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The Continuing Search for a Constitutionally Protected Environment

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THE CONTINUING SEARCH FOR A CONSTITUTIONALLY PROTECTED ENVIRONMENT

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INTRODUCTION

For almost five years environmental advocates have argued for the existence of a fundamental right to a non-hazardous environment.[1] Recently, supporters of this position received their sharpest setback when a Federal District Court ruled in *Pinkney v. Ohio Environmental Protection Agency,*[2] (hereinafter cited as *Pinkney*), that the right to a non-hazardous environment is not a fundamental right guaranteed by the United States Constitution. To reach this result, the *Pinkney* court relied on the criteria set forth by the Supreme Court in *San Antonio Independent School District v. Rodriguez,*[3] (hereinafter cited as *Rodriguez*), as to what constitutes a fundamental right. Under the prevailing test established by the majority opinion in *Rodriguez*, the *importance* of a right is not the critical determinant in deciding whether that right is explicitly or implicitly guaranteed by the Constitution.[4]

Petitioners in *Pinkney* had instituted a class action on behalf of all Cuyahoga County residents praying for a preliminary injunction against the construction of what they contended would be the largest enclosed shopping center mall in the United States.[5] The action was brought against the construction company, the Ohio Environmental Protection Agency (OEPA), the Administrator of the United States Environmental Protection Agency (EPA), the village of North Randall, Cuyahoga County, and the State of Ohio, alleging violations of the Clean Air Act of 1970[6] and the United States Constitution. In their Post Hearing Brief, plaintiffs asserted that there exists a federal constitutional right to freedom from unreasonable contamination of air, water and other fundamental life sources that can only be protected by affirmative state government enforcement, and that the lack of such enforcement constitutes a denial of sub-

stantive and procedural due process actionable under the Civil Rights Act.[7] Applying the *Rodriguez* test,[8] the *Pinkney* court did not find any guarantee of a healthful environment in the Federal Constitution and therefore could not rule that the claimed right was fundamental.[9]

Pinkney is the first case in the environmental area to apply the *Rodriguez* test of what constitutes a fundamental right. If future courts follow the *Pinkney* approach, environmental lawyers will be forced to seek other than constitutional avenues for environmental protection. However, in order to appreciate the context in which the *Pinkney* decision was rendered, it is necessary to examine previous cases which have addressed the issue of a constitutionally protected right to a healthful environment.

I. Prior Decisions

In *Ely v. Velde*,[10] (hereinafter cited as *Ely*), the residents of a Virginia community brought an action against the Law Enforcement Assistance Administration (LEAA) and the Director of the Virginia Department of Welfare and Institutions to halt the proposed funding and construction of a medical and reception center for state prisoners in their neighborhood, which contained certain historic sites. Federal funding of the project was enjoined on the grounds that the LEAA must comply with the procedural requirements of the National Environmental Policy Act (NEPA) and the National Historical Protection Act (NHPA) in approving block grants to states for law enforcement purposes.[11] However, the court found that the requirements of NEPA and NHPA were addressed only to Federal agencies. Therefore, the court refused to issue an injunction against the State officials' failure to consider the environmental and cultural impact of the proposed center.[12]

Alternatively, the *Ely* petitioners contended that apart from NEPA and NHPA, the federal constitution was violated by the State director's "unreasonable and arbitrary action" in placing the proposed center in their community. The *Ely* court declined the invitation to elevate this contention to a constitutional level, observing that ". . . [W]hile a growing number of commentators argue in support of constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so."[13]

Other cases have been more explicit in their reasoning. In *Environmental Defense Fund v. Corps of Engineers*,[14] (hereinafter

cited as *Environmental Defense Fund*), the District Court for the Eastern District of Arkansas expressed its sensitivity to petitioner's constitutional claims. However, the court felt that the principle of judicial restraint precluded the announcement of a new doctrine of such proportions:

> The Court is not insensitive to the positions asserted by the plaintiffs. . . . Those who would attempt to protect the environment through the Courts are striving mightily to carve out a mandate from the existing provisions of our Constitution. Others have proposed amendments to our Constitution for this purpose. . . . Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition. But as stated by Judge Learned Hand in Spector Motor Serv. Inc. v. Walsh, 139 F. 2d 809 (2nd. Cir. 1944): 'Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.' The Ninth Amendment may well be as important in the development of constitutional law during the remainder of this century as the Fourteenth Amendment has been since the beginning of the century. But the Court concludes that the plaintiffs have not stated facts which would under the present state of the law constitute a violation of their constitutional rights. . . . The Court's decision on this point gives further emphasis to its statement, *supra*, that final decisions in matters of this type must rest with the legislative and executive branches of government.[15]

The only other case which held (based upon its own reasoning rather than past precedents) that the right to a clean environment could not be found in the Constitution was *Tanner v. Armco Steel Corp.*,[16] (hereinafter cited as *Tanner*). In that case, plaintiffs brought an action to recover for personal injuries allegedly sustained from air pollutants emitted by defendant's petroleum refineries and plants located along the Houston Ship Channel. Among the claims raised by plaintiffs in their jurisdictional statement were allegations of a federal question under the Ninth and Fourteenth Amendments, the Civil Rights Act of 1871 (42 U.S.C. § 1983), and its jurisdictional counterpart, 28 U.S.C. § 1343 (3). The court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted.[17]

Since environmental protection is not explicitly provided in the text of the Constitution, the *Tanner* plaintiffs contended that the right to a healthful environment is one of the "other" rights "retained by the people" under the Ninth Amendment.[18] The court declined to accept this position and noted that:

> The parties have cited and the Court has found no reported cases in which the Ninth Amendment has been construed to embrace the rights here asserted. Such a construction would be ahistorical and would represent essentially a policy decision. In effect, plaintiffs invite this Court to enact a law. Since our system reserves to the legislative branch the task of legislating, this Court must decline the invitation. The Ninth Amendment through its "penumbra" or otherwise, embodies no legally assertable right to a healthful environment.[19]

On the Fourteenth Amendment claim, the court found that plaintiffs had not met the minimum requirements for alleging "state action"[20] on the part of defendants. Assuming *arguendo* that state action was present, the court advanced four reasons for rejecting plaintiffs' contention that defendants had violated any judicially cognizable federal constitutional right:

> First, there is not a scintilla of persuasive content in the words, origin, or historical setting of the Fourteenth Amendment to support the assertion that environmental rights were to be accorded its protection. To perceive such content in the Amendment would be to turn somersaults with history. . . . Second, it is apparent that nowhere in the Fourteenth Amendment—or its "incorporated" amendments—can be found the decisional standards to guide a court in determining whether the plaintiffs' hypothetical environmental rights have been infinged, and, if so, what remedies are to be fashioned. . . . Third, from an institutional viewpoint, the judicial process, through constitutional litigation, is peculiary ill-suited to solving problems of environmental control. . . . Finally, to the extent that an environmental controversy. . . is presently justiciable, it is within the province of the law of torts, to wit: nuisance.[21]

The court concluded that if it were desirable to effect a wholesale transformation of state tort suits into federal cases, ". . .it should be accomplished by Congress through legislation, and not by the courts through jurisdictional alchemy."[22]

Almost all other cases which decided the issue of a fundamental right to a "clean" or "non-hazardous"[23] environment have followed the reasoning developed in the *Ely*,[24] *Environmental Defense Fund*,[25] or *Tanner*[26] cases. One case was ambivalent as to the position it took,[27] and only in *Environmental Defense Fund v. Hoerner Waldorf*,[28] (hereinafter cited as *Waldorf*), has a court clearly recognized that ". . .each of us is constitutionally protected in our natural and personal state of life and health."[29] However, *Waldorf* was dismissed because the plaintiff failed to demonstrate state action.

Several reasons for the courts' reluctance to grant constitutional recognition to the right to a non-hazardous environment can be

distilled from the cases. (1) According to the majority in *Rodrigeuz*, an interest is deemed fundamental and therefore granted constitutional stature *only* if it is explicitly or implicitly found in the Constitution. It has been argued that the guarantee to a non-hazardous environment does not meet this criterion, and thus does not meet the prevailing test of what constitutes a fundamental right.[30] (2) It has also been contended that there is no indication in the words, origin or historical setting of the Fourteenth Amendment Due Process Clause to support the assertion that environmental rights were to be within its scope. Therefore, to grant such protection under the Fourteenth Amendment Due Process Clause would contravene the intent of the framers of the Amendment.[31] (3) Similarly, it has been argued that nothing indicates that the Ninth Amendment or the "penumbras"[32] of the first eight amendments embrace a legally assertable right to a non-hazardous environment.[33] (4) It has also been observed that if the courts were to derive such a right from the Ninth Amendment, the penumbras of the first eight amendments, or the Fifth Amendment through the Due Process Clause of the Fourteenth Amendment, they would be granting substantive due process protection to litigants, and arguably usurping legislative powers, a role which the Supreme Court unequivocally renounced in the late 1930's.[34] (5) Furthermore, one court has observed that individual litigants can obtain judicial redress on the local level through nuisance suits, and, were it desirable to cope with such problems on a nationwide scale, the task should more properly be left to Congress.[35] (6) Others believe that from an institutional viewpoint, the judicial process should not engage in matters inherently political because of the potential trade-off between economic and ecological values presented by the question.[36] (7) Finally, it has been argued that there are no decisional standards to guide a court in determining whether a plaintiff's hypothetical environmental rights have been infringed, and if so, what remedies are to be fashioned.[37] It is submitted that each of the above arguments can be answered, and that the courts should recognize a constitutional right to a reasonably non-hazardous environment.

II. Fundamental Rights Under The Equal Protection Clause

In *Rodriguez*, the Supreme Court held that the Texas scheme of financing public elementary and secondary education, relying primarily upon local *ad valorem* property taxes, was not a denial of equal protection under the Fourteenth Amendment, even though the scheme resulted in disparities between school districts in the

amount of funds available for educational expenditures. Among the claims raised by petitioner was that the Texas system must be subject to strict scrutiny under the Equal Protection Clause because education is a fundamental personal right. In rejecting this claim, Justice Powell, writing for the majority, stated that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[38] Rather, he concluded, ". . . the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[39]

In a dissenting opinion, Mr. Justice Marshall argued that neither the right to procreate,[40] the right to vote in state elections,[41] nor the right to an appeal from a criminal conviction[42] could be found in the text of the Constitution and yet each had been granted protection by the Court in the past.[43] "These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection."[44] Various commentators have characterized the majority's standard as an unreasonably narrow reading of the precedents,[45] while one has gone so far as to say that it is contradictory to some of the Court's other holdings in the area of fundamental rights.[46]

Finally, it should be pointed out that the majority's standard is itself a judicial construct and not a constitutional mandate. Thus, as Justice Marshall[47] and one commentator[48] have noted, the *Rodriguez* Court arbitrarily placed a limit on selecting what are to be fundamental rights in an equal protection analysis without sufficiently distinguishing the clear trend of recent decisions.

