In Defense of Environmental Rights in East European Constitutions

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Western experts have extensively counselled East European constitution drafters regarding the dangers of including various social and economic rights within their constitutions. These advisors often criticize provisions that guarantee a right to a clean environment or make the protection of the environment a duty of the state. Such provisions are condemned as holdovers from the old communist constitutions and are branded as unenforceable or as luxuries that the bankrupt economies of Eastern Europe cannot afford. Each of these arguments has some grounds for support.

However, the environmental provisions within East European constitutions could be both enforceable and effective if the drafters applied the lessons learned from 20 years of experience under U.S. state constitutions’ environmental provisions. More than 30 U.S. states have constitutional provisions that deal with either the environment or specific natural resources. The suc-

1 B.A. 1985, College of William and Mary; M.A. 1987, Johns Hopkins University; J.D. Candidate 1994, The University of Chicago.
2 Eastern Europe refers to Albania, Bulgaria, the Czech Republic, Hungary, Poland, Romania, and the Slovak Republic as well as the new nations that formerly comprised the Soviet Union and Yugoslavia.
3 See for example Ala Const Art I, § 24, & Amend 272; Alaska Const Art VIII, §§1-18; Ariz Const Art X, § 1, 2, 9; Ark Const Amend 35; Cal Const Art I, § 25, Art X, §§ 2-4; Colo Const Art XVI, §§ 5-8, Art XVIII, § 2, 6; Fla Const Art II, § 7, Art IV, § 9, Art X, § 11; Ga Const Art III, § 6, § II(a)(1); Hawai Const Art XI, § 1, 2, 3, 6, 7, 8, 9, 11; Idaho
cesses and failures of these state constitutions' environmental provisions suggest how to draft such provisions to be self-executing and enforceable.

The East Europeans should implement enforceable environmental laws, both constitutional and statutory; for them, environmental protection is a necessity, not a luxury. Eastern Europe is an environmental disaster area. Forty-five years of communism resulted in lives significantly shortened by exposure to pollution, forests destroyed by acid rain, waters polluted with industrial waste and sewage, and air unbreathable in many places.\(^3\) The transformation of Eastern Europe's economies to capitalism will have a significant impact on the environment. Ernst U. von Weizacker of the Institute for Climate, Environment, and Energy in Germany commented that "[b]ureaucratic socialism collapsed because it did not allow prices to tell the economic truth. [A] market economy may ruin the environment and ultimately itself if prices are not allowed to tell the ecological truth."\(^4\) Essentially, von Weizacker is calling for sustainable development. The World Commission on Environment and Development, appointed by the U.N. General Assembly, defined sustainable development as development that meets current needs without compromising the ability of future generations to meet their own needs.\(^5\) Environment degradation presents a serious impediment to achieving this goal.

Sustainable development is possible. Western advisors should encourage these countries to halt environmental degradation done in the name of development. The right mix of policies and assistance will promote economic growth while protecting and cleaning up the environment. Much of the current advice and aid to Eastern Europe fails to accomplish either. As Dr. Karolyi Kiss, a leading economist at the Institute for World Economics in

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5 Id at 5-6.
Hungary, commented, "[w]hat we would really like is for just one Western country to step forward as a patron saint of sustainable development."6

I. BACKGROUND CONCERNING INCLUSION OF ENVIRONMENTAL RIGHTS PROVISIONS IN EAST EUROPEAN CONSTITUTIONS

All the draft constitutions in Eastern Europe include some form of social and economic rights. However, the drafters have not mindlessly cribbed these rights from the old communist constitutions; they purposefully wanted to reflect a sense of community and shared values.7 Peter Hack, a Hungarian lawyer who helped draft the Hungarian bill of rights, commented on how the inclusion of social and economic rights highlighted the difference between American and East European conceptions of rights:

It is different socialization. Especially in Eastern Europe, people are used to thinking in collective terms, so we always think about the society, and the collective rights of people.8

Environmental rights are usually included in the chapter on social and economic rights in East European constitutions.

Before analyzing how environmental provisions might be structured in order to be enforceable and effective, it is worthwhile to examine how and why the East Europeans decided to include them in their constitutions. The political dynamics in Poland, Hungary, the Czech Republic, Slovakia and Bulgaria are similar to those in other countries in Eastern Europe. The experiences of these five countries provide useful insights into the drafters' goals for such provisions.

A. Poland

The communist regime originally adopted the Polish Constitution in 1952 (the "Communist Constitution") and amended it in December 1989 to facilitate the transition to democracy and a market economy.9 Article 71 states that the "[c]itizens of the Republic of Poland shall have the right to benefit from the natu-

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8 Id.
ral environment and it shall be their duty to protect it.” This article was incorporated into the Communist Constitution in 1976, during the first wave of environmental regulation in the Eastern Bloc. Like constitutions in other communist countries, the Polish Communist Constitution contained a lengthy list of rights that were not legally enforceable unless also implemented by ordinary legislation. Thus, the original intent of the drafters of the environmental provision in the Communist Constitution was to enunciate a goal, not an enforceable right.

On October 17, 1992, the Sejm passed the Constitutional Act on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government. This law repealed the Communist Constitution and established operating rules for the three branches of the Polish government—the legislature, the executive and the judiciary—until a new constitution is adopted. The Constitutional Act stipulated that certain provisions of the Communist Constitution remained in force. Among these provisions was Article 71 on protecting the environment.

As this comment goes to press, Poland is still in the process of adopting a completely new constitution. The Sejm has debated numerous proposals concerning the draft provisions. However, a compromise appears to have been struck on the issue of including environmental rights in the new constitution.

This compromise is reflected in the language of the October 1991 draft of the new constitution, which has served as one of the primary working documents in the drafting process. The October 1991 draft constitution recharacterizes the right to a clean environment as a universal duty to protect the environment. Article 48 of the draft constitution states that everyone has an obligation “to take care of natural environment.”

