

THE CASE FOR AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR PROTECTION OF THE ENVIRONMENT

Affirming Responsibilities Rather Than Declaring Rights May be the Most Promising Route to the Objective

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- Q. Tell me in no more than thirty seconds why an environmental amendment to the United States Constitution is necessary.
- A. The drafters in 1787 did not foresee the severe impacts that unprecedented expansion of population, technology and economic power would have upon the environment, and thus made no provision for its wise governance in the public interest. Protection of the environment has now become an urgent responsibility to which our traditional legal system responds inadequately. A late arrival among the priorities of Americans, environmental values tend to be discounted in competition with limited, short term economic interests. And in the absence of a constitutional referent, the courts are reluctant to reverse executive decisions. Where there is a constitutional mandate, (for example, the Civil Rights' Amendments) the courts take a closer look; where there is none, as in environmental cases, they reverse executive decisions only where they find flagrant disregard of statutory law. Thus, there is a need to place environmental protection clearly among the powers, authorities, and responsibilities conferred upon the government of the United States under the Constitution.

THE CASE IN SUMMARY

A growing number of people are concluding that without a constitutional mandate, environmental goals specified in statutes such as the National Environmental Policy Act¹ will never be attained.² This

conclusion follows from two observations: the first is an apparent inclination of the Congress to compromise principle in pursuit of expediency. The second is the tendency of the American judiciary to defer to the executive branch in the interpretation of legal obligations in the absence of an explicit constitutional requirement regarding discretionary acts. Courts can more readily ascertain whether procedural requirements have been met than determine whether administrative decisions on substantive issues are consistent with NEPA.³

Whether judicial intervention in administrative decision making is insufficient or excessive in its present form is largely a question of legal philosophy. In civil rights cases judicial intervention has been carried to great lengths, in contrast to judicial deference to administrative judgment in environmental cases. Yet it is becoming increasingly difficult to demonstrate that person-to-person human rights are ultimately more important than the relationship of humans to the biosphere, a relationship which decisively affects human welfare, health and happiness. I do not set forth first or fourteenth amendment adjudication as a model for environmental decisions, but I do argue that because of basic inconsistencies between traditional assumptions regarding property rights and the needs and obligations of environmental protection, the three divisions of government need a comprehensive statement of principles to guide policy making.

Some have argued that statutory law—both federal and state—provides sufficient environmental protection. One might assume that members of state legislatures and the United States Congress would honor the language and spirit of prior statutory enactments. But this assumption fails to take account of the ambiguous and often paradoxical behavior of legislative bodies. On certain questions of policy the personal, political and economic interests of members

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may be served by ignoring that certain of their statutory provisions are not judicially enforceable. Members of Congress who have cultivated personal images as environmental defenders have reversed their positions where powerful economic interests in their constituencies oppose environmental legislation. Timber, energy, water, mineral, agricultural and mass recreation interests are among the more notorious advocates of freedom from environmental controls. Statutory provisions authorizing multiple uses of public lands provide for the optimal use and management of such lands; they have also been favored by some resource development interests to prevent the "locking up" of minerals and timber in environmentally protected areas.⁴ Absent criteria for determining priorities, resolution of conflicting interests results in trial by political combat.

The Congress, as well as legislatures generally, lacks self-discipline. The practice of trade-offs for votes enables the enactment of special-interest legislation that, in principle, a majority of members might otherwise reject. The Congress can evade or ignore the substantive provisions of NEPA because, unlike civil rights or freedom of speech issues, there is no constitutional provision that restrains the sacrifice of environmental values to political expediency and self-interest.

An environmental amendment should not substitute for law more appropriately addressed by statute. The National Environmental Policy Act affords a mandate sufficient, if applied, for achieving high goals of environmental quality and sustainability. But except for its procedural requirements—notably the environmental impact statement—NEPA is enforceable only at executive discretion. Only in flagrant instances of executive dereliction are the courts likely to intervene.⁵ NEPA does not declare "rights;" it does declare obligations, which implies that the American people have a "right" to expect the government to administer public affairs in accordance with its declared principles. Long experience with the dereliction of environmental regulations by federal agencies was a powerful motive for enacting NEPA. The Executive branch's continuing avoidance of NEPA's mandates provides an argument for its constitutional reinforcement.

