You Say You Want an Environmental Rights Revolution: Try Changing Canadians' Minds Instead (of the *Charter*)

Jason MacLean

THE WELL-INTENTIONED ARGUMENT FOR constitutionalizing the right to a healthy environment in the *Charter* is misconceived legally, politically, and as a matter of progressive environmental advocacy. Arguments for constitutionalizing environmental rights unjustifiably privilege and assign causal efficacy to the Constitution's text and exaggerate the transformative potential of case-by-case litigation. Moreover, proposals for top-down constitutional amendment pay insufficient attention to the bottom-up normative foundations that generate effective policies. Not only do arguments in favour of establishing a *Charter* right to a healthy environment grossly underestimate or ignore altogether the political price tag of such a constitutional amendment, they likewise ignore the irony inherent in the proposal itself. Namely, even if it were politically possible to reach "7/50" and entrench the right to a healthy environment in the *Charter*, such an amendment would hardly be necessary in the first place. The same political will required to amend the *Charter* would already be reflected in progressive federal, provincial, and territorial environmental laws and policies.

In the short and mostly regrettable history of Canadian environmental law, however, governments have been largely unwilling to pursue environmental protection, save for brief periods of exceptional public concern. As a matter of policy, environmental law scholars

L'ARGUMENT BIEN INTENTIONNÉ VOULANT que l'on enchâsse dans la *Charte* le droit à un environnement sain est mal conçu sur les plans juridique et politique et en tant que défense progressiste de l'environnement. Les arguments en faveur de la constitutionnalisation des droits environnementaux privilégient de façon injustifiable le texte constitutionnel en plus de lui attribuer une efficacité causale tout en exagérant le potentiel transformateur des poursuites juridiques au cas par cas. Qui plus est, les propositions visant à adopter une modification constitutionnelle descendante n'accordent pas suffisamment d'attention aux fondations normatives ascendantes qui donnent lieu à des politiques efficaces. Ainsi, non seulement les arguments en faveur de l'établissement d'un droit à un environnement sain dans la *Charte* sous-estiment largement ou méconnaissent le coût politique d'une telle modification constitutionnelle mais ils font en outre fi de l'ironie inhérente à la proposition elle-même. En particulier, même s'il était politiquement possible d'atteindre la proportion de «7/50» et d'enchâsser le droit à un environnement sain dans la *Charte*, une telle modification ne serait pas vraiment nécessaire en premier lieu. La même volonté politique requise pour modifier la *Charte* serait déjà présente dans les lois et politiques progressistes adoptées au niveau fédéral, provincial, et territorial en matière d'environnement.

Au cours de la brève et déplorable histoire du droit canadien de l'environ-

and advocates should concentrate on the bottom-up drivers of greater public engagement in polycentric environmental governance. An emerging body of research suggests that advocates focus particularly on communicating the economic development and community resilience co-benefits of pursuing climate change mitigation and sustainability policies.

nement, toutefois, les gouvernements ont dans une large mesure évité d'assurer la protection de l'environnement, hormis pour de brèves périodes et ce, afin de répondre à des préoccupations exceptionnelles exprimées par le public. D'un point de vue stratégique, les chercheurs et défenseurs en droit de l'environnement devrait concentrer leurs efforts sur des moteurs ascendants de plus grand engagement public dans le cadre d'une gouvernance environnementale polycentrique. Selon un corpus croissant de travaux de recherche, les porte-parole de la défense de l'environnement insistent plus particulièrement sur les avantages conjoints que sont le développement économique et la résilience de la collectivité qui découlent des politiques de durabilité et d'atténuation des changements climatiques.

CONTENTS

You Say You Want an Environmental Rights Revolution: Try Changing Canadians' Minds Instead (of the *Charter*)
Jason MacLean

Introduction **187**

I. You Say You Want a Revolution (in Environmental Rights) **193**

II. You Say You'll Change the Constitution **207**

Conclusion: You Say You Got a Real Solution **215**

You Say You Want an Environmental Rights Revolution: Try Changing Canadians' Minds Instead (of the *Charter*)

Jason MacLean[*]

Only where the state is also understood as a social institution do its legal forms lend themselves to the pursuit of a common good other than organization by reciprocity. Re-creating an element of shared commitment in our political life ought therefore be at the top of any agenda for regulatory reform.[1]

No country would find 173 billion barrels of oil in the ground and just leave them.[2]

INTRODUCTION

We live in a new climate reality. According to data collected by the World Meteorological Organization, the atmospheric concentration of carbon dioxide (CO_2) first reached 400 parts per million (ppm) in 2015, then again in 2016, the Earth's hottest year on record,[3] and will likely remain

* College of Law, University of Saskatchewan. I would like to thank Lynda Collins and Nathalie Chalifour for their comments on a presentation of an earlier version of this paper, and Adam Dodek for inviting me to present this paper at the *The Charter and Emerging Issues in Constitutional Rights and Freedoms: From 1982 to 2032 Conference at the University of Ottawa Faculty of Law*. I would also like to thank this paper's two anonymous peer reviewers, whose comments significantly sharpened my argument. The usual disclaimer applies.

1 Roderick A Macdonald, "Understanding Regulation by Regulations" in Ivan Bernier & Andreé Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 81 at 139.

2 The Right Honourable Prime Minister Justin Trudeau, quoted in Jeremy Berke, "'No Country Would Find 173 Billion Barrels of Oil in the Ground and Just Leave Them': Justin Trudeau Gets a Standing Ovation at an Energy Conference in Texas", *Business Insider* (10 March 2017), online: <www.businessinsider.com>.

3 Jugal K Patel, "How 2016 Became Earth's Hottest Year on Record", *The New York Times* (18 January 2017), online: <www.nytimes.com>.

above 400 ppm "for many generations."[4] To put this development in perspective, the citizens' environmental organization, 350.org, takes its name from the research of renowned climate scientist James Hansen. In 2008, Hansen argued that humanity should aim to cap the concentration of CO_2 in the atmosphere at 350 ppm to avoid dangerous and irreversible climate tipping points, which are associated with a 2°C increase in global temperature above the pre-industrial norm.[5] Hansen has subsequently argued that even a 2°C global warming is "dangerous."[6] He and his colleagues warn that "we have a global emergency" and that "[f]ossil fuel CO_2 emissions should be reduced as rapidly as practical."[7]

Following the hope—hype?[8]—engendered by the *Paris Agreement* on climate change,[9] however, both the initial commitments and the actual policies of the *Agreement*'s 196 signatory countries fall far short of meeting the global community's aspiration of limiting global warming well below 2°C—and no more than 1.5°C—above the pre-industrial norm.[10] The *Paris Agreement* target translates into a finite and severely constrained planetary

4 World Meteorological Organization, Press Release, "Globally Averaged CO_2 Levels Reach 400 Parts per Million in 2015" (24 October 2016), online: <public.wmo.int>.

5 James Hansen et al, "Target Atmospheric CO_2: Where Should Humanity Aim?" (2008) 2 Open Atmospheric Science J 217 at 217. See also 350, "About", online: <350.org>.

6 James Hansen et al, "Ice Melt, Sea Level Rise and Superstorms: Evidence from Paleoclimate Data, Climate Modeling, and Modern Observations that 2°C Global Warming Could be Dangerous" (2016) 16 Atmospheric Chemistry & Physics 3761 at 3801.

7 *Ibid*.

8 See e.g. Jody Warrick & Chris Mooney, "196 Countries Approve Historic Climate Agreement", *Washington Post* (12 December 2015), online: <www.washingtonpost.com>; Coral Davenport, "Nations Approve Landmark Climate Accord in Paris", *The New York Times* (13 December 2015), online: <www.nytimes.com>; Fiona Harvey, "Paris Climate Change Agreement: The World's Greatest Diplomatic Success", *The Guardian* (14 December 2015), online: <www.theguardian.com>; Eric Reguly & Shawn McCarthy, "Paris Climate Accord Marks Shift Toward Low-Carbon Economy", *The Globe and Mail* (12 December 2015), online: <www.theglobeandmail.com>; Union of Concerned Scientists, Press Release, "Global Action on Historic Climate Change Agreement Expected in Paris" (12 December 2015), online: <www.ucsusa.org>; Anne-Marie Codur, William Moomaw & Jonathan Harris, "After Paris: The New Landscape for Climate Policy", Global Development and Environment Institute, Tufts University, Climate Policy Brief No 2 (February 2016) at 1, online: <www.ase.tufts.edu/gdae/Pubs/climate/ClimatePolicyBrief2.pdf>; Thomas L Friedman, "Paris Climate Accord is a Big, Big Deal", *The New York Times* (16 December 2015), online: <www.nytimes.com>.

9 *Report of the Conference of the Parties on its Twenty-First Session, Held in Paris from 30 November to 13 December 2015 Addendum Part Two: Action Taken by the Conference of the Parties at its Twenty-First Session*, UNFCCCOR, 21st Sess, Annex, Paris Agreement, UN Doc FCCC/CP/2015/10/Add.1 (2016) at 21–36 (entered into force 4 November 2016) [*Paris Agreement*].

10 Johan Rockström et al, "A Roadmap for Rapid Decarbonization: Emissions Inevitably Approach Zero with a 'Carbon Law'" (2017) 355:6331 Science 1269; see also Joeri Rogelj et al,

carbon budget. To have a 50% chance of limiting warming to 1.5°C by the year 2100, and a-greater-than-66% chance of meeting the 2°C target, global carbon emissions must peak no later than the year 2020.[11]

Under the *Paris Agreement*, Canada has committed to reducing its 2005 greenhouse gas (GHG) emissions levels by 30% by 2030.[12] It is important to note, that this target was originally set by the Harper Government and submitted as Canada's initial independently-determined national contribution during the United Nations *Framework Convention on Climate Change* negotiation process that culminated in the 2015 *Paris Agreement*.[13] At the time, the Liberal Party criticized the Harper target as unambitious and even "fake."[14] Nevertheless, the Trudeau government adopted the Harper target as its own, suggesting that it was quite ambitious after all.[15] Scientifically, however, it is decidedly less than ambitious and inconsistent with the Paris targets.[16]

Making matters worse, Canada is not even on track to meet its already unambitious GHG reduction target. According to Environment and Climate Change Canada, Canada is presently on pace to emit *at least* 30% *more* GHGs in 2030 than it emitted in 2005.[17] "[I]t remains to be seen," one Canadian environmental advocacy group observed in response to the government's report, "whether the government is serious about meeting its targets."[18] Such doubts are amplified by the Federal Government's support

---

"Paris Agreement Climate Proposals Need a Boost to Keep Warming Well Below 2°C" (2016) 534:7609 Nature 631.

11 Rockström et al, *supra* note 10 at 1269.

12 Laura Payton, "Liberals Back Away from Setting Tougher Carbon Targets", *CTV News* (18 September 2016), online: <www.ctvnews.ca>.

13 *Ibid*.

14 *Ibid*.

15 *Ibid*.

16 See e.g. Alina Averchenkova & Sini Maitikainen, "Assessing the Consistency of National Mitigation Actions in the G20 with the Paris Agreement" (London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, 2016), online: <www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2016/11/Averchenkova-and-Matikainen-2016.pdf>.