The drafters deliberately made the provision vague. Public support for strong environmental measures waned as economic

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11 Bowman and Hunter, 13 Mich J Intl L at 931 (cited in note 6).
12 Id.
13 The Sejm is the parliament of the Republic of Poland.
15 Id at Art 77.
reforms caused unemployment and other hardships. Environmental concerns in Poland declined in importance during the first six months that the Solidarity-led government was in power. This decline was due to the rise of competing interest groups, the shortage of funds, and the rising concern about economic problems. The language of the environmental provision reflects a compromise between the desire of various political parties, particularly the Green Party, to have future governments protect the environment and the concerns of those parties who favor conservative economic policies and view environmental protection as a luxury. The language implies that the drafters did not intend the article to be self-executing but saw it as merely stating a goal or aspiration.

The conflict between proponents of strong environmental measures and those primarily concerned about more immediate economic problems is illustrated in the 1990 dispute over a steel mill in Krakow. In Krakow in 1990, the communist dominated city council joined forces with environmental groups to force a local steel mill to cut production to comply with a 1982 environmental ordinance. The mill’s communist managers and the local Solidarity union jointly protested to the Ministry of Industry. Bronislaw Kaminski, the Minister of the Environment who originally drafted the law in 1982, sided with Solidarity and the Ministry of Industry and stated that local jurisdictions lacked the authority to limit production at a national steel mill. After much public debate, both sides hammered out a compromise under which the mill would shut down six of its worst polluting chimneys between 1990 and 1992.

The October 1991 draft constitution of Poland also represents a compromise between legislators who want to guarantee very specific rights and legislators who want to follow the practice of communist constitutions with a list of sweeping rights. Those who advocated sweeping rights believed that they could later be

18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
defined by judicial interpretation. However, the judiciary may use the provision’s vagueness to interpret it as an aspiration and not an enforceable right.

B. Hungary

The Hungarians amended their old communist constitution in April 1990 to operate as a transitional constitution while they attempt to implement democratic and market reforms. The government intends to eventually to draft a new constitution.

The current Hungarian Constitution states that “[t]he Republic of Hungary recognizes and implements everyone’s right to a healthy environment.” In addition, it guarantees every person living in Hungary the “right to the highest possible level of physical and mental health” and promises to implement “this right through arrangements for labour safety, with health institutions and medical care, through ensuring the possibility for regular physical training, and through the protection of the built-in natural environment.”

The fact that the current cobbled-together constitution has an environmental provision is not surprising. Support for the environment was strong prior to the collapse of Communism. In fact, the environmental movement provided one of the few tolerated avenues for opposition to the Communist government. For example, in January, 1989, the environmentalists gathered over 100,000 signatures on a petition to stop the Bos-Nagymaros dam project with Czechoslovakia. Less than one month later, in February, 1989, the government endorsed a multi-party system for Hungary. Given the popular backing for the Hungarian environmental movement, most political parties chose to include an environment plank within their platforms for the 1990 elections.

However, those parties for whom environmental issues predominated, the Green Party and the Biosphere Party, failed to

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24 Id.
25 Id at 613.
27 Republic of Hungary Const, Ch XII, Art 70/D, §§ 1-2 (emphasis added), Hungarian Rules in Force at 1658 (cited in note 26).
29 Id.
win any seats in the Hungarian parliament in the 1990 elections. Janos Sebeok, the Principal Vote- Getter and Ambassador of the Biosphere, mused:

[j]t is extremely regrettable, but those apparatchiks have been proven right who were saying all along that the movements were about politics, rather than about ecology. The hundreds of thousands, or most of them, were demonstrating by indirect means for a change in the system.  

Even though the environmental parties did not win any seats in the parliament, some delegates with strong environmental credentials did. These included Nandor Rott of the Christian Democratic Party, Zoltan Szelezczy of the Forum, Ferenc Wekler with ties to the Alliance of Free Democrats, and Pal Dragon of the Smallholders Party. This initial support in parliament for environmental reforms led to the constitutional amendment which included an environmental provision.

Since 1991, Hungary has concentrated on drafting comprehensive environmental legislation rather than attempting to use the constitutional environmental provision as an enforceable right. The conflicts over this law reflect the increasing reluctance of politicians to enact strong environmental laws in the face of economic difficulties. The Hungarian Parliament's Committee on the Environment completed a comprehensive draft law under the direction of Professor Andras Sajo, Professor of Law at the Hungarian Academy of Sciences. The Ministry of Environmental Protection opposed the Committee's draft, criticizing the draft's expense, increased public participation, and new limitations on the Ministry's powers. The Committee revised the draft in response to the Ministry's objections. However, the political tug of war over this law continues to delay its passage.

C. Czech Republic

Both the Slovak Constitution and the Czech Constitution contain some provisions for ensuring environmental rights. The Slovak Constitution, adopted on September 3, 1992, contains an

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31 Id.
32 Id.
33 Bowman and Hunter, 13 Mich J Intl L at 949 (cited in note 6).
34 Id at 951.
entire chapter aimed at protecting the environment.\textsuperscript{35} The Czech Constitution, adopted on December 16, 1992, became effective on January 1, 1993.\textsuperscript{36} The Czech Constitution makes it a duty of the State to protect the country’s natural resources.\textsuperscript{37} In addition, the Czech Constitution refers to the Charter of Fundamental Rights and Freedoms, which also guarantees the right to a favorable environment.\textsuperscript{38}

The Czech Republic Charter of Fundamental Rights and Freedoms draws heavily upon the Czechoslovak Charter of Rights and Freedoms that was adopted in January 1991 by the Federal government of Czechoslovakia before the country dissolved into two independent states. The Czech Republic Charter of Fundamental Rights and Freedoms declares that “[e]veryone has a right to a favorable environment.”\textsuperscript{39} It goes on to guarantee everyone access to full and timely information on the state of the environment and natural resources.\textsuperscript{40} In addition, the Charter limits other rights to the extent that they “endanger or cause damage to the living environment, natural resources, the wealth of natural species, and cultural monuments beyond limits set by law.”\textsuperscript{41} These provisions in the Czech Republic Charter are identical to the same provisions in the original Czechoslovak Charter of Fundamental Rights and Freedoms.