RIGHTS AND RESPONSIBILITIES

It is not realistic to rely upon specified legal rights to protect the environment *per se*. Proposals for constitutional reinforcement of environmental laws have hitherto sought to declare environmental rights. As early as December 11, 1967 a constitutional amendment was proposed in the House of Representatives by Congressman Charles E. Bennett (HJ Res 954). A similar proposal was made on June 13, 1968 by Representative Richard Ottinger (HJ Res 1321), and in April 1970 by Representative Morris Udall (HJ Res 1205). Congress has not acted upon these proposed "environmental rights" amendments. The drafters of NEPA attempted to establish environmental rights by statute. However, the provision in Senate Bill 1075 that "each person has a fundamental and inalienable right to a healthful environment" was deleted in conference.⁶

On January 19, 1970 Senators Gaylord Nelson, Alan Cranston and Clairborne Pell introduced SJ Res 169, an amendment which declared that "every person has the inalienable right to a decent environment. The United States and every State shall guarantee this right." However, had any of these provisions been adopted, it is doubtful that they would have achieved their purpose. Defining a practicable and generally acceptable definition of "decent" would likely prove an impossible task.

A new wave of interest in an environmental amendment arose in the late 1980s and continues to advance. After reviewing two decades of experience with the National Environmental Policy Act, it is evident that a constitutional amendment is needed to implement fully the Act's provisions and to extend its principles to other statutory provisions (notably those authorizing multiple uses of certain public lands).⁷ Meanwhile several concrete proposals for amendments have been made. Among them is the text of a proposed Environmental Quality Amendment, which the National Wildlife Federation published in March 1987 and revised in September 1989. Concerned citizens, such as Marshall Massey and Carolyn Merchant, have made similar proposals.⁸ These drafts adopted the "rights" thesis that characterized the Bennett and Ottinger resolutions of 1967 and 1968. All of these proposals are based upon an assumption that there is, or

ought to be, a right to a safe and sanitary environment. Some proposals (for example, Richard Cartwright Austin's "Civil Rights for Nature") would extend this right to all living species and natural systems.⁹

Between these proposals and mine (which follows), there is a fundamental jurisprudential difference. The objective of the foregoing amendments would be the adoption of an environmental bill of rights. I infer the focus upon rights to be inspired by, although not necessarily dependent upon, a philosophy of natural rights derived from natural law.¹⁰ (This is the philosophy embodied in the Declaration of Independence, reflecting the rationale of the Enlightenment of the eighteenth century that is still widely accepted in America today). One may, of course, take a utilitarian view of rights—understanding rights to be socially derived, not inherent in the nature of things and hence never inalienable. However, I do not find the "rights" approach to environmental protection the most promising route to the fundamental objective of environmental protection. There are great difficulties in interpreting and applying a constitutional amendment based upon rights. There are, however, fewer difficulties, and a more enforceable mandate, in an amendment that establishes a governmental obligation to administer the laws and policies in ways that avoid unnecessary damage to the environment, its species and ecosystems. The principal difficulty with the "rights" approach is that it opens the door to potentially endless, indeterminate litigation. It is easier to enforce clearly defined obligations—even if general in character—than to adjudicate an indefinite number of individual claims with indeterminate merits.

Although there is a fundamental philosophical difference between laws asserting rights and laws establishing obligations, rights are implicit in obligations. In a democratic society people have a "right" to have the obligations of their government honored, or at least acknowledged, and not subverted or ignored. This right is an expansion of responsible self-government and derives from a general social consensus.

Enforceable rights relate to human behavior, but humanity has no inherent rights that are enforceable against nature. For example, a right to a healthful environment might be enforced against transgression by

humans (for example, cigarette smoking). But nature could hardly be held liable for conditions under which human behavior leads to heat stroke, emphysema or malaria. The purpose of a limited rights thesis in environmental law is to protect both humans and nature from abusive human action against nature. Explicit law is required to define, and where necessary, to deny claimed rights to degrade or destroy the natural world. Nature cannot hold society legally accountable, but governments may be made responsible for the preservation of nature.

