Law Quadrangle (formerly Law Quad Notes)

Volume 32 | Number 3 Article 6

Spring 1988

The Environment, the Constitution, and the Coupling of Fallacy

James E. Krier
University of Michigan Law School

Why should something so fundamental as the environment go unrecognized in something so fundamental as the Constitution?

The Environment, the Constitution, and the Coupling Fallacy

James E. Krier

This article is based on a paper entitled "Environmental Quality as a Political Question" that was delivered at the University of Tennessee's October 1987 Bicentennial Conference on The Constitution and the Environment.

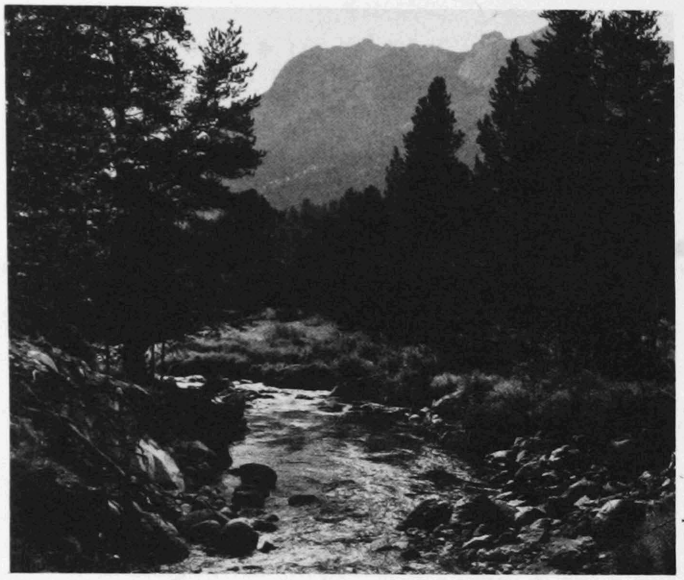
Shortly after the environmental movement first got underway, almost 20 years ago now, there appeared a little parade of articles urging a constitutional right to a clean environment. While a few of the articles campaigned for an amendment to this effect, most of them reasoned that an amendment was unnecessary. They argued that the right in question is already in the Constitution, however inconspicuously — in the Ninth Amendment, say, or in the concept of ordered liberty protected by the Due Process Clause, or in the so-called penumbra of the Bills of Rights. They asked the courts simply to acknowledge this reading, but the courts did not. The United States Supreme Court has not subscribed to any of the theories advanced by the articles, and neither have the lower federal courts nor the state courts, with a couple of inconsequential exceptions.

Why should something so fundamental as the environment go unrecognized in something so fundamental as the Constitution? True, there is no explicit statement of an environmental right in the constitutional text, but it hardly follows that such a right could not be read in, and in a principled way. The reading would be principled because it would reason from precedents themselves principled, and because it would follow one or another broadly accepted method of constitutional interpretation. Neither of these points needs to be belabored. There are precedents, involving precisely the theories mentioned above, with which to build plausible arguments for a constitutional right to environmental quality. And conventional canons of constitutional interpretation permit one to read between the lines. There is no explicit right to privacy in the Constitution, for example, but there is a constitutional right of privacy. And the Constitution does not explicitly provide a right to defense counsel, at government expense, in criminal prosecutions, but there is a constitutional right to this effect. So too for the exclusionary rule and the right to travel and so on. The Constitution is longer, and larger, than its text. So why no constitutional right to environmental quality?

Two reasons are usually given, but I think they boil down to one. The literature mentioned above, arguing for the constitutional right, was regarded by critics as high-minded but also high-flown. Close examination of the literature's claims suggested that their connection to accepted constitutional understanding was too attenuated. My colleague Philip Soper reached just this conclusion after a very patient and, I think, sympathetic review of the entire subject published in 1974. Richard Stewart, writing three years later, was more dismissive. "Advocacy of a constitutional right to environmental quality," he said, "has been rejected by the courts. There is little doubt that the judges are correct in resisting these siren calls. The asserted right lacks any foundations in the constitutional text or in history." Call this the *doctrinal* reason against the right.

Critics of a constitutional environmental right insist that such a right would reach well beyond the range of judicial competence . . .

Constitutional doctrine is not, of course, formed in a vacuum; to some degree, the Constitution and decisions interpreting it are read to say what they should say, to mean what it makes sense to have them mean, from the perspective of a given reader. To some degree, then, the readings of Soper and Stewart and others like them clearly are influenced by the belief that it would not be sensible to read the environment into constitu-



Philip Dattilo

tional law. There might be any number of reasons for this belief, but one has been obviously dominant. Critics of a constitutional environmental right insist that such a right would reach well beyond the range of judicial competence, in both the immediate sense of technical capacity and the more remote sense of political legitimacy. This is the *functional* reason against the right, and, I think, the rationale that drives the doctrinal reading of people like Stewart and Soper.