There were no due process issues in *Rodriguez*; Justice Powell was addressing the specific issue of standards of review under the Equal Protection Clause.[49] Thus, one cannot help asking whether the majority opinion implicitly recognized that an entirely different conceptual approach to the issue of fundamental rights may exist when scrutinized under the Due Process Clause.[50]

For example, in *Rodriguez* Justice Powell made a point of distinguishing the Supreme Court's prior wealth discrimination cases. He found that those cases required a class of plaintiffs who were ". . . completely unable to pay for some desired benefit, and as a consequence, had sustained an *absolute deprivation* of a meaningful opportunity to enjoy that benefit"[51] (emphasis added). Having found in those cases a requirement of absolute deprivation before relief

could be granted, Justice Powell observed that a mere showing that pupils living in poorer districts received a poorer quality education does not, in and of itself, establish a violation of the Equal Protection Clause.[52] He relied on Texas' assertion that it was providing an "adequate" education for all children in the state.[53] Then he stated that even if education were a fundamental interest, Texas furnished enough of it to ". . . provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[54] In this way Justice Powell incorporated an "adequacy argument" into his definition of determining when fundamental rights arise under the Equal Protection Clause.[55] His approach has been severely criticized for having turned the Equal Protection Clause into an "adequacy protection" clause.[56]

Without elaborating on the merits of this criticism, it should be pointed out that the Court rarely discusses the "adequacy" of the interests at stake when engaging in a due process analysis.[57] Instead, it asks whether or not the party claiming relief has been deprived of a right in *absolute* terms. That is, when members of society (not consigned to a discriminatory classification) are or potentially could be deprived of a given right by the government, the question becomes one of whether they have been denied due process of law.[58] In due process cases, the Court does not speak in *relative* terms as under an equal protection analysis. Instead, it determines whether the right allegedly being denied is recognized in law. If so, the Court will define that right, deriving it from the Constitution. Then it must decide if the State has certain countervailing interests which would allow it to place reasonable restraints on the exercise of that right. Where sufficient state interests are not present, the Court will then vindicate the claimed right.[59]

Because of the "absolute" focus of a due process analysis (as distinguished from the "relative" or "adequacy" analysis in an equal protection examination) it is submitted that: (1) the Due Process Clause provides a stronger foundation for the derivation of the constitutional right to a reasonably non-hazardous environment, and (2) the limitations placed upon the definition of a fundamental right by the *Rodriguez* Court are inapposite when applied to a due process analysis.[60]

III. Fundamental Rights Under The Due Process Clause

The purpose of the Fourteenth Amendment Due Process Clause is to render applicable to the states ". . . immunities that are valid

as against the federal government by force of the specific pledges of particular amendments [to the Federal Constitution]."[61] However, the central issue is not the *purpose* of the Fourteenth Amendment, but rather the *test* to be applied in determining which rights granted by the first eight amendments are to be incorporated under the Fourteenth Amendment's shorthand phrase "due process" and thereby rendered applicable to the states.

In *Palko v. Connecticut*,[62] (hereinafter cited as *Palko*), the Supreme Court held that a specific guarantee of the Bill of Rights was applicable to the states through the Fourteenth Amendment only if denial of the right ". . .violate[s] those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."[63] That is: "Is the right '. . .implicit in the concept of ordered liberty,' and thus, through the Fourteenth Amendment, valid as against the states?"[64]

In *Adamson v. California*,[65] (hereinafter cited as *Adamson*), Mr. Justice Black, in a dissenting opinion, opted for the principle of total incorporation of the specific Bill of Rights guarantees into the Fourteenth Amendment.[66] He believed that the purpose of the Fourteenth Amendment was ". . . to extend to all the people of the nation the complete protection of the Bill of Rights. . .",[67] and the Fourteenth Amendment Due Process Clause is a shorthand expression which renders all of the rights granted by the first eight amendments applicable to the states.[68]

More recent decisions have adopted the compromise position of "selective incorporation", utilizing a more lenient test of what is "fundamental". As the Court recently noted, "Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness'."[69] But, while the specific holding in *Palko* has been overruled and its rationale severely questioned,[70] the Court has been unwilling to adopt Justice Black's "total incorporation" thesis.[71] Rather, the present test appears to be that:

> Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice",. . . the same constitutional standards apply against both the State and Federal Governments.[72]

A parallel development in Constitutional law has been the recognition that included within the specific rights enumerated in the Bill of Rights are several "implied" or "inchoate" rights which exist within the "penumbra" of the explicit rights contained in the first eight amendments to the Federal Constitution. An example is the

"right of privacy" found to be inherent in several of the amendments which comprise the Bill of Rights, and the application of the right to the states through the Fourteenth Amendment Due Process Clause.[73] In a wide-ranging group of cases, the Supreme Court has found rights, not explicitly contained in the Bill of Rights, to be nonetheless *implicitly* guaranteed by the Constitution and therefore "fundamental" and entitled to constitutional protection.[74] Once such an implicit right is found to be *fundamental* it is "selectively incorporated" by the Due Process Clause and made equally applicable to the states and federal government.[75]

It is also important to note the elastic nature of the due process concept — a characteristic of great importance to those who would bring environmental rights under its purview. In *Wolf v. Colorado*,[76] Justice Frankfurter observed that due process of law should be defined within the context of our changing historical environment; that it is a "living principle":

> It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights. To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of "inclusion and exclusion." Davidson v. New Orleans, 96 U.S. 97, 104.[77]

Juxtaposition of the elasticity of the due process concept with the growing number of "implicit" rights which have been found to be "fundamental" suggests that specific textual reference in the Constitution to a reasonably non-hazardous environment is *not* a prerequisite to constitutional protection under the Due Process Clause:

> . . . the failure of the founding fathers to provide in explicit constitutional language for guarantees against enviromental spoilage is easily explained. Despite their anxiety to enact a living constitution adapted to the needs of succeeding generations, they could no more have foreseen the given consequences of environmental contamination from their vantage point in an unpopulated simple agrarian economy than they could hve foreseen the development and constitutional implication of electronic eavesdropping devices, telephones or telephone booths.[78]

Therefore, even if it be conceded that "fundamental rights" must be narrowly construed under a *Rodriguez*-type equal protection analysis, it does not follow that a due process definition of such rights must be similarly restricted. To hold otherwise is to ignore the ability of the Due Process Clause to grow through interpretation and adaptation to changing social, historical and *environmental* conditions.[79]

IV. Deriving The Right To A Reasonably Non-hazardous Environment

A. The Fifth and Fourteenth Amendments

Having argued that the restrictive approach taken by the *Rodriguez* Court under the Equal Protection Clause should not control when a fundamental right to a reasonably non-hazardous environment is asserted under a claim of denial of due process, it must then be asked where such a right can be found in the Constitution. It is submitted that the words "life" and "liberty" of the Fifth and Fourteenth Amendment Due Process Clauses constitute one source.

Specifically, the Fourteenth Amendment provides that a State may not ". . . deprive any person of life, liberty or property without due process of law." Together with the Fifth Amendment it protects the right to life. Since human life may perish if the environment is destroyed, it can be argued that the preservation of our environment is a fundamental right or value, under the specific protection of the two amendments.[80]

The court in *Environmental Defense Fund v. Hoerner Waldorf*[81] noted that ". . . a person's health is what, in a most significant degree, sustains life," and that "life" is protected under the Fifth and Fourteenth Amendments. It concluded, ". . . each of us is constitutionally protected in our natural and personal state of life and health."[82] It might have added that our liberty and the various rights specifically enumerated in the Constitution may become meaningless abstractions if life itself is endangered by the assault of pollution on the human body.[83]

Liberty is also explicitly protected under the Fifth and Fourteenth Amendments.[84] In *Roe v. Wade*,[85] the Supreme Court held that the State's interference with a woman's decision to end her pregnancy in the first trimester is a denial of due process under the Fourteenth Amendment. In reaching this result, the Court expressed the belief that the right to privacy could be found in the Fourteenth Amendment's concept of personal liberty.[86] Moreover,

the majority of the Court intimated that liberty implicitly includes the right to be free from unhealthful influences[87] and the right to personal bodily integrity.[88] Arguably, it follows from the majority's approach in *Roe v. Wade*, that the concept of liberty embraces freedom from a contaminated environment. Furthermore, it is not unreasonable to contend that dangerous levels of dust, smog, water contaminants and other forms of pollution constitute unhealthful influences, unacceptably threatening to bodily integrity.[89]

B. The Ninth Amendment

It can also be argued that the existence of a right to a reasonably non-hazardous environment is implicit in the language of the Ninth Amendment. Numerous scholars,[90] and three justices of the Supreme Court,[91] have maintained that the Ninth Amendment does in fact constitute a basis for asserting rights which, although not enumerated in the Constitution, nonetheless protect individuals. After a detailed examination of the history of the Constitutional Convention debates, Bruce A. Beckman concluded that:

> The history of the Ninth Amendment. . . indicates beyond a doubt that the amendment expressed recognition of certain basic fundamental [*sic*] or natural rights beyond those expressly mentioned in the Bill of Rights or elsewhere in the Constitution.[92]

Similarly, in *Griswold v. Connecticut*,[93] (hereinafter cited as *Griswold*) Justice Goldberg's concurring opinion noted that:

> The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.[94]

One author has suggested that the substance of Mr. Justice Goldberg's theory is indistinguishable from Mr. Justice Harlan's due process approach.[95] Justice Black, in his dissenting opinion in *Griswold*, discussed the two approaches together since he believed them to be essentially identical.[96] Indeed, in language reminiscent of several opinions by his senior colleague dealing with the Fourteenth Amendment, Justice Goldberg observed that the existence of the Ninth Amendment ". . . lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments *. . . is not restricted to rights specifically mentioned in the first eight amendments*"[97] (emphasis added).

The approach used by Mr. Justice Goldberg to define fundamental rights in the context of the Ninth Amendment is similar to that

taken by the Court under the Due Process Clause.[98] Under either approach "[Judges] must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental'."[99] Arguably, the right of all citizens to have an environment favorable to human life on a long-term basis derives from "the traditions and collective conscience of our people" and is thus protected under the Ninth Amendment.

C. The Penumbra Approach

Unlike the theory advanced under the Ninth Amendment by Mr. Justice Goldberg, the majority's opinion in *Griswold* limited the development of new rights to those implicit in expressed rights.[100] The concept developed by the Court was that specific Bill of Rights guarantees would be less than meaningful unless ancillary "peripheral" rights, evolved out of those explicit guarantees, were elevated to a Constitutional plane.[101] These "penumbral" rights, as Justice Douglas referred to them, were ". . .formed by emanation from those [specific] guarantees, that help give them life and substance."[102] Douglas found the marital relationship to be within a zone of privacy created by the penumbras of the First, Third, Fourth, Fifth and Ninth Amendments, and therefore deserving of Constitutional protection.[103]

Justice Douglas did not employ Justice Goldberg's standard for determining which unenumerated rights were to be granted constitutional protection. Instead, under the penumbra theory, a "peripheral" right is constitutionally protected if ". . . its existence is necessary in making the express [Bill of Rights] guarantees fully meaningful."[104]

Even under this test the right to be free from unreasonable environmental hazards should pass constitutional muster. The guarantees of the Bill of Rights are "fully meaningful" only if one is alive and healthy enough to exercise and enjoy them.[105] One can look to the penumbras of the Fifth and Ninth Amendments in order to substantiate this claim, since it is in these provisions that the Constitution gives explicit expression to values of life and liberty.[106]

V. Substantive Fundamental Rights: The Return to *Lochner*?

This article has attempted to find the constitutional sources for the right to a reasonably non-hazardous environment. However, there are objections raised against alleged judicial "creation" of fundamental rights not explicitly mentioned in the Constitution

which must be addressed.