17 Environment and Climate Change Canada, *Canadian Environmental Sustainability Indicators: Progress Towards Canada's Greenhouse Gas Emissions Reduction Target*, Catalogue Number En4-144/48-2017E-PDF (Gatineau: ECCC, 2017) at 5, 10–11 online: <www.canada.ca/content/dam/eccc/migration/main/indicateurs-indicators/cced3397-174a-4f0e-8258-91dcfe295b34/progresstowardscanadaghgemissionstarget_en.pdf>.

18 Dale Marshall, National Program Manager, Environmental Defence, quoted in Alex Ballingall, "Environment Canada Report Says we are on Pace to Miss Emissions Target", *Toronto Star* (27 March 2017), online: <www.thestar.com>. See also Shawn McCarthy, "Carbon Prices Must Rise to Meet Canada's 2030 Greenhouse-Gas Targets: Officials", *The Globe and Mail* (31 March 2017), online: <www.theglobeandmail.com>.

for, and approval of, the construction of new oil pipelines to expand exploitation of Alberta's oil sands.[19] As Prime Minister Trudeau recently remarked at an oil and gas industry conference in Texas: "[n]o country would find 173 billion barrels of oil in the ground and just leave them."[20] Unsurprisingly, Mr. Trudeau received a standing ovation.[21]

"With these various political landslips intruding into climate policy and its implementation at such a critical juncture for climate mitigation efforts," argues the Editorial Board of *Nature Climate Change*, "the environment has probably never been more in need of championing *even if we need to think carefully about how that is done*."[22] "Environmental advocacy and education at this politically tumultuous time," the editorial continues, "is certainly needed to keep the climate and environment front and centre in the minds of the public and their politicians."[23]

The critical question is how best to accomplish this objective of promoting greater public support for environmental protection. A growing body of research suggests that interventions, based on the assumption that informing people about environmental impacts and their Anthropogenic causes will inspire pro-environmental behaviour, are not effective.

---

19 For an analysis of this contradictory policy approach, see Jason MacLean, "The Misleading Promise of 'Balance' in Canada's Climate Change Policy", *Policy Options* (29 March 2016), online: <policyoptions.irpp.org>.

20 Berke, *supra* note 2; see also Andrew Leach, "Is Justin Trudeau a Hypocrite on Climate Change?", *The Globe and Mail* (24 April 2017), online: <www.theglobeandmail.com>. For examples of political priorities favouring economic development over environmental protection abound in Canada, see Camille Bains, "BC Liberals Cite Jobs as Top Election Issue, NDP Pledges Climate Action", *The Globe and Mail* (1 May 2017), online: <www.theglobeandmail.com>.

21 Berke, *supra* note 2.

22 "Political Swings and Roundabouts" (2017) 7:4 Nature Climate Change 305 [emphasis added]. While the journal's editorial focuses on the climate change implications of recent and proposed executive orders of the Trump administration in the United States, its analysis is no less applicable to the current Canadian political context. Moreover, there is no meaningful conceptual distinction between the complexity of addressing climate change and the complexity of addressing environmental problems more generally. Both are equally beset by "enormous interdependencies, uncertainties, circularities, and conflicted stakeholders implicated by any effort to develop a solution" (see Richard J Lazarus, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future" (2009) 94:5 Cornell L Rev 1153 at 1159 [Lazarus, "Super Wicked Problems"]). For an analysis of the continuum of complexity of climate change and environmental problems more generally in Canada, see Jason MacLean, Meinhard Doelle & Chris Tollefson, "The Past, Present, and Future of Canadian Environmental Law: A Critical Dialogue" (2015) 1:1 Lakehead LJ 79 at 87–90 [MacLean, Doelle & Tollefson, "The Past, Present, and Future"].

23 "Political Swings and Roundabouts", *supra* note 22 at 305.

"[P]articularly if people do not already value environmental protection" in the first place.[24] Given the urgency of addressing climate change mitigation and related issues of environmental protection and sustainability, "we need to ask whether it is necessary to change people's beliefs about anthropogenic climate change, *or whether it is more important to convince people to engage in and support pro-climate behaviours and policies, irrespective of their beliefs*."[25]

Put another way, strategy matters. Time is short; we must rapidly decarbonize and immediately accelerate the transition to sustainability. Meanwhile, resources—political, economic, and epistemic—are scarce. While localized democratic experimentalism remains a particularly promising approach to crafting environmental policies and regulations in the Anthropocene,[26] we must also begin to critically assess proposed approaches to enhancing environmental protection and charting pathways to carbon neutrality.[27] Notwithstanding the shared pro-environmental commitment of countless activists and academics—"*Well, you know / We all want to change the world*"[28]—there also exists a remarkable range of contested approaches to vindicating this common objective, whereby "contestable choices for climate futures are woven into the technical elaboration of alternative pathways."[29] Were it not for the confounding crises of time and scarce resources, this messy pluralism of theory and practice would otherwise be a boon to environmental activism and scholarship, instead of an increasingly apparent constraint on coordinated collective action.[30]

---

24 "Politics of Climate Change Belief" (2017) 7:1 Nature Climate Change 1 at 1; see also Jan Willem Bolderdijk et al, "Values Determine the (In)Effectiveness of Informational Interventions in Promoting Pro-Environmental Behavior" (2013) 8:12 PLOS ONE e83911 1 at 6 online: <journals.plos.org>.

25 "Politics of Climate Change Belief", *supra* note 24 at 1 [emphasis added]; see also Dan M Kahan & Katherine Carpenter, "Out of the Lab and into the Field" (2017) 7:4 Nature Climate Change 309.

26 See e.g. Jason MacLean, "Autonomy in the Anthropocene? Libertarianism, Liberalism, and the Legal Theory of Environmental Regulation", Dal LJ 280 [forthcoming in 2017].

Delete opening parenthesis, the ibid, and 1 closing parenthesis

27 Silke Beck & Martin Mahony, "The IPCC and the Politics of Anticipation" (2017) 7:4 Nature Climate Change 311 (arguing that the assessment of potential pathways to meeting the *Paris Agreement* targets "must take into account political context and implications in a systematic way" (*ibid* at 312)).

28 "Revolution 1" (music) The Beatles, USA SKBO 3404 (25 November 1968) [The Beatles].

29 Beck & Mahoney, *supra* note 27 at 312.

30 For an analysis of this collective action problem vis-à-vis industry lobbying and regulatory capture, see Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 J Envtl L & Prac 111 [MacLean, "Striking at the Root Problem"].

This article critically and systematically assesses the argument advanced by some prominent environmental activists and academics that constitutionalizing—or even merely *attempting* to constitutionalize[31]—environmental rights is a strategically effective means of enhancing environmental protection, including climate change mitigation and the promotion of sustainability.[32] This is not, however, merely a question of constitutional law, although the analysis will, in the end, have something important to say about the vitally important nature of constitutional law theory and interpretation. Rather, it is foremost a question of the efficacy of a proposed pathway to a collective climate future. The Intergovernmental Panel on Climate Change's crucially important post-*Paris Agreement* mandate is to develop *performative* solutions to climate change. Namely, pathways and scenarios that not only represent possible futures but also help bring certain futures into being.[33] Pathways, in this framework, are "political interventions that can define the freedom of action and spectrum of choices in the future by determining the often irreversible path of developments."[34] It is in this high-stakes, polycentric framework that this article will assess the argument in favour of what some have called "the environmental rights revolution."[35] Can the addition of a new constitutional right to a healthy environment—any more than the addition of new scientific facts about

Delete opening parenthesis, the ibid, and 1 closing parenthesis

31 See e.g. Lynda M Collins, "Safeguarding the *Longue Durée*: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR (2d) 519 [Collins, "Environmental Rights in the Canadian Constitution"] (arguing that "[w]hile constitutional amendment is a difficult path in Canada, these benefits arguably justify the journey" (*ibid* at 359)).

32 For an initial sketch of the argument developed in further detail and scope below, see Jason MacLean, "Greening the *Charter*? Why Trying to Constitutionalize a Right to a Healthy Environment is Misguided", *CBA National* (28 February 2017), online: <nationalmagazine.ca> [MacLean, "Greening the *Charter*"]. For a critique based on libertarian legal theory as opposed to legal pluralism, see Bruce Pardy, "A Right to Clean Air? Constitutional Protection for the Environment may Leave People out of Luck", *Literary Review of Canada* 20:2 (March 2012), online: <reviewcanada.ca>.

33 See Jeff Tollefson, "Climate-Panel Chief Hoesung Lee Wants Focus on Solutions", *Nature News & Comment* (13 October 2015), online: <www.nature.com>.

34 Beck & Mahony, *supra* note 27 at 312.

35 See e.g. David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) [Boyd, *The Environmental Rights Revolution*]; David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) [Boyd, *The Right to a Healthy Environment*]; Dinah L Shelton, ed, *Human Rights and the Environment*, vol 1 (Cheltenham, UK: Edward Elgar Publishing, 2011); Lynda Collins, "Are We There Yet? The Right to Environment in International and European Law" (2007) 3:2 JSDLP 119; John Lee, "The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law" (2000) 25 Colum J Envtl L 283.

the causes and consequences of climate change—bring about the urgently needed shift in public values and political priorities? More specifically, can a constitutional right to a healthy environment expand the capacity and potential of environmental governance to respond to the proliferating effects of unsustainability and build new pathways to more viable and desirable futures?[36]

I. YOU SAY YOU WANT A REVOLUTION (IN ENVIRONMENTAL RIGHTS)

In arguing for an amendment to the Canadian Constitution that adds an explicit right to a healthy environment, Collins claims that the 1972 *Stockholm Declaration*[37] ushered:

> [A] stunning level of success in domestic constitutional systems around the world. The *vast majority of constitutions* that have been enacted or amended in the last four decades include some form of explicit constitutional recognition of the environmental rights of individuals, the environmental responsibilities of government, or both.[38]

Globally, Collins notes, "more than 90 states have constitutionalized some form of environmental right, variously described as the right to a healthy, ecologically balanced, safe, or wholesome environment."[39] If one includes states "that have constitutionalized environmental rights through the interpretation of other rights (*e.g.* the right to life) or through incorporation of international or regional human rights instruments, the number of nations that accord constitutional protection to environmental rights and/or obligations is 147 (out of a total of 193 U.N. members states)."[40]

Before proceeding to look closer at the putative effects of constitutional environmental rights on pro-environmental policies, it is important

36 This formulation is inspired by Robert Gibson's groundbreaking work on sustainability assessment. See Robert B Gibson, "Opportunities: Finding Best Openings for Influential Applications" in Robert B Gibson, ed, *Sustainability Assessment: Applications and Opportunities* (New York: Routledge, 2017) 246 at 252.

37 *Declaration of the United Nations Conference on the Human Environment* in *Report of the United Nations Conference on the Human Environment*, UNGAOR, 1972, UN Doc A/CONF.48/14/REV.1 (1973) at 3, 11 ILM 1416 (1972) [*Stockholm Declaration*].

38 Collins, "Environmental Rights in the Canadian Constitution", *supra* note 31 at 537 [emphasis added].

39 *Ibid*.