Professor Stewart is the most transparent in this regard. After writing the language I quoted above, he went on to discuss at much greater length all of the functional reasons why he considered the doctrinal case for the constitutional right to be weak. He had to do this, because he conceded that the argument from doctrine was "not necessarily a decisive objection . . . ." So he went on to say, in several passages too lengthy to quote, that (doctrine aside) "there are other basic difficulties." If the constitutional right were recognized, courts would be ultimately responsible for large resource allocation decisions, and this could mean that they would have to use economic and other methods of technical analysis when there is no reason to suppose that they know how; and they would have to determine the distributional impacts of various environmental policy alternatives, a determination that is itself a difficult technical matter, and then trade these impacts off against allocational efficiency without the assistance of any accepted guide for making such tradeoffs; and they would have to confront the polycentric and dynamic characteristics of environmental policy and figure the impact of alternatives on research and development in the field of pollution control technology, not to mention (Stewart didn't) the impacts of one environmental policy — dealing with air quality, say — on other environmental media, such as water and land; and they would have to puzzle over questions having to do with values and preferences and intergenerational justice; and there is little if any principled basis for any of this so how would the courts manage? And even if they managed, they would still be left with the embarrassing problem of figuring out how to implement the constitutionally required programs. Courts lack the competence, technical and political, for all of these tasks.

Soper is less transparent than Stewart, but his brief discussion of "judicial competence" did mention more or less the same points that Stewart repeated later. And Soper was very explicit in stating the bottom line. The functional considerations, he said, pointed to the conclusion that environmental matters are "more appropriately left to the judgment of the legislature" and to "majoritarian determination."

In other words, to politics.

Exactly! Ignore for now the possibility that the likes of Soper would insist that doctrine really is the central concern, because there will be occasion later to suggest that even on doctrinal grounds the case against the constitutional status of environmental quality has been far less than fully considered. Assume for the sake of argument that functional considerations actually do underlie the views of everyone who is troubled by the notion of a constitutional right to a clean environment. Acknowledge that in the reading of all but the most explicit of constitutional provisions, and perhaps even then, doctrine is influenced by function. And concede, as I readily do, that functional considerations emphatically suggest that environmental quality is most prudentially regarded as a political not a judicial question. Even my former colleague Joseph Sax, perhaps the foremost advocate of an active judicial role in matters of environmental law, concluded in his book *Defending the Environment* that there should not be a constitutional right, because a court "should not be authorized to function as an environmental czar against the clear wishes of the public and its elected representatives."

But look at what Sax (and everybody else, apparently) has done: The idea of a *constitutional* right has been coupled with the idea of *judicial* management of the right. So far as I can tell, the entire debate on this issue — which seems to have ended with the appearance of Professor Stewart's article a decade ago — has gone forth on the singular notion that the Constitution and the courts are necessarily coupled together. But that notion, however typical, is hardly necessary, even as a matter of doctrine.

The argument . . . commits what can neatly be called the coupling fallacy.

Political question doctrine, for instance. Whatever disputes there might be about its marginal meanings, the central core of political question doctrine is conventional enough that I can simply quote an encyclopedia on the subject. An entry labeled "Political Question" in the *Encyclopedia of the American Constitution* says that the Supreme Court recognized as early as the turn of the last century "that decisions on some governmental

questions [and here the author, Philippa Strum, could have added the words *arising from constitutional provisions*] lie entirely within the discretion of the 'political' branches of the national government — the President and Congress — and thus outside the proper scope of judicial review." In other words, decisions on political questions are not justiciable.

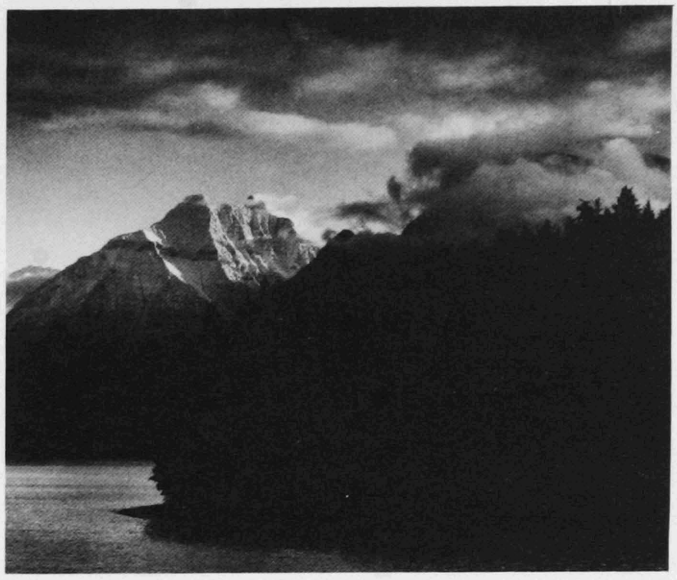
That is what Ms. Strum says at the beginning of her essay. This is what she says at the end:

> The [political question] device . . . enables the judiciary to maintain its independence by withdrawing from no-win situations . . . . The Supreme Court, declaring the presence of a political question, tacitly admits that it cannot find and therefore cannot ratify a social consensus. . . . The political question doctrine, which permits the Court to restrain itself from precipitating impossible situations that might tear the social fabric, gives the electorate and its representatives time to work out their own rules . . . .

This isn't perfect, but it's close enough, and anyone wishing to read Ms. Strum's essay in its entirety will find that the political question doctrine fits our case quite nicely. Thus the Court has used the doctrine when it would otherwise have to define obscure terms (such as "republican form of government") the content of which can be resolved only by picking one political philosophy over another, or when it would have to develop principles beyond its capabilities, or when it would have to announce unenforceable judgments. All of this sounds strangely familiar. To my mind, political question doctrine provides a ready answer to the *functional* case against constitutional status for environmental quality, because it lets us uncouple the Constitution and the courts. That the judiciary is incompetent to define and manage certain kinds of constitutional conceptions is simply not a conclusive, and maybe not even a very interesting, objection to the conceptions themselves. The argument to the contrary is faulty. It commits what can neatly be called the coupling fallacy.

Is mine just a debater's point? What good is it to find an item in the Constitution if the item is regarded by the courts as raising nonjusticiable political questions? And how would one get the item read into the Constitution in any event, aside from the difficult process of constitutional amendment? Certainly the Court isn't going to wend its tired way through the constitutional text in search of something it already knows it will declare to be of a political, and hence nonjusticiable, nature. And what about the *doctrinal* case against interpreting the Constitution in favor of environmental quality? Commentators like Soper and Stewart claim that function is not the sole concern; they claim that on their reading of the constitutional text (and on their reading of the Supreme Court's reading of the constitutional text) the environment just isn't there. So even if the functional objections are cancelled by the political question doctrine, the doctrinal objections remain.

Two of these questions — the one about achieving the desired reading, absent constitutional amendment; and the one about the doctrinal arguments against the reading — are related and call for separate treatment. The question about the value of nonjusticiable constitutional language can be considered here. Taken all together, my answers do not suggest that those who debated the general issue in the years 1970 to 1977 were wrong, on either side. The suggestion, rather, is that much of what they had to say was irrelevant.



Philip Dattilo

What good would constitutional status be, without the courts?

So what good is a constitutional provision without the courts directly behind it? There are a number of answers that come immediately to mind: Recognition of the environment as an item with nonjusticiable constitutional status might, without contradicting the purposes of political question doctrine, allow courts to insist that the legislative and executive branches consider environmental values in an open and reasoned way in the policy process, no matter what those branches ultimately conclude. Similarly, recognition might give courts room to construe ambiguous legislation in favor of environmental values when the competing values at stake in the legislation's meaning are not of constitutional dimension; or room to manipulate the burden of proof in cases involving the environment; and so on.

As interesting as these points might be, I do not wish to pursue them here. All of them arise from the premise that courts could still be *indirectly* behind our hypothetical constitutional provision. I want to consider the value of the provision utterly independent of the judiciary.

Assume, accordingly, that the courts are going to be out of the picture entirely. What good would constitutional status be then? Obviously, I have to speculate. My speculations would be greatly enriched if the origi-

nal debaters had made my debater's point and thereby been forced to take the question up, but none of that happened. If it had, I imagine that someone would have considered that a constitution is surely more than a set of propositions about the structure and limits of government and about concrete rights in the people. A constitution — I'm convinced this is true of our Constitution — must serve some more abstract purposes as well, whether you call them symbolic or educational or legitimating.

The Constitution itself, as a whole, is a symbol held in immeasurable esteem by millions of people who have never even read it. It follows that to be an item in the Constitution, explicitly or not, is to take on a meaning larger than meanings that can be captured in, or reduced to, mere operations. A republican form of government stands for something quite without the courts and even if Congress itself cannot articulate, other than by decisions in the name of the form, just what that something is.