A constitutional provision is most appropriate when it addresses the powers and responsibilities of government. The Constitution of the United States, as amended, lays no explicit obligation upon the government to protect and maintain the quality of the environment. Environmental legislation enacted by the United States Congress is based upon implied powers, or enacted pursuant to enumerated powers pertaining, for example, to interstate commerce, taxation or treaties. The environment is a relatively new policy focus; most environmental legislation is barely a quarter-century old. Difficulties are inevitable in reconciling new environmental concepts with traditional legal assumptions. Moreover, scientific discoveries have profound effects in all areas of environmental law, from clean air legislation to the control of toxic substances. For example, the identification of carcinogens and the reinterpretation of the Rivers and Harbors Act of 1899¹¹ have triggered the application of long-standing, dormant legal provisions. It is unrealistic to expect that comparatively recent understandings of environmental relationships could easily displace 300 years of beliefs regarding property rights and legitimate expectations as they affect the future of the Earth and humanity.

It has become conventional to speak of the "rights of nature" or the rights of other living species against human exploitation or abuse.¹² But the natural world cannot defend those rights directly. Humans must act on behalf of nature to restrict certain behaviors in relation to nature. Thus, although nature has no defensible rights against humanity, humankind cannot be accorded unlimited rights against nature if the natural world is to be preserved. Human rights can be established and enforced against human behavior, but it is not evident that rights can be

enforced against nature. Reasonable responsibilities laid on public officials for protecting the quality of air, water, soil, ecosystems, and human settlements and developments are enforceable if established by statute, and more certainly so if reinforced by constitutional principles.

DIFFERENCES IN APPROACH

The decision to seek protection of the environment through declared individual rights or public responsibilities may be regarded as a tactical option. I therefore have no quarrel with the amendment proposed by the National Wildlife Federation.¹³ However, the more reliable and less convoluted route to sustainable relationships between humanity and nature is not through respective rights not easily defined or defended, but through responsibilities affirmed by fundamental law.

Might this concept of social responsibility through government be written into law? Following is a draft amendment to the Constitution of the United States that, in less than fifty words, declares the responsibility of government to protect the quality and integrity of the environment:

In all acts of government, the integrity and sustainability of natural systems shall not be impaired except to protect health and safety where no acceptable alternative exists. Maintenance, restoration, and renewability of natural systems, enhancement of environmental quality, and fairness to posterity shall be governing principles of policy.

The proposed amendment does not attempt to encompass directly all aspects of environmental policy, many of which are addressed more effectively through statutory laws. The amendment could strengthen the application of those statutes by affirming the responsibility of government for attaining the statutes' objectives. The phrase "all acts of government" does not imply that the federal government is the sole agent of responsibility. Acts of government occur at all jurisdictional levels—international, national, state and local. Acts of government affecting environmental conditions need to be consistent with the environmental principles declared in the Constitution. The amendment

does not confer explicit rights on posterity, but affirms the responsibility of public policy makers to consider the impact of their actions upon future generations.¹⁴

Thus, the proposed constitutional amendment is not an attempt to write into the Constitution legal provisions appropriate to statutes. The Constitution of the United States was intended to establish a structure for a federal government and to specify its responsibilities, powers and limitations. This amendment makes explicit those responsibilities hitherto deduced by implication from other specified responsibilities and powers. We have reached a point in the development of our society at which the fragmentary bases of our environmental legislation are inadequate to support the actions that may be necessary to attain national and international environmental policy objectives. The counterargument—that we have all of the powers and laws needed to protect the environment—ignores experience. For example, authority for environmental protection may be present, but compulsion to act may be missing. Moreover, there are contradictions and equivocations in statutory law that, for example, allow the multiple-use mandate of the Congress to be invoked to defeat protective measures. In the absence of a fundamental constitutional declaration, we may have more statutes and regulations than would be needed if the environmental responsibilities of the federal government were made explicit.