In a long line of cases since 1934,[107] the Supreme Court has implicitly overruled a doctrine of judicial activism in the area of economic and social legislation that was firmly established in *Lochner v. New York*,[108] (hereinafter cited as *Lochner*). In *Lochner*, the Court had held that a State law regulating the hours of work in the bakery industry interfered with the liberty of the person to contract under the Due Process Clause of the Fourteenth Amendment.

Under the *Lochner* approach, the Court freely utilized its sense of values in reviewing economic and social legislation challenged on due process grounds.[109] As a result, the Court struck down as unconstitutional a number of legislative enactments for the promotion of social and economic well-being when, in its view, the State had exceeded the bounds of its legitimate police power by interfering with substantive rights guaranteed by the Constitution. It was felt that the social benefits ensuing from the exercise of the police power, however desirable they might be, were subordinate to values and rights which the Court believed to be part of the very fabric of the Constitution—*e.g.*, "freedom of contract".

With the abandonment of this approach, the Court adopted a more confined concept of judicial review. Today a legislature may act in any substantive area and such legislation will be upheld where it does not violate a constitutional immunity, is a valid exercise of the police power, reasonably related to its ends and serves an adequate state interest.[110] However, at the same time that the Court was removing itself from an "activist" role in protecting economic and social "liberties", it was becoming increasingly involved in protecting unenumerated *personal* "liberties" under the same Due Process Clause. In the name of fundamental rights of a procedural nature, the Court began to strike down legislation, usually in the criminal law area, which was "shocking" or offended one's sense of justice.[111]

The problem faced by those urging the extension of constitutional protection to the environment is to forfend the criticism of Justice Black, who ". . . plead[ed] for a concept of judicial review based only on specific constitutional provisions lest another court in another day use a flexible concept of due process to re-enact the sorry history of the mid-1930's."[112] Justice Black has also argued that the recognition of unenumerated rights, whether under the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment, ". . . require[s] judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise

or unnecessary."[113] Such a task, he believed, engages the Court in a process of legislative usurpation.[114]

One suspects Justice Black would argue that the substance/procedure distinction, insofar as it relates to the Court's role in determining constitutional rights, is a chimera. Be that as it may, making the distinction permits a further argument to be advanced. Namely, that the distinction exists because, as to procedure:

> Courts are particularly qualified not only to formulate policies for the efficient conduct of litigation but to percieve the essentials of a fair trial, and the community is likely to accord substantial deference to that judicial expertise.[115]

Specifically, in the area of environmental rights, it has been noted that:

> [A]ny attempts by the courts to recognize such imputed rights and fashion remedies for such rights would clearly constitute a usurpation of legislative power. A complex area such as the control of pollution demands not only a great deal of special expertise, but also an intricate balancing process whereby economic, social and political factors must be weighed. Functions such as these should properly be exercised by the legislatures on both the state and federal levels.[116]

It is further argued that the courts are not well suited as institutions to make these kinds of decisions, even if the subject matter were expressly placed under their primary jurisdiction.[117]

Thus several arguments can be arrayed against the propriety of judicial recognition of the existence of a fundamental right to a reasonably non-hazardous environment. On the constitutional level, two arguments are made: (1) were the Court to engage in creating substantive personal rights, a double standard of review would result depending on the nature of the claimed right, since it presently maintains a nearly "hands-off" attitude in the area of economic and social legislation; (2) it is beyond the province of the Court to guarantee constitutional protection to interests not explicitly mentioned in the Constitution. Otherwise, according to Justice Black, the Court undertakes a process whereby rights are created out of thin air on the basis of what judges today think makes good social policy. From an institutional viewpoint, two corellative arguments may be raised: (1) the inherent political nature of the competing interests at stake indicates that judicial interference in such matters constitutes usurpation of legislative and executive powers; (2) the courts are not equipped with the requisite expertise to deal with adversary interests in this area of the law. That is, the courts arguably lack

adequate standards for deciding what constitutes a hazard to the environment, and also for fashioning a proper remedy and supervising its implementation.

However, these criticisms can be answered. The peculiar nature of the right being argued for herein calls for judicial activism in spite of the limitations on the powers and institutional competence of courts described above. The reasoning in support of this position requires some development, to which we now turn.

VI. The Basis of a New Judicial Doctrine of Environmental Protection

A. Judicial Criteria

The *Griswold* Court implictly disavowed a return to the era of substantive due process. Noting that in the modern era civil rights predominate over traditional property rights, the Court observed that:

> We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws which touch economic problems, business affairs or social conditions. This law, however, operates directly on an intimate relation of Husband and Wife and their physician's role in one aspect of that relation.[118]

Answering Justice Black's criticism, it can be argued that rather than engaging in substantive due process, the *Griswold* majority was engaging in "selective incorporation" by giving recognition through the Due Process Clause to a right implicit in the Bill of Rights. Arguably, the *Griswold* Court merely recognized a right (*the right of privacy*) which it felt had *always* permeated the Constitution and was not engaging in policy decisions by "creating" substantive constitutional guarantees.[119] It may also be argued in passing that Justice Black failed to distinguish between the *recognition* of a constitutional right and the *standard employed* in determining the constitutionality of legislation infringing on the right.[120]

However, these observations do not provide a complete answer to Mr. Justice Black. In his terms, it is not enough (or perhaps even significant) to decide that the right to a reasonably non-hazardous environment is intrinsic to the person qua person, like the right to be free from other, more obvious forms of assault and battery. Because the Court applies a more stringent test to legislation challenged as infringing upon personal rights,[121] the "preferred" status of this new personal right would invite a repetition of the pre-New Deal experience by creating a double standard of review. This criti-

cism has never been directly answered, but there are two justifications for granting personal rights a preferred status over economic and social considerations.

First, it is contended that while the states may experiment with social legislation regulating and restricting business and economic affairs, such power does not reside in the states with respect to personal rights guaranteed by the Constitution.[122] Personal rights are more "fragile" in nature than economic rights, and therefore the states do not have a free rein to experiment with them.

A related argument is that personal rights are fixed in time, whereas economic rights may come and go according to the popularity of a contemporary economic theory.[123] Personal rights are of a permanent nature; they establish the foundation of a free society which depends upon them for its vitality. On the other hand, economic conditions can and should be subject to the popular will of legislatures to meet the changing needs of society.

The obvious problem is to distinguish between personal and economic rights. It could be argued that environmental issues are inextricably tied to economic decisions. However, environmental rights should be granted a preferred status because they amount, in the final analysis, to the personal right not to be directly, physically, damaged. It is submitted that environmental rights are more basic and fundamental than many of our other rights because: (1) their breach may be irremedial, and (2) their breach may ultimately render the existence of other rights meaningless.

Within the realm of *economic* decision-making, the courts will almost always defer to the other branches of government and allow experimentation to take place. The reason given is that if a particular decision is thought to be detrimental to societal interests it can be altered by resort to the political process.[124] However, this may not be possible when environmental degradation takes place. As one author observed:

> . . . [T]echnological impact has now reached dimensions of such magnitude that society may never have the opportunity to reconsider "its" initial decision. The argument that society can revoke social security, minimum wages, Medicare, or the antitrust laws does not apply to many environmental problems. Society may not be able to bring back into existence a dead lake, our genetic pool if mutilated by radiation, or a habitable earth once it begins to cool because of air pollution. In other words, the arguments against judical review of substantive economic decisions do not necessarily apply to review of substantive environmental-impact decisions.[125]

Reasoning along these lines, it would seem that environmental considerations are of such a serious nature and are so "fragile" that they demand careful judicial scrutiny.[126]

Secondly, recognizing a constitutional right to a non-hazardous environment would simply acknowledge and protect the basic foundation upon which our other rights exist. "We cannot enjoy our other rights if we are all dead."[127] The framers of the Constitution did not worry about the ecosphere around them; a vast continent lay before their eyes. However, it cannot be concluded that our health and the quality of our lives are not somehow addressed by a document ". . . intended to endure for ages to come, and consequently, to be adapted to the various crises for human affairs."[128]

The second major criticism which Justice Black leveled at what he characterized as the "substantive due process approach" in *Griswold* was that judges must inevitably substitute their own personal biases and philosophies for that of the legislature in determining what unenumerated rights should be elevated to a Constitutional plane.[129] Justice Harlan, concurring in the result in *Griswold*, replied that:

> While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process", lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times" . . .[130]

Indeed, the mere fact that judges are continuously called upon to render their interpretations of broad provisions in the Constitution indicates that the Court is always in a position to abuse its power. However, this is no reason to abdicate the responsibility of exercising that power correctly.[131]

The Constitution is a living document, to be interpreted in a way which meets the challenges of modern society.[132] A narrow reading of its provisions would never allow us to cope with the problems of a growing technological society.[133] Moreover, the Court has been willing in the past to recognize the existence of implied rights in the Bill of Rights through the Due Process Clause so as to keep that

document "in tune with the times".[134] Our growing environmental problems require an interpretation of the Constitution that will make that document even more meaningful in terms of the problems of our era. As the conditions of life in society change, we may very well need to rely on the courts to give meaning to unenumerated rights so that society can adapt to those changed conditions.

Assuming for the moment that environmental rights should be constitutionally protected, we must evaluate the proposition that the courts are the most suitable organ of our government to give meaning to them.

B. Institutional Constraints

Aside from the arguments that must be overcome in order to grant constitutional protection to the right to a reasonably non-hazardous environment, there are certain institutional limitations on the judical system that argue effectively against enforcement of the right by courts. As noted earlier,[135] critics contend that: (1) adequate remedies are already available under nuisance theories and, in any case, the question is inherently political in nature and therefore better left to the legislative, executive and administrative branches for conflict-resolution; (2) the courts do not have the requisite expertise or decisional standards to guide them in resolving issues presented in adjudications of an environmental right.

It is quite true that recognition by a court of this or any other constitutional right may engage it in an anti-democratic process. However, as one author noted, ". . . [The process] reflects a court's judgment that certain matters are too important to be left to the vagaries of majority will."[136] Thus judicial recognition of a constitutional environmental right, if such a right is as crucial to the existence of all others as many claim, may not subvert democratic principles, but rather give life to them. Judicial activism in this area may be both necessary and supportable.