If I were a conscientious legislator or executive who had taken my oath to heart, the fact that environmental quality had constitutional status would make the environment mean something more to me than otherwise, even if I could not articulate the meaning in the absence of reaching decisions on particular issues. It would make the environment mean more to me even if, but more likely especially because, questions of environmental quality were regarded as nonjusticiable, so that I and my colleagues had the last word on the questions. My sense of the significance of having the environment in the Constitution might be remote, but the consequences of the environment being there in the document could be immediate, as when some formerly loyal group of my constituents asked me to make a close call against environmental interests and I could point out to them that, under the circumstances, I felt *constitutionally* bound to do otherwise.

Would my explanation to my constituents assure their loyalty to me at the time of my re-election campaign? Hardly. But might the results of hundreds of re-election campaigns held over tens of years and involving hundreds of incumbents who acted as I be at least marginally different, and in a direction favoring environmental quality, if environmental quality had (nonjusticiable) constitutional status? I'm not sure, but a bet on yes is a better bet than the bet that any one particular legislator would be re-elected.

The argument from symbolism takes on more power once one recognizes that all executives and all legislators and all constituents were once children, and that most children actually study the Constitution, one way or another, in school. Would students gather a different set of notions about the environment if they studied it as an item in the Constitution rather than as merely an item in a science course or an elementary economics course or a course in current events? Again, a bet that over time the popular mind-set would change in a statistically (and politically) significant way, and in a direction more sympathetic to environmental values, seems safe. For these sorts of reasons, I am unmoved by the fact that in the few states that have amended their constitutions to include the environment, policy probably looks pretty much like it did before. It is far too soon to tell. (And if policy does look pretty much the way it did before, the amendments have probably done no harm.)

It may be, however, that the best response to skeptics is the response that accentuates the negative rather than the positive. My colleague Frederick Schauer has drawn from the literature and suggested to me the legitimating role of the Constitution. I don't mean, and Schauer didn't mean, that constitutional recognition of the environment would give a special endorsement to environmental concerns. Probably it would, but merely as a consequence of the symbolic and educational considerations discussed above. The legitimating role (perhaps it would be better called the *de*legitimating role) is importantly different and has to do with a sort of negative endorsement that might arise from the *absence* of an item in the Constitution. The concern here is the appearance of implicit moral approval of something actually wrong. Take state action doctrine, which says, for instance, that the *government* shall not discriminate on the basis of race. The unintended implication is that private citizens may discriminate, that private discrimination is legitimate. The absence of the environment in the Constitution could encourage similar, unintended reasoning. You pollute. I object. You tell me not to make a federal case out of it.

I am painfully aware that all of the foregoing sounds soft and preachy, which is perhaps why it isn't often, or ever, heard coming from legal scholars. I am equally aware that a determined program of reading might, to the contrary, actually uncover innumerable sources where much the same was said or all the same rebutted with the sort of rigor, and accompanied by the sort of citations, one associates with solid professional work. I would be willing to discipline my arguments and do the reading if my agenda right now were more ambitious and less hopeless than simply getting those debaters of ten years ago to concede that a lot of what they argued about missed, if not *the* point, still quite clearly *a* point, and that they would be well advised to start anew.

Congress is the answer . . .

Two related questions remain: Granting, purely for the sake of argument, everything said thus far, and putting a constitutional amendment to the side, and recognizing that it would be strange for the Court to search for something in the Constitution knowing all along that any discovery would be regarded as a nonjusticiable matter, how could the environment ever find constitutional status? How could it do so, in particular, in the face of inhospitable constitutional doctrine?

The questions are related because Congress is the answer to each of them. As Paul Brest and others have pointed out at some length, it may usually be the case, since *Marbury v. Madison*, that the Supreme Court is the *ultimate* interpreter of the Constitution, but it is not ever the case that it is the *exclusive* interpreter. It is in fact