40 *Ibid* at 537–38.

to look a little more closely at the effect of the 1972 *Stockholm Declaration* on international (*i.e.* transboundary) environmental protection, including climate change mitigation. In particular, Principle 21 of the *Stockholm Declaration*, long considered the "cornerstone of international environmental law,"[41] addresses both the exploitation of natural resources by sovereign states and the prevention of transboundary environmental harm. Specifically, Principle 21 provides:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[42]

In an influential article entitled, "The Myth and Reality of Transboundary Environmental Impact Assessment,"[43] Knox argues that the predominant narrative about the *Stockholm Declaration's* cornerstone principle of transboundary harm prevention belongs to what Bodansky earlier described as the "myth system" of international environmental law. Specifically, a collection of ideas often considered part of customary international law that are in fact contradicted by actual state practice.[44] These ideas, Bodansky argues, "represent the collective ideals of the international community, which at present have the quality of fictions or half-truths."[45] Or as Schachter aptly puts it, "[t]o say that a state has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day."[46]

The mythical, or solely declaratory nature of international environmental law counsels skepticism in response to claims such as Collins' that

41 See e.g. Philippe Sands, *Principles of International Environmental Law I: Frameworks, Standards and Implementation* (Manchester: Manchester University Press, 1995) at 190; David A Wirth, "The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?" (1995) 29 Ga L Rev 599 at 620.

42 *Stockholm Declaration*, *supra* note 37, Principle 21.

43 John H Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96:2 Am J Intl L 291.

44 Daniel Bodansky, "Customary (and Not So Customary) International Environmental Law" (1995) 3:1 In J Global Leg Studies 106 at 116.

45 *Ibid*. See also Stepan Wood, Book Review of *Transboundary Harm in International Law: Lessons From the Trail Smelter Arbitration* (2007) 45:3 Osgoode Hall LJ 637.

46 Oscar Schachter, "The Emergence of International Environmental Law" (1991) 44:2 J Intl Affairs 457 at 463.

"the right to a healthy environment has achieved a stunning level of success in domestic constitutional systems around the world."[47] If Principle 21 of the *Stockholm Declaration,* which is the *cornerstone* principle of international environmental law, has largely failed to transform state practice and prevent transboundary environmental harm, it is difficult to maintain that the *Stockholm Declaration's* novel enunciation of a right to enjoy—and a responsibility to promote—a healthy environment has bent the arc of sovereign state practice toward pro-environmental policies and practices, including constitutionalized environmental protections. Indeed, it is difficult, if not impossible, to reconcile the stunning success that environmental rights have reportedly enjoyed in domestic constitutional systems—147 out of 193 UN member states, on Collins' account[48]—with "the great variety of transborder environmental harms that occur every day"[49] and the indisputable and ever-accumulating scientific evidence that "the environment has probably never been more in need of championing."[50]

How to explain this dramatic discrepancy? Bodansky rightly observes that "[l]awyers tend to be good, not at empirically studying behavior, but rather interpreting and utilizing texts—for example, cases, statutes, treaties, and resolutions. And, in writing about 'customary' international law, this is exactly what international lawyers do."[51] According to Bodansky, "[a] perusal of any work on customary international environmental law confirms that this methodology is the rule, not the exception."[52]

This analytic tendency makes Boyd's work on environmental rights all the more groundbreaking. In his books, *The Environmental Rights Revolution* and *The Right to a Healthy Environment*, Boyd undertakes a comprehensive empirical analysis of the explicit constitutionalization (*i.e.* through enactment or amendment) of environmental rights, and argues that such explicit constitutionalization produces pro-environmental policies and performance.[53] According to Boyd:

---

47 Collins, "Environmental Rights in the Canadian Constitution", *supra* note 31 at 537.

48 *Ibid* at 538.

49 Schachter, *supra* note 46 at 436.

50 "Political Swings and Roundabouts", *supra* note 22.

51 Bodansky, *supra* note 44 at 113. As argued in further detail below, Canadian constitutional law scholars also fit this description. For an analysis of this analytic tendency, see Roderick A Macdonald & Robert Wolfe, "Canada's Third National Policy: The Epiphenomenal or the Real Constitution?" (2009) 59:4 UTLJ 469.

52 Bodansky, *supra* note 44 at 114.

53 Boyd, *The Environmental Rights Revolution*, *supra* note 35; Boyd, *The Right to a Healthy Environment*, *supra* note 35.

> The empirical evidence paints a bright green picture. Countries with constitutional environmental provisions have stronger environmental laws, more rigorous enforcement, and increased public participation. More importantly, these countries have smaller ecological footprints (both globally and regionally), perform better on comprehensive indices of environmental performance, and have made superior progress in reducing air pollution and tackling climate change.[54]

In a subsequent quantitative analysis of the effects of constitutional environmental rights on environmental outcomes, Jeffords and Minkler conclude that their results support Boyd's "comprehensive, largely qualitative study."[55] They also note, however, that their measures of the legal enforceability and stringency of constitutional environmental rights provisions "are perhaps a bit too simple. In future specifications, we will have to consider the differences in keyword categories to see if some are more important than others in providing the [constitutional environmental rights] provision *with legal teeth*."[56] The authors candidly acknowledge that their analysis does not account for important economic, sociodemographic, and legal factors at the country level, including "a country's legal origins, governmental and non-governmental organizations tasked with protecting the environment, type of government, *natural resource endowments*, aspects of international trade, and statutory law, regulation, and court decisions."[57] Moreover, the authors concede that their measures are more general than specific and, in certain important and revealing instances, indirect rather than direct.[58]

---

54 David R Boyd, "Re: 'Governing the Environment,' by Bruce Pardy (March 2012)", *Literary Review of Canada* 20:3 (April 2012) [Boyd, "Governing the Environment"].

55 Chris Jeffords & Lanse Minkler, "Do Constitutions Matter? The Effects of Constitutional Rights Provisions on Environmental Outcomes", (2014) University of Connecticut Department of Economics Working Paper Series No 2014–16 at 16, online: <web2.uconn.edu/economics/working/2014-16.pdf>.

56 *Ibid* at 17.

57 *Ibid* [emphasis added]. For further methodological details regarding this study, see Christopher R Jeffords, "An Economist's Musings on Constitutions and the Environment", *Alumni News Department of Economics Indiana University of Pennsylvania* 54 (2013) 1, online: <www.iup.edu/economics/news/alumni-newsletters>.

58 Jeffords & Minkler, *supra* note 55. The authors note that "because we are examining the potential effects of CER provisions, which by their nature are general, we need a general outcome measure as well" (*ibid* at 8). Elsewhere, the authors explain that being a state party to the United Nations International Covenant on Economics, Social, and Cultural Rights (ICESCR) "implies accession/ratification of the ICESCR, both of which imply the covenant has (in part or in full) been integrated into the law of the country" (*ibid* at 9,

These are far from minor concessions. In an empirical *legal* analysis of the effects of a variety of constitutional rights, Chilton and Versteeg demonstrate that where constitutional rights do in fact influence government policy, they tend to do so by facilitating the establishment of *organizations* (*e.g.* political parties and unions) with both the incentives and the *means* to protect their interests. In this way, certain constitutional rights appear to be self-enforcing.[59] The political, economic, and social effects of constitutional rights, in other words, cannot be properly understood without taking close account of their lived, institutional context.[60] As Jeffords and Gellers acknowledge, further research, including case studies, is required to address the various limitations and qualifications of the existing empirical research. In particular, analyses of the effects of constitutional environmental provisions must acknowledge and address "*the realities and constraints inherent to different legal and political contexts*. Further implementation and subsequent analysis is necessary in order to better understand *the conditions under which environmental rights achieve their intended objectives*."[61] As indicia of the determinants of pro-environmental government policies, the presence versus absence of a constitutional environmental right along with arbitrary textual variations in the framing of constitutional environmental rights are simply far too general to be compelling, more noise than signal.[62]

These methodological shortcomings are perhaps nowhere more evident than in environmental rights advocates' trumpeting of the Latin American experience with constitutionalizing environmental rights. According to Boyd, for instance, "[t]here are major regional differences in the extent to which the constitutional right to a healthy environment is

n 16). This is plainly incorrect, and even in cases where the inference is justified, it says nothing about the effective level of enforcement that the covenant in question enjoys. The Canadian government's hot and cold and hot again embrace of the principle of free, prior, and informed consent (FPIC) under the *United Nations Declaration on the Rights of Indigenous Peoples* is a contemporaneous case in point. See e.g. "Globe Editorial: Ottawa Changes its Mind on UNDRIP, but it is Taking a Risk", Editorial, *The Globe and Mail* (25 April 2017), online: <www.theglobeandmail.com>.

59 Adam S Chilton & Mila Versteeg, "Do Constitutional Rights Make a Difference?" (2016) 60:3 American J Political Science 575 (this analysis does not include the constitutional environmental provisions, however).

60 See e.g. Chris Jeffords & Joshua C Gellers, "Constitutionalizing Environmental Rights: A Practical Guide" (2017) 9:1 J Human Rights Practice 136. For an intriguing analysis of this issue from a law reform perspective, see Nathalie Des Rosiers, "Rights Are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers" (2002) 18:3 Touro L Rev 443.

61 Jeffords & Gellers, *supra* note 60 at 143–44 [emphasis added].

62 See Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail—but Some Don't* (New York: Penguin Press, 2012).

exerting influence. *The most far-reaching changes have taken place in Latin America.*"[63] On the basis of recent enactments and amendments, Boyd cites the experiences of countries such as Argentina, Brazil, Colombia, Costa Rica, and Ecuador as countries at the "top of the list" when it comes to "creative ideas at the convergence of constitutions, human rights, and environmental protection."[64]

Even on cursory examination, however, the putative effects of newly constitutionalized environmental provisions in Latin American countries are difficult to discern.[65] Argentina is a case in point. Boyd contrasts Canada's efforts to clean up and conserve the Great Lakes with Argentina's efforts to clean up the severely polluted 64-kilometre Matanza-Riachuelo River, which runs through Buenos Aires and is widely regarded as one of the most polluted ecosystems in Latin America.[66] Boyd notes that politicians in both countries repeatedly reneged on commitments to reduce industrial pollution in these vital watersheds.[67] As of 2012, Canada invested less than 10 million dollars annually to restore the Great Lakes, which is but a fraction of the required level of investment.[68] By contrast, Boyd and other environmental rights advocates celebrate a 2008 decision of the Argentina Supreme Court[69] that relied on the right to a healthy environment added to the Argentine constitution in 1994.[70] The Court's decision, Boyd argues, "triggered a crackdown on polluters, a multi-billion dollar infrastructure upgrade and a dramatic increase in environmental monitoring.

63 Boyd, *The Environmental Rights Revolution*, *supra* note 35 at 282 [emphasis added].

64 *Ibid*.