This amendment does not impose legal burdens or responsibilities upon the government beyond those already declared by statutory law. It does diminish the possibilities of their evasion, and narrows the discretion of decision makers to act in conformity with declared national policy. It opens the way to judicial review of the substantive consequences of administrative decisions. To the extent that the Congress, the President, and the bureaucracy act in good faith in conformity with the amendment, it should reduce rather than increase the volume of litigation. By intent, the amendment appears to move the balance in economy-environment controversies toward considerations of environmental integrity and sustainability. In fact, it would tend to shift action away from the striking of balances between environmental and economic considerations toward a search for synthesis in which fundamental

and continuing values were reconciled in the general and long-term public interest. To this end, the amendment might force a more valid and basic definition of environmental and economic values. All too frequently, a close examination of asserted economic values reveals them to be little more than short-sighted and self-serving subjective preferences. Environmental values are also susceptible to self-serving tendencies, and are equally deserving of evaluation in the determination of public policies.

Differences in viewpoint over a constitutional amendment come down, at least in part, to differences over priorities. People with political influence and popular following have urged constitutional amendments for prayer in schools and against flag burning. Are these issues more urgent and more important than the state of the natural systems of air, water, land and biota upon which the future of the nation depends?

Fears that an environmental amendment would widen the door to endless litigation are misplaced. An emphasis on "rights" would more readily invite self-serving abuse of the legal system than would fixing responsibility for the environment upon government. It would be less subject to corruption by the victimization-compensation obsession that now distorts the entire justice system. The litigious character of American public life today is a consequence of unpredictability, politicization of the justice system, and an excessive emphasis on contemporary personal rights to the neglect of social responsibilities. It has less to do with the actual merits of substantive law or its rational interpretation. The implication of most objections to an environmental amendment is that people-to-people issues are far more important than people-to-environment issues. We are slow to comprehend that the impact of people upon the environment is also an impact upon people—now and in the future. Environmental issues *are* people-to-people and transgenerational issues.

Our lack of constitutional protection of the environmental basis of our health, security and prosperity contrasts sharply with our commitment to civil rights. The fifth and fourteenth amendments are motivated by considerations of justice; judicial interpretations of these amendments and of the requirements of justice have evolved over the years. In a complex, pluralistic society, it may

be unrealistic to expect general agreement on the substance of justice in all respects. However, we define justice in relation to individuals and discrete groups, and do not easily, if at all, define justice in relation to the complexities of the modern world or to future generations. If there is an obligation for justice to the future it can be realized only in the legacy passed on to the future. A significant and fundamental part of that legacy is environmental in both a material and conceptual sense. The environment sets ultimate parameters within which options and opportunities may or may not be realized.

Technology has the capability of utilizing nature to reshape nature, but it would be presumptuous to assume that technology has no limits and thus may compensate for whatever deprivations are inflicted upon the environment.¹⁵ To destroy or impoverish natural systems would, moreover, reduce the resources available for technological innovation, including uses of technology to protect the environment. Can it be seriously argued that the possibility of technological innovation justifies the intentional or inadvertent impairment of the quality of life and impoverishment of the biosphere?

There is evidence of a growing realization throughout the world that human behavior in relation to the environment may profoundly affect the quality of life and human welfare now and in the future. In at least fifty nations environmental protection measures have been written into constitutions—although some are no more than pro forma and relate to the national cultural patrimony.¹⁶ Most of these countries fall into the developing or Third World category where several governments offer visible examples of flagrant environmental mismanagement. Nonetheless, these rhetorical commitments have significance; they reveal, at least, that recognition of environmental values may be politically expedient. This recognition would not be given if environmental values were not in some sense regarded as important.

At least twenty of the United States have environmental provisions in their state constitutions.¹⁷ Some have statutory provisions which, in certain respects (notably regarding land use), provide more environmental protection than does federal legislation (for example, California, Florida, Vermont). But the states presently cannot prevent pre-

emptive action by the federal government on certain environment-related issues; nuclear power and interstate shipments of hazardous waste are among the more publicized subjects of political contention. An environmental provision in the Constitution would not preempt the functions of the states on matters of environmental protection and could strengthen their position against invasive action by federal agencies and by developers. State discretion would be reduced only where state governments sought to accommodate economic or other interests pursuing projects unnecessarily destructive of environmental values.