The inclusion of social and economic rights in the Czechoslovak Charter and later in the Czech Republic Charter could be viewed as the result of the persistent desire for a continued reliance on the existence of a paternalistic state. In August 1991, prior to the break up of Czechoslovakia, Martin Porubjak, deputy prime minister of the Slovak government, noted in an interview that, “[i]t seems that we still are harboring a Byzantine concept of the state as a powerful guardian and punishing father who authoritatively makes all decisions for us.”\textsuperscript{42}

However, by early 1991, public concern about the environment had diminished in the face of economic concerns.\textsuperscript{43} Federal

\textsuperscript{35} Slovakia Const, Section 6, Arts 4 & 5, (Czechoslovak News Agency, Prague).
\textsuperscript{36} Czech Republic Const, trans by Vojtech Cepl and Mark Gillis (Charles University Law Faculty, Prague, 1993).
\textsuperscript{37} Czech Republic Const, Ch 1, Art 7.
\textsuperscript{38} Czech Republic Const, Ch 1, Art 3; Czech Republic Charter of Fundamental Rights and Freedoms, Ch 4, Art 35, §1, trans by Ivo Dvorak.
\textsuperscript{39} Czech Republic Charter of Fundamental Rights and Freedoms, Ch 4, Art 35, §1.
\textsuperscript{40} Id at §2.
\textsuperscript{41} Id at §3.
\textsuperscript{42} Slovak Official Views Current Issues, JPRS 8, 9 (Sep 12, 1991).
\textsuperscript{43} New Air Quality Waste Management Laws Expected to be Compatible with EC
Environmental Minister Josef Vavrousek commented:

A year ago, there was great pressure from the people about the environment, but now we are in the paradoxical situation that people are taking less care of the environment. . . . Many people believe that capitalism is a miracle; they do not understand the relationship between the environment and the economy. You need a strong economy for environmental protection, but there is a very strong feedback from the environment to the economy.  

Politicians who favor conservative economic policies, such as the Czech Premier Vaclav Klaus, and citizens who fear unemployment oppose strong environmental provisions. These forces tried to block inclusion of environmental provisions in the draft constitution of the Czech Republic. Klaus refused to consider any additional references to environmental rights within the constitution beyond the reference in Chapter 1, Article 7, which provides that the state is responsible for the economical use of natural resources and the protection of the natural wealth.

Vojtech Cepl, Vice Dean of the Charles University Law School in Prague and a member of the Government Constitutional Commission, and other critics of environment provisions opposed including environmental rights in the constitution on the grounds that such rights are unenforceable. For example, the Czech Republic’s Charter of Fundamental Rights and Freedom states that no one may harm the environment “beyond the limits set by law.” Arguably, this qualifying phrase downgrades these rights to mere “aspirations and exhortations to the legislature” and thus, prevents the provision from being self-executing. In addition, Cepl argued that legal rights have to be “functional from an economic point of view” and that the government cannot

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44 Id.


47 Czech Republic Charter of Fundamental Rights and Freedoms, Ch 4, Art 35, §3 (cited in note 38).


afford to guarantee a right to a healthy environment.\textsuperscript{50}

The views of Klaus and Cepí contrasted sharply with the Green Party's which advocated the inclusion of environmental rights in the Czech Constitution.\textsuperscript{51} On December 16, 1992, approximately 40 representatives from various ecological groups and the Czechoslovak Green Party demonstrated outside the parliament building and read a demand for incorporation of additional environmental paragraphs in the draft Czech constitution.\textsuperscript{52}

Former Czech president, Vaclav Havel, while voicing general support for the government's draft constitution, proposed a number of changes by November 17, 1992. Havel advocated the incorporation of an environmental paragraph, which would make the protection of nature and its diverse life forms a duty of the state.\textsuperscript{53}

Although the writers of the original government draft of the Constitution referred to the Charter of Fundamental Rights and Freedoms in Article 1, they did not explicitly incorporate the Charter into the body of the proposed Constitution. The governing Coalition Parties opted to include a fewer number of rights in the constitution's second chapter than were enumerated in the Charter.\textsuperscript{54} Ivan Masek, a member of the Civic Democratic Alliance, explained that the government felt that only enforceable rights ought to appear in the constitution and not merely declarative rights.\textsuperscript{55} Czech Premier Vaclav Klaus had enunciated the same view on September 11, 1992 when he spoke of the need to make the Charter of Fundamental Rights and Freedoms shorter before incorporating it into Article 2 of the constitution.\textsuperscript{56}

In December 1992, the Constitutional and Legal Committee agreed to the Opposition demand that the constitution make

\textsuperscript{50} Myers, Chicago Tribune (Oct 11, 1992) (cited in note 46).

\textsuperscript{51} Id.

\textsuperscript{52} Deputies, Ecology Groups Lobby, CTK National News Wire (Dec 16, 1992).

\textsuperscript{53} Havel Proposes Modifications to Draft Czech Constitution, CTK National News Wire (Nov 17, 1992).


reference to the Charter of Fundamental Rights and Freedoms.\textsuperscript{57} The constitution that was finally adopted on December 16, 1992, places a greater emphasis on the environment than the government would have preferred. Thus, like most constitutions, the environmental provisions in the Czech Constitution reflect compromises between conflicting political forces and interest groups.