65 For an initial sketch of this analysis, see MacLean, "Greening the *Charter*", *supra* note 32.

66 "Argentinian Supreme Court's Pioneering Judgement on Environmental Rights" (2017), *FuturePolicy.org* (blog), online: <www.futurepolicy.org>. See also Javier Auyero & Débora Alejandra Swistun, *Flammable: Environmental Suffering in an Argentine Shantytown* (New York: Oxford University Press, 2009); Jonathan Blitzer, "Life Along a Poisoned River", *The New Yorker* (25 October 2016), online: <www.newyorker.com>.

67 Boyd, "Governing the Environment", *supra* note 54.

68 *Ibid*.

69 Corte Suprema de Justicia de la Nación [Supreme Court], Buenos Aires, 8 July 2008, *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza—Riachuelo)* M 1569 XL (Argentina). Unofficial English Translation: ESCR, "Mendoza Beatriz Silva et al vs. State of Argentina et al on Damages (Damages Resulting from Environmental Pollution of Matanza/Riachuelo River)", online:<www.escr-net.org>.

70 Section 41 of the Federal Constitution of Argentina (revised version of 1994) states that "[a]ll inhabitants enjoy the right to healthful, balanced environment fit for human development" (see Constitute, "Argentina's Constitution of 1853, Reinstated in 1983, with Amendments through 1994" (New York: Oxford University Press), online: <constituteproject.org>).

Constitutional recognition of the right to a healthy environment has ushered in a new era of accountability in Argentina."[71]

The most recent evidence concerning the actual impact of the Court's ruling, however, paints anything but a green picture. In a status hearing before the Supreme Court in 2016, Argentina's government indicated that since 2008, it spent 5.2 billion dollars on the clean-up of the Matanza-Riachuelo.[72] According to a report prepared and filed with the Court in 2016 by the Matanza-Riachuelo Basin Authority (Acumar), the official government agency in charge of the clean-up, "[t]he Riachuelo is still serving the function of drainage for the economic and human activities in the city of Buenos Aires and a large part of the Greater Buenos Aires [region], as it has for the last 200 years."[73] In what has been called "Argentina's Never-Ending Environmental Disaster,"[74] each year more than 90,000 tons of heavy metals and other toxic substances are dumped into the river, the basin of which is home to approximately six million people.[75] According to Acumar, the Matanza-Riachuelo is "not just highly polluted, *but it continues to be contaminated*."[76]

How to explain the dramatic discrepancy between the high hopes engendered by the Supreme Court's 2008 decision, and its patent failure to improve the conditions of the Matanza-Riachuelo? Raúl Estrada Oyuela offers a localized explanation. Estrada is a member of the Association of La Boca, the neighbourhood where the Riachuelo flows into the Rio de la Plata. He is also a former diplomat who was Chairman of the Committee of the Third Conference of the Parties to the UNFCC, which finalized the negotiation of the United Nations Kyoto Protocol on climate change in 1997. In Estrada's view, "there is a lack of will to tackle the main problem, which is the pollution of the water, soil and air, because that would mean affecting the interests of the industries, which of course would have

71 Boyd, "Governing the Environment", *supra* note 54 [emphasis added]. David Suzuki, a leading Canadian environmental rights activist, has similarly lauded this decision of the Supreme Court of Argentina (see David Suzuki & Ian Hanington, "We Can Make Canada's Reality Match its Image" (5 December 2013), *Science Matters* (blog), online: <www.davidsuzuki.org>).

72 Daniel Gutman, "Argentina's Never-Ending Environmental Disaster", *Inter Press Service* (11 February 2017), online: <www.ipsnews.net>.

73 *Ibid*.

74 *Ibid*.

75 *Ibid*.

76 *Ibid*. See also Fabiana Frayssinet, "It Takes More than Two to Tango—or to Clean up Argentina's Riachuelo River", *Inter Press Service* (13 August 2014), online: <www.ipsnews.net>.

to make investments if they were forced to switch to a clean production system."[77]

Estrada's view is echoed by Andrés Nápoli, Director of the non-governmental organization Environment and Natural Resources Foundation, which intervened in the Matanza-Riachuelo case before the Supreme Court in 2008. According to Nápoli, the lack of progress is due to "the huge web of political and economic interests in Buenos Aires."[78] In 2014, Nápoli further observed that "[t]here are vulnerable people living along the banks of streams, or next to polluting industries. *Six years after the Supreme Court ruling we still don't know exactly who are at risk*."[79]

The never-ending environmental disaster of Argentina's Matanza-Riachuelo is a case in point regarding the methodological shortcomings of analyzing constitutional provisions and judicial decisions in isolation from their broader political and economic enforcement contexts. Regrettably, it is not an isolated case in Argentina. According to a recent investigation conducted by the *Washington Post*, for instance, Indigenous communities are at risk of being left both waterless and poorly compensated after international mining companies—including a Canadian-Chilean venture named Minera Exas—extracted lithium from the ground in their communities.[80] Meanwhile, and more broadly, a comparison of the consistency of G20 countries' climate change mitigation actions with their *Paris Agreement* commitments reveals that Argentina's past and present actions on climate change are—just as Canada's—"largely inconsistent with meeting

77 Gutman, *supra* note 72. This conflict of interest among affected stakeholders is an illustration of Lazarus' insight about the super wicked complexity of environmental problems, including but not limited to climate change, which is itself a result of a specific form of air—carbon dioxide—pollution, a classic environmental problem (see Lazarus, "Super Wicked Problems" and Climate Change", *supra* note 22).

78 Frayssinet, *supra* note 76.

79 *Ibid* [emphasis added]. It is important to note, however, that there is no suggestion that the concomitant presence of constitutionalized economic rights such as the right to property in Argentina or any other Latin American state is responsible for the ineffectiveness of constitutionalized environmental rights, which might suggest that such a constitutionalized environmental right would flourish in Canada because of the absence of constitutionalized economic rights here. To the contrary, Boyd argues that "the nations where courts are actively enforcing the right to a healthy environment are generally more active in enforcing social and economic rights" (Boyd, *The Environmental Rights Revolution*, *supra* note 35 at 128).

80 Todd C Frankel & Peter Whoriskey, "Tossed Aside in the 'White Gold' Rush: Indigenous People are Left Poor as Tech World Takes Lithium from Under Their Feet", *The Washington Post* (19 December 2016), online: <www.washingtonpost.com>. See also "El Salvador's Historic Mining Ban", Editorial, *The New York Times* (1 April 2017), online: <www.nytimes.com> ["Historic Mining Ban"].

the key requirements of the Paris Agreement."[81] Contrary to the repeated, but naked, assertions of environmental rights advocates, the existence of a constitutionalized right to a healthy environment in Argentina has not ushered in a new era of environmental accountability in respect of either its most enduring or its newly-emerging environmental problems.

Brazil is a case equally heralded by environmental rights advocates and equally illustrative of the limits of the environmental rights argument. "Brazil has had its ups and downs when it comes to protecting the environment," observes the leading science journal *Nature*, "*but on paper, at least, many of the country's policies are admirably green. The right to an 'ecologically balanced environment' is even enshrined in the Brazilian constitution.*"[82] This constitutional provision, however, has not proven to be much of an obstacle to the efforts of a loose coalition of "agricultural and industrial interests to undermine the government's authority—and constitutional obligation—to protect the environment."[83] In 2012, for instance, this coalition influenced the introduction of legislation to weaken Brazil's 1965 *Forest Code*, which was once a landmark environmental law governing forested lands across the country.[84] As of this writing, there are more than 20 legislative proposals before Brazil's Congress designed to loosen environmental regulations. These include a proposed constitutional amendment that would ensure approval of economic development projects once the project proponents themselves have submitted their own environmental impact analyses.[85] If approved, this proposal will effectively eliminate governmental environmental assessment, notwithstanding the government's constitutional obligation to maintain an ecologically balanced environment.

Nor is Brazil presently on track to meet its climate change mitigation commitments under the *Paris Agreement*.[86] Brazil's "National Policy on Climate Change" covers only the period until 2020 and uses a "business-as-usual baseline" rather than the more ambitious and stringent 2005 baseline used in setting its GHG reduction target under the *Paris Agreement*.[87]

81 Averchenkova & Maitikainen, *supra* note 16 at 6.

82 "Environmental Rights", Editorial, (10 November 2016) 539 Nature 139 [emphasis added].

83 *Ibid*.

84 *Ibid*.

85 Jeff Tollefson, "Brazil Debates Loosening Environmental Protections" (2016) 539 Nature 147. See also Chris Arsenault, "Brazil, Home of the Amazon, Rolls Back Environmental Protection", *Reuters* (15 May 2017), online: <www.reuters.com> (observing that "Brazil has embarked on the biggest roll back of environmental protections in in two decades").

86 Averchenkova & Maitikainen, *supra* note 16 at 15.

87 *Ibid*. See also Jan Rocha, "Brazil Risks 'International Pariah' Status with Deep Cuts to Amazon Monitoring", *Climate News Network* (20 April 2017), online: <climatenewsnetwork.net>.

But perhaps the most celebrated case in the so-called Latin American environmental rights revolution proffered by environmental rights advocates is Ecuador. In 2008, Ecuador approved a new constitution that, among other things, gave nature the "right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution"[88] and mandated that the government take "preventative and restrictive measures on activities that might lead to the extinction of species, the destruction of the ecosystems and the permanent alteration of the natural cycles."[89]

Local environmental activists note, however, that for all the hope accompanying the "Rights of Nature" provisions in Ecuador's new constitution, "there are shortcomings and contradictions with the laws *and the political reality on the ground*."[90] In particular, Ecuador has proceeded with oil drilling in the Yasuní National Park, one of the world's most biodiverse regions, along with open-pit mining in El Condor Mirador, home to multiple endemic species.[91] To satisfy the applicable case law and not contravene the country's constitutional Rights of Nature, the Ecuadorian government merely promised to perform environmental studies.[92] In order to ensure that no Indigenous communities are harmed, the government simply redrew its tribal territory maps, moving the Taromenane and Tagaeri tribes off the oil-rich areas.[93]

In Ecuador, there are two competing conceptions on how to achieve what is called *Buen Vivir* (living well): the extractive position and the conservationist position.[94] The extractive position views natural resources as a means to *Buen Vivir*, whereas the conservationist position promotes

88 Andrew C Revkin, "Ecuador Constitution Grants Rights to Nature" (29 September 2008), *Dot Earth* (blog), online: <dotearth.blogs.nytimes.com/2008/09/29/>.

89 See Edmund A Walsh School of Foreign Service, *Constitution of the Republic of Ecuador*, (31 January 2011) online: Political Database of the Americas <pdba.georgetown.edu>.

90 See e.g. Cyril Mychalejko, "Ecuador's Constitution Gives Rights to Nature", *OpEdNews* (27 September 2008), online: <www.opednews.com> [emphasis added].

91 Percy Olson, "A Constitutional Analysis of Drilling for Oil in Ecuador" (23 March 2014), *Michigan Journal of Environmental & Administrative Law* (blog), online: <www.mjeal-online.org/a-constitutional-analysis-of-drilling-for-oil-in-ecuado>. See also Beth Wald, "Inside the Struggle for Ecuador's Cordillera del Condor" (10 March 2016), *Global Greengrants Fund* (blog), online: <www.greengrants.org/2016/03/10/inside-the-struggle-for-ecuadors-cordillera-del-condor>.

