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Symposium on Global Environmental Constitutionalism: An Introduction and Overview

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INTRODUCTION

Symposium on Global Environmental Constitutionalism: An Introduction and Overview

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Welcome to our symposium issue of the *Widener Law Review*, dedicated to the proceedings of a symposium on “Global Environmental Constitutionalism,” which we held at Widener University School of Law’s Delaware campus on April 11, 2014.

Constitutions reflect the values most treasured by society, including rights to speak, vote, run for political office, worship or not; to due process and legal representation; against cruel and unusual punishment and taking private property without just compensation, and so on. Since the U.N. Declaration on Human Rights in 1948, many constitutions have also sought to guarantee so-called socioeconomic rights to dignity, education, health, and shelter. One such socioeconomic right that has enjoyed a great deal of attention in national and subnational constitutions is a right to a quality environment. Indeed, reflecting a global trend, scores of countries have affirmed that their citizens are entitled to healthy air, water, and land and that their constitution should guarantee certain environmental rights. Scores more have imposed duties on government or citizens to protect the environment. Dozens provide further process rights in environmental matters. Some even go so far as to provide constitutional recognition of rights of nature, sustainability, energy, water, public trust, climate change, and other constitutionally emerging areas.

Most people live under constitutions that protect environmental rights in some way. Indeed, the constitutions of more than 165 of the 193 UN-recognized nations on the planet address environmental matters in some fashion, some by committing to environmental stewardship, others by recognizing a basic right to a quality environment and still others by ensuring a degree of public participation in environmental decision making.

Environmental values and rights are featured in constitutions around the globe, addressing such issues as preservation, re-development, sustainability, pollution abatement, climate change, energy reform, water resources, and biodiversity. Constitutional provisions from almost six dozen countries embed individual rights to some form of healthy, adequate or quality environment, recognize basic human rights to clean water, air, and land, and

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environmental opportunity, or provide a right not just to, but of, nature. And more than one-third of the states in the United States explicitly purport to provide a basic civil right to a quality environment or recognize environmental concerns as a policy consideration.

The contributions collected here reflect a full range of perspectives on cutting edge issues from around the globe relating to these constitutional provisions.

The first paper introduces readers to the *Robinson Township* decision from Pennsylvania, explaining why it evinces the power and potential of global environmental constitutionalism. The next three papers explore the pre-figurative, structural, and design aspects of global environmental constitutionalism. And then the final four papers explore the thicket of global environmental constitutionalism, including adoption, implementation, and interpretive challenges, including the judicial obligation to vindicate environmental rights in the context of other constitutional rights and values, such as the protection of indigenous populations or the commitment to respect human dignity.

First, in *Robinson Township v. Pennsylvania: A Model for Environmental Constitutionalism*, **Erin Daly and James May** take a hard look at the working potential of environmental constitutionalism. Their article explains how the Pennsylvania Supreme Court turned to that state's 45-year old "Environmental Rights Amendment" to invalidate a state law that was specifically designed to promote hydraulic hydrofracturing or fracking. In invalidating the law, a plurality of the Court found that environmental rights were "on par" with constitutionally protected civil and political rights. A concurring justice also held that the law contravened substantive due process of local communities and their citizens.

This article provides an overview of the state legislative and constitutional law as well as the judicial opinion, before explaining what the opinion means for public trust responsibilities and concepts of sustainable development. The authors observe that *Robinson Township* "provides a roadmap for how courts can maneuver through the factual, legal, and political complexities of environmental constitutionalism." They contend that the Court "takes the words of the Environmental Rights Amendment seriously, and then reads the provision broadly and forcefully. It respects the limits imposed by separation of powers but asserts the full measure of judicial authority to push the limits of constitutional environmental law."

Such judicial engagement of environmental constitutionalism can have transformative effects and serve as inspiration elsewhere: "the impact of such opinions can even transcend national boundaries: a court's vindication of a constitutional environmental right can resonate in the constitutional jurisprudence of courts around the world and in that way, be transported beyond the immediate locale that gave rise to the claim in the first place." Thus, Daly and May conclude that *Robinson Township* "is a bellwether decision not only for Pennsylvania, but also for advancing environmental constitutionalism around the globe."