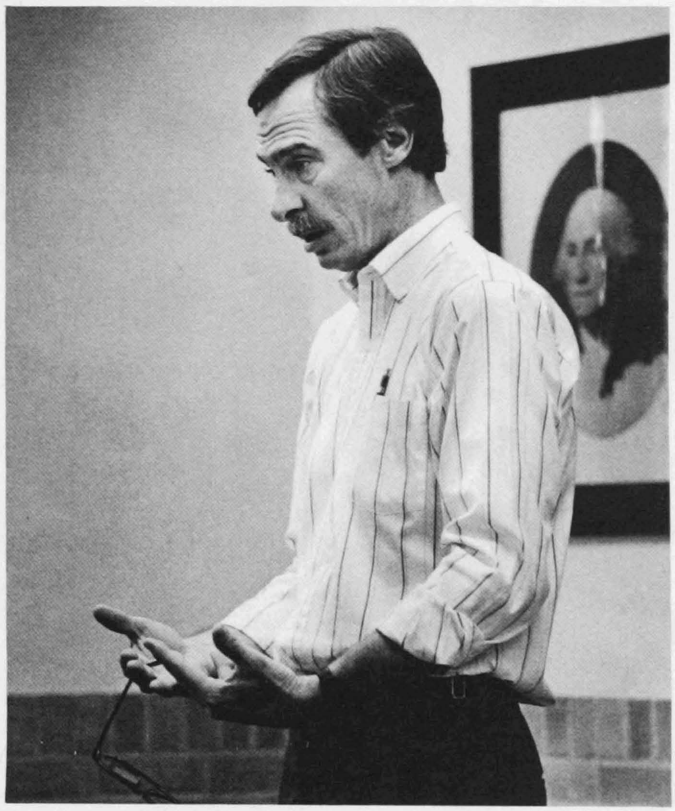
perfectly plain that Congress is necessarily an interpreter as well, and that its interpretive authority can be the equal of the Court's in that Congress may, on occasion, step beyond the boundaries of the Court's reading. Whether it is equal in the sense that Congress is entitled to contradict the Court is a much more difficult matter, but one that can be ignored here because the Court has never said, itself, explicitly, that the Constitution forecloses a reading that endorses environmental values. So I do not see why Congress could not enact a joint resolution or a statutory finding expressing exactly such a reading — a reading whose meaning, contours, and implications Congress would be perfectly happy to have the Court regard as involving political questions, nonjusticiable issues.

Could a conscientious Congress declare such an interpretation in the face of the doctrinal arguments against it? Here I draw on an article by Judge Richard Posner that appeared last year in *The New Republic*. The article suggests, to me at least, that a conscientious Congress could do precisely what I have in mind. In the course of making a case against strict constructionism, which is a brand of constitutional interpretation, Posner observed that the choice of method of constitutional interpretation is a decision that itself entails, if you will, constitutional interpretation, this simply because the Constitution doesn't explicitly state how it, the Constitution, is to be interpreted. One can't say "The Constitution says nothing on the matter of interpretation so it should be interpreted narrowly" and expect a round of applause, because one could just as well say "The Constitution says nothing on the matter of interpretation so it should be interpreted broadly." A choice independent of explicit constitutional text has to be made. This doesn't mean, though, that the choice is independent of the Constitution *as* a text. Although Judge Posner didn't say so exactly, I am sure he believes that principled interpretation will have reference to the fabric of the document. Of particular bearing here, it will have reference to, among other things, the constitutional role of the reader. So, regarding the choice of interpretative approach, Posner wrote: "That decision must be made as a matter of political theory, and will depend on such things as one's view of the springs of judicial legitimacy and of the relative competence of courts and legislatures in dealing with particular types of issues."

If, as seems to be the case, the legislature (along with the executive) is the relatively competent branch in the case of environmental matters, then it is difficult for me to understand why it could not conscientiously interpret the Constitution — purely and explicitly for its own purposes, and purely in light of its own instrumental competence — in such a way as to recognize the enduring importance of environmental quality. The doctrinal arguments that might seem to stand in the way may in fact be to the side, because they are arguments based on a reading of the Constitution for purely judicial purposes. But our purposes are not judicial at all.

Congress would not be expanding its legislative authority by interpreting the Constitution in a manner that recognizes environmental quality, because the Commerce Clause already gives Congress broad power to legislate in the area. Moreover, the interpretation I have in mind need not be considered to create congressional obligations or limitations — not, at least, justiciable ones. The interpretation would be simply hortatory. (The environmental amendments to state constitutions have been regarded by state courts in this way.) For these reasons, I have shied away from couching my own argument in terms of a constitutional *right* to environmental quality; I have spoken, rather, of constitutional status.

I don't know whether it would be easy to convince Congress to exercise its interpretive prerogative, and in favor of environmental values. I am confident that the chances that Congress could be so moved are better than the chances of obtaining an amendment or of convincing the Court to take sympathetic action. I can't be sure that granting constitutional status to environmental quality would matter in any event, but I addressed above some reasons why it might. And, most of all, I have little idea how to answer the long list of lawyers' questions that would surely arise if Congress did exercise its prerogative. But those questions, whatever they may be, I leave for now to people whose professional concern is not the environment, but the Constitution.



Philip Dattilo

Professor James E. Krier taught at UCLA and Stanford before he joined the University of Michigan Law School faculty in 1983. His teaching and research interests lie chiefly in the fields of property and environmental law.