One court that argued against the creation of a judicial doctrine in the area of environmental rights observed that the traditional tort theory of nuisance is capable of resolving ecological disputes.[137] However, a recent decision by the New York Court of Appeals illustrates the fallacy of this argument. In *Boomer v. Atlantic Cement Co.*,[138] (hereinafter cited as *Boomer*), plaintiffs were property owners near the defendant's cement plant, which was built after plaintiffs had moved into the community. They brought an action for nuisance, seeking both damages and an injunction against defendant's further pollution. It was established in the trial court[139] that defen-

dants had installed the most efficient pollution control devices then available, and yet the pollution was still considerable. The Court of Appeals, after noting that the defendant had erected its plant at a cost of over $45,000,000 and employed over 300 workers,[140] granted damages based upon the loss of usable value of the plaintiffs' property.[141] However, while admitting that defendant's activities constituted a nuisance, New York's highest court granted an injunction only until the payment of permanent damages.[142] This result occurred even though the court acknowledged that the damages to the plaintiff were substantial and that the nuisance in all probability would continue unabated for some time.[143] Moreover, the court ignored earlier New York decisions which supported plaintiffs' claim for permanent injunctive relief, and instead went outside the jurisdiction to find authority for its result.[144]

The opinion has been criticized for not effectively dealing with our growing pollution problems.[145] In failing to permanently enjoin defendant's activities, the court relied on the traditional nuisance balance-of-equities doctrine, under which a court will refrain from granting equitable relief when the hardship to the defendant is believed to outweigh the benefit to the plaintiff. As commentators[146] and the dissent in *Boomer*[147] recognized, the practical effect of this approach is " . . .a condemnation of private property for a private use by private individuals who do not have the power of eminent domain."[148] Plaintiff is granted a remedy for damages, but no right to stop his neighbor from harming him.

A more obvious problem with the nuisance approach to environmental degradation is that the party seeking relief usually must await an injury in fact before he or she can seek judicial relief. Given the facts of *Boomer* and the application of the balance-of-equities doctrine, one can appreciate why the court reached the result it did and refused to grant a permanent injunction. However, in the interim, plaintiff must suffer damage; needless damage, since he should have been able to bring suit before the apparent injury occurred. Thus, under traditional nuisance theory, a potential plaintiff finds himself in a "Catch-22" situation. Unable to bring suit before the apparent injury occurs, he must wait until he is in fact harmed, at which time it may be too late to obtain meaningful relief.

Alternatively, one can reasonably maintain that nuisance actions are outdated because historically they have been generally accepted as the appropriate means to control only the *isolated* instance of localized pollution, while today, pollution has become a more perva-

sive threat.[149] *Boomer* illustrates that nuisance actions are not achieving the hoped for result of controlling pollution. It is not hard to understand, therefore, why one author has complained that legal responses to the problems of ordering land use, responses relying on nuisance suits and zoning decisions ". . . are not decisions how to use land but rather umpire decisions resolving or avoiding discordant market-dictated uses."[150] Indeed, "[g]iven decisions as incredibly unresponsive as *Boomer*, there is an urgent need to guarantee on the constitutional level protection of individual rights in the environment . . . ."[151]

As a suggested alternative, therefore, some states have enacted constitutional amendments to establish a right to a clean or healthful environment.[152] This approach can accomplish two discernible benefits. First, it allows the courts to become the ultimate authority (short of further constitutional amendment) on environmental rights.[153] Second, these amendments enunciate a public policy which requires all state agencies to consider the impact of their decisions on the environment before taking action.[154]

Unfortunately, the results of this approach have not been very satisfactory. As one author concluded, ". . .such declarations have neither eliminated pollution nor redirected a state's priorities."[155] Among the deficiencies of these amendments, there is first a problem of drafting the provisions accurately so as to discourage narrow judicial interpretation that could all but defeat their purpose. The failure of the State of Pennsylvania to obtain an injunction under its own constitutional amendment against the building of an observation tower at the Gettysburg National Battlefield is a clear example of this situation.[156]

Moreover, few of the State constitutional amendments that have been enacted are self-executing.[157] Rather, the declarations call for the implementation of legislation designed to enunciate or supplement the constitutional provisions. Even in those cases where the environmental provision *commands* legislative action, some state legislatures have not completely fulfilled their responsibilities.[158] As one author noted:

> . . .if legislatures are unwilling to enact legislation to guarantee citizens' rights to a decent or healthful environment, constitutional provisions may remain ineffectual platitudes. As a consequence, citizens hoping to vindicate their environmental rights may have to move from the legislative to the judicial arena.[159]

Prescinding from the intra-state problems with state constitutional provisions, there are also interstate barriers. Leaving large

scale environmental problems outside the scope of federal control could result not only in inconsistent state policies, but even more importantly, inconsistent state judicial treatment of those policies.[160] The potential result of such an inconsistency of treatment is that one day we may very well see all of our industrial and economic development centered in a few anti-environmentally minded states. But even before that day, states feeling the pinch may decide to repeal environmental legislation in favor of "progress" and wealth. Thus:

> . . .any right to an environment suitable for human habitation must be something *applicable equally to all the states* lest laggard jurisdictions benefit economically from the reforms imposed elsewhere. An effort at the federal level appears to be the only answer[161] (emphasis added).

The Supreme Court had indicated some support for this notion. In *Illinois v. City of Milwaukee*,[162] the Supreme Court recognized a cause of action under the federal common law of nuisance for an aggrieved state against a municipality of another state which was polluting common waters. The Court held that the federal common law of nuisance is a "law" of the United States within the meaning of the general "federal question" jurisdictional statute.[163] The Court observed that, ". . .when we deal with air or water in their ambient or interstate aspects, there is a federal common law. . . ."[164] The decision recognized the need for a federal forum to adjudicate environmental questions of an interstate nature.[165] In this sense, the ". . .state is now assured that its problem is of enough importance to the well-being of the national environment to be dealt with as a federal question and to be resolved by federal common law."[166] Most importantly, the Court's ruling points to the need for a relatively uniform body of law applicable to the states through the federal courts.

Even on the federal level, though, Congressional attempts to achieve a clear mandate for effective environmental protection have fallen short of success. Indeed, Congress has been a prolific source of "environmental" and "conservation" legislation in recent years, intended to cope with our ecological imbalance.[167] Yet on the whole, environmental writers have not only found existing statutory legislation inadequate to achieve the task,[168] but also in some instances, improperly enforced by administrative agencies.[169] Moreover, Congress has circumvented its own legislative schemes when it felt the desire for economic progress to be a more paramount objective.[170]

Finally, it is to be noted that recent efforts seeking Congressional

passage of legislation with strong constitutional implications have either been watered down or died in committee. For example, when the National Environmental Policy Act[171] first passed the Senate it contained a provision granting each person ". . . a fundamental and inalienable right to a healthful environment."[172] When finally enacted, the language granting a legal right had been diluted to a mere hortatory statement of official policy.[173] Also, in both the 92nd and 93rd Congresses, the Environmental Protection Act[174] proposed by Senator Hart of Michigan met a quiet death in the Committee on Commerce.

As an alternative to statutory enactments, an attempt has been made to amend the Federal Constitution.[175] This effort, by Senator Gaylord Nelson of Wisconsin, failed to gain majority support in Congress. However, even if such an amendment did gain Congressional approval, it would still take several years to obtain the necessary ratification of the measure by three-fourths of the state legislatures.[176] It is submitted that this nation cannot afford to put off to a later day what is urgently needed now: a mandate of constitutional protection for our environment. Moreover, an approach to the problem which would favor the amendment process over judicial recognition of a right ignores the vital function of courts to give meaning to the Constitution's textual phrases in light of the challenges of a modern society.[177] Finally, a more practical reason for relying on the courts to recognize the claimed right as constitutional in nature is that ". . .the amendment process rather than ordinary legislative action [then becomes necessary] for its repeal or substantial alteration."[178]

The ultimate question is presented: Should the courts ". . . stand marking time, anticipating a moment when the environment deteriorates to such a point that the Court is compelled to confirm that, along with free speech and religion, there exists a right to an environment fit for human habitation . . ."?[179] It is submitted that because our political institutions have not effectively responded to this question, the courts must fill the vacuum.

The courts, rather than the legislature, may be the branch of government most capable of preventing the future despoliation of our environment. The legislature failed to make the initial response to the race problem,[180] to gerrymandering,[181] to consumer protection,[182] to abortion rights,[183] and to the individual's right to marital privacy.[184] Judges had to take the first step toward reorienting societal values, making democracy more than a dead letter. True, the courts risked losing their credibility as a nonpolitical institution in

each instance, but these decisions were necessitated and perhaps even caused, to some extent, by the resistance to change in the other branches of government.[185]

These instances of pioneering judicial activism accentuate a basic premise of our government: that ". . .the Court has been the device by which questions of fundamental structure have been resolved in this country."[186] Society's relationship to the environment is an area in which some fundamental restructuring must take place. The courts should recognize a constitutional right to a reasonably non-hazardous environment. The result of such a declaration, as one author so aptly put it:

> . . .would compel a restructuring of our conventional wisdom in favor of the pursuit of a quality environment rather than the contemporary involvement in quantity consumption which is undercutting that environment.[187]

A judicial declaration of environmental rights would not only serve as our conscience for conduct in the future, but even more importantly, it would impose a duty on legislatures to exercise their power when the public interest required it.[188] The immediate need for effective environmental control suggests that the ecology can no longer be subject *solely* to political considerations.

Having argued that the courts *should* take an activist role through the recognition of a constitutional mandate in the area, the question then becomes *can* they? Opponents of the activist position argue that the courts do not have the expertise to deal in matters that may become very technical and scientific.[189] Concomitantly, without standards to guide a court in this area of the law, inconsistencies may arise between various courts on the resolution of any given issue.

In reply to the first point, environmentalists with litigation experience contend that the cases to date have not been unusually complicated.[190] Alternatively, it has been noted that given the courts' ability to handle complex issues like patent infringement, securities regulation and antitrust cases, judges should not have any greater difficulty in deciding environmental issues as well.[191]

Of course, expert testimony in this area of the law is always subject to conflicting trends of thought, often making it speculative and possibly contradictory. But given the necessity of environmental protection, and the courts' traditional role as fact-finders often faced with the resolution of conflicting testimony, this latter objection loses much of its initial plausibility.[192] Professor Joseph L. Sax of the University of Michigan School of Law has argued that it is a

myth to believe there is something unique about environmental law that places it outside the range of judicial competence.[193] He contends that precisely because the courts are *not* experts, they are more amenable to broader considerations and therefore *more* impartial in reaching a decision than would be a so-called "expert":

> What we are talking about is the need to have an institutional format in which some supervision can be given to the agencies to protect them against the inevitable excess of the professional point of view. . . to the pressures which we realistically know are brought to bear from time to time on every agency; and as our experience in Michigan has suggested, to use the judicial process, not only for supervision, in the sense of bringing a broader perspective than the internalized narrow view of the specialized expert, but also to help to liberate the expert from the pressures which he inevitably finds himself subjected to simply because of the nature of the process that he is a part of.[194]

A judicial forum should not be deterred from adjudicating environmental suits simply because judges are not initially any more expert in this area than in others.