If one were to x-ray global environmental constitutionalism, what would one find? **Klaus Bosselmann** seeks to find answers in *Global Environmental Constitutionalism: Mapping the Terrain*. Bosselmann tracks global environmental constitutionalism's lineage to the concept of global constitutionalism, which he describes "as the study and advocacy of constitutional ideas that present themselves at international and national levels." He maintains that recognizing global environmental constitutionalism as an advent of global constitutionalism "makes it possible to see the relationship between international law and domestic law in less dichotomic and more correlated terms, and develop new areas of study such as, for example, international constitutional law." To Bosselmann, differentiating between international and domestic law is beside the point: "[P]ublic international law is one area of research, domestic law another, and international and comparative legal research ideally inform one another."

Bosselmann identifies as the building blocks of global environmental constitutionalism the constitutional character of international environmental law, environmental rights, sustainability, and global environmental governance. As to the first component, he concludes that global environmental constitutionalism coheres in ways lacking in international environmental law insofar as it is "an analysis and advocacy of environmental values, principles, and rights that are sufficiently coherent and enduring to form a constitution."

Bosselmann next concludes that the jury is still out on whether and the extent to which global environmental constitutionalism will improve ecological or human rights outcomes: "International comparison [] shows that the process of 'greening' of national constitutions and international law is slow, incomplete, sketchy, and not following an overarching objective. There is, as of now, no global consensus on the importance of sustainability similarly to constitutionalized values such as human rights, democracy, or peace. Likewise, policy objectives tend to focus on economic prosperity and largely ignore its dependence on sustainability."

Lamenting the lack of consistent constitutional coherence, Bosselmann then argues in favor of making sustainability a mainstay of global environmental constitutionalism, concluding that "the argument for sustainability as a constitutional principle in national and international law is strong and deserves further investigation. It should be of central importance to global environmental constitutionalism."

As to his final building block, Bosselmann concludes that while not necessary, having a global environmental constitution would advance the notion of global environmental constitutionalism. In particular, he proffers the Earth Charter as a proxy for a global environmental constitution, noting (and quoting Nick Robinson) that "the binding principles embodied in the Earth Charter can be and are being applied in courts and are found in virtually all national environmental laws." He then concludes that the Earth Charter and other "benchmark documents" should be used to "measure the progress of global environmental constitutionalism."

At bottom, Bosselmann concludes that global environmental constitutionalism isn't simply a convenient construct but is instead a transformative means for advancing human rights to a quality environment for current and future generations: "If we accept that the twenty-first century will be defined by its success or failure of protecting human rights and the environment, then global environmental constitutionalism, like global constitutionalism in general, becomes a matter of great urgency." Constitutions should reflect this urgency, he concludes: "Above all, global environmental constitutionalism should aim for shifting the environment from the periphery to the center of constitutions."

In *The Conceptual Contours of Environmental Constitutionalism*, **Louis J. Kotzé** considers just how environmental constitutionalism fits into the framework of comparative constitutionalism. He first describes how constitutional features are typically "thin,"—that is, provide a framework for governance—or "thick,"—that is, supply the interior components of rights-based constitutionalism. He writes that while environmental constitutionalism exhibits both thin and thick features, it holds the most salience as a thick exponent of an environmental right to a healthy environment.

Kotzé tackles the difficult issue of defining the normative contours of "environmental constitutionalism." Deeming definition insoluble, he leans toward describing environmental constitutionalism as a means for incorporating its normative qualities "into existing domestic and global regulatory arrangements that seek to mediate the human-environment interface." He observes that the rationale behind environmental constitutionalism is congruent with other notions of constitutional rights and constitutionalism that have evolved over time, and concludes by proposing a consolidated description of "environmental constitutionalism." To Kotzé, "environmental constitutionalism" hybridizes thick and thin concepts to "embod[y] a transformative approach that relies on constitutions to provide for the architecture of environmental governance, whereupon it then acts to improve environmental protection through various constitutional features such as fundamental rights and duties, principles of environmental governance, the rule of law, and endearing aspirational values."