92 *Ibid*.

93 *Ibid*. See also Nick Miroff, "In Ecuador, Oil Boom Creates Tension", *Washington Post* (16 February 2014), online: <www.washingtonpost.com>.

94 Jorge Guardiola & Fernando García-Quero, "Nature & *Buen Vivir* in Ecuador: The Battle Between Conservation and Extraction" (2014) 1:1 Alternautas 100.

respect for nature as part of the search for alternative pathways to achieving *Buen Vivir*.[95] As illustrated above, government policy in Ecuador has thus far followed the extractive approach, whereby the government opted for the extraction and commercialization of largely state-owned natural resources to ensure fiscal balance and support poverty reduction.[96] As former President—and key architect of the Rights of Nature and *Buen Vivir*—Rafael Correa explained, Ecuadoreans "cannot live as beggars sitting on a sack of gold."[97]

The Latin American experience with constitutionalizing environmental rights offers a starkly different lesson than the one typically offered by its advocates. Far from painting a bright green picture, the experiences of Argentina, Brazil, and Ecuador canvassed above suggest that the effects—if any—of constitutionalized environmental rights depend on their broader political and economic institutional contexts. Upon closer examination, however, those contexts suggest that constitutional environmental rights are more paper tigers than pro-environmental policy triggers. Indeed, even a cursory examination of these contexts reveals that environmental advocacy in Latin America struggles against not only the priorities of economic development that exist elsewhere[98] but also in a troubling number of cases against the absence of effective state policing and prevention of violence. The non-governmental organization, Global Witness, for instance, reports that 185 environmental activists were murdered worldwide in 2015, and more than half of those murders occurred in Latin America; 50 occurred in Brazil alone.[99] Throughout Latin America, there is an abundance of natural resources, often located on remote lands occupied and claimed by

95 *Ibid* at 101.

96 *Ibid*. In fact, as Riofrancos demonstrates, the rewriting of Ecuador's Constitution and its government's avid promotion of extractive projects were intimately related, concomitant developments (see Thea Riofrancos, "*Extractivismo* Unearthed: A Genealogy of a Radical Discourse" (2017) 31:2–3 Cultural Studies 277).

97 Rafael Correa, "Intervencíon XII Cumbre ALBA" (30 July 2013), online: YouTube <www.youtube.com/watch?v=W67MqQUnPTA> [translated by author]. See also Interview of Rafael Correa, "Ecuador's Path" (2012) 77 New Left Rev 89, online: <newleftreview.org> (arguing that "[i]t is madness to say no to natural resources, which is what part of the left is proposing—no to oil, no to mining, no to gas, no to hydroelectric power, no to roads" (*ibid* at 95)).

Delete opening parenthesis, the ibid, and 1 closing parenthesis

98 See e.g. Chris Jeffords, "Hydraulic Fracturing and the Constitutional Human Right to Water in Pennsylvania" (2014) 21:2 Pennsylvania Economic Rev 33 [Jeffords, "Hydraulic Fracturing"].

99 Global Witness, "On Dangerous Ground" (London: Global Witness, 2016)) at 8–9, online: <www.globalwitness.org>; see also "Dying to Defend the Planet: Why Latin America is the Deadliest Place for Environmentalists", *The Economist* (11 February 2017), online: <www.economist.com> ["Dying to Defend the Planet"].

Indigenous peoples, which state governments tend to insufficiently police and protect.[100] *The New York Times* recently characterized the situation in the region this way: "[t]he prospect of job creation and short-term returns has prompted several governments in Latin America to welcome mining companies *and keep regulation to a minimum*. In remote areas, unauthorized miners have sucked up natural resources without regard for the environmental and social damage they leave behind."[101] These conditions, notwithstanding the existence of constitutionalized environmental rights, are far more conducive to environmental exploitation—and significant human harm—than environmental protection.[102]

100 "Dying to Defend the Planet", *supra* note 99.

101 "Historic Mining Ban", *supra* note 80 [emphasis added]. Environmental rights advocates such as Boyd candidly—albeit contradictorily—acknowledge that "Latin American environmental laws are notorious for being strong on paper but weak in reality. The main reasons for this are a lack of enforcement resources and a reluctance to enforce laws when doing so could adversely affect economic interests" (Boyd, *The Environmental Rights Revolution*, *supra* note 35 at 146). However, much the same can be said about Canada, notwithstanding Canada's greater economic wealth. Canadian courts have long recognized this reality: "[o]ne must also be alert to the fact that governments themselves, even strongly pro-environmental ones, are subject to many countervailing social and economic forces" (see e.g. *Labrador Inuit Association v Newfoundland* (*Minister of Environment and Labour*), (1997), 155 Nfld & PEIR 93 at para 11, 152 DLR (4th) 50 (Nfld CA)). Indeed, a recent expert academic environmental law reform proposal in Canada is premised on "[t]he long-standing inadequacy of federal environmental laws," including "*the reality on the ground is that Canada's environmental laws are exceedingly weak in form and in their implementation*" (see Martin Olszynski et al, "Strengthening Canada's Environmental Assessment and Regulatory Processes: Recommendations and Model Legislation for Sustainability" (16 August 2017), online: University of Calgary <law.ucalgary.ca/files/law/strengthening-envirolaws-olszynski-et-al_aug-2017.pdf> at 3 [emphasis added]; see also Martin Olszynski et al, "Sustainability in Canada's Environmental Assessment", *Policy Options* (5 September 2017), online: <policyoptions.irpp.org>). Accordingly, a critical examination of the so-called Latin American environmental rights revolution has much to teach us about the likely ineffectiveness of a constitutional right to a healthy environment in Canada, absent underlying popular and political support for environmental protection and sustainability.

102 Meanwhile, legitimate—if nonetheless always contingent—environmental success stories in Latin America such as El Salvador's recently-enacted ban on metal mining—described as "historic" by *The New York Times*—stemmed, not from litigation based on a constitutional environmental right, but from a broad-based, grassroots social movement that also regrettably (but tellingly) involved the deaths of several anti-mining activists (see "Historic Mining Ban", *supra* note 80; Gene Palumbo & Elisabeth Malkin, "El Salvador, Prizing Water Over Gold, Bans All Metal Mining", *The New York Times* (29 March 2017), online: <www.nytimes.com>. But see M Belén Olmos Giupponi & Martha C Paz, "The Implementation of the Human Right to Water in Argentina and Colombia" (2015) 15 Anuario Mexicano de Derecho Internacional 323).

Much the same relationship between constitutionalized environmental rights and political economy exists closer to home, in jurisdictions having substantially similar constitutional frameworks (*mutatis mutandis*) as Canada's. Consider the case of Pennsylvania. In 1971, Pennsylvania's state constitution was amended to include the following right:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[103]

Pennsylvania also has abundant reserves of natural gas contained in the Marcellus Shale region. Natural gas—*i.e.* shale gas—can be extracted through hydraulic fracturing, a technological process that *post*-dates the state's environmental rights amendment.[104] In the Marcellus Shale region, drilling a horizontal well, for the purpose of hydraulic fracturing over the course of a single week requires between four and eight million gallons of water. Such wells are hydrofractured up to 20 times over their lifetimes.[105] Hydraulic fracturing results in negative externalities, including reductions in the quantity and quality of available drinking water.[106] Accordingly, hydraulic fracturing reflects—and is made possible by—the State Government's inability to fulfill its constitutional obligation to provide, among other things, pure water. Notwithstanding this right and a recent decision of the Pennsylvania Supreme Court,[107] hydraulic fracturing is rampant in

103 PA Const art I, § 27. For a detailed discussion of the inclusion of this right in Pennsylvania's Constitution, see John C Dernbach & Edward J Sonnenberg, "A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania" (2015) 24:2 Widener LJ 181.

104 Jeffords, "Hydraulic Fracturing", *supra* note 98 at 33, 35–36.

105 *Ibid* at 33.

106 *Ibid*.

107 *Pennsylvania Environmental Defense Foundation v Commonwealth*. 161 A (3d) 911 (Pa 2017). In this case, the Pennsylvania Supreme Court held that pursuant to the state's "Environmental Rights Amendment," funds that the state derives—via permits and licenses—from public natural resources must be reinvested into the conservation of those resources and cannot be used to fund other public programs. Notably, the decision does not limit natural resource extraction or environmental harm. It holds, rather, that any funds derived by the state therefrom go back into environmental conservation on the basis of public trust principles. Moreover, the decision, while hailed by some as transformative, raises far more questions than it answers (see e.g. Anthony R Holtzman et al, "Pennsylvania Supreme Court Issues Transformative Decision in Environmental Rights Amendment Case" (11 July 2017), *K&L Gates*

Pennsylvania, and its environmental effects have attracted considerable public attention.[108] According to Jeffords, however, the effect—if any—of the state's constitutional right to pure water is affected by the number of natural gas producers operating in the state, and the extent to which these producers can be held accountable for violations of the constitutional right. Both are conditions *external* to, and broader than, the scope and substance of the constitutional environmental right itself.[109]

This finding accords with the fate of constitutional environmental rights generally, which have "largely failed at the state level" in the United States.[110] As United States Court of Appeals for the Sixth Circuit Judge Jeffrey Sutton rhetorically asks: "[h]ow does even the most motivated court enforce a 'right to a healthful environment'?"[111] This objection is not simply about the vagueness of the right's formulation, which applies to a greater or lesser extent to most, if not all, constitutional rights. However, such language can obscure deeper normative differences about the substance and scope of constitutional rights.[112] Rather, Judge Sutton's objection is more about institutional competence: "[c]ourts are institutionally ill-equipped to do either of the two things ultimately needed to increase the funding for a policy, even a constitutionally protected policy: impose a tax increase themselves or order a reprioritization of a fixed budget."[113] Consequently, most constitutionalized environmental rights—including state-level environmental rights in the United States—"are under enforced because they are not designed or deemed to be self-executing."[114]

Legal Insight (blog), online: <www.klgates.com/pennsylvania-supreme-court-issues-transformative-decision-in-environmental-rights-amendment-case-07-11-2017>).

108 See e.g. Eliza Griswold, "The Fracturing of Pennsylvania", *The New York Times Magazine* (17 November 2011), online: <www.nytimes.com>.

109 Jeffords, "Hydraulic Fracturing", *supra* note 98.

110 Jeffrey S Sutton, "Courts as Change Agents: Do we Want More—Or Less?" (2014) 127 Harv L Rev 1419 at 1440.

111 *Ibid*.

112 This implicates the balancing of competing rights and interests, which in Canada plays out under section 1 of the *Charter*. This issue is discussed in the next section below. See generally Jamie Cameron, "The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy Ltd v Attorney-General of Quebec*" (1989) 35 McGill LJ 253 [Cameron, "The Original Conception of Section 1"]; see also Lynda M Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 Windsor Rev Legal Soc Issues 7 at 30–31 [Collins, "An Ecologically Literate Reading of the Charter"].