Moreover, the current lack of judicial standards is no reason for declining to enunciate a doctrine of environmental rights.[195] Admittedly, the dimensions of a right to a reasonably non-hazardous environment will be imprecise at first. But it is fair to anticipate that on the basis of case-by-case experience, content and meaning will be given to that right so that a fair degree of certainty as to its implications will develop over time.[196]

> Just like the destruction of the status quo wrought by *Brown v. Board of Education* , and like the excursion in the "political thicket" symbolized by *Baker v. Carr*, this approach will also demand a long, gruelling campaign of difficult decisions to give content to the original declaration.[197]

In the end, the evolution of precedent will supply the necessary content through an application of the same principles of equity which have enabled courts in the past to fashion remedies for newly-recognized rights.[198]

The courts already have a base upon which they can decide what standards will be used to give meaning to the content of the right. For example, commentators suggest that the degradation must be "unreasonable".[199] This would comport with the reasonableness standard used to decide issues concerning explicit constitutional provisions incorporated under the Due Process Clause (*e.g.*, "unreasonable" searches and seizures).[200] By using a reasonableness standard, the courts could weigh the balance between individual rights

and societal progress. As in other situations where fundamental personal liberties are involved, the state would be required to show a compelling interest in order to prevail over the plaintiff where unreasonable degradation has been shown.[201] However, even upon a showing of a compelling state interest, the means used to achieve the given purpose cannot be employed if they broadly stifle the right to a reasonably non-hazardous environment and the end can be achieved by more narrowly confined measures.[202] If the courts' ability in the past to create standards of review and give meaning to vague provisions is an index of their ability to adjudicate environmental issues under a constitutional mandate, further postponement of judicial intervention in the area based upon a "lack of standards" argument appears to be unsupportable.

Conclusion

A constitutional mandate protecting the environment is long overdue. Environmental degradation is a long-range public health menace, no less dangerous because sub-clinical. It has been submitted that the courts should recognize that each individual has a fundamental right to a reasonably non-hazardous environment. The outcome of such action would as a minimum establish that all governmental agencies, *state* as well as federal, must take environmental considerations into account when making decisions.[203] Moreover, it would create a cause of action independent of statutory or common law grounds. Equally important, the burden of proof would be shifted to the private or governmental defendant once a prima facie case of environmental degradation was shown by the plaintiff.[204] This is current court procedure in civil rights employment discrimination cases.[205] Moreover, given the need for judicial activism in this area of the law, granting substantive as well as procedural protections would be consistent with the present practice of the courts in equal protection and free speech cases. Although there are fears that the federal courts would be unduly congested with environmental suits if the courts were to enunciate a constitutional right to a reasonably non-hazardous environment,[206] these concerns appear to be unfounded.[207] As one environmental attorney has observed:

> I sympathize with those who are concerned about the overburdening of the Federal courts. But the determination as to which cases should be heard in Federal courts should be made on the basis of the importance of the cases to the country. Based on this [*sic*] criteria, environmental litigation is clearly as important as any cases heard in the Federal courts and far more important than most.[208]

Assuming that an environmental constitutional right was recognized by the courts, other hurdles (beyond the scope of this article) such as standing to sue[209] and state action[210] would have to be addressed in any given case. Nonetheless, it is submitted that the right to a reasonably non-hazardous environment is fundamental and implicit in our Constitution. Judicial activism to enunciate, develop and protect this right is suggested as one possible solution to our continuing environmental crisis.

FOOTNOTES

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[1] A whole series of articles first started to appear in 1970. *See, e.g.*, Pearson, *Note: Toward A Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970) (hereinafter cited as Pearson); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970) (hereinafter cited as Sive, *Environmental Lawyer*); Sive, *The Environment, Is It Protected by the Bill of Rights?*, CIVIL LIBERTIES (April, 1970) (hereinafter cited as Sive, *Bill of Rights*); Roberts, *The Right to a Decent Environment*, 55 CORNELL L. REV. 674 (1970) (hereinafter cited as Roberts); Esposito, *Air and Water Pollution: What To Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32 (1970) (hereinafter cited as Esposito).

[2] 375 F.Supp. 305 (N.D. Ohio 1974).

[3] 411 U.S. 1 (1973).

[4] *Id.*, at 33, 34.

[5] 375 F.Supp. 305, 307; Plaintiffs-Appellants' Opening Brief on Appeal, Pinkney v. Ohio EPA, Case-No. 74-1343, at 4-7. Because the action was dismissed for failure to state a claim upon which relief can be granted, the district court never reached the merits of plaintiffs' motion for a preliminary injunction.

[6] 42 U.S.C. §1857 *et seq.* (Supp. 1972).

[7] 42 U.S.C. §1983 (1970). Plaintiffs' Post Hearing Brief In Support of Motion For Preliminary Injunctions, Pinkney v. Ohio EPA Case No. C73-1159, filed Jan. 7th, 1974 at 2. *See also*, Pinkney v. Ohio EPA, 375 F. Supp. 305, 309 (N.D. Ohio 1974).

[8] *See* note 4 *supra* and accompanying text.

[9] 375 F.Supp. 305, 310.

[10] 451 F.2d. 1130 (4th Cir. 1971).

[11] *Id.*, at 1137-38.

[12] *Id.*, at 1139.

[13] *Id.*

[14] 325 F.Supp. 728 (E.D. Ark. 1971).

[15] *Id.*, at 738-39.

[16] 340 F.Supp. 532 (S.D. Tex. 1972).

[17] *See*, C.A. Wright, LAW OF FEDERAL COURTS, (2d. Ed. 1970) at 62. *Cf.*, Wheeldin v. Wheeler, 373 U.S. 647 (1963); Bell v. Hood, 327 U.S. 678 (1946).

[18] 340 F.Supp. 532, 535. The Ninth Amendment provides that:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[19] 340 F. Supp. 532, 535.

[20] "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 72 (1955). ". . . [T]he prohibitions of the Fourteenth Amendment 'have reference to State action exclusively, and not to any action of private individuals.' . . . 'It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment.' " Corrigan v. Buckley, 271 U.S. 323, 330 (1926). *Cf.*, Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1875). *See, e.g.*, Shelly v. Kraemer, 334 U.S. 1, 13 (1948) (Judicial enforcement of a restrictive covenant held to constitute state action). The importance of establishing "state action" in an environmental suit, therefore, is that the guarantees of due process under the Fourteenth Amendment cannot be invoked without the showing of a requisite amount of state involvement in the pollution process.

[21] 340 F.Supp. 532, 536-37.

[22] *Id.*, at 537.

[23] The two terms have been used interchangeably to denote the substance of the right. This article will proceed on the basis that the right is to have a reasonably *non-hazardous* environment, since the requirements of assuring a *clean* environment may impose too great a burden on the state. Moreover, our environment may be unclean and yet impose no substantial interference with personal rights. One author has defined the right in terms of an environment at least predominantly comprised of air which is not a health hazard, non-combustible waterways and a food supply uncontaminated with carcinogenic and other hazardous residues. *See*, Beckman, *The Right to a Decent Environment Under the Ninth Amendment*, 46 L.A. BAR. BULL. 415, 416 (1971) (hereinafter cited as Beckman). Also, state legislatures, in drafting constitutional amendments for environmental protection, have encountered problems as to the use

of the terms "healthful" and "beautiful". *See*, Tobin, *Some Observations on the Use of State Constitutions to Protect the Environment*, 3 ENV. AFF. 473, 478-81 (1973) (hereinafter cited as Tobin) for a full discussion of this problem.

[24] James River and Kanawha Canal Parks v. RMA, 359 F.Supp. 611 (E.D. Va. 1973).

[25] Environmental Defense Fund v. TVA, 4 ERC 1892 (E.D. Tenn. 1972).

[26] *See*, Hagedorn v. Union Carbide Corp., 363 F.Supp. 1061 (N.D. W.Va. 1973), which relied on all three cases. *See also*, Fair v. Volpe, 5 ERC 1205 (N.D. Ga. 1973). *Cf.*, T.W. Guthrie v. Alabama By-Products Co., 328 F.Supp. 1140 (N.D. Ala. 1971); In Re Motor Vehicle Air Pollution Control Equipment, 52 F.R.D. 398, 402 (C.D. Cal. 1970).

[27] Virginians for Dulles v. Volpe, 344 F.Supp. 573 (E.D.Va. 1972).

[28] 1 ERC 1640 (D.C. Mont. 1970).

[29] *Id.*, at 1641.

[30] Pinkney v. Ohio EPA, 375 F.Supp. 305, 310 (N.D. Ohio 1974).

[31] Tanner v. Armco Steel Corp., 340 F. Supp. 532, 536 (S.D.Tex. 1972).

[32] "Penumbras" may be defined as "peripheral" rights emanating from the explicit guarantees in the Constitution. For a full discussion of terminology as applied to the issues raised in this article, *see* n. 100-106 *infra* and accompanying text.

[33] Tanner v. Armco Steel Corp., 340 F. Supp. 532, 535; E.D.F. v. Corps of Engineers, 325 F.Supp. 728, 739.

[34] *Cf.*, Griswold v. Connecticut, 381 U.S. 479, 507-27 (1965), (Black, J., dissenting).

[35] Tanner v. Armco Steel Corp., 340 F. Supp. 532, 537. *Cf.*, E.D.F. v. Hoerner Waldorf, 1 ERC 1640, 1643 (D.C. Mont. 1970).

[36] *Id.*, at 536; Little, *Note: The Aftermath of the Clean Air Amendments of 1970: The Federal Courts and Air Pollution*, 14 B.C. IND. & COMM. L. REV. 724, 756 (1973) (hereinafter cited as Little); Neustadter, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 U.C.L.A. L. REV. 1070, 1075-77 (1970) (hereinafter cited as Neustadter); Cramton and Boyer, *Citizen Suits in the Environmental Field: Peril or Promise?* 2 ECOLOGY LAW QUARTERLY 407, 410-13 (1972) (hereinafter cited as Cramton and Boyer).

[37] Little, *supra* n. 36 at 756; Cramton and Boyer, *supra* n. 36 at 413-15; Tanner v. Armco Steel Corp., 340 F.Supp. 532, 536; E.D.F. v. Hoerner Waldorf, 1 ERC 1640, 1642-43 (D.C. Mont. 1970).

[38] 411 U.S. 1, 30.

[39] 411 U.S. 1, 33-34. At the conclusion of these remarks, Justice Powell cited a number of cases he believed to be in support of this proposition: Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535 (1942).

[40] Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535 (1942).

[41] Reynolds v. Sims, 377 U.S. 533 (1964).

[42] Griffin v. Illinois, 351 U.S. 12 (1956).

[43] 411 U.S. 1, 100.

[44] *Id.*

[45] *E.g.*, Sauntry, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur*, 62 GEO. L. J. 1173, 1184 (1974) (hereinafter cited as Sauntry); Noll, *Comment: San Antonio Independent School District v. Rodriguez: A Retreat From Equal Protection*, 22 CLEV. ST. L. REV. 585, 595 (1973) (hereinafter cited as Noll); Eisen, *Comment: Equal Protection of the Laws: Education Is Not a Fundamental Right*, 26 UNIV. FLA. L. REV. 155, 159 (1973) (hereinafter cited as Eisen).

[46] Johnson, *Comment: The Constitutional Right of Bilingual Children to an Equal Educational Opportunity*, 47 SO. CAL. L. REV. 943, 976 (1974) (hereinafter cited as Johnson).

[47] 411 U.S. 1, 109-10.

[48] Eisen, *supra* n. 45, at 159.

[49] For example, Justice Powell disregarded the importance of the service performed by the state (in this case, education) as a determinant of fundamentality, ". . .for purposes of examination under the Equal Protection Clause." 411 U.S. 1, 30.

[50] A reading of the procedural and right to privacy due process cases, (*see* n. 69-79 *infra* and accompanying text) will show the different contours, dimensions and standards under such an analysis of fundamental rights that is presented in San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), Lindsey v. Normet, 405 U.S. 56 (1972), and Dandridge v. Williams, 397 U.S. 471 (1970).