D. Bulgaria

The Bulgarian Constitution, enacted on July 12, 1991, states that the protection of the environment is a duty of the state.\textsuperscript{58} It also declares that "citizens shall have the right to a healthy and favourable environment corresponding to the established standards and norms. They shall protect the environment."\textsuperscript{59}

As in the other countries in the region, Bulgarian environmentalists played a significant role in the early development of noncommunist opposition groups. For example, the political party Ecoglasnost was established originally to protest the environmental problems that the communist regime failed to address, such as air pollution in the city of Ruse and the nuclear power plant in Belene.

Ecoglasnost and the Green Party formed part of the opposition coalition called the Union of Democratic Forces (UDF), which was the major opposition to the Bulgarian Socialist Party (the former Communist Party) in the 1990 and 1991 elections.\textsuperscript{60} The UDF was created on December 7, 1989, as a coalition of two political parties and eight independent associations and clubs.\textsuperscript{61} Additional parties joined the Union later. Environmentally sensitive economic development was one of the initial stated aims of the Union of Democratic Forces.\textsuperscript{62} However, before the first free elections, all Bulgarian political parties included a provision on environmental protection in their platforms.\textsuperscript{63} In that election, delegates from Ecoglasnost won 17 seats and delegates from the

\textsuperscript{58} Bulgaria Const, Ch 1, Art 15 (Sofia Press, 1991).
\textsuperscript{59} Bulgaria Const, Ch 2, Art 55.
\textsuperscript{60} Political Parties Within SDS Analyzed, JPRS 3, 4 (Mar 18, 1991).
\textsuperscript{61} Id.
\textsuperscript{62} Union of Democratic Forces Sets Out Its Aims, British Broadcasting Corporation Summary of World Broadcasts EE/0635/3/1 (Dec 9, 1989).
\textsuperscript{63} Conflicts Within Ecoglasnost Analyzed, JPRS 6, 7 (Sep 4, 1991).
Green Party won 15. The Union of Democratic Forces won a total of 144 seats out of the 400 in parliament.

Zeal for environmental protection began to wane in the face of daunting economic difficulties. In mid-1990, Petur Slabakov, Chairman of Ecoglasnost, declared, "I would not hesitate even a moment to make ecology first and foremost." Only one year later, Aleksandur Karakachanov, Chairman of the Bulgarian Green Party, in August 1991 commented on the need to emphasize economic growth:

We do not intend to neglect the 'social umbrellas.' The emphasis is elsewhere: reviving the initiative of the government's commitment 'to influence' the early expansion of production. In order to give one must have something.

Increasingly divergent views on the relative importance of economic and environmental issues led to a split in Ecoglasnost in mid-1991. At that time, Krasen Stanchev, then-chairman of the Environmental Commission in the Grand National Assembly, and a group of deputies resigned from Ecoglasnost. Stanchev attributed the split to the organization shifting its original focus. Nevertheless, most of the work done by the Bulgarian parliament on environmental issues was based on proposals submitted by Ecoglasnost.

II. ENVIRONMENTAL RIGHTS AND DUTIES?

When drafting constitutional environmental provisions, governments need to resolve several issues. For example, they must determine what kind of right or duty exists, who can claim the right, and who is obligated to protect the right or carry out the duty. Many U.S. state constitutions and East European constitutions contain provisions that both claim a right to a healthy environment and a duty to protect the environment. However, the conceptual underpinnings for these provisions differs greatly between Eastern Europe and the United States. These differences suggest why environmental provisions in certain U.S. state

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64 SDS Analyzed, JPRS 4 (Mar 18, 1991) (cited in note 60).
65 Id.
66 Ecoglasnost Chairman Slabakov Interviewed, JPRS 9, 10 (Jan 9, 1991).
68 Conflicts Within Ecoglasnost, JPRS 6 (Sep 4, 1991) (cited in note 63).
69 Id.
70 Id.
constitutions are considered self-executing and enforceable while environmental provisions in East European constitutions probably will not be enforced. The American experience indicates ways the East Europeans can draft their environmental articles in order to make them enforceable and effective.

A. Environmental Rights as Human Rights

Jan Marecek, chief legal counsel to and deputy director of the Environmental Committee of the then Federal Republic of Czechoslovakia, characterized the right to a clean environment, which was included in the Charter of Fundamental Rights and Freedoms, as a "human right." This concept of environmental rights is very different from the concept that underlies U.S. state constitutions, which tend to view environmental rights as property rights.

This concept of environmental rights as human rights is born of a desire to demand these rights even when the government may not be willing to recognize and confer them. The dissident movements in Eastern Europe under the communists were built around the fight for human rights. Thus, the members of those groups that now make up the governments in Poland, Hungary, Bulgaria, and the other East European countries probably would reject the view of Jeremy Bentham and H.L.A. Hart that moral rights do not exist and that the only rights that people have are those conferred by a legal system. East Europeans who wish to characterize the right to a healthy environment as a human right would identify more with Ronald Dworkin's views on rights. In his book Taking Rights Seriously, Dworkin says that two ideas must be accepted in order to assert a basis for rights independent of government recognition:

The first is the vague but powerful idea of human dignity. This idea . . . supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

The second is the more familiar idea of political equali-

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It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.\textsuperscript{73}

At first blush, environmental rights would not seem to fit these criteria. However, W. Paul Gormley argues that the right to a clean environment is fundamental to the right to life.\textsuperscript{74} The rationale, as Gormley states, is that "[i]n short, a contaminated environment will kill human life."\textsuperscript{75} This definition collapses the distinction between traditional civil and political rights and economic and social rights, which is problematic. Such a definition can easily be used to justify almost any economic right as a human right. This type of expansive definition is illustrated by Dr. F. Menghistu, who commented, "[t]he right to life is meaningless without access to the basic and minimum material goods and services essential to sustain life."\textsuperscript{76} This concept of the right to life poses slippery slope problems as to which economic rights ought to considered human rights and which should not.

