Greening the U.S. Constitution

Greening the U.S. Constitution will take more than wishful thinking. A more political and in-depth process is hard to find (Bowen 1966; Hoban & Brooks 1996). United States jurisprudence has long lacked strong and useful mechanisms to support, analyze, or regulate either the cumulative effects of decisions affecting the environment or the downstream effects on future generations. In part these problems arise with the initial zoning, taxes, and public works design of land-use law (Williams 1970) and the end-of-discharge-pipe focus of pollution law going as far back as Great Britain's Rivers Pollution Act of 1876 (Ridgeway 1970).

Traditional technical fixes—such as discharge permits—merely set maximum harm conditions by permit or mitigate the degradation and devastation of our water, air, and land. Permits and mitigation only slow the harmful effects of individual projects. This "nonecosystem" design fixed in place a medium-by-medium permitting approach to pollution issues with the establishment of a body of federal environmental laws in the 1970s, including the National Environmental Policy Act, the Clean Water and Clean Air Acts, and the various statutes related to hazardous substances. To be sure, we have gained in water and air quality since the nadir of dirty water and air in the 1960s. Whatever gains have since been made have been more than offset, however, by losses of habitat and biodiversity resulting from the cumulative effects of human population growth, and the death by a thousand cuts represented by individual land-use decisions and the increasing chemicalization of land, air, and water worldwide (Lavigne 2001).

As we make a transition from environmental mitigation law to ecosystem law (see Brooks et al. 2002), a constitutional amendment guaranteeing the right to a healthy environment makes great sense and the movement to put it into reality has a long way to go. The past 35 years are instructive. In the heyday of early environmental law, at least two serious proposals were made to begin the change to the U.S. Constitution. Earth Day founder and former Wisconsin Senator Gaylord Nelson led the charge in 1968 with what is thought to be the first proposal to amend the Constitution with a right to a clean environment (Meltz 1999). Representative Richard Ottinger introduced a more comprehensive amendment in 1970 (Meltz 1999), and several cases were also brought to federal courts to assert that the Constitution already held an implicit right to a clean environment (Hoban & Brooks 1996).

Between 1970 and 1979, five states amended their constitutions to include the right to a clean environment (Meltz, 1999). Hawaii, Illinois, Massachusetts, Montana, and Pennsylvania all have constitutional amendments asserting the right of "the people" or "each person" to everything from a "right to a healthful environment" (Illinois) or a "right to clean air, pure water, and to the preservation of "natural, scenic, historic, and esthetic values of the environment" (Pennsylvania). Hawaii references its laws relating to environmental quality and provides a citizen enforcement provision (as does Illinois).

Though there is yet little case law with which to interpret these state constitutional provisions, at least one clear validation of the constitutional amendment path was provided by the Montana Supreme Court. In the case of *Montana Environmental Information Center et al. v. Department of Environmental Quality*, the Montana Supreme Court (20 October 1999) held that, under its constitution, Montana citizens have a fundamental right to a clean and healthful environment and that any state statute that implicates environmental rights must be strictly scrutinized and can only survive scrutiny if the state establishes a compelling state interest. At issue were groundwater aquifer tests associated with a proposed cyanide-heap-leach gold mine on the Blackfoot River, where the state Department of Environmental Quality approved, without review, the discharge of arsenic-laden groundwater into the alluvial aquifer of the Blackfoot and Landers Fork rivers. The court concluded that "based on the eloquent record of the Montana Constitutional convention...the delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment."

Beyond the relatively untested state constitutional provisions in the United States (Meltz 1999), burgeoning international law and policy debates rage over assertion of rights to the basic necessities of life, including clean water. In their book *Blue Gold* (2002), Maude Barlow and Tony Clarke detail why the wars of the twenty-first century will be more about water than oil, something astute observers already note in the Middle East. The journalist Jeffrey Rothfeder (2001) furthers the analysis of global water policy several steps with his assertion that "it's both

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perplexing and disheartening to realize that access to water has never been explicitly included in any of the various declarations of human rights that were produced by international agencies in the past fifty years."

David Orr asserts that the time has come for an ecological enlightenment in law schools and courts. He is right, of course, and whether our institutions of legal training (law schools), adoption (legislatures), and interpretation (the courts) recognize this in the face of the many absurdities of our modern legal system (Campos 1998) is a large, open question.

When we look with fresh eyes at the geomorphic, cultural, political, legal, and physical boundaries of water, the moral and ethical dilemmas created by the current legal system are absurd. Our current water law and policy system cries out for reform nearly everywhere. First, access to clean, healthy drinking water is a fundamental human right. Our bodies are approximately 70% water, and we live on the blue planet. Water is not merely a commodity to be made available for a price; it is fundamental to human and all other life forms on this planet. Second, access to water for a variety of purposes, including recreation, fishing, and even economic gain, is an issue of public trust. Public trust doctrine holds that natural resources are held in common and that their care and management are held in trust by the government to serve the use and enjoyment of its people. Third, and this is the broader point, healthy freshwater systems are pathways for living organisms. They are the veins and arteries of the Earth. They connect great ecosystem types, transport nutrients up and down the landscape, and directly or indirectly sustain the health of the planet.

Despite the importance of healthy freshwater ecosystems, in much of the western United States we govern water with prior-appropriation doctrine (Getches 1997), or what I call the "law of the two-year-old." Simply put, prior-appropriation doctrine is the law of a crying baby holding a big gun yelling "I've got it, it's mine, and you can't have it." It literally arose out of gun battles to protect water sluice mining claims in camps of the California Gold Rush in 1849.

Prior-appropriation doctrine is one of a series of laws and doctrines that University of Colorado law professor Charles Wilkinson calls a "lord of yesterday" (Wilkinson 1992). The doctrine is one of a series of five laws and doctrines put in place in the late nineteenth and early twentieth centuries to govern the extraction of natural resources and, in parallel, to guide the "development" and subsequent theft of the West from native peoples.

The current context of the "lords of yesterday" and the failure of modern environmental law to effectively protect ecosystems calls attention to Orr's proposal to reintroduce a constitutional amendment to enumerate an inalienable right to a clean environment. It is long past time that the United States rejoined the international community with useful leadership on environmental policy and environmental justice. The real question is how to create the political and social change that will transform the way we create environmental policy.

The City of San Francisco is showing us one way. A bold new environmental code became law in San Francisco in August 2003 (Blumenfeld 2003). The city redesigned its 11 existing environment-related statutes into a new code that challenges traditional assumptions about costs and risks. Fundamentally, the city now asks the question of the precautionary principle—how little environmental harm is possible?—rather than the standard question posed by most environmental statutes—how much harm will we allow? The precautionary principle requires decision-makers to determine whether a potentially harmful activity is necessary and whether less hazardous options are available. San Francisco's example presents a historic opportunity to refocus environmental decision-making. Creating the political change to amend the U.S. Constitution is another.

Peter M. Lavigne

Rivers Foundation of the Americas, 3619 SE Milwaukee Avenue, Portland, OR 97202–3858, U.S.A., email watershed@igc.org, www.riversfoundation.org

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