

SOME FURTHER OBSERVATIONS ON ENVIRONMENTAL RIGHTS AND DUTIES

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In the initial issue of the *Duke Environmental Law & Policy Forum*, I addressed the need for an environmental amendment to the Constitution of the United States based upon the obligations of government rather than the rights of citizens.¹ A shortened version of this article appeared in Marshall Massey's *Environmental Amendment Circular No. 4* (June 1991).² In pursuit of simplicity, brevity and focus, I confined my discussion to the issue of duties versus rights. I proposed language that would place environmental protection among the responsibilities of government declared in the Constitution. I did not attempt to analyze or compare in detail other, earlier proposals. I focused on language that could compel the President and the Supreme Court to enforce substantive provisions of environmental law or at least to give them due weight when allegedly in conflict with other constitutional provisions.³

This approach, however, risked omission of relevant information that might have avoided misconstruction of what was actually said. In my article I referred to prior constitutional proposals by Bennett, Ottinger, Massey, Merchant, Austin and the National Wildlife Federation, observing that "these drafts adopted the 'rights thesis,'" and that "all of these proposals are based upon an assumption that there is, or ought to be, a right to a safe and sanitary environment."⁴ Although literally true, these statements overstate the case if the assumption is made that the treatment of rights was the same in all of

these proposals or that none of these proposals declared obligations.

An analysis of the proposals would have shown that Marshall Massey's proposal emphasizes the obligations of government and invokes rights only in "the right of citizens to bring suit on behalf of the provisions" specified in his draft.⁵ I construed this language to be an implicit acknowledgement of the rights thesis. None of the other "rights" amendments to the Constitution include "the right of citizens to bring suit." I thus concluded that some special entitlement regarding environmental rights was intended. Hence I included the Massey proposal in my generalization regarding the proposed amendments that had come to my attention. My concentration on the specific language of an amendment declaring governmental obligations did not require (but might have benefitted from) a comparison or reference to similar proposals. In retrospect, I should have included this comparison for, in its absence, readers might conclude that no similar proposal had been made.

The best way to avoid or correct misinterpretation of my earlier remarks is to present Marshall Massey's Nature Amendment in full. The drafting of this amendment preceded my own by some months and was unknown to me when I turned my attention to this issue. I

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limited my initial examination of previous proposals to those actually introduced into the Congress and published as government documents. With the growth of public interest in the issue, this limitation is no longer appropriate. Marshall Massey's carefully considered and revised amendment deserves widespread attention. His text follows:

THE NATURE AMENDMENT

Proposed Language for a Comprehensive Environmental Amendment to the Constitution of the United States of America

Section 1. No action, policy or pattern of neglect, either public or private, shall be taken or permitted by the United States or any State, which would have a significant adverse effect:

- a) on the atmospheric chemistry, waters, soils, or other physical resources on which life depends;
- b) on the integrity, diversity, or continuing viability of a plant or animal species of known or potential, direct or indirect value to humanity; or
- c) on the integrity, diversity, or continuing viability of a wild ecosystem.

Section 2. All public authorities shall nurture the social bases of a sustainable human relationship with the natural world:

- a) by preserving natural features of outstanding beauty;
- b) by facilitating ecological research and promoting popular understanding of ecological principles and concerns;
- c) by promoting and facilitating the practice of pro-environmental disciplines, such as conservation, recycling, pollution control and sustainable technology; and

- d) by promoting respect for the welfare of non-human creatures, and protecting them from unnecessary suffering at human hands.

Section 3. The preservation of ecosystems being necessary to the future of humanity, the right of citizens to bring suit on behalf of the provisions of this Article, or in direct defense of the entities protected by Section 1 above, shall not be denied or abridged by the United States or any State.

Section 4. The Congress shall have power to enforce this article by appropriate legislation.⁶

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I would be happy to see this amendment embodied in the constitutional law of the United States. My proposal is more general and concise — but not necessarily more likely to achieve the objective in law. I assume that a carefully generalized but concise amendment declaring basic principles is more likely to win congressional support and public consensus than more detailed and specific provisions. The Bill of Rights is a relatively concise statement of principles. The more detail in language, the greater room for equivocation and dispute. Adoption of a constitutional amendment declaring principles such as I have proposed should be paralleled by an interpretative statute, incorporating the provisions of the Massey amendment and perhaps others.

I do not know whether consensus could be achieved among those most informed and concerned regarding an environmental amendment. A small conference or workshop primarily consisting of those persons who have proposed amendments might be the best way to find out. Probably no more than ten or twelve individuals should be

convened at this time for this purpose. A meeting of minds or delineation of fundamental differences — if they exist — needs face-to-face deliberation. Mass meetings or White House Conferences are not the appropriate forums for this purpose.

1. Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment*, 1 Duke Envir L & Policy Forum 1 (1991).

2. Lynton K. Caldwell, *An Environment Amendment to the Constitution*, Amendment Circular No 4 at 12 (June 1991).

3. For texts of other proposals, see generally Amendment Circular No 4 (cited in note 2). (Copies available from Comprehensive Environmental Amendment Project, c/o Marshall Massey, 4353 East 119th Way, Thornton, CO 80233-1738).

The present language of my proposed draft amendment is as follows:

In all acts of government, integrity and renewability of natural systems shall not be impaired except as necessary to protect health or safety, nor shall long-term sustainability be sacrificed to short-term advantage. Maintenance, restoration, and enhancement of environmental quality, and fairness to future generations shall be governing principles of policy, and of the administration of justice.

Caldwell, 1 Duke Envir L & Policy Forum at 4 (cited in note 1).

4. Caldwell, 1 Duke Envir L & Policy Forum at 2-3 (cited in note 1).

5. Marshall Massey, *The Nature Amendment*, Amendment Circular No 4 at 25 (cited in note 2).

6. *Id.*