B. Environmental Rights Under the Public Trust Doctrine

The problems resulting from conceiving of environmental rights as human rights can be avoided if the East Europeans adopted the view embraced by most U.S. state constitutions. This view holds that environmental rights have evolved as property rights under the public trust doctrine.\textsuperscript{77} Under the public trust doctrine, the citizens own or have a "right" to those things committed to the trusteeship of the state. The state has a fiduciary duty as trustee to preserve and protect this right.\textsuperscript{78} The state does not own these natural resources in its sovereign capacity.\textsuperscript{79}

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{79} Id.
Some scholars trace the development of the public trust doctrine to the ancient Roman res communes doctrine which states that some classes of property cannot legally be owned except by the community as a whole. This historical precedent may ease the transfer of the public trust doctrine to East Europe whose civil codes are historically rooted in Roman law.

In the late 1960s and early 1970s, many states within the U.S. adopted amendments to their constitutions giving their citizens environmental rights based on the public trust doctrine. Pennsylvania, New York, Michigan, Montana, Hawaii, Virginia, Rhode Island, Illinois, North Carolina, Massachusetts, and Louisiana are some of the states with such provisions in their constitutions.

These amendments expanded the public trust doctrine to cover either a broader array of natural resources or the entire environment. Historically, the public trust doctrine applied only to land below the low water mark of lakes or the sea, to navigable waters, and to fishery rights.

The state environmental amendments also took different forms. The amendments adopted by New York and Michigan were mere statements of policy. Pennsylvania, however, declared that environmental rights were vested in citizens and Pennsylvania courts treated the provision as self-executing.

Enforceability needs to be a key feature of environmental constitutional provisions. Oleg Rumiantsev, chairman of the Constitutional Commission of the Russian parliament, noted in an address to the RSFSR Supreme Soviet on October 10, 1991, that “[r]ights are realizable to the extent that they can be protected with the help of judicial action. This is an indisputable truth and a constitution is all about this fact.” Under the communist regimes of Eastern Europe, environmental law was the exclusive province of government bureaucrats. Although the
laws of some countries, like Poland and Hungary, provided for public participation, they were largely ignored.\textsuperscript{88} The environmental groups that developed in these countries in the 1980s have fought to ensure public access to information on the environment and public participation in protecting the environment.

The creation of private rights of action depends upon the language of the provision, its location within the constitution, the resource being protected, and the comprehensiveness of the statutory scheme enacted in accordance with the constitutional provision.\textsuperscript{89} States that incorporated public trust provisions in their bill of rights were more likely to treat such provisions as self-executing than those that placed them in a legislative article.\textsuperscript{90} For example, the Virginia Supreme Court in \textit{Robb v Shockoe Slip Found}\textsuperscript{91} held that the constitutional environmental provision was not self-executing because it "contained no declaration of self-execution, it is not in the Bill of Rights, it is not declaratory of common law, and it lays down no rules by means of which the principles it posits may be given the force of law."\textsuperscript{92}

U.S. state courts appear more willing to find violations of the public trust in cases where the land or water has been violated by traditional condemnation or private use actions.\textsuperscript{93} However, courts have been reluctant to enforce it in cases involving more unusual uses, like maintaining environments free of unnecessary solid wastes.\textsuperscript{94} This pattern flows naturally from judicial reliance upon precedents to interpret constitutional and statutory provisions. In general, courts comfortably reach decisions that incrementally expand a state's historic public trust duties, but refrain from significant expansion of such duties. Marked extension of a state's duties would leave courts vulnerable to charges of judicial legislation.

State courts have refused to interpret environmental provisions in constitutions as self-executing for several reasons, including vagueness, need for judicial restraint, separation of powers and judicial incompetence to resolve environmental matters without legislative direction.\textsuperscript{95} Courts frequently fail to define

\textsuperscript{88} Id.
\textsuperscript{89} Note, 59 Tul L Rev at 1562-63 (cited in note 78).
\textsuperscript{90} Id at 1564.
\textsuperscript{91} 228 Va 678, 324 SE2d 674 (1985).
\textsuperscript{92} Id at 682, 324 SE2d at 676.\textsuperscript{93} Note, 59 Tul L Rev at 1563 (cited in note 78).
\textsuperscript{94} Id.
\textsuperscript{95} Lynda L. Butler, \textit{State Environmental Programs: A Study in Political Influence and}
such provisions as self-executing, and order legislatures to pass implementing laws.\textsuperscript{96} However, state courts, like the Virginia Supreme Court, do consider such constitutional provisions requiring implementing laws in a particular area as declarations of state policy.\textsuperscript{97} These courts have justified striking down legislation that contradicts the policies embraced by such constitutional provisions.\textsuperscript{98} Following the same idea, East European courts could use such environmental provisions to strike down laws which would contravene the provisions' aims.

Although many state courts have refused to treat environmental provisions as self-executing, Alaska, Florida, Illinois and Louisiana all, to varying degrees, have treated such provisions as enforceable due to the language used and the placement of the article within the constitution.\textsuperscript{99} The courts in these states have used the environmental articles to either strike down or closely review state action in conflict with the provisions.

One argument often posed against constitutional provisions declaring a right to a clean environment is that such a right is stated in absolute terms and therefore absurd. However, as Richard Epstein noted:

\begin{quote}
All constitutional liberties start life as absolutes. They end life, however, as the first stage in a balancing process—a process that gives no clear guidance as to what exceptions should be allowed, what qualifications should be heaped upon the exceptions, what burdens of proof should be assigned, and who should decide whether rights have been abridged or respected.\textsuperscript{100}
\end{quote}

Some states, like Illinois, attempt to avoid the problem posed by stating environmental rights in absolutist language by conditioning the provision on the passage of subsequent legislation. The Illinois Constitution states, "[t]he General Assembly shall provide by law for the implementation and enforcement of this public policy."\textsuperscript{101} Bulgaria, the Czech Republic, Slovakia, Slovenia, and the Ukraine all include similar qualifying language within their


\textsuperscript{96} Howard, 58 Va L Rev at 199 (cited in note 77).