INTERNATIONAL CONSIDERATIONS

In governments everywhere rhetoric is a time-honored substitute for action. But rhetoric is often a necessary precursor of action. As the necessity of global cooperation to protect the Earth's atmosphere, waters and living systems becomes more apparent, these rhetorical commitments may facilitate international environmental policies and agreements. Since the original Declaration of Principles adopted by the 1972 United Nations Conference on the Human Environment at Stockholm, more than a dozen significant multi-national declarations pertaining to environmental quality have been issued.¹⁸ Most are superficial or loosely drawn. It is reasonable to believe that they will have a positive effect upon the future of international law.

It is difficult to believe that fully informed people could doubt that in an evermore interactive, interdependent world, transnational policies and institutions for protection of the environment can indefinitely be resisted. Many international policies have been formally adopted, and more are being proposed. Trends in the natural world, scientifically identified and measured, are driving this process. But reductionist perceptions of environmental problems and the persistence of archaic interpretations of sovereignty have caused fractional and ad hoc international responses to environmental imperatives. Comprehensive and integrated statements of principles have been promulgated by the United Nations Conference on the Human Environment, by the World Charter for Nature and by the World Commission on Environment and Develop-

ment. These pronouncements, more detailed and explicit than the more numerous declarations, have not yet had more than a marginal impact upon governments, and have not been generally accepted as binding international law. Yet they have added precepts and propositions of an official character to theory on national behavior and international obligation, and they represent too much thought, negotiation and acceptance to have been merely extemporaneous or ephemeral expressions.

A growing understanding of the transnational character of environmental problems has led to a convergence of national and international environmental law.¹⁹ Proposals for an international convention for environmental protection have been introduced into the United States Senate. Of these, the most notable is S Res 29, introduced by Senator Claiborne Pell of Rhode Island on January 24, 1977. This proposed treaty would have required signatory governments to prepare environmental assessments and to consult with other countries in potentially harmful projects. The treaty proposition was still alive in April 1979 when the idea was presented to the Governing Council of the United Nations Environment Programme.²⁰ The idea was ahead of its time, and perhaps still is. Yet in 1989, Amedeo Postiglione, a distinguished Italian jurist, proposed at an international congress in Rome the drafting of a Universal Convention for the Environment as a Human Right. The Convention, he declared, "should specify an individual's inalienable rights and establish an adequate level of information, participation and actions necessary to maintain those rights. The Convention should also define the main obligations of the individual States [and] ... must identify the people responsible for promoting and protecting this human right."²¹ Thus, the Convention would draw upon both the natural rights and the positivist legal approaches to an international constitutional law for the environment.

Meanwhile, consideration might be given to a treaty with a more limited number of signatories that would, in effect, establish a quasi-constitutional basis for environmental law as provided under article VI of the Constitution: "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...."

Commenting on the feasibility of this approach Dolgin and Guilbert observe that:

The increasing recognition that environmental problems, however local in origin, affect the world ecosystem in ways that legitimately concern foreign governments should make credible any attempt to deal mutually with such problems through appropriate treaties and implementing legislation.²²

This statement is even more pertinent today, eighteen years since it was written. Nevertheless, constitutional interpretations inconsistent with international obligations could cripple their implementation under national law, a circumstance that an environmental amendment could obviate. To address this possibility, a committee of the Economic Commission for Europe has proposed a Charter on Environmental Rights and Duties to be open for signature by ECE members in 1992. A draft of the Charter, published in the Bruntland Bulletin stresses popular rights and specific governmental responsibilities.²³

Precedent for invoking the treaty power on behalf of domestic policy was set by the British-American treaty of 1916 for protection of migratory birds, extending federal protection throughout the United States, to those states that had no protective legislation, or that treated migratory wildlife as if it belonged to any landowner on whose property it might be found.²⁴ Obviously a treaty was necessary for protection of birds crossing the international boundary between Canada and the United States, but it was also necessary to provide the Congress of the United States with constitutional authority to protect migratory wildlife through statutory legislation. A treaty may supersede conflicting statutory legislation at the time of ratification, but unlike a constitutional amendment, it does not prevent the Congress from enacting contrary legislation in the future. A constitutional amendment would not only provide firmer assurance for environmental protection in the United States, but would strengthen American credibility abroad when, as seems probable, new initiatives and institutional arrangements for global environmental protection are undertaken.

