (Author's Note 35). With no independent status in the Constitution, federal power to protect environmental interests waxes and wanes as the lines of these other constitutional doctrines shift.

Hence, not only does the United States' non-constitutionalism result in no enforceable federal duty to act for the environment, but it also leaves the very authority to act in question over the long run.

On the other hand, leaving the environment out of the Constitution allows Congress and the public to avoid being "locked in" or "entrenched" to particular levels of environmental protection or styles of environmental policy that could arise should the courts actively interpret and enforce an environmental provision (Author's Note 36).

In this sense, perhaps the overriding concern that leads to the non-constitutionalist approach in some nations, and the apparent lack of public enthusiasm for changing that direction, is that the environment not be elevated above the economy in terms of constitutional status, lest the flexibility to adjust priorities between the two domains be diminished.

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### **Biographical Sketch**

**J. B. Ruhl**, the Matthews & Hawkins Professor of Property, is a nationally regarded expert in the fields of endangered species protection, regulation of wetlands, ecosystem management, environmental impact analysis, and environmental and natural resources law.

**Education:** LL.M., George Washington University, 1986; J.D., University of Virginia, 1982, B.A. with High Honors, University of Virginia, 1979.

His extensive publications include his award-winning articles, "Currencies and the Commodification of Environmental Law," 53 *Stanford Law Review* 539 (2000) (co-authored), and "Farms, Their Environmental Harms, and Environmental Law," 27 *Ecology Law Quarterly* 263 (2000), each of which was selected by a national peer review committee as one of the ten best law review articles of the year in environmental law. Professor Ruhl is also co-author of the forthcoming casebook, *The Law of Biodiversity and Ecosystem Management* (Foundation Press). He teaches Environmental Law, Land Use, and Property. Prior to joining the Florida State University College of Law faculty in 1999, Professor Ruhl taught at Southern Illinois University in Carbondale, Illinois and George Washington University Law School. Before entering law teaching, he was a partner in the law firm of Fulbright & Jaworski, L.L.P. in Austin Texas. Professor Ruhl has served as the Executive Editor of the *American Bar Association, Section of Environmental, Energy, and Resources Law quarterly, Natural Resources & Environment*, and as the Publications Officer of that ABA Section.