\textsuperscript{97} Id.

\textsuperscript{98} Id.

\textsuperscript{99} Butler, 31 Wm & Mary L Rev at 847 (cited in note 95).


\textsuperscript{101} Ill Const, Art XI, §1.
However, this qualifying language usually prevents the environmental provision from being self-executing. For example, the Bulgarian Constitution provides for a healthy environment “corresponding to the established standards and norms.” The Czech Republic Charter of Fundamental Rights and Freedoms states that no one may damage the environment “beyond the limits set by law.”

These phrases are problematic because they imply a duty upon the legislature or the executive to pass laws or adopt regulations providing specific guidelines. In general, when environmental provisions make reference to additional legislation, the judiciary holds that they are not self-executing and consequently, not enforceable. If the legislature or the executive fails to act, no means exists to compel them to do so. The judiciary in the United States generally refrains from intervening in such cases on the grounds that it is a political question.

Excluding such qualifying language is considered anti-democratic by some critics if the courts decide to treat the provisions as enforceable. Some argue that such a vague provision could enable the judiciary to act as a “superlegislature, reallocating resources and reshuffling governmental priorities to a degree that healthy democratic systems ordinarily reserved for the legislature and executive.” This would dramatically upset the balance of powers by allowing the judiciary to force the state to make substantial budgetary outlays and reorder its spending priorities. In addition, such a system of judicial legislation would undermine the legitimacy of courts’ decisions.

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102 Bulgaria Const, Ch II, Art 55 (cited in note 58); Czech Republic Const, Ch I, Art 3 (cited in note 36) (referring to the Czech Republic Charter of Fundamental Rights and Freedoms that includes such language in Ch 4, Art 35, §3 (“limits set by law”)) (cited in note 38); Slovak Republic Const, Ch II, Art 44; Slovenia Const, Ch III, Art 72 trans by Sherrill O'Connor-Sraj and Garry Moore, ed by Miro Cerar and Janez Kranjc, Faculty of Law, University of Ljubljana (Ljubljana, 1992); Draft Ukraine Const, Ch IV, Art 47, trans by Council of Advisors to the Parliament of the Ukraine, revised by the Ukrainian Legal Foundation Council of Advisors (Jun 10, 1992).

103 Bulgaria Const, Ch 2, Art 55.

104 Czech Republic Charter of Fundamental Rights and Freedoms, Ch 4, Art 35, §3.


106 Id at 482.

107 Id.


109 Id.

110 Id.
Appointing the judiciary the final arbiter of environmental decisions poses other problems, for example:

(1) the judiciary may be the branch least well-equipped to make decisions concerning the environment because they generally lack the staff and technical expertise to evaluate environmental impacts;
(2) judicial procedures can be prohibitively costly and time consuming; and
(3) courts may be reluctant to intervene in an administrative issue in the absence of specific guidelines and therefore, will limit their review to whether there has been a manifest abuse of discretion.\textsuperscript{111}

Placing this power over the environment in the hands of judiciary does however have its advantages. These include:

(1) the judiciary is insulated from political pressures;
(2) defendants must respond to questions and justify their actions; and
(3) courts can help to equalize the political and administrative leverage of the adversaries.\textsuperscript{112}

Courts have interpreted both Pennsylvania's and Louisiana's environmental provisions apparently without producing the dire consequences forecast by critics. Courts have adopted balancing tests which require public officials and others to weigh the environmental consequences of an action against other factors. The Louisiana Supreme Court outlined this balancing test in *Save Ourselves, Inc v Louisiana Envi'l Control Commission*.\textsuperscript{113} The balancing test requires that all state agencies that evaluate a project to weigh the environmental costs and benefits against other social and economic factors and make a determination subject to a reasonableness test.\textsuperscript{114} State agencies must consider whether alternate projects, alternate sites, or other mitigative measures would "offer more protection for the environment... without unduly curtailing non-environmental benefits."\textsuperscript{115} The court places the burden upon state agencies as trustees for the

\textsuperscript{111} Tobin, 3 BC Envir Aff at 482 (cited in note 105).
\textsuperscript{112} Id at 483.
\textsuperscript{113} 452 So2d 1152 (La 1984).
\textsuperscript{114} Id.
\textsuperscript{115} Id.
public to prove that they have met their obligations under the constitution and the Louisiana Environmental Quality Act.116

The Louisiana Supreme Court held that judges were to evaluate agency compliance with the constitutional provision in terms of a “rule of reasonableness.”117 This rule would be satisfied if reasonable minds found that the regulators diligently considered the environmental impact before taking final agency action.118 To meet the diligence requirement, the agency must “determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.”119

Pennsylvania also adopted a balancing test approach in *Payne v Kassab.*120 The Pennsylvania Constitution provides that the “people have a right to clean air, pure water, and to the preservation of the scenic, historic and aesthetic values of the environment. . . . [a]s trustee for these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”121 The *Payne* decision interpreted this right to require an inquiry into whether:

1. all applicable statutes and regulations relevant to natural resource protection have been complied with;
2. the record of the case demonstrates a reasonable effort to reduce environmental incursion to a minimum; and
3. the environmental harm which will result from the action in question so clearly outweighs the benefits derived therefrom that to proceed would be an abuse of discretion.122

The decisions by courts in Pennsylvania and Louisiana illustrate that vague or absolute language can be interpreted as enforceable. In both Pennsylvania and Louisiana, the environmental provisions codified the public trust doctrine, which enabled the courts to treat the provisions as self-executing.