[51] 411 U.S. 1, 20.

[52] *Id.*, at 23-24.

[53] *Id.*, at 24.

[54] *Id.*, at 37.

[55] Justice Powell did not reach the question of what the result in the case would have been if Texas did not provide plaintiff-appellees with an adequate education. However, it is hard not to

read into the majority opinion an adequacy requirement. Otherwise, Justice Powell would not have been able to answer the implied rights-nexus argument. As it is, the majority's response to the implied rights argument has been criticized for not taking into account the realities of our competitive society where those with more than "enough" education can more easily get ahead. On this last point *see*, San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 at 113-14 n. 72, 115-16 (1973) (Marshall, J., dissenting opinion); Noll, *supra* n. 45, at 597.

[56] Noll, *supra* n. 45, at 597.

[57] In comparing the Equal Protection and Due Process Clauses as interpreted by the Court, it should be remembered that the *Rodriguez* Court was asserting that discrimination vis-a-vis the Equal Protection Clause does not result as long as a *minimum* level of protection is granted to a given interest, even though some may be deriving *greater* benefits. *See*, n. 51-56, *supra* and accompanying text. *See also*, Johnson, *supra* n. 46, at 975.

[58] *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106, 111-17 (1949) (Jackson, J., concurring). *Compare*, the majority opinion of Justice Douglas in Skinner v. Oklahoma, 316 U.S. 535 (1942) *with* the concurring opinion of Chief Justice Stone, *id.*, at 543-45. In each of these instances, a distinction between an equal protection analysis and due process analysis is drawn in the manner suggested in the text.

[59] Note the approach taken in Roe v. Wade, 410 U.S. 113, 154 (1973), where the woman's right to have an abortion uninhibited by interference from the State is limited to the end of the first trimester: "We, therefore, conclude that the right of personal privacy . . . is not unqualified and must be considered against important state interest in regulation." *Id. See also* Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). A compelling state interest test has been suggested for environmental litigation asserting a fundamental right to a reasonably non-hazardous environment under the Due Process Clause, (*see* Pearson, *supra* n. 1, at 478-79) and under the Ninth Amendment; *see*, V.J. Yannacone, *et. al.*, ENVIRONMENTAL RIGHTS AND REMEDIES, Vol. 1, at 61 (1972) (hereinafter cited as Yannacone); Beckman, *supra* n. 23, at 453. *See also*, n. 201-202 *infra* and accompanying text.

[60] On the basis of the distinctive approach taken by the Court when engaging in a due process analysis (as opposed to an equal protection analysis) it is suggested that in addition to *Rodriguez*, the equal protection cases Lindsey v. Normet, 405 U.S. 56 (1972) (no

fundamental right to housing), and Dandridge v. Williams, 397 U.S. 471 (1970) (no fundamental right to welfare benefits), should not pose any hurdles to the recognition of a right to a reasonably non-hazardous environment under an alleged violation of the Due Process Clause. This argument will be developed in the next section, *see* n. 61-79 *infra*, and accompanying text. Even assuming, *arguendo*, that the more restrictive *Rodriguez* standard is applicable, it can still be argued by analogy that while a court need not guarantee the "cleanest" or "best possible" environment, certain minimum standards are essential pre-requisites to the enjoyment of all other rights granted by the Constitution.

[61] Palko v. Connecticut, 302 U.S. 319, 324-25 (1937). *Compare* Benton v. Maryland, 395 U.S. 784 (1969) which overruled the specific holding in *Palko*, but re-affirmed the purpose of the Fourteenth Amendment as making federally guaranteed rights applicable to the states, *id.*, at 793-96.

[62] 302 U.S. 319 (1937).

[63] *Id.*, at 328.

[64] *Id.*, at 325.

[65] 332 U.S. 46 (1947).

[66] *Id.*, at 68-92 (1947) (Black, J., dissenting opinion).

[67] *Id.*, at 89.

[68] *Id.*, at 90. Justice Murphy in his dissenting opinion carried the Black approach one step further, stating that:

> . . .I am not prepared to say that the [Fourteenth Amendment] is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.

Id., at 124, (Murphy, J., dissenting opinion). In essence, Justice Murphy had presaged the growing recognition of implied rights emanating from the explicit guarantees of the Bill of Rights. *See* n. 73-75 *infra* and accompanying text.

[69] Benton v. Maryland, 395 U.S. 784, 795 (1969).

[70] *See* n. 51 *supra*.

[71] *Cf.*, Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968).

[72] Benton v. Maryland, 395 U.S. 784, 795 (1968). As will be discussed *infra* (n. 81-83, 99-111 and accompanying text), the controversy over incorporation has become somewhat diffused as a result of the Supreme Court's decision in Griswold v. Connecticut, 381 U.S. 479 (1965). Moreover, as Professor Redlich has noted, since

most of the Bill of Rights has already been incorporated, the principal attention of the Court will be devoted to the meaning of these provisions. Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U. L. REV. 787, 794-95 (1962) (hereinafter cited as Redlich).

[73] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion rights); Stanley v. Georgia, 394 U.S. 557 (1969) (search and seizure); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital rights). However, as Mr. Justice Blackmun observed in Roe v. Wade:

> . . .only personal rights that can be deemed "fundamental or implicit in the concept of ordered liberty," . . . are included in this guarantee of personal privacy.

410 U.S. 113, 152.

[74] Wisconsin v. Constantineau, 400 U.S. 433 (1971), (right to maintain one's good name, reputation, honor or integrity); United States v. Robel, 389 U.S. 258 (1967), N.A.A.C.P. v. Alabama ex. rel. Patterson, 357 U.S. 449 (1958), (right of association); Loving v. Virginia, 388 U.S. 1 (1967), (freedom to marry); Aptheker v. Secretary of State, 378 U.S. 500 (1964), Kent v. Dulles, 357 U.S. 116 (1958), (freedom to travel); N.A.A.C.P. v. Button, 371 U.S. 415 (1963), (right of access to the courts); Board of Education v. Barnette, 319 U.S. 624 (1943), (right to refuse to salute and pledge allegiance to the flag); Pierce v. Society of Sisters, 268 U.S. 510 (1925), (right to educate a child in a school of the parent's choice—whether public, private or parochial); Meyer v. Nebraska, 262 U.S. 390 (1923), (right to study any particular subject or any foreign language).

[75] *See* n. 72 *supra* and accompanying text.

[76] 338 U.S. 25 (1949).

[77] *Id.*, at 27.

[78] Plaintiffs-Appellants' Opening Brief, Pinkney v. Ohio E.P.A. Case No. 74-1343, at 3. *Cf.*, Katz v. United States, 389 U.S. 347 (1967).

[79] *See*, Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting opinion). *Cf.*, Parker v. Levy, 417 U.S. 733, 773-789 (1974) (Stewart, J., dissenting opinion) (hereinafter cited as *Levy*). In the *Levy* case, Appellee challenged his court martial conviction partially on the ground that two articles of the Uniform Code of Military Justice were "void for vagueness" under the Due Process Clause of the Fifth Amendment. The Supreme Court held the articles not unconstitutionally vague, citing precedent dating from the turn of the century. In his dissent, Justice Stewart remarked:

> It is true, of course, that a line of prior decisions of this Court, . . . have (*sic*) upheld against constitutional attack the ancestors of today's general articles. With all respect for the principles of *stare decisis*, however, I believe that these decisions should be given no authoritative force in view of what is manifestly a vastly "altered historic environment."

Id., at 781.

[80] This follows from the argument that one of our "basic societal values" is the preservation of the human species. *Cf.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

[81] 1 ERC 1640 (D.C. Mont. 1970).

[82] *Id.*, at 1641.

[83] Esposito, *supra* n. 1, at 48.

[84] As Justice Douglas has observed, "liberty . . . gains context from the emanations of other specific [constitutional] guarantees . . . or from experience with the requirements of a free society." Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting opinion). *See also, id.*, at 543 (Harlan, J., dissenting opinion), and Abrams, *What Are the Rights Guaranteed By the Ninth Amendment?*, 53 A.B.A.J. 1033, 1037 (1967) (hereinafter cited as Abrams).

[85] 410 U.S. 113 (1973).

[86] *Id.*, at 153.

[87] *Id.*, at 153, 207-08, (Burger, C.J., concurring opinion).

[88] *Id.*, at 153.

[89] One final approach to this issue is indicated by the Supreme Court's increasing acceptance (though piecemeal) of the generalized notion that one has a "right to be let alone". (*See*, n.73 *supra* and accompanying text). Beginning with the dissenting opinion of Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 471-79 (1928), the Court has become more receptive to granting protections to the individual from intrusions by the Government into personal affairs. Not only have surveillance activities by the State been proscribed, but also intrusions into marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965), and a woman's decision to have an abortion, Roe v. Wade, 410 U.S. 113 (1973). Arguably, it would not be a misreading of the above precedents to say that a contaminated environment intrudes upon one's "right to be let alone".

[90] Beckman, *supra* n. 23; Kutner, *The Neglected Ninth Amendment: The Other Rights Retained By the People*, 51 MARQUETTE L. REV. 121 (1968); B. Patterson, THE FORGOTTEN NINTH AMENDMENT, (1955); Redlich, *supra* n. 72; Roberts, *An Environmental Lawyer Urges: Plead the Ninth Amendment*, Natural History (August-September, 1970) (hereinafter cited as Roberts). *See also*, Yanna-

cone, *supra* n. 59. In support of the notion that the Ninth Amendment was to apply for the protection of the individual and not the states, *see*, A.T. Mason, FREE GOVERNMENT IN THE MAKING, (1965), at 316.

[91] 381 U.S. 479, 486-99, (Goldberg, J., concurring opinion joined by Warren, C.J., and Brennan, J.) Justice Douglas in an opinion joined by Justice Clark, mentioned the Ninth Amendment, stated what it provides in explicit terms, and implied that marital privacy emanates as a penumbra from its provisions. If one were to say that all unenumerated rights are to be implicitly derived from express rights, then it is possible to argue that there were five members of the Griswold Court in agreement. That this is probably what Mr. Justice Douglas meant is indicated in his dissenting remarks in Osborn v. United States, 385 U.S. 323, 352 (1966).

[92] Beckman, *supra* n. 23, at 418-20.

[93] 381 U.S. 479 (1965).

[94] 381 U.S. 479, 492. *See also*, Esposito, *supra* n. 1, at 47.

[95] Pearson, *supra* n. 1, at 461.

[96] Griswold v. Connecticut, 381 U.S. 479, 511 (Black. J., dissenting opinion).

[97] 381 U.S. 479, 493.

[98] *See*, Snyder v. Massachussetts, 291 U.S. 97, 105 (1934).

[99] Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring opinion).

[100] 381 U.S. 479, 484-86. *See also*, Hanks *et. al.*, *The Right to a Habitable Environment*, in THE RIGHTS OF AMERICANS—WHAT THEY ARE—WHAT THEY SHOULD BE. (Dorsen, Ed., 1971) at 153 (hereinafter cited as Hanks).

[101] 381 U.S. 479, 483-84. Pearson, *supra* n. 1, at 459-60.

[102] 381 U.S. 479, 484.

[103] *Id.*, at 484-86.

[104] 381 U.S. 479, 483 (1965).