113 Sutton, *supra* note 110 at 1441.

114 John C Dernbach, James R May & Kenneth T Kristl, "*Robinson Township v Commonwealth of Pennsylvania:* Examination and Implications" (2015) 67 Rutgers L Rev 1169 at 1194. See e.g. *Enos v Secretary of Environmental Affairs*, 731 NE (2d) 525 at 532 (Mass 2000) (the Supreme

Perhaps unsurprisingly, then, even enthusiastic advocates of constitutionalizing environmental rights like Jeffords and Minkler "emphasize that our results do not support unqualified implementation of [constitutional environmental rights] as a strategy to increase a country's environmental performance."[115] In addition to the constitutional environmental rights model's failure to capture the influence of a country's economic and political institutional contexts, to which this article will ultimately return,[116] their analysis also neglected "to incorporate the *cost* of [constitutional environmental rights] implementation."[117] Given the paramount importance of the opportunity costs associated with potential strategic avenues for enhancing environmental protection and charting pathways to a more sustainable future, this omission is critical and merits closer attention. This article turns now to a consideration of the strategic implementation costs of attempting to constitutionalize the right to a healthy environment in Canada.

II. YOU SAY YOU'LL CHANGE THE CONSTITUTION

Canadian constitutional environmental rights advocates' preferred approach is to amend the Constitution—more specifically the *Charter of Rights and Freedoms*—to add an explicit right to a healthy environment. Collins and Boyd argue that "the right to a healthy environment also delivers a much broader form of environmental protection than that offered by existing *Charter* rights. The environmental scope of existing constitutional provisions is likely limited to conduct that implicates human health or protected

Court of Massachusetts held that the state constitutional right to clean air and water does not afford an independent means to challenge an agency's decision to grant a permit to operate a sewage treatment plant under the Massachusetts *Environmental Policy Act*). The judiciary of Montana has proven equally reluctant to enforce the state's constitutional environmental right (see e.g. *NPRC v Montana Bd of Land Comm'rs*, 288 P (3d) 169 at 174–75 (Mont 2012)). This difficulty equally affects the enforcement of constitutional environmental rights worldwide (see generally James R May & Erin Daly, "Global Constitutional Environmental Rights" in Shawkat Alam et al, eds, *Routledge Handbook of International Environmental Law* (New York: Routledge, 2013) 603).

115 Jeffords & Minkler, *supra* note 55 at 16.

116 Indeed, the absence of the economics and politics of environmental protection, while fatal to the constitutional environmental rights argument, usefully gestures toward a more robust approach to enhancing environmental protection and accelerating the transition to sustainability.

117 Jeffords & Minkler, *supra* note 55 at 16 [emphasis added].

Aboriginal rights (including title)."[118] Collins summarizes Boyd's research on the benefits of constitutional environmental rights globally, and his argument for a constitutional amendment in Canada thus:

> ...the inclusion of the right to a healthy environment in the Canadian Constitution would: decrease environmentally-induced mortality and morbidity, preserve our natural heritage for future generations, reflect the centrality of the environment in Canadian national identity, clarify the environmental obligations of all levels of government, and reflect the core importance of environmental values in Indigenous legal systems in Canada, as well as aligning our Constitution with the international law of environmental human rights.[119]

Collins concludes by noting that "[w]hile constitutional amendment is *a difficult path in Canada, these benefits arguably justify the journey*."[120]

"Difficult," however, does not begin to do justice to the complexity of constitutional amendment in Canada. Amendments to the Constitution, including the *Charter*, not specifically enumerated in sections 42, 43, 44, and 45 of Part V of the *Constitution Act, 1982*[121] are subject to the amendment procedure set out in section 38(1) of same. Section 38(1) requires resolutions of the Senate and the House of Commons, and resolutions of the legislative assemblies of at least two-thirds of the provinces having at least 50 percent of the population of all the provinces,[122] the so-called "7/50 formula."[123] As Hogg notes, "[i]t will be difficult to secure *any* amendment to the Constitution, because of the high level of agreement required by the general amending procedure. Eight governments out of eleven is a group which is hard to assemble on *anything*."[124]

Hogg further notes that no matter how much public consultation and participation has occurred in respect of a given amendment proposal, "at some stage in the process of amendment there has to be an agreement of

118 Lynda M Collins & David R Boyd, "Non-Regression and the *Charter* Right to a Healthy Environment" (2016) 29 J Envtl L & Prac 285 at 293.

Delete opening parenthesis, the ibid, and 1 closing parenthesis

119 Collins, "Environmental Rights in the Canadian Constitution", *supra* note 31 at 539.

120 *Ibid* [emphasis added]. But see Collins, "An Ecologically Literate Reading of the Charter", *supra* note 112 ("[*f*]*ortunately, no amendment is required to import ecological rights into the Canadian Charter of Rights and Freedoms*" (*ibid* at 48) [emphasis added]).

121 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 42–45.

122 *Ibid* at s 38(1).

123 Adam Dodek, "Amending the Constitution: The Real Question Before the Supreme Court", *Policy* (March/April 2014) 35 at 36.

124 Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2015) at 4-40 [emphasis added].

the first ministers.... Unfortunately, obtaining an agreement from the first ministers inevitably turns into a process of bargaining, which excludes popular involvement at the crucial moment, and which leaves no assurance that any given position has been accepted or rejected on the merits."[125] As Dodek observes, "[o]n this basis, since patriation over 30 years ago, it has proven difficult, if not impossible, to amend the Constitution."[126] Indeed, the *Charter* has not been amended in its (thus far) 35-year history. That the *Charter* has not once been amended belies the tacit assumption animating the environmental rights argument that it is easier to engender support for an abstract constitutional right to a healthy environment than it is to popularize complex policies and regulations capable of promoting environmental protection and sustainability.

The political difficulty associated with the constitutional amendment procedure in Canada gestures towards its more fundamental paradox, particularly in respect of environmental protection, in which the federal, provincial, and territorial governments play key roles. If the political will at each of these levels of government required to constitutionalize a greater level of environmental protection actually existed (it does not), then a constitutional amendment would not be required in the first place. That political will would already be reflected in sufficiently stringent and robustly-enforced legislation at the federal, provincial, and territorial levels.[127]

---

125 *Ibid* at 4-42–43. For a contemporary example, consider the strident opposition of Premiers Brad Wall and Brian Pallister to a nationwide price on carbon (see e.g. Mia Rabson, "Saskatchewan Environment Minister says Province Will Never Allow a Carbon Tax", *National Observer* (4 May 2017), online: <www.nationalobserver.com>).

126 Dodek, *supra* note 123 at 36. But see Kate Glover, "Complexity and the Amending Formula" (2015) 24:2 Cont Forum Const 9; see also Jamie Cameron, "Legality, Legitimacy and Constitutional Amendment in Canada" (2016) Osgoode Legal Studies Research Paper Series No 71/2016.

127 The literature on this score is regrettably deep, see e.g. Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996); Stepan Wood, Georgia Tanner & Benjamin J Richardson, "What Ever Happened to Canadian Environmental Law?" (2010) 37 Ecology LQ 981; Jason MacLean, Meinhard Doelle & Chris Tollefson, "Polyjural and Polycentric Sustainability Assessment: A Once-in-a-Generation Law Reform Opportunity" (2016) 30:1 J Envtl L & Prac 35 [MacLean, Doelle & Tollefson, "Sustainability Assessment"]. Moreover, if a *Charter* right to a healthy environment were accompanied by the doctrine of non-regression, as Collins and Boyd propose (without explaining how), not only would there be even greater industry and political resistance to the amendment, but it is also likely that the broad popular support assumed—but not empirically established—by environmental rights advocates would diminish significantly. Recent public opinion poll data bear this out. For example, when asked to choose between the policy option of reducing carbon emissions while also building new oil pipelines (which would violate the doctrine of non-regression), and the option of a ban on new oil

The lengthier experience with constitutional amendment in the United States (US) is instructive in this regard. There are two ways to amend the US Constitution. The first, and better-known, is set out in Article V: proposed amendments must be approved by two-thirds of each chamber of Congress (*i.e.* the House of Representatives and the Senate) and subsequently ratified by three-fourths of the states.[128]

But, Article V also allows for an alternative method of proposing constitutional amendments that cuts out Congress altogether: two-thirds of state legislatures can call for a constitutional convention, and three-fourths of the states can ratify any resulting amendment proposal.[129] This method has yet to produce a constitutional amendment, and that is arguably by design as the framers of the US Constitution sought to avoid such outright partisanship. "The principle is that an idea should have demonstrated broad and transparent appeal before it is adopted into a framework of the republic."[130]

Since the ratification of the US Bill of Rights, there have been five amendment proposals that received Congressional approval but failed to win state ratification, notably including the eradication of child labour and the protection of equal rights for women. Reflecting on not only these legislative developments but also on the ongoing failure to amend the US Constitution so as to bar budget deficit spending, Cobb notes that "most causes worthy of legitimacy can obtain it without the Constitution being amended; *if the logic of a federal balanced budget were so compelling, it would have met with a greater degree of success legislatively*."[131]

Now, this is arguably an overly-sanguine account of the workings of the legislative process, which tends to be subject to capture by special interests. This is especially true in respect of environmental legislation, both in

---

pipeline construction as a further and progressive means of reducing emissions (which would be consistent with non-regression), a large majority of Canadians continues to support the *former* policy option (see Bruce Anderson & David Coletto, "Public Attitudes on Oil, Pipelines, Climate, and Change", *Abacus Data* (9 September 2017), online: <abacusdata.ca>). Nevertheless, the same polling data reveal, quite apart from any proposal to amend the *Charter*, "the widespread feeling, including in Alberta, that Canada should not stand apart from the race to innovate with cleaner forms of energy" (Anderson & Coletto, *supra* note 127). See also Jason MacLean, "Paris *and* Pipelines? Canada's Climate Policy Puzzle" (2017) J Envtl L & Prac [forthcoming 2017].

128 US Const art V.

129 *Ibid*.

130 Jelani Cobb, "Comment: A State Away", *The New Yorker* (13 March 2017) 27 at 28.

131 *Ibid* [emphasis added].

the US[132] and Canada.[133] Nevertheless, this account undoubtedly illustrates the political underpinnings of constitutional amendment processes.

The US experience offers a further, and intricately nuanced lesson. On the one hand, otherwise ordinary legislation that is bipartisan and popular can be characterized as "sticky,"[134] and thus difficult to displace notwithstanding the absence of constitutional entrenchment. But on the other hand, legislation and administrative action can also be effectively constrained and ultimately undermined by actions that are beyond the reach of constitutional rights. To date, the efforts of the Trump administration to reduce and revise the role of the US Environmental Protection Agency (EPA) illustrate this point. In proposing his first budget plan, President Trump signalled an intention to cut the EPA's already-underfunded budget by 31% for the 2018 fiscal year.[135] However, the budget agreement ultimately reached by the US Congress rejected this sharp cut to the EPA and a variety of US science agencies.[136] Ultimately, the EPA's budget was still reduced, but only by 1% (for now).[137] Congress's interests—in the aggregate—are broader, more varied, and more significantly entrenched than the President's.[138] *The Economist* summed up the situation by observing that

> [r]educing the EPA would be easier if Congress were to amend the environmental legislation underpinning the EPA's rules—for example, by binning the provisions of the Clean Air Act on which the [Obama Clean Power Plan] rests. But there is currently no chance this could evade the Democratic filibuster in the Senate, *and many Republican congressmen*

132 See e.g. Richard J Lazarus, "Congressional Descent: The Demise of Deliberative Democracy in Environmental Law" (2006) 94:3 Geo LJ 619 at 621–22.

