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ESSAY

The Primary Right

CARTER DILLARD*

I. INTRODUCTION

"I wish to speak a word for Nature, for absolute freedom and wildness, as contrasted with a freedom and culture merely civil."[1]

This essay seeks to fill a gap in the law: the conspicuous absence among commonly accepted civil and political human rights[2] theories of any particular right that tells us *where* the other rights ought to exist – not the jurisdictions in which they apply, but what the physical world those other rights occupy ought to look like. In other words, what sort of environment do humans have a right to?

This essay fills the gap by adding one right to the list of commonly accepted civil and political human rights, what can be

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1. Henry David Thoreau, *Walking*, *in* THE PORTABLE THOREAU 592 (Carol Bode ed., 1964).

2. *See generally* PAUL SIEGHART, THE LAWFUL RIGHTS OF MANKIND: AN INTRODUCTION TO THE INTERNATIONAL LEGAL CODE OF HUMAN RIGHTS (1985).

called "the primary right." The primary right is a general human claim-right[3] to completely exit all polities and enter states of non-polity or wilderness (a specialized concept related to but not synonymous with legal wilderness, described in detail below), or places where there is an absence of human political association, and absence of others' power, control, or influence.

The right is derived from the premise that in order for individuals to be truly autonomous they must consent to being a part of a political system. Further, unless there exists an alternative to participation in a political system – a right to walk away from all human polities – consent is meaningless if not impossible and individual autonomy is thus undermined. How can you consent to something if you have no alternative? In a world filled with political association, or others' power and influence, non-consent to political association becomes impossible. Logically, if one values consensual political association, one must also value the alternatives to political association, i.e., places void of human influence, which would make choosing to associate possible. The essential insight of this essay is thus that wilderness is inextricable from autonomy and must therefore be preserved, and perhaps restored, to allow persons to access it as an alternative to others' power, control, and influence. Properly understood, liberal political philosophy must value wilderness because only access to the wilderness can make possible truly consensual human political society.

The primary right demands strong environmental protections, and responds to recent arguments that a religious or non-rational basis is needed to support environmental protection because those protections often only benefit the non-human world. Also, the primary right directly addresses three distinct but related problems facing environmental law theorists today: how to choose a baseline from which to develop environmental

3. A claim-right is a right to claim another person's duty to do or not do something, as opposed to a liberty (or liberty-right) which is the absence of a duty to do or not do something. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

regulation,[4] how to articulate environmental rights, including a human right to a particular environment, and how to define what we mean by the term overpopulation. While discussed in detail below, the primary right begins to address these problems by posing a simple question: do you, at this moment, as you read these lines, have reasonable access to the non-human world?

While the right is based upon the objective value of autonomy through consent, recognizing and protecting the right would have desirable consequences as well: relevant to climate change, urban sprawl, the loss of species, the spread of toxins, etc., as well as social consequences, not the least of which would be how thoughtful persons, if truly respecting the primary right, would have to become about bringing other persons into the world. As should become clear, had the human rights theorists that, decades ago, developed the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights been thinking along the lines of the primary right, we likely would not be faced with the mass environmental degradation and threat of climate change that exists today.

The picture that will emerge then is not a state called Wilderness to which all of the non-human world has been relegated (an error I refer to below as the "territory trap" and which obviously would entail significant human influence), but polities in a sea of wilderness, islands of consensual human political association in a sea of non-polity. Is this so fantastical? It describes our world today, the oceans being relatively autonomous zones between growing masses of human power and influence.[5] But we ought not to be forced to sea[6] in order to be free.

This essay is, at base, a normative argument for a human right to wilderness, a right that effectively buttresses the presently rickety foundation of environmental lawmaking. Its

4. *See generally* DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY (2010).