[105] *See*, Pearson, *supra* n. 1, at 463, and Plaintiffs-Appellant's Opening Brief, Pinkney v. Ohio E.P.A., Case No. 74-1343, filed January 7th, 1974, at 26.

[106] Hanks, *supra* n. 100, at 153; Roberts, *supra* n. 1, at 691.

[107] Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949); West Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

[108] 198 U.S. 45 (1905).

[109] Redlich, *supra* n. 72, at 794-95.

[110] *Id. See also*, Ratner, *The Function of the Due Process Clause,* 116 PENN. L. REV. 1048 (1968) (hereinafter cited as Ratner).

[111] *See, e.g.*, Rochin v. California, 342 U.S. 165, 172-73 (1952); Wolf v. Colorado, 338 U.S. 25 (1949). *Cf.*, Betts v. Brady, 316 U.S. 455, 462 (1942).

[112] Redlich, *supra* n. 72, at 794. *See also*, Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting opinion), and Betts v. Brady, 316 U.S. 455, 474-77 (1942) (Black, J., dissenting opinion). Justice Black later reaffirmed his position with a vigorous dissent in the Griswold case:

> The due process clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility of the nation. . . .That formula, based on subjective considerations of "natural justice", is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought we had laid that formula, as a means for striking down state legislation, to rest once and for all.

381 U.S. 479, 522.

[113] Griswold v. Connecticut, 381 U.S. 479, 511-12.

[114] *Id.*, at 513, 521.

[115] Ratner, *supra* n. 110, at 1063.

[116] Little, *supra* n. 36, at 756. *See also*, Neustadter, *supra* n. 36, at 1075-77, and Cramton and Boyer, *supra* n. 36, at 196-99.

[117] Hanks, *supra* n. 100, at 153-54. Cramton and Boyer, *supra* n. 36, at 413-15. Tanner v. Armco Steel Corp., 340 F.Supp. 532, 536 (S.D.Tex. 1972).

[118] 381 U.S. 479, 482.

[119] As Justice Douglas, who wrote the majority opinion for *Griswold*, had said in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 521 (1961), "This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live."

[120] *See*, State v. Abellano, 441 P.2d 333, 338 (Hawaii Sup. Ct. 1968) (Levinson, J., concurring).

[121] The Supreme Court has granted a preferred status to the assertion of First Amendment freedoms (Brandenburg v. Ohio, 395 U.S. 444 (1969); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)), equal protection rights (Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967)), and to the "one man-one vote" principle (Reynolds v. Sims, 377 U.S. 533 (1964)).

See also, United States v. Caroline Products Co., 304 U.S. 144, 152 n. 4 (1938), where the first indication of the preferred status approach appeared. Note that Justice Stone did not necessarily limit the application of the preferred status approach to the rights listed above.

[122] *See*, Poe v. Ullman, 367 U.S. 497, 517-18 (1961) (Douglas, J., dissenting opinion). *Cf.*, Marsh v. Alabama, 326 U.S. 501, 509 (1946).

[123] *See*, Kovacs v. Cooper, 336 U.S. 77, 95 (1949), where Justice Frankfurter spelled out this notion while discussing Justice Holmes' theory on personal rights. *Cf.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Schneider v. State, 308 U.S. 147, 161 (1938).

[124] Hanks, *supra* n. 100, at 151. *See also* n. 122 *supra* and accompanying text.

[125] Hanks, *supra* n. 100, at 152.

[126] Sive, *Environmental Lawyers, supra* n. 1, at 643.

[127] Roberts, *supra* n. 90, at 26. *See also*, Beckman, *supra* n. 23, at 451-52 and Esposito, *supra* n. 1, at 46. One Federal court has already intimated that environmental rights are "preferred". *See*, E.D.F. v. Ruckelshaus, 439 F.2d 584, 597-98 (1971).

[128] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 203 (1819).

[129] Griswold v. Connecticut, 381 U.S. 479, 518-19 (1965) (Black, J., dissenting opinion).

[130] *Id.*, at 501 (Harlan, J., concurring opinion). Moreover, Professor Redlich has indicated that under the Ninth Amendment a guiding judicial standard could be set up: the rights reserved are to be of a nature comparable to the rights enumerated, Redlich, *supra* n. 72, at 810, 812. Following this suggested standard, he demonstrates how *Lochner* can easily be distinguished from a case like *Griswold*:

> The right of employees to contract with employers concerning hours of work, which was the right upheld in *Lochner v. New York*, hardly fits into the scheme of rights set forth in our Constitution. But, the right of a married couple to maintain the intimacy of their marital relationship free from the criminal sanction of the state does fit into the pattern of a society which set forth in its national character that men should be free from unreasonable searches and seizures.

Id., at 811. The actual approach taken by Mr. Justice Goldberg under the Ninth Amendment, utilizing the fundamental rights theory, is analogous to the judicial test proposed by Professor Redlich. *See* n. 72 *supra* and accompanying text.

[131] *See*, State v. Abellano, 441 P.2d 333, 338 (Hawaii Sup. Ct. 1963) (Levinson, J., concurring opinion).

[132] *Id.*, at 338-39. *See also*, Hanks, *supra* n. 100, at 149. In this

context the words of Mr. Justice Holmes in Missouri v. Holland, 252 U.S.416, 433 (1920), carry a special meaning:

> . . .when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been forseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.

[133] *See* n. 76-79 *supra* and accompanying text.

[134] *See* n. 73-75 *supra* and accompanying text.

[135] See n. 21, 35-37, 116-17 *supra* and accompanying text.

[136] Pearson, *supra* n. 1, at 481.

[137] Tanner v. Armco Steel Corp., 340 F.Supp. 532, 537 (S.D.Tex. 1972).

[138] 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (Ct. App. 1970).

[139] 55 Misc.2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967).

[140] 26 N.Y.2d 219, 225 (1970).

[141] *Id.*, at 228.

[142] *Id.*

[143] *Id.*, at 223, 225.

[144] *Id.*, at 226, 228. *See also, Recent Decisions: An Unwelcome Precedent for New York Environmental Law—Boomer v. Atlantic Cement Co.*, 35 ALBANY L. REV. 148, 153 (1970) (hereinafter cited as *Recent Decisions*).

[145] *See, e.g.*, Note: *Injunctive Relief Denied in Private Action for Nuisance Caused by Industrial Polluter—Boomer v. Atlantic Cement Co.*, 45 N.Y.U. L. REV. 919 (1970); *Recent Decisions, supra* n. 144.

[146] Hanks, *supra* n. 100, at 147-49; Roberts, *supra* n. 1, at 680.

[147] 26 N.Y.2d 219, 230-31 (1970) (Jasen, J., dissenting opinion).

[148] Hanks, *supra* n. 100, at 148.

[149] Neustadter, *supra* n. 36, at 1073. *See also*, Plaintiffs-Appellants' Opening Brief, Pinkney v. Ohio E.P.A., Case No. 74-1343, at 22.

[150] Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, in LAW AND THE ENVIRONMENT, (Baldwin, Ed. 1970), at 148, 151 (hereinafter cited as Roberts).

[151] Roberts, *supra* n. 1, at 704.

[152] North Carolina (Art. XIV, §5), Montana (Art. XI), Massachu-

setts (Art. 97 of the amendments), Illinois (Art. XI), New Mexico (Art. XX, §21), Virginia (Art. XI), Pennsylvania (Art. I, §27), Rhode Island (Art. I, §17), New York (Art. XIV), Florida (Art. II, §7), Michigan (Art IV, §52). *See* Tobin, *supra* n. 23, at 486-88.

[153] J.L. Sax, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION, (1971) at 237 (hereinafter cited Sax).

[154] Tobin, *supra* n. 23, at 475-77.

[155] *Id.*, at 478.

[156] Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588 (Sup. Ct. Penn. 1973); Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Cmwlth. Ct. 231, 302 A.2d 886 (1973); Commonwealth v. National Gettysburg Battlefield Tower, Inc. (Court of Common Pleas, Adams County), No. 2, July Term 1971; 3 ERC 1270. The trial judge noted that neither the environmental amendment nor procedures for its implementation were defined. The Supreme Court of Pennsylvania essentially concurred in this finding and stated that the amendment should only be considered as a general principle of law. Moreover, in order to define the aesthetic values which the amendment seeks to protect, the Supreme Court felt that additional legislation would be needed. For a discussion of the history of this controversy and other attempts to halt the construction, *see* Roe, *The Second Battle of Gettysburg: Conflict of Public and Private Interests in Land Use Policies*, 2 ENV. AFF., 16-63 (1972). For discussion of the Gettysburg cases and other problems of drafting environmental Constitutional Amendments, *see*, Tobin, *supra* n. 23, at 478-81. *See generally*, Roberts, *supra* n. 1, at 686-87.

[157] Tobin, *supra* n. 23 at 481. *See also*, Roberts, *supra* n. 1, at 688.

[158] Tobin, *supra* n. 23 at 481-82.

[159] *Id.*, at 482.

[160] Roberts, *supra* n. 1 at 687. *Cf.*, Missouri v. Holland, 252 U.S. 416 (1920) (hereinafter cited as *Holland*). In *Holland*, a bill in equity was brought by the State of Missouri to prevent the game warden of the U.S. from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918. The Treaty prohibited the killing, capturing or selling of any of the migratory birds included in the terms of the treaty with certain exceptions noted. The Supreme Court held that the Treaty was within the treaty-making power conferred by Art. II §2 of the Constitution and valid under Art. I §8 of the Constitution as a necessary and proper means of effectuating the treaty. In dicta the Court discussed the problems inherent in an approach which would leave the conservation issue to the states alone:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act.

Id., at 435. For an example of the inadequacies of existing State legislation, *see*, Gross and Bailey, *Note: Constitutionalism and Ecology*, 48 N. DAKOTA L. REV. 307 (1972), which studied the problems in North Dakota.

[161] Roberts, *supra* n. 1, at 688.

[162] 406 U.S. 91 (1972).

[163] 28 U.S.C. §1331(a) (1970).

[164] Illinois v. Milwaulkee, 406 U.S. 91, 103 (1972).

[165] *See*, Watson, *Note: Environmental Law—Cause of Action Under Federal Common Law for Pollution of Interstate Waters*, 77 DICK. L. REV. 451, 456 (1972-73).

[166] Sherman, *Comment: Federal Jurisdiction and Federal Common Law—Public Nuisance Suits Concerning Interstate Water Pollution*, 49 DENVER L. REV. 609, 618 (1973).

[167] *See*, Pearson, *supra* n. 1, at 467 n. 49.

[168] *See, e.g.*, Note: *Injunctive Relief Denied in Private Action for Nuisance Caused by Industrial Polluter*, 45 N.Y.U. L. REV. 919, 923 n. 26-27 (1970); Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666 (1970) (hereinafter cited as Ottinger); Roberts, *supra* n. 150, at 156; Lohrmann, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085 (1970); Comment: *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734, 735 (1970).

[169] *See, e.g.*, Esposito, *supra* n. 1; Sax, *supra* n. 153; statement of Brock Evans during the *Hearings on S. 1104 before the Subcommittee on the Environment of the Senate Committee on Commerce*, 93rd Cong., 1st Sess., Ser. No. 93-19, at 20 (April 2, 1973) (hereinafter cited as Evans). Also, one justice of the Supreme Court has noted that the agencies are not sufficiently representing environmental interests to date:

> The suggestion that Congress can stop [agency] action which is undesirable is true in theory; yet even Congress is too remote to give mean-

> ingful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relationships, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.