133 See MacLean, "Striking at the Root Problem of Canadian Environmental Law", *supra* note 30 at 114–15; MacLean, Doelle & Tollefson, "The Past, Present, and Future", *supra* note 22 at 102–03.

134 See e.g. Kelly Levin et al, "Overcoming the Tragedy of Super Wicked Problems: Constraining our Future Selves to Ameliorate Global Climate Change" (2012) 45:2 Policy Sci 123 at123; Aaron L Nielson, "Sticky Regulations", U Chicago L Rev [forthcoming in 2018].

135 See Sara Reardon & Erin Ross, "Science Wins Reprieve in US Budget Deal", *Nature* (1 May 2017), online: <www.nature.com>.

136 *Ibid*.

137 *Ibid*.

138 For example, the Senate rebuked the Trump administration's regulatory reform agenda by voting to uphold rather than overturn an Obama-era climate-change regulation that controls the release of methane from oil and gas wells on public land (see Coral Davenport, "In a Win for Environmentalists, Senate Keeps an Obama-Era Climate Change Rule", *The New York Times* (10 May 2017), online: <www.nytimes.com>).

> *would not welcome the fight. Around 60% of Americans say they are in favour of more environmental protection.*[139]

Indeed, according to a report by *The New York Times* during the lead-up to the bipartisan congressional budget deal, "[t]ens of thousands of demonstrators, alarmed at what they see as a dangerous assault on the environment by the Trump administration, poured into the streets…to sound warnings both planetary and political about the Earth's warming climate."[140]

At the same time, however, the Trump administration is nevertheless proceeding with its agenda to revise and reduce the EPA's role in regulating industry pollution. In perhaps the most significant move to date, the EPA has begun dismissing academic members of its scientific review board, which reviews the research used to draft rules and regulations on pollution, ranging from hazardous waste to GHG emissions. At the same time, the EPA suggested that the board's academic, environmental, and social scientists will be replaced by representatives from the very industries whose pollution the EPA is mandated to regulate.[141] According to the Union of Concerned Scientists, "[t]his is completely part of a multifaceted effort to get science out of the way of a deregulation agenda."[142] The "premature removals of members of this Board of Science Counselors when the board has come out in favour of the E.P.A. strengthening its climate science, plus the severe cuts to research and development—you have to see all these things as interconnected."[143]

So it would indeed appear. And yet, even if the US Constitution contained a right to a healthy environment, policy changes like the EPA's dismissal of independent academic scientists—framed in terms of staffing the EPA's review board with members "who understand the impact of

139 "Revenge of the Polluters: A Scourge of the EPA Takes Over at the EPA", *The Economist* (23 February 2017), online: <www.economist.com> [emphasis added]. The Trump administration faces even stronger bipartisan and popular opposition to fulfilling President Trump's campaign pledge to withdraw the United States from the *Paris Agreement* (see George P Shultz & Ted Halstead, "The Business Case for the Paris Climate Accord", *The New York Times* (9 May 2017), online: <www.nytimes.com>).

140 Nicholas Fandos, "Climate March Draws Thousands of Protesters Alarmed by Trump's Environmental Agenda", *The New York Times* (29 April 2017), online: <www.nytimes.com>. Similar public outcry recently occurred in Australia over proposed cuts to funding of basic climate science (see Justin Gillis, "A Parable from Down Under for U.S. Climate Scientists", *The New York Times* (8 May 2017), online: <www.nytimes.com>).

141 See Coral Davenport, "E.P.A. Dismisses Members of Major Scientific Review Board", *The New York Times* (7 May 2017), online: <www.nytimescom>.

142 *Ibid.*

143 *Ibid.*

regulations on the regulated community"[144]—would surely fall outside the scope and substance of any such constitutional right. To imagine how, simply recall the examples provided above, ranging from Pennsylvania to Brazil. As one environmental scientist and member of the EPA's review board characterized the dismissal: "[t]his is clearly very political."[145]

And so it is. Issues of environmental protection and sustainability are irreducibly political. Returning to the Canadian context, the recent provincial election in British Columbia illuminates the political nature of these issues. The Liberals, who governed the province with a majority of seats for the previous 16 years, campaigned on a promise to "get to yes" with respect to natural resources development. However, the Official Opposition, the New Democratic Party, campaigned on a promise to block or review anew a number of controversial energy development projects—*e.g.* the Trans Mountain pipeline expansion, the Pacific NorthWest LNG terminal and pipelines, and the Site C hydroelectric dam—because of environmental concerns and objections of local Indigenous communities.[146] "In British Columbia, the political debate is framed by these dimensions: Jobs versus sustainability, and what degree of influence should the province's 203 First Nations have on those decisions. *In this election, British Columbian voters will be choosing where the balance should rest*."[147] The result? In one of the closest Canadian elections in recent history, the Liberals emerged with a tenuous minority government, with the Green Party holding the balance of power.[148]

144 *Ibid* (said spokesperson for the EPA's lead administrator, Scott Pruitt).

145 *Ibid* (said Joseph Arvai).

146 See e.g. Justine Hunter, "Local Resources, National Impact", *The Globe and Mail* (7 May 2017), online: <www.theglobeandmail.com> [Hunter, "Local Resources, National Impact"]. The constitutional duty to consult Indigenous peoples under section 35 of the *Constitution Act, 1982*, *supra* note 121 further illustrates the inescapably political nature of the contested balancing of traditional Indigenous rights and economic development. In the Supreme Court of Canada's recent decision clarifying the nature of the right protected under section 35, the Court noted that "[t]rue reconciliation is rarely, if ever, achieved in courtrooms" (*Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 24). The Court proceeded to reiterate its earlier conclusion that "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests" (*Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 14). Advocates of a constitutional right to a healthy environment would do well to heed the Court's own admonition against prioritizing case-by-case *ex post facto* litigation over the *ex-ante* negotiation and agreement.

147 Hunter, "Local Resources, National Impact", *supra* note 146 [emphasis added].

148 See Justine Hunter, "BC Liberals Cut to Minority with Greens Holding Balance of Power", *The Globe and Mail* (10 May 2017), online: <www.theglobeandmail.com> (soon after the election, the NDP and the Greens formed a coalition government).

This is not, however, an argument against so-called "juristocracy;"[149] the critical term used to describe and decry a transfer of power from representative institutions to judiciaries. Nor is it a denial of the central importance of the Constitution to Canada's legal system, or its relevance to key policy issues. The argument advanced here, rather, is subtler, and twofold. First, advocates of constitutionalizing environmental rights cannot hope to escape the irreducible politics of environmental protection and the promotion of sustainability. No matter how desirable, the avoidance of what is perceived by many environmental rights advocates as a failed political process, which is surely part and parcel of the constitutionalization strategy, is simply not possible because environmental rights advocates' preferred means of constitutionalization—constitutional amendment—is irreducibly (and ironically) political. Second, even when environmental rights advocates shift their strategic lens to advancing environmental protection through litigation based on existing *Charter* rights (*e.g.* sections 7 and 15), the unavoidable—and unavoidably political—balancing of competing interests nevertheless looms large, whether it occurs in respect of governments' and courts' recourse to section 1 of the *Charter*, or in respect to the narrow scoping of *Charter* rights themselves.[150] The recourse to politics in respect of environmental protection is unavoidable, although it is hardly news. As Doremus rightly observes, "despite a societal consensus that the environment merits some level of protection, individuals strongly

149 See e.g. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004) at 1. But see Jason MacLean & Chris Tollefson, "Climate-Proofing Judicial Review After Paris: Judicial Competence, Capacity, and Courage" (2017) J Envtl L & Prac [forthcoming 2018].

150 See e.g. Cameron, "The Original Conception of Section 1", *supra* note 112; see also Cameron Jefferies, "Filling the Gaps in Canada's Climate Change Strategy: 'All Litigation, All the Time…?'" (2015) 38:5 Fordham Intl LJ 1371 (arguing that "it is unlikely that a court would, even in the absence of a clear American-style Political Questions Doctrine, choose to weigh in on and/or order the sort of relief required to close the gaps in Canada's national [climate change] strategy" (*ibid* at 1374)). For a comprehensive analysis of environmentalists' dismal record before the Supreme Court of the United States, see Jonathan Z Cannon, *Environment in the Balance: The Green Movement and the Supreme Court* (Cambridge, MA: Harvard University Press, 2015). See also Richard Lazarus, "The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains" (2012) 100:5 Geo LJ 1507 at 1509–10. (observing that the US Supreme Court has decided 17 cases arising under the *National Environmental Policy Act*—"environmental law's 'Magna Carta' in the United States"—and that the government has won every case, almost all of them unanimously).

Delete opening parenthesis, the ibid, and 1 closing parenthesis

disagree about the desirable extent of protection and what trade-offs it justifies."[151]

Politics, however, is not merely an *obstacle* to the constitutionalization of environmental rights. From the broader perspective of establishing and entrenching policies that promote environmental protection and sustainability that will stick, the perennial problem of politics points towards promising, if challenging, *opportunities* for policy design and law reform. These are explored in the concluding section below.

CONCLUSION: YOU SAY YOU GOT A REAL SOLUTION

This article takes its title and subtitles from the Beatles' iconic song, "Revolution." This narrative device is far more than stylistic. The Beatles' hit song resonates in a number of striking, counterintuitive ways. On the surface, the song may sound like an unabashed call for revolution, particularly to contemporary ears following the use of the song in a famous television commercial for Nike shoes in 1987.[152] But, on closer inspection of not only the lyrics but also their normative origins, "Revolution" turns out to be something altogether. According to a leading biographer of the group, Ian MacDonald, the song's author, John Lennon, was profoundly conflicted about the song's message.[153] The immediate inspiration for the song was the May '68 student uprising in Paris, along with the reaction to the Tet Offensive in Vietnam and the assassination of Martin Luther King, both of which followed soon after.[154] Lennon was profoundly wary of the violence and destructive impulses of the radical Maoist Left at the time, and endeavoured in his lyrics to argue in favour of a more peaceful plan aimed at changing hearts and minds. As MacDonald puts it, Lennon's "rejection of 'minds that hate' and dry demand to be shown 'the plan' shows an intuitive grasp of the tangled issue of ideology."[155] In Lennon's lyric, there is also a finely-tuned sense of "small-r" revolutionary political strategy, one that continues—in modified form—to resonate today: "*But*

151 Holly Doremus, "Adapting to Climate Change with Law That Bends Without Breaking" (2010) 2 San Diego J Climate & Energy L 2:45 at 51.

152 See e.g. Nick Ripatrazone, "Story Behind Nike's Controversial 1987 'Revolution' Commercial", *Rolling Stone* (22 February 2017), online: <www.rollingstone.com>.