The difference in interpretation between state courts stems in part from the language used in the provisions. However, the lack of historical experience in fleshing out the boundaries of a

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116 Id.
117 Id at 1156-57.
118 Id.
119 Id at 1157.
121 Penn Const, Art I, §27.
122 *Payne,* 11 Pa Cmwlth at 29-30, 312 A2d at 94.
“right to a clean environment” also plays a role.\textsuperscript{123} Other rights such as the right to freedom of speech are also vague in terms of what is protected and how this right ought to be balanced against other rights.\textsuperscript{124} However, in the case of freedom of speech and other traditional rights, courts can look to historical experiences for accepted ideas of what those rights mean and how far they reach.\textsuperscript{125} In general, the right to a clean environment lacks such historical underpinnings and so courts are reluctant to step in and give meaning to such vague terms.\textsuperscript{126}

The language used to describe the type of environment to which the public has a right can also aid in making the provision less vague or absolute. Most East European constitutions use the word “healthy” to describe the environment.\textsuperscript{127} Illinois’ Constitutional provision is instructive on how the word “healthy” may be interpreted. The Illinois Constitution makes it the “public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.”\textsuperscript{128} It further declares that each “person has a right to a healthful environment.”\textsuperscript{129}

The term “healthful” was chosen over “clean” because it describes the environment in terms of its direct effect on human life and because it was more flexible than a description in terms of physical characteristics which could be made obsolete by the discovery of new pollutants.\textsuperscript{130} The phrase “healthful environment” is meant to describe “that quality of physical environment

\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Tobin, 3 BC Envir Aff at 478 (cited in note 105).
\textsuperscript{128} Ill Const, Art XI, §1.
\textsuperscript{129} Id.
which a reasonable man would select for himself were a free choice available. This definition provides a standard that is easier for courts to interpret than clean, favorable, or safe, which the Slovak Constitution and the draft Russian and Ukrainian Constitutions use. Medical testimony can be used to help establish such a breach. The Illinois Constitutional Convention chose it for the Illinois state constitution precisely because it provided such guidance.

The standard of "healthful" is perhaps the least stringent of various qualifiers employed in U.S. state constitutions. Substantial environmental degradation can occur before it begins to directly affect the health of human beings. However, in many places in Eastern Europe, the environmental degradation has already exceeded this threshold. It will be quite an accomplishment if the governments of Eastern Europe can restore the environment to a healthful condition.

A constitutional provision granting a right to a healthy environment or imposing a duty on the state to protect the environment has a major advantage over a similar provision promulgated in a statute. Self-executing constitutional provisions strengthen judicial decisions based on them because it is usually very difficult for the legislature to overrule such court decisions without amending the constitution. Most constitutions are difficult to amend, while statutes can usually be adopted by a simple majority of the legislature. This means that the public in states or countries with such constitutional provisions will have a more enforceable right to a minimum level of environmental protection than citizens in states or countries with statutorily created environmental rights.

The public needs a basis for procedural standing when seeking to enforce these environmental provisions. The public trust doctrine might provide such a basis by establishing that any member of the public has standing to sue the government when

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131 Id at §2.
132 Tobin, 3 BC Envir Aff at 479 (cited in note 105).
133 Slovak Republic Const Ch II, Art 44 (cited in note 102); Draft Russian Federation Const Ch IV, Art 38 (cited in note 127); Draft Ukraine Const Ch IV, Art 47 (Jun 10, 1992) (cited in note 102).
135 Id.
136 Id at 463.
137 Id.
the government violates its fiduciary duty as trustee.\footnote{Howard, 58 Va L R at 262-63 (cited in note 77).} In the United States, cases like \textit{Sierra Club v. Morton} state that a party has standing if they suffered "injury in fact" with regard to a protected interest, but do not require a showing of "economic injury."\footnote{405 U.S. 727 (1972).} Public trust provisions in constitutions make natural resources and the environment the protected interests of any member of the public.

Some states drafted their environmental provisions to ensure that every member of the public has standing. For example, the Illinois Constitution was carefully drafted to eliminate the requirement that an individual show "special injury" in order to be granted standing.\footnote{Helman and Whalen, \textit{Constitutional Commentary}, Ill Const Art XI, §2 (1970) (cited in note 130).} The General Assembly can pass requirements which limit this right to standing.\footnote{Id.} The Illinois Constitution allows an individual to seek only the traditional remedies of injunction, declaratory judgment, and compensation to the extent of proven economic injuries.\footnote{Id.}

Precedent supports the idea that if environmental provisions are properly drafted, East European courts will enforce them. A recent case before the Polish Constitutional Tribunal indicates that social and economic rights, like the right to a clean environment, may be enforceable after all.\footnote{Id.} The case involved a challenge brought before the Constitutional Tribunal by Ombudsman Ewa Letowska at the behest of a large number of Polish citizens against a statute that restricted the benefits of pensioners who took employment.\footnote{Id.} Letowski argued that the statute violated the constitutional provision guaranteeing the people's "right to work."\footnote{Mark F. Brezinski, \textit{Constitutional Tribunal's Constitutional Dilemma}, The Warsaw Voice (Aug 9, 1992).} The Sejm had passed the statute in an attempt to address Poland's serious financial crisis.\footnote{Id.} The Tribunal agreed that the statute violated the pensioners' right to work and declared it unconstitutional.\footnote{Id.} The Tribunal's decision was submitted to the Sejm for approval and after much debate, was up-
held on May 6, 1992. If other constitutional courts take the same approach, the environmental provisions in the East European constitutions may be enforced.