Blake Hudson also explores the contours of environmental constitutionalism in *Structural Environmental Constitutionalism*. Much like Kotzé's thin/thick constitutionalism paradigm, Hudson describes environmental constitutionalism as being along several possible axes: it may be either fundamental or structural, or it may be either about the environmental ends to be achieved, or the means for achieving them. Fundamental constitutionalism can be thought of as ends-promoting, that is, "textual constitutional provisions protecting fundamental substantive or procedural citizen rights to a quality environment in national or subnational instruments." By comparison, Hudson describes structural environmental constitutionalism as the architectural means for achieving fundamental environmental ends, that is, "the allocation of environmental regulatory authority across levels of government within particular nations."

Hudson explains how structural environmental constitutionalism should and can be deployed to achieve various desired environmental constitutionalism-promoting outcomes: “Structural environmental constitutionalism has yet to be integrated into the environmental constitutionalism literature, yet there are a number of reasons why it should be given greater attention.” He explains how both the likelihood of adopting and eventual effectiveness of textual provisions is inextricably intertwined with whether the governance system is federal or unitary, national or subnational, customary or evolving judicial and legislative roles, as well as the variety of environmental constitutionalism under consideration.

Turning to implementation, Hudson then “details the promises and perils of structural environmental constitutionalism and its implications for achieving the goals of environmental constitutionalism generally—a different set of implications than those presented by fundamental environmental constitutionalism.” He concludes that “[f]ailing to see environmental governance authority as also a constitutional matter rather than merely a political matter can lead to path dependency and the perpetuation of institutions that negatively impact environmental governance.” Failing to appreciate structural limits and pathways, he writes, means that “governments get a free pass to continue to politically perceive that they are unable to act on certain important environmental subject matter. The study of structural environmental constitutionalism and adjustment of deficient constitutional structures will be critical to ensuring that structural deficiencies within constitutions do not undermine political will when it is present.”

Of course, appetite for environmental constitutionalism is hardly a given. In *A Greener Future for Caribbean Constitutions? The Bahamas as a Case Study*, **Lisa Benjamin and Michael Stevenson** relay “that while Caribbean countries should include substantial environmental provisions in their constitutions, this process has been largely unsuccessful.” Indeed, in bucking what is a global trend, few Caribbean countries have constitutions that advance environmental rights or other protections. Moreover, even when reform has occurred, it is of limited moment. In particular, Benjamin and Stevenson are frustrated by recent but limited success in reforming the Bahamian constitution to enshrine a constitutional right to a healthy environment that is unlikely to be consequential. There, while the recent reform effort induced constitutional changes to reflect environmental concerns, vague text and placement within a preamble rather than as an enforceable right in all likelihood relegates the provisions to practical obscurity.

They report that authentic efforts at constitutional reform to advance environmental protection in the Caribbean is hampered by “preference for the use of ordinary legislation and judicial intervention, the preferential weighting of some issues over others, and a concern to achieve legitimacy through public acceptance . . .” This “timidity,” toward constitutional reform “ultimately led to a restrictive approach being adopted regarding the scope of an environmental constitutional provision.”

Benjamin and Stevenson raise several concerns about this constitutional timidity. First, they reject the notion that legislative and regulatory means are adequate positive law bases to respond to efforts to advance environmental and human rights. Indeed, they observe that constitutional reform is often the product of maladjusted legislative outcomes, and that the very idea of constitutional adjustment is to provide levels for rule of law inputs that reinforce coordinate branches of government. In the Bahamas, for example, they note that “environmental protection is left largely to the domain of domestic legislation and institutional agencies within these states [and that] these mechanisms have proven largely inadequate to regulate and monitor the types of development projects undertaken in the country.” And, they report, a lack of will and resources, corruption, and inexorable poverty stack the deck against legislative and administrative efforts to promote and protect environmental and human rights.