5. I owe this point to Derek Fincham.

6. The Seasteading Institute's mission is to further the establishment and growth of permanent, autonomous ocean communities, enabling innovation with new political and social systems. *See* THE SEASTEADING INSTITUTE, http://seasteading.org (last visited Apr. 30, 2012).

claims sit comfortably between political philosophy and normative environmental law theory, using truths from the former about consent and legitimacy to solve problems in the latter, a field struggling to justify the inherent value of the non-human world against seemingly competing liberal values. That said, the concept of the primary right will seem foreign to many liberals who conceive of autonomy as the absence of restraint, something subsumed by the more demanding notion of autonomy as the absence of others' influence.

Others will find such a highly theoretical discussion irrelevant to positive law and the practice of environmental regulation. But lawyers and lawmakers should be able explain why we have environmental law at all, and why it is justified. The primary right does that by framing a totally novel answer with liberal political premises that many who oppose environmental regulation accept. Environmentalists have a human rights claim to make, and a powerful one. The primary right justifies environmental protections which trump many other competing interests, so much so that weakening or repealing things like the Wilderness or Endangered Species Acts[7] would not only be wrong, but constitute a grievous violation of human rights.

Part II of this essay lays out the theoretical argument for a right to completely exit human society – the primary right – and will distinguish this right from traditional exit rights. Part III demonstrates that complete exit requires access to and protection of wilderness. Part IV then bridges exit rights theory and environmental law theory, demonstrating that the primary right solves, heretofore substantial, challenges to environmental law theory. Finally, Part V lays out and responds to likely counterarguments to the claims made herein. Future work will show that the primary right can be supported by positive law, both domestic and international, and that protecting and furthering the primary right is politically, economically, and culturally feasible.

7. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531—44); Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131—1136).

II. CONCEIVING THE PRIMARY RIGHT

What is the first or primary human right[8] – that particular act or state of being which we first permit or refuse another person when we are working out how we will treat each other, and upon which the rights and duties we then hash out together may arguably rest? Many have said, at least in passing, that particular rights are primary. Thomas Paine said that the right to vote "is the primary right by which other rights are protected," because without it we are subjected to the will of other persons.[9] Others have considered whether it is the right to speak freely that is the primary right,[10] or the "inherent worth of each person,"[11] while some have said that "the right to food is the primary human right."[12] Many, like Louis Henkin, have

8. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 181 (Oxford Univ. Press 1986) [hereinafter RAZ, MORALITY] ("Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties."). *See also id*. at 166 ("'X has a right' if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty." Generally, *human* rights claims are based on those interests we believe we have, and which others ought to value and respect, simply because we are human. Readers who know Raz's work will be surprised to see him cited in a claim that will appear at first glance to support a choice-based, rather than an interest-based, right. As will be made clear below, the primary right protects (as a negative right) and furthers (as a positive right) an interest in what will be called bare autonomy. Bare autonomy is different and should be unbundled from the form of autonomy Raz critiques as the "simple principle," but also from the form of autonomy, "valuable autonomy," Raz defends. *Id.* at 12-14, 381; JOSEPH RAZ, PRACTICAL REASONS AND NORMS 11-18 (1999) [hereinafter RAZ, PRACTICAL REASONS]; *see also* Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 998 (1989).

9. Thomas Paine, *Dissertation on First Principles of Government* (1795), *in* THE THOMAS PAINE READER 452 (Michael Foot & Isaac Kramnick eds., 1987).

10. *See* Sydney Kentridge, *Freedom of Speech: Is it the Primary Right?*, 45 INT'L & COMP. L.Q. 253 (1996).

11. Helen Ginger Berrigan, *"Speaking Out" About Hate Speech*, 48 LOY. L. REV. 1, 2-3 (2002) ("[T]he Europeans and international human rights community promote as the primary human right the inherent worth of each person, including all the trait-based qualities that make up that person's identity.").