Even if the East European constitutions were explicitly self-executing, it is questionable to what extent that the public would seek to use them. Margaret Bowman and David Hunter, who advised the Czech Republic on its draft environmental laws, commented on this problem:

Of course, strong public participation laws alone will not create effective public participation in Central Europe's environmental decision making. The social traditions of disenfranchisement must also be reversed before citizens feel the desire and ability to provide constructive input into the decision making process.

The fact that many of the same bureaucrats who enforced environmental laws under the communist regimes are still in their same jobs will exacerbate this problem. These officials retain their bias against public participation and their habits of weak enforcement. Bureaucrats in the region tend to ignore enforcement of environmental laws. Communist governments adopted environmental laws and regulations but failed to enforce these laws. As a result, the environment continued to deteriorate. However, should the public take advantage of the opportunities provided by the enactment of self-executing constitutional provisions that allow for public monitoring and participation via litigation, enforcement of environmental regulations might increase.

CONCLUSION

In summary, a constitutional environmental provision would be most enforceable if it is placed in the Bill of Rights, if it codifies the public trust doctrine, if it uses language which provides guidance to courts seeking to balance the environmental rights proclaimed against other rights and interests, and if it explicitly declares its intention to grant the public standing to sue the government. The environmental provisions of the East European constitutions and draft constitutions contain various combina-

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148 Id.
149 Bowman and Hunter, 13 Mich J Intl L at 964 (cited in note 6).
150 Id at 973.
151 Id at 972.
tions of these elements. Article 48 of the October 1991 draft of Poland’s Constitution, which states that everyone has “a duty to protect the environment,” has none of the above mentioned criteria and is the least likely to be enforced. At the other end of the spectrum are the Slovak Constitution, which devotes a significant portion of a chapter to environmental protection, and the draft Ukrainian Constitution, which contains an entire chapter on environmental rights and duties and makes violations subject to prosecution and compensation.\textsuperscript{153} If East Europeans seriously want to clean-up and protect their environment, they ought to draft constitutions containing provisions similar to the Slovak or the Pennsylvanian constitutional provisions, as these are most likely to be enforced.

One final issue worth examining is whether environmental provisions should be excluded from the East European constitutions because these countries cannot afford to pay for environmental clean-up at this time. This view stems from a general attack on the inclusion of positive, economic rights in East European constitutions. However, this view makes several questionable assumptions when it includes environmental rights in the basket of economic rights that the East Europeans cannot afford.

First, this view assumes that deferring clean-up is less costly than beginning to take action now. Currently, the governments of Eastern Europe pay a price for their industrial and urban pollution in increased health problems. The Polish National Academy of Science estimates that $7 billion (10 percent of Poland’s GDP) is lost annually due to the health problems caused by air and water pollution.\textsuperscript{153} In the northern part of Czechoslovakia life spans are 15 years shorter than the national average.\textsuperscript{154} In Hungary, one out of every 17 deaths is blamed on air pollution.\textsuperscript{155} Air pollution is estimated to cause $60 million a year in health costs in Hungary.\textsuperscript{156} The state-run health care programs ultimately cover the costs of these health problems and will continue to do so in the future. The governments of Eastern Europe will not scrap their national health care systems because their citizens strongly support these programs.

\textsuperscript{153} Slovak Republic Const Ch II, Art 44 and 45, and Draft Ukraine Const Ch X, Art 79-83 (Jun 10, 1992) (cited in note 102).
\textsuperscript{155} Battista, Wash Post A1 (cited in note 17).
\textsuperscript{156} Tarnoff, CRS Review 29 (cited in note 153).
\textsuperscript{156} Battista, Wash Post (cited in note 17).
Second, the assumption that East European nations cannot achieve economic growth while protecting the environment is flawed. Since 1970 the United States has cleaned up its air and water, lowered the levels of toxic substances in the environment, and controlled toxic wastes.\textsuperscript{157} Meanwhile, the U.S. gross national product increased by more than 70 percent.\textsuperscript{158} Bill L. Long commented in the \textit{OECD Observer} in February, 1991, that:

\begin{quote}
The only type of development which is sustainable over the long term is one which integrates environmental concerns, and the only environmental policy sustainable over the long term is one that is in harmony with economic objectives. The challenge is to define the ways and means to achieve this so that nations do not have to choose between a healthy environment and a healthy economy.\textsuperscript{159}
\end{quote}

These sentiments were echoed by C. Fred Bergsten, director of the Institute for International Economics in Washington, D.C., who stated, “[i]f you do it right, you can simultaneously pursue environmental and economic objectives.”\textsuperscript{160} Hilary F. French, a researcher at the Worldwatch Institute and author of the report, \textit{Clearing the Air: A Global Agenda}, commented that the notion that “pollution is the price of progress” is antiquated and that Eastern Europe will need to bolster traditional methods of pollution control with policies that encourage energy efficiency and that develop alternative sources of energy that spew out less pollution.\textsuperscript{161}

The cost of cleaning up Eastern Europe will be enormous. Some experts estimate that it may exceed $500 billion.\textsuperscript{162} However, no one expects the governments of Eastern Europe to pay for this tomorrow. East European governments can begin to address this problem by substituting market pricing for subsidies in areas like energy and water to discourage waste. In addition, the governments of Eastern Europe could use economic incentives, such as taxes on excessive waste, instead of more costly command and control structures to more efficiently eliminate pollu-

\textsuperscript{158} Id.
\textsuperscript{160} \textit{Report Warns of Pollution in Eastern Europe}, NY Times (Jan 21, 1990) (cited in note 3).
\textsuperscript{161} Id.
Constitutional environmental provisions can force politicians to keep environmental concerns in mind when short term economic problems might encourage them to ignore the environment. Short sightedness by communist planners got the countries in the region into the mess that they are in now. A constitution ought to encourage politicians and bureaucrats to take a more long term view of the world, especially when it is politically expedient to do otherwise.