Next, those opposing constitutional reform also advance the position that Benjamin and Stevenson take issue with the argument that an active and engaged judiciary ameliorates the need for constitutional reform. They note that judicial roles in common law traditions tend to be conservative and protective of property rights over environmental values. To be sure, they examine a number of cases that “have attempted to use the constitution to prevent environmentally destructive activities.” Yet on balance, they conclude, if anything, outcomes in these cases “speak to the urgent need for Caribbean countries to implement constitutional environmental provisions.”

Benjamin and Stevenson then describe the reluctance to have environmental rights “weigh” the same as civil and political rights, or even other socioeconomic and cultural rights, thus disabling constitutional environmental rights from the moment of inception. Last, they examine how in countries with common law traditions that environmental rights are viewed as being less legitimate than other constitutional rights.

Benjamin and Stevenson report that these multivariate degrees of resistance have predictable outcomes: “The reform exercises in the region to include environmental provisions have, to a large extent, been unsuccessful.” The case study is their experience in the Bahamas, “where the [constitutional] Commission’s common law approach to constitutional reform provided for a watered down recommendation for an environmental provision.” Furthermore, they argue that this result is intentional, “and in line with a conservative, common law approach to constitutional reform employed by the Commission,” along with a predisposition “to play it safe.” Thus, the lesson is that even when reform effort yields constitutional changes to reflect environmental concerns, vague text and placement within a preamble rather than as a constitutional bill of right can severely limit its practical effect.

Continuing with a focus on implementation challenges, here focusing on environmental rights text in Montana and Illinois’ constitutions, **Jack Tuholske** provides a litigator’s perspective on the “promises and pitfalls” of adjudicating subnational provisions in *U.S. State Constitutions and Environmental*

Protection: Diamonds in the Rough. His ultimate query is whether and the extent to which environmental rights differ from other constitutional rights.

Tuholske sees enormous and largely untapped potential in environmental rights provisions in state constitutions, writing that these provisions should not “lay fallow.” In Tuholske’s view, public interest lawyers are central to seeing to it that these provisions reach their potential, writing that they “have an obligation, along with their NGO clients, to stay abreast of pending cases and weigh in as amicus to use their expertise to help courts understand that environmental rights should not be treated differently than other constitutional rights.”

To Tuholske, skilled case selection and adjudication are paramount: “Constitutional rights are ultimately defined by judges, so strategic case selection and excellent lawyering matter.” He writes that strategic case selection “involve[s] public interest issues that relate directly to a clean and healthful environment. Clean water is always a good place to start. Good facts make it easier to create good law. Courts understand their role as the final arbiters of the constitution, a role easier to enforce when examining the constitutionality of a statute rather than a private or agency project.” Turning to recent development in Pennsylvania and Alaska, he finds solace in development of the public trust doctrine, which he attributes largely to choosing the right cases and then litigating them carefully. He concludes: “balanced interpretations of environmental rights can lead us away from the ill-conceived zero-sum game of development versus environmental protection and towards putting environmental rights on par with other human rights.”

Choosing cases wisely and litigating them well are especially important when invoking international norms—say a right to dignity—in the absence of an explicit constitutional right to a quality environment. In *Constitutions, Courts, Subsidiarity, Legitimacy and the Right to Potable Water*, **Itzhak E. Kornfeld** describes how in the *Abu Masad v. Water Commissioner* decision, the Supreme Court of Israel turned to international norms to hold that Bedouin citizens who were illegally occupying land are nonetheless entitled to potable water under the “dignity prong of Israel’s Basic Law.” In *Abu Masad*, six Bedouin men—representing hundreds of similarly situated Bedouin in Israel’s Negev Desert—argued that the Israeli government’s refusal to provide water for drinking and sanitation violated their fundamental rights to dignity. In the words of President Justice *Emeritus* Aharon Barak, Kornfeld quotes, “The right of a person to dignity is also the right to conduct his everyday life as a human being, without being subdued by distress and encountering unbearable [deprivation]. This is an approach, by which the right to dignity is the right that a person be ensured the minimum of material means to exist within the society in which he lives.” A “minimum of material means” includes a right to potable water, the court held: “[a]ccessibility to water sources for basic human use falls within the realm of the right to minimal existence with dignity. *Water is a vital need for humans, and without basic accessibility to water of a reasonable quality, humans cannot exist.*” Turning to international norms respecting dignity, including the International Covenant for Social, Economic and Cultural Rights

1996, the court agreed that there was a cognizable cause of action, and remanded the case for further proceedings.