12. Christoph Stueckelberger, *Food Crisis: The Right to Food is the Primary Human Right*, TAGES-ANZEIGER, Apr. 17, 2008, at 27 ("The right to freedom of expression or political participation is of no use at all to the person dying of hunger.").

described the right to life as the primary human right.[13] However, Winston Churchill said that it is "the primary right of men to die and kill for the land they live in,"[14] and U.S. constitutional scholars have argued that both Blackstone and the Framers saw self-defense as the primary human right.[15]

I will argue that none of these can properly be deemed the primary right, at least in the sense of being the first act or state of being the permission or refusal of which is, as a descriptive matter, determined when working out how one person will treat another. Instead, we must obviously determine whether we, or the other person in question, are to be part of the particular system of rights and duties at issue. That is, whether we will treat each other at all. The primary human behavior or state of being determined by any system of rights is of course whether I, the putative right-holder in question, am even part of it. No right or duty in that system applies to me if I am not part of it; thus determining whether I am or not is primary.[16]

Additionally, as a normative matter, asserting the primary right is to assert that one ought to be able to choose to consent or not consent to any and all political systems. To the extent consent is necessary to justify political association[17] (something

13. *See* Phillip A. Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417, 451 (2006) (quoting Louis Henkin, *The Universal Declaration and the U.S. Constitution*, 31 PS. POL. SCI. & POLITICS 512, 515 (1998)) ("The primary human right that can be protected in all situations by the international community is the right to life. . . . [T]he most fundamental right is the right of existence.").

14. WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE BIRTH OF BRITAIN 27 (1956).

15. *See* Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L. REV. 1211, 1221 (2009).

16. The claim made herein, that a particular form of exit right called the primary right ought to be recognized, should be distinguished from "primary rights" as that term is used in Allen Buchanan's helpful typology dividing rights to secede into primary right and remedial right theories. *See* Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31 (1997). There is an obvious connection between that typology and how I use the term "primary," but "primary" as used in the typology refers to non-remedial theories of secession by groups of people (that is, not derived from or seeking to remedy some injustice), rather than *the* primary human right I discuss herein.

17. Communitarians will deny this premise but this short essay will not defend the idea of consent-based political association, mostly because that defense already occupies whole shelves of libraries, and because this essay

taken as a given by many liberals and referred to as the Fundamental Liberal Principle),[18] consent is necessary to justify any amount of political association. Conceptually, once one withdraws consent, what legitimacy does the State (or any other person) have to *any* amount of your continued association? Also, if you believe that you have to give your consent to be subject to another's will, what legitimates others changing the world in which you live – at all – without your consent? Second, to the extent one has the general right to withdraw consent and exit a polity, she or he has the right to exit all polities. Otherwise, one would simply be compelled to associate with the least objectionable polity. Third, the right to exit all polities completely requires access to, and therefore the continued existence of, non-polity or wilderness. Without it there is no possibility of not consenting. Therefore, to the extent consent is necessary to justify political association, wilderness must continue to exist and persons must have access to it.

The primary right is oriented around a theoretical ideal or value we call wilderness, the way other rights are oriented around other theoretical ideals or values like free speech, privacy, and due process. Though we never totally achieve those values or ideals, mostly because we have to balance them against competing ideals and values like national security, they very much exist and we know this because we use them to guide our behavior, much the way our ideal of the perfect home guides our behavior though we may never quite achieve it. The ideal at the core of the primary right, wilderness, non-polity, or the absence of political association is used as a baseline to counterbalance conflicting values; the argument that what the right calls for can never be completely achieved misses the mark. The idea will be to strive towards the ideal as a matter of degree as one accommodates conflicting interests, the way we still strive towards free speech, privacy, and due process in the face of the

specifically targets liberals who overlook the limits liberalism logically places on how we treat the nonhuman world.

18. *See infra* note 31 and accompanying text. A corollary to the right to leave a polity by withdrawing one's consent to political association is the authority one has to consent (or not) to the admission of new members into one's existing polity. *See* Carter