THE CASE RESTATED

I return now to my principal thesis: (1) environmental policy in the United States is of sufficient importance to merit a declaration of fundamental law; (2) the present status of environmental law and public administration requires a higher directive to remedy statutory ambiguities and contradictions; and (3) international cooperation on global environmental issues could be strengthened through an amendment to the United States Constitution. Underlying the problem of how to enhance the effectiveness of public law in protection of the environment, at least two major philosophical barriers need to be lowered. The first is what some observers see as a national obsession with individual human rights, which gives a distinctive American twist to the administration of environmental law in the United States. The second, which underlies the first, is the belief in natural law as the source of human rights, and the extension of the rights concept to non-human life forms and even to inanimate things.

It is not the function of this essay to debate the natural law-human rights linkage. Here, the purpose is to advance the proposition that basic public law governing relationships between humans and their natural environment is more firmly supportable by a consensus on obligation and responsibility than upon rights—whether metaphysically or socially derived.

There is a logic, both ethical and juridical, in basing law upon an affirmation of responsibility rather than upon an assertion of rights. Responsibilities and rights may be linked, but responsibilities imply an obligation to act—a positive imperative—whereas rights are characteristically asserted against their infringement. A citizen may claim a general "right" to have government protect his or her environment, but this assertion does not, in itself, establish an explicit obligation on government to do anything. It may be more difficult to demonstrate that a person's environmental rights have been infringed than to show that governments have failed to perform specified duties when those obligations are based upon fundamental law. The environmental impact statement mandated by NEPA is a duty specified by law and so enforceable in fed-

eral courts. But public officials may evade and equivocate the non-procedural substantive mandates of NEPA, since there is no justiciable way to enforce these stated obligations in agency planning and decision making.

Obligations and responsibilities, like rights, are derived from societal consensus. In one respect, however, the concept of responsibilities has a more empirical, demonstrable and tangible foundation. This is ascertainable where the consequences of prior action or inaction are experienced, or can be described and measured. Complexities in the real world, coupled with the lag between events and outcomes, make cause-effect analysis difficult and sometimes beyond our ability to ascertain. Even so, as science and analytic technologies grow and advance, fixation of causal factors, even when complex, becomes more reliable. Systems analysis and computing capabilities are enlarging areas only recently accessible. Responsibility in a cause-effect sense appears to be less difficult to ascertain than before, whereas claims of individual rights appeal to beliefs and to values that lack visible consequences in the natural world. For example, one can ascertain, measure and, to a certain degree, objectively evaluate the consequences of ill-conceived irrigation projects or of clear-cutting of forests. But when measuring or evaluating individual claims of environmental wrongs, one could be more susceptible to subjective bias. The adjudication of health and injury claims offer many cases in point. Invariably the question arises: did the claimant's behavior contribute to the alleged damage? In actual circumstances, if not always in a legal sense, people cannot divorce themselves from whatever share of responsibility inheres in their conduct.

Although the Declaration of Principles adopted by the 1972 United Nations Conference at Stockholm asserted the fundamental human right to "an environment of a quality that permits a life of dignity and well-being," it also asserted "a solemn responsibility to protect and improve the environment for present and future generations." The emphasis of the declared twenty-six principles was clearly on responsibilities rather than rights. The shorter Declaration on the Human Environment was foremost a statement of duties and responsibilities. After

setting forth the imperative to defend and improve the human environment, paragraph seven declared that:

To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future. Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International co-operation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities in this field. A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organizations in the common interest. The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.²⁵

In efforts to actualize these principles the great powers have failed to provide consistent leadership. Among these, the United States has pursued an ambivalent and paradoxical course. No one can wholly escape from the disasters that threaten the world's environment. The United States has taken the lead in many aspects of environmental protection, but it has not given this protection a place in its fundamental law. It is still possible, as under the Reagan presidency, for the federal government to reverse commitments and, where there is no clear, substantive constitutional mandate, to ignore the constitutional obligation of the President to ensure that the laws be faithfully executed.²⁶ Except in cases of clearly evident dereliction, the President is the sole judge of his or her "faithful execution" of the laws.