Sierra Club v. Morton, 405 U.S. 727, 745-46 (1972) (Douglas, J., dissenting opinion). Finally, even where two states agreed to cooperate with the Federal authorities in enforcement of the Clean Air Act, it took almost ten years of litigation to halt the pollution. *See*, United States v. Bishop Processing Company, 423 F.2d 469 (4th Cir. 1970).

[170] The controversy over the building of the Three Sisters Bridge over the Potomac River at Washington, D.C., is one example. *See* Ottinger, *supra* n. 168, at 671.

[171] 42 U.S.C. §4321 *et seq.*, (1970).

[172] S. 1075, 91st Cong., 1st Sess. (1969).

[173] "Each person should enjoy a healthful environment and has a responsibility to contribute to the preservation and the enhancement of the environment." 42 U.S.C. §4331(c) (1970). *See also*, Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A. J. 1061 (1970) (hereinafter cited as Platt) where the author alluded to this episode and a subsequent attempt by Representative John B. Dingell in the Second Session of the 91st Congress (H.R. 15578), to restore the original Senate language. The attempt failed.

[174] S. 1104, 93rd Cong., 1st Sess. (1973); S. 1032, 92nd Cong., 1st Sess. (1971). As originally proposed in committee, S. 1104 had the objective of extending standing to sue government agencies and private parties, removing restrictions on judicial review of administrative action, and granting citizens the right to sue to enforce Federal agency regulations. The last of these goals is, in essence, the so-called "private attorney general" concept which has been judicially recognized in, for example, securities regulation litigation under the Securities Exchange Act of 1934. *See* J.I. Case v. Borak, 377 U.S. 426 (1964). The rationale of creating or implying a private right of action is derived from the assumption that: (1) agencies cannot possibly achieve full enforcement of regulatory statutes on their own; and (2) state remedies at law are inadequate. In granting individual plaintiffs the standing to sue, one federal court has already explicitly recognized and accepted the private attorney general concept in environmental litigation. *See* Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (2nd Cir. 1965), *cert. den.* 384 U.S. 941 (1966).

Toward the end of the second session of the 93rd Congress, Senator Gaylord Nelson of Wisconsin proposed an amendment (No. 1814) to S. 1104 (August 19, 1974), entitled: "Presumptions and Burdens of Proof". The import of the amendment was that, upon a prima facie showing that the defendant's conduct constitutes a reasonable risk of being a threat to public health, a rebuttable presumption arises, placing upon the defendant the burden of proof. Defendant can satisfy this burden of proof by showing: (1) that in fact no threat to public health exists or that the risk of any such threat is negligible; or (2) that the physical and economic considerations in favor of such course of conduct outweigh any possible threat to public health. This second condition is analogous to the balancing-of-equities doctrine (in nuisance suits) criticized above, (n. 146-149 *supra* and accompanying text). The overall effect of S. 1104 with the amendment would have been to emphasize environmental rights in litigation before the federal courts.

[175] S.J. RES. 169, 91st Cong., 2nd Sess. (1970).

[176] The present difficulties in ratifying the Equal Rights Amendment, passed by Congress in 1972, illustrates the delay involved in the amendment process.

[177] *See*, State v. Abellano, 441 P.2d 333, 339 (Hawaii Sup. Ct. 1963) (Levinson, J., concurring opinion). *See also*, n. 132 *supra*.

[178] Sive, *Bill of Rights*, *supra* n. 1, at 6.

[179] Roberts, *supra* n. 1, at 691. *See also*, Comment: *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734 (1970).

[180] Brown v. Board of Education, 347 U.S. 483 (1954).

[181] Baker v. Carr, 369 U.S. 186 (1962).

[182] *See, e.g.*, Greenman v. Yuba Power Products Inc., 59 Cal.2d 57, 377 P.2d 897 (1963); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[183] Roe v. Wade, 410 U.S. 113 (1973).

[184] Griswold v. Connecticut, 381 U.S. 479 (1965).

[185] Roberts, *supra* n. 150, at 156-57; Roberts, *supra* n. 1, at 693. Hobson v. Hansen, 269 F.Supp. 401, 517 (D.D.C. 1967). *See also*, Commoner, B., THE CLOSING CIRCLE (1971) at 294-99.

[186] Roberts, *supra* n. 150, at 156.

[187] *Id.*, at 165.

[188] Pearson, *supra* n. 1, at 486.

[189] *See*, nn. 21, 36, 116-117 *supra* and accompanying text.

[190] Evans, supra n. 169, at 29; Statements of William Rodgers Jr., Bruce J. Terris, and William A. Butler during the *Hearings on S.*

1104 before the Subcommittee on the Environment of the Senate Committee on Commerce, 93rd Cong., 1st Sess., Ser. No. 93-19 (April 2, 1973) at 23-29 (hereinafter respectively cited as Rodgers, Terris, and Butler). Statement of Joseph L. Sax during the *Hearings on S. 1104 before the Subcommittee on the Environment of the Senate Committee on Commerce*, 93rd. Cong., 1st. Sess., Ser. No. 93-19 (April 5th, 1973) at 63-88 (hereinafter cited as Sax). *See also* Smith, *The Environment and the Judiciary: A Need for Cooperation or Reform?*, 3 ENV. AFF. 627, at 635-36. (hereinafter cited as Smith).

[191] Butler, *supra* n. 190, at 28-9; Terris, *supra* n. 190, at 27.

[192] *See*, Pearson, *supra* n. 1, at 478. *See also*, Maechling, *The Emerging Right to a Decent Environment*, 1 HUMAN RIGHTS 66, 70 (1970).

[193] Sax, *supra* n. 190, at 69.

[194] *Id.*, at 65. *See also*, Tobin, *supra* n. 23, at 483, where four advantages of environmental litigation as opposed to legislative or administrative determinations are set forth as follows: (1) the judicial process is less amenable than the legislature to political pressures; (2) courts generally guarantee access; (3) defendants must respond to questions and justify their actions; (4) courts help to equalize the political and administrative leverage of the adversaries.

[195] Beckman, *supra* n. 23, at 452.

[196] Pearson, *supra* n. 1, at 478; Sive, *Bill of Rights, supra* n. 1, at 6; Plaintiffs-Appellants Opening Brief, Pinkney v. Ohio E.P.A., Case No. 74-1343 at 20.

[197] Roberts, *supra* n. 1, at 692.

[198] "[W]here federally protected rights have been invaded. . . courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684 (1946); *accord*, Bivens v. Six Unknown Agents of Fed. Bur. of Narc., 403 U.S. 388 (1971). *Cf.*, Jones v. Mayer, 392 U.S. 409, 414 n. 13 (1968).

[199] Esposito, *supra* n. 1, at 48; Pearson, *supra* n. 1, at 473; Yannacone, *supra* n. 59, at 61. *See also*, Plaintiffs-Appellant's Opening Brief, Pinkney v. Ohio E.P.A., Case No. 74-1343 at 20.

[200] Esposito, *supra* n. 1, at 48.

[201] *See*, Roe v. Wade, 410 U.S. 113 (1973) (abortion rights); Sherbert v. Verner, 374 U.S. 398 (1963) (religious freedom); Bates v. City of Little Rock, 361 U.S. 516 (1960) (freedom of association). *See also*, Yannacone, *supra* n. 59, at 61; Pearson, *supra* n. 1, at 478-79.

[202] *See*, N.A.A.C.P. v. Alabama ex. rel. Flowers, 377 U.S. 288 (1964); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Shelton v.

Tucker, 364 U.S. 479 (1960). *See also*, Beckman, *supra* n. 23, at 452-53.

[203] Roberts, *supra* n. 1, at 691; Hanks, *supra* n. 100, at 153-56, 170. *See also*, Udall v. F.P.C., 387 U.S. 428 (1967), and Scenic Hudson P.C. v. F.P.C., 354 F.2d. 608 (2nd. Cir. 1965), *cert. den.* 384 U.S. 941 (1966). Both of these decisions give implicit support to this procedural right.

[204] *See*, Hanks, *supra* n. 100, at 150.

[205] *See, e.g.*, Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 354 F.Supp. 778 (D.Conn. 1973), *modified*, 482 F.2d. 1333 (2nd. Cir. 1973); Castro v. Beecher, 334 F.Supp. 930 (D. Mass. 1971), *aff'd in part, rev'd. in part*, 459 F.2d. 725 (1st Cir. 1972); Griggs v. Duke Power Co., 401 U.S. 424 (1971); and Carter v. Gallagher, 452 F.2d. 315 (8th Cir. 1971).

[206] Cramton and Boyer, *supra* n. 36, at 415-19.

[207] Evans, *supra* n. 169, at 19-20; Terris, *supra* n. 190, at 26-27; Butler, *supra* n. 190, at 22; *See also,* DO CITIZENS SUITS OVERBURDEN OUR COURTS?, Consumer Interest Foundation (1973). Smith, *supra* n. 190 at 632-33.

[208] Terris, *supra* n. 190, at 27. However, the shifting of attorneys' fees may be difficult since the Supreme Court has rejected the private attorney general theory of fee shifting. Alyeska Pipeline Service Co. v. Wilderness Society, 43 U.S.L.W. 4561 (May 12, 1975). Yet, recent statutory enactments provide for attorney fee shifting; *see*, e.g., The Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d) (1970), The Water Pollution Prevention and Control Act, 33 U.S.C. § 1365(d) (Supp. 1974), and the Noise Control Act of 1972, 42 U.S.C. § 4911(d) (Supp. 1974).

[209] For a discussion of possible strategies to effectively assert standing in environmental litigation, *see*, Rheingold, *Comment: A Primer on Environmental Litigation*, 38 BROOKLYN L. REV. 113, 115-19 (1971).

[210] The importance of meeting the state action requirement, where a plaintiff asserts a constitutional right to a reasonably non-hazardous environment, is illustrated by the fact that several courts have dismissed such suits on state action grounds. *See*, Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972) (emission of air pollutants by private petroleum refineries and plants along Houston Ship Channel, *held*: not state action); Guthrie v. Alabama By-Products Company, 328 F.Supp. 1140 (N.D. Ala. 1971) (issuance by Alabama Water Improvement Commission of permits for discharge of industrial liquid wastes to defendant corporations, *held*:

not state action, even though the issuing agency had power to regulate or prohibit the discharges); E.D.F. v. Hoerner Waldorf, 1 ERC 1640 (D. Mont. 1970) (invitation by City of Missoula through its Mayor and extended on behalf of the Missoula City Commission to defendant paper mill company to become part of Missoula's economy, *held*: not state action. Action of state planning board in inviting and encouraging public acceptance of the plant, *held*: not state action); In re Motor Vehicle Air Pollution Control Equipment, 52 F.R.D. 398 (C.D. Calif. 1970) (private automobile corporations, *held*: not public utilities nor do they have the functions of a government to constitute state action). For discussions of the "state action" problem, *see*, Pearson, *supra* n. 1, at 474-76; Esposito, *supra* n. 1, at 48-51.