Kornfeld concludes that to reach this result the court had to rely on “extra-constitutional influences, and the subsequent engrafting of human and environmental rights, specifically the right to/for water.” He wonders whether the court was aiming either to import international norms into the Israeli constitution—or what he calls “subsidiarity”—or to export national ideals of dignity into international norms, which he views as a means for advancing the court’s legitimacy. Either way, he concludes that the decision advances environmental constitutionalism.

Constitutional environmental rights can be used to advance interests in related fields such as environmental justice and human rights, particularly for indigenous populations, as **Catherine J. Iorns Magallanes** explores in *Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment*. Iorns holds the view that protecting indigenous rights—including constitutionally—is *sine qua non* to protecting the environment: “I suggest that indigenous rights are in fact also helping to protect the environment; therefore, in addition to upholding indigenous human rights for the sake of indigenous peoples, it is worth upholding indigenous human rights for the sake of all peoples, including for the better protection of the natural environment.” Iorns spotlights examples from Aotearoa (Maori word for New Zealand), which has a tradition of upholding minority indigenous Maori cultural rights to the natural world.

Iorns first contrasts indigenous cosmology—loosely described as considering humans as an interdependent part of nature—with the dominant and prevailing Western “anthropocentric” viewpoints, where humans are the object of constitutionalism as opposed to a subject of it. Then she explores how constitutional, treaty and other positive law conventions, including the Treaty of Waitangi, reflect rights of indigenous Maori in New Zealand. Next, Iorns addresses how a kind of constitutional cosmology informs decision-making about natural resources affecting Maori: “It is these special arrangements in particular which environmentalists have focused on because some recent examples have recognized in law the Maori view that the natural environment should be treated more as a person—indeed, as a relative—rather than simply as a resource.” She maintains that takeaways from the Maori experience “illustrate ways in which the law can be used to implement and incorporate indigenous cosmologies with a Western society and legal system and better protect the natural environment in the process.” At bottom, she concludes, “the protection of indigenous rights to culture and religion could better protect a healthy environment for everyone.”

Courts in New Zealand, she writes, have shown just how constitutionalism can contribute to advancing indigenous rights, and in turn, environmental protection norms. The leading case is the judicial recognition of agreements to recognize the legal personhood of the Whanganui River and Te Urewera forest: “A fundamental—though perhaps less obvious—aspect underlying these examples is the importance placed on the intrinsic value of nature itself.”

On the other hand, Iorns observes, “these examples do not fit squarely within the standard environmental protection paradigm, whereby nature is protected apart from people.” Instead, they reflect “the indigenous cosmological view of people as part of nature, not separate nor above it. Indeed, the legal recognition of personality in these examples also recognizes the Maori cosmology of ancestral nature and the indivisibility of the physical and metaphysical elements of the natural world.” She sees potential in how these outcomes might shape more cosmological considerations in implementing constitutional rights to a healthy environment in other parts of the world: “It is relevant that these changes have been agreed to for human rights reasons, not for environmental protection reasons. . . . It just so happens that Maori culture is based on a different cosmology and view of humans’ relationships with the natural world, one which traditionally takes a more protective or sustainable view of nature’s resources.”

In the aggregate, these papers manifest the increasing recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts. This global environmental constitutionalism represents the confluence of constitutional law, international law, human rights, and environmental law. National apex and constitutional courts are exhibiting a growing interest in constitutional environmental rights, and as courts become more aware of what their peers are doing, this momentum is likely to increase. These papers examine why such provisions came into being, how they are expressed, and the extent to which they have been, and might be, enforced judicially. It is, to our understanding, the first such symposium journal on the subject. We hope you find the readings that follow to be useful.