153 Ian MacDonald, *Revolution in the Head: The Beatles' Records and the Sixties*, 3rd ed (Chicago: Chicago Review Press, 2007) at 283. See also Jon Wiener, *Come Together: John Lennon in His Time* (London: Faber and Faber, 2001) at 60–63.

154 MacDonald, *supra* note 153 at 283.

155 *Ibid* at 284.

if you go carrying pictures of Chairman Mao / You ain't going to make it with anyone anyhow."[156] Not only does this rhythmic turn signal Lennon's support of the then-counterculture's embrace of psychosexual politics,[157] but it also sounded—and continues to sound—serious skepticism regarding the consequences of previous revolutions and the likelihood of then-contemporaneous calls for same.[158] Lennon's lyrics artfully call into question the soundness of particular tactics, while also attempting to enlarge the terrain of shared commitments and common ground.[159]

Now, of course, neither the context nor the intention of environmental rights revolutionaries, neatly map onto the context or the intentions of the '68 Leftists. But, there is nonetheless a morphological similarity. Concentrating strategic resources on advocating for a constitutional amendment or prosecuting a strategic piece of *Charter* litigation is akin to the kind of "single-shot 'paradigmatic'" solutions that Levin and her colleagues have identified as being "inadequate to generate the necessary momentum or levers for the transformations of behavior and economic activity necessary to combat climate change."[160] Instead, they call for a "focus on coalitions and norms/values,"[161] which ultimately accords with Doremus' skepticism about conceiving law as a cause rather than an effect of pro-environmental norms and commitments. As Doremus rightly argues, "[c]lever governance strategies will never be sufficient *by themselves* to combat [the] temptation [to exploit rather than protect the environment]. Unless people care, now and in the future, about conservation, society simply will not bear the costs conservation imposes."[162]

The strategic question for environmental law and policy reform, then, is how to enhance public *demand* for and *participation in* policymaking—future pathways—actually capable of enhancing environmental protection, mitigating climate change, and promoting sustainability. This, after all, is no

156 The Beatles, *supra* note 28 [emphasis added].

157 MacDonald, *supra* note 153 at 284.

158 For a brilliant analysis of this dimension (and others) of the 1960s revolutionary Left, see Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Cambridge, MA: Harvard University Press, 1998).

159 The evidence, however, suggests that he failed to do so, and in the end angered those on both the Left and the Right, see MacDonald, *supra* note 153 at 283–284 (this in itself is suggestive of a larger point that also resonates with issues of constitutional interpretation: the multivalent nature of language and meaning. Neither song lyrics, nor rights language speak for themselves).

160 Levin et al, *supra* note 134 at 148.

161 *Ibid*.

162 Doremus, *supra* note 151 at 67 [emphasis added].

mean task in light of polarized views about climate change,[163] which make it difficult to have a civil, much less productive, conversation about it in the political arena.[164] Two broad strategies stand out as especially promising: (1) advocacy establishing the economic co-benefits of mitigating climate change and promoting sustainability; and (2) enhanced climate change and sustainability education framed in such co-benefit terms.

Emerging research suggests that communicating the co-benefits of addressing climate change — including economic development and enhanced community resilience — motivates pro-environmental action and commitment to a degree on par with the prior belief that climate change is important, and does so *independent* of that belief.[165] That is, individuals "convinced" of the importance of addressing climate change as well as individuals who are "unconvinced" are equally likely to be motivated to address climate change through citizenship, consumerism, and making financial donations when they learn of the integrated economic and local communitarian co-benefits of climate change policies.[166] Indeed, those identifying as "unconvinced" about the importance of climate change were especially influenced by the prospect of economic development co-benefits.[167]

These findings — tentative as they are at this juncture — suggest a potentially fruitful strategy at a particularly critical time. Moreover, they stand in stark distinction to the pessimistic implications of cognitive psychological research suggesting that action on climate change is prevented by ideology, or relies on personal experience of climate change. Communicating the co-benefits of addressing climate change can encourage greater public attention and action, "thereby influence government action, even among those unconvinced or unconcerned about climate change."[168] Importantly, this emerging line of research also suggests that climate and sustainability policy actions that clearly embody co-benefits — especially

163 Jeffrey J Rachlinski, "The Psychology of Global Climate Change" (2000) 2000:1 U Ill L Rev 299 at 305.

164 *Ibid*.

165 Paul G Bain et al, "Co-Benefits of Addressing Climate Change can Motivate Action Around the World" (2016) 6 Nature Climate Change 154. See also Eric Biber, "Cultivating a Green Political Landscape: Lessons for Climate Change Policy from the Defeat of California's Proposition 23" (2013) 66:2 Vand L Rev 399.

166 Bain et al, *supra* note 165 at 154.

167 *Ibid* at 156.

168 *Ibid* at 157. See also Heide Hackmann, Susanne C Moser & Asuncion Lera St Clair, "The Social Heart of Global Environmental Change" (2014) 4 Nature Climate Change 653.

the co-benefit of economic development—are capable of attracting broad public support.[169]

Perhaps the greatest support for this advocacy strategy comes, perhaps ironically, from the most recent US presidential election. While the results of a comprehensive meta-analysis show that ideology and political orientation are among the strongest predictors of climate change belief,[170] ideology and political orientation do not appear to predict climate mitigation policy support and actual implementation.[171] The state of Florida, for instance, voted for President Trump, but it also voted to expand the development of solar power.[172] Moreover, US states that produce the greatest proportion of their electricity from wind, along with the leading wind-energy producing congressional districts, are led by Republicans, many of whom support the development of clean and renewable energy sources, not because they reduce GHG emissions, but because of the potential economic benefits.[173]

A crucial caveat, however, is in order. While the co-benefits communication and policy design model suggests clear and promising directions for climate and sustainability advocacy, the co-benefits approach is not a panacea. Achieving co-benefits in practice will turn on contextually-sensitive communication strategies[174] and carefully-designed policies. More important still, critical choices remain for Canadians and citizens elsewhere about the level of co-benefits actually desired, and the price they are prepared to pay for them. Climate and sustainability advocates can play a pivotal role in instigating and guiding critical public conversations about alternative pathways in order to inform the necessary—and necessarily contentious—democratic deliberation over the desired balance of co-benefits. Indeed, it is imperative that we begin to do so.

The foregoing line of argument about co-benefit pathways has important implications for the second broad strategy that climate and sustainability

169 See e.g. Brett A Bryan et al, "Designer Policy for Carbon and Biodiversity Co-Benefits Under Global Change" (2016) 6:3 Nature Climate Change 301.

170 Matthew J Hornsey et al, "Meta-Analyses of the Determinants and Outcomes of Belief in Climate Change" (2016) 6:6 Nature Climate Change 622.

171 "Politics of Climate Change Belief", *supra* note 24 at 1.

172 *Ibid*.

173 *Ibid*. See also "A Rare Republican Call to Climate Action", Editorial, *The New York Times* (13 February 2017), online: <www.nytimes.com>.

174 Kahan & Carpenter, *supra* note 25 at 310. See e.g. Hiroko Tabuchi, "In America's Heartland, Discussing Climate Change Without Saying 'Climate Change'", *The New York Times* (28 January 2017), online: <www.nytimes.com>.

advocates ought to further develop: public education regarding climate change and sustainability. While the time-sensitive imminence of mitigating climate change and accelerating the transition to sustainability may suggest that there is not sufficient time to address education, advocates must simultaneously play both the short game and the long game lest they cede the future to the advocates of "business as usual." For instance, the Heartland Institute, a conservative think tank well known for attacking climate science, plans to distribute its slim, glossy book entitled "Why Scientists Disagree About Global Warming" to virtually every science educator—from public school teachers to college and university instructors—in the US.[175] The Institute's cover letter accompanying the book makes its premise and intention perfectly clear. Claims of a scientific consensus on climate change rest, the Institute's cover letter claims, "on two college student papers, the writings of a wacky Australian blogger, and a non-peer-reviewed essay by a socialist historian."[176] One observer is likely correct in surmising that most recipients of this book will simply ignore it. But even if only a small percentage of teachers use it as intended, to "teach the controversy," as it were, then tens of thousands of students will be misled year after year.[177] This by-no-means-isolated example,[178] demonstrates the importance of efforts to better educate the public about climate science. Given the pathological role that ideology and political orientation has on such efforts, advocacy of this type would do well to build on the emerging research regarding the potential of communicating the co-benefits of climate change mitigation and sustainability for economic development and community resilience. This task is no less pressing in Canada, where many extractive industry representatives and advocates continue to publicly contest not only the value but even the very possibility of achieving sustainability.[179]

This suggests a final note about the nature of the challenge before us, the conceptual soundtrack for which, even more than the Beatles'

175 Quoted in Curt Stager, "Sowing Climate Doubt Among Schoolteachers", *The New York Times* (27 April 2017), online: <www.nytimes.com>.

176 *Ibid*.

177 *Ibid*.

178 *Ibid* (for example, in some U.S. states, including Tennessee and Louisiana, state law permits the teaching of alternative interpretations of evolution and climate science).

179 See e.g. Trevor McLeod, "Ottawa Needs to Bury This Plan for a New Assessment Process—Unless We Want to Kill any Future Energy Projects", *Financial Post* (11 May 2017), online: <business.financialpost.com>. See also Canadian Association by Petroleum Producers, "A Competitive Policy and Regulatory Framework for Alberta's Upstream Oil and Natural Gas Industry" (July 2017), online: <www.capp.ca>. For a critique of this line of argument generally, see MacLean, Doelle & Tollefson, "Sustainability Assessment", *supra* note 127.

ambivalent "Revolution," is best captured by the radical jazz poet and anti-racist advocate Gil Scott-Heron's poem "The Revolution Will Not Be Televised."[180] "The first revolution," according to Heron, "is when you change your mind about how you look at things and see that there might be another way to look at it that you have not been shown."[181] Heron's deceptively-simple lyric suggests that the real revolution is the epistemic shift that precedes the actions inspired by that shift: "what you see later on is the results of that, *but that revolution, that change that takes place will not be televised*."[182]

Perhaps one day in the future our Constitution will contain a right to a healthy environment, or perhaps our courts will simply take it for granted that such a right is an unwritten principle of the Constitution, as foundational to the supreme law of the land as the unwritten principles of democracy and the rule of law.[183] If and when that environmental rights revolution is consummated and celebrated, however, it will be due to a prior, far more foundational but *untelevised* revolution in how Canadians think about the proper interrelationship among economy, environment, community, and law. It will reflect a new, shared commitment to a sustainable future as a country with the collective courage to find 173 billion barrels of oil and leave them in the ground.

180 "The Revolution Will not be Televised" (music) Gil Scott-Heron, USA, USBB10400704 (1972) [Scott-Heron]. See also Brian T Edwards, "Moving Target: Is 'Homeland' Still Racist?", *Los Angeles Review of Books* (31 March 2017), online: <lareviewofbooks.org> (for an incisive discussion of the use of the longer, spoken-word version of Gil Scott-Heron's poem "The Revolution Will Not Be Televised" in the opening credits of season six of the popular and controversial television show "Homeland").

181 Scott-Heron, *supra* note 180.

182 *Ibid* [emphasis added].

183 See e.g. *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.