CONCLUSION

If the United States is to lead in world environmental affairs, or even to join in common efforts, it will be necessary to arrive at a general consensus upon basic priorities. If the United States is unable or unwilling to place environmental protection high among its constitutional obligations, it will hardly be a credible leader among nations in this aspect of public and international policy. More is expected of the United States than of most nations. Amending the United States Constitution to recognize the fundamental importance of the environment in national and world affairs would set an example that could greatly facilitate the movement toward global environmental protection, which must succeed if we are to preserve the richness and renewability of the living Earth.

1. National Environmental Policy Act of 1969, 42 USC §§ 4321-4337 (1970).
2. Lynton K. Caldwell, *A Constitutional Law for the Environment: 20 Years with NEPA Indicates the Need*, 31 *Envir* 6 (December 1989) (see also commentaries at pp 2-5 and 31-32).
3. See, for example, William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 *Ind L J* 205 (1988-1989).
4. Efforts to establish a multiple-use mandate for the public lands have been widely regarded to have failed owing to absence of an authoritative criterion for setting priorities. See the Multiple-Use, Sustained-Yield Act of 1960, 16 USC §§ 528-531 (1988), and the Classification and Multiple Use Act of 1964, Pub L No 88-607, 78 Stat 986 (1964). This latter act appeared to have expired in December 1970 but was restored by the Federal Land Policy and Management Act of 1976, 43 USC 1712 (1988), the organic act for the Bureau of Land Management. Commenting on the multiple-use concept, Arnold W. Reitze, Jr. writes that "[t]he concept of multiple-use both in theory and in practice is so vague as to be often meaningless, or worse yet, to have completely different meanings for dozens of its users," and is thus "too vague to offer much policy guidance." Arnold W. Reitze, Jr., *Environmental Planning: Law of Land and Resources* 6-4 & 6-5 (North American International, 1974). See also George R. Hall, *The Myth and Reality of Multiple-Use Forestry*, 3 *Natural Resources J* 276 (1963); D. Michael Harvey, *Public Land Management Under the Classification and Multiple Use Act*, 2 *Natural Resources Lawyer* 238 (1969); Warren A. Starr, *Multiple Land Use Management*, 1 *Natural Resources J* 288 (1961); Gilbert F. White, *The Choice of Use in Resource Management*, 1 *Natural Resources J* 23 (1961).
5. See opinion of Circuit Judge J. Skelly Wright in *Calvert Cliffs' Coord. Comm. v US AEC*, 449 F2d 1109 (DC Cir 1971).
6. See National Environmental Policy Act of 1969, H Rep No 91-765, 91st Cong, 1st Sess (December 20, 1969) in 1969 USCCAN 2768.
7. Caldwell, *A Constitutional Law*, 31 *Envir* (cited in note 2).
8. The National Wildlife Foundation version as of October 1989, together with text or excerpts of other proposals, appears in *The Evolution of the NWF's Environmental Quality Amendment*, Environmental Amendment Circular, No 3 (Comprehensive Environmental Amendment Project, October 1989). (Copies available from The Comprehensive Environmental Amendment Project, c/o Marshall Massey, 4353 East 119th Way, Thornton, CO 80233-1738).
9. *Id.*, citing Richard Cartwright Austin, *A Considerate Constitution*, *The Animals' Voice* (October 1989).
10. For historical background on natural law see John Cogley, et al, *Natural Law and Modern Society* (The World, 1961). There is vast literature on natural law and natural rights.
11. The Rivers and Harbors Act of 1899, 30 Stat 1121 (1899).
12. See Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (U Wisconsin, 1989); Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979); C. D. Stone, *Should Trees Have Standing: Toward Legal Rights for Natural Objects* (Avon, 1975); *Earth and Other Ethics: The Case for Moral Pluralism* (Harper & Row, 1987). See also Holmes Rolston III, *Environmental Ethics: Duties and Values in the Natural World* (Temple, 1988); Tom Regan and Peter Singer, eds, *Animal Rights and Human Obligations* (Prentice Hall, 1976); Joel Feinberg, *The Rights of Animals and Unborn Generations* in W. T. Blackstone, ed. *Philosophy of the Environmental Crisis* 43-68 (U Georgia, 1974).

13. *The Evolution of the NWF's Environmental Quality Amendment*, Environmental Amendment Circular No 3 (cited in note 8).
14. Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *Ecol L Q* 495, 540-41 (1983-4) and Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations University and Transnational Publishers, 1989).
15. Lynton K. Caldwell, *Human Limitations and the Future of Technology*, 14 *Humanities: Journal of the Institute of Man* 47 (1978).
16. See generally Albert P. Blaustein and Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Oceana Publications, 1971-). (19 vol loose-leaf and supp. The English translations of some of the constitutions are accompanied by the original texts. The collection includes bibliographies.) See also the listing in Weiss, *In Fairness to Future Generations* at Appendix B, 297-327 (cited in note 14).
17. Sharon Newsome and Alan Ciamporcerro, *Environmental Bill of Rights—Analysis of an Environmental Bill of Rights Campaign* (report to National Wildlife Federation, undated) (assisted by Elise Jones and Susan Ephron).
18. *Environment Stockholm '72 2* (Centre for Economic and Social Information, United Nations European Headquarters, June 1972). See also United Nations, *Report of the United Nations Conference on the Human Environment*, UN Doc A/Conf 48/14/Rev1. International declarations on environmental policy are included in the multi-volume continuing series by Bernd Ruster, Bruno Sima and Michael Bock, eds, *International Protection of the Environment: Treaties and Related Documents* (Oceana, 1975-). Supplementing this publication is a new series covering documents issued since 1982: Bernd Ruster and Bruno Sima, eds, *International Protection of the Environment, Second Series* (Oceana, 1991).
19. Lynton K. Caldwell, *Law and Environment in an Era of Transition*, 2 *Col J Intl Envir L & Policy* 1 (1991). See also Henry J. Steiner and Detlev F. Vagts, *Transnational Legal Problems* 531-636 (Foundation, 2d ed 1976) (chapter entitled *The Interpretation of National and International Law*).
20. Margot Hornblower, *US Proposes Treaty on Environment*, *Washington Post* A15 (April 24, 1979).
21. Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations*, 20 *Envir L* 322 (1990).
22. Erica L. Dolgin and Thomas G. P. Guilbert, eds, *Federal Environmental Law* 28 (Environmental Law Institute, West, 1974). Professor Quincy Wright cites numerous commentators on international law whom he declares have clearly shown the importance of national constitutions in determining the actual capacity of states to exercise power and meet responsibilities under international law. See Quincy Wright, *International Law in its Relation to Constitutional Law*, 17 *Am J Intl L* 234, 234-5 (1923).
23. *Charter for Environmental Rights and Obligations* reprinted in 9/10 *Bruntland Bulletin* 6, SF10-11 (September-December 1990) (proposed charter for the Economic Commission for Europe).
24. *Missouri v Holland*, 252 *US* 416 (1920), upheld the Federal Migratory Bird Treaty Act of 1918, 16 *USC* § 703, on the basis of the treaty power. See also Wright, 17 *Am J Intl L* at 234-44 (1923) (cited in note 22); and Pitman B. Potter, *Relative Authority of International Law and National Law in the United States*, 19 *Am J Intl L* 315-26 (1925).
25. *Environment Stockholm '72* (cited in note 18).
26. USCS, *US Const*, Art III, § 2, cl 1 (1982 & Supp 1988). See also Collin S. Diver, *Presidential Powers*, 36 *Am U L Rev* 519-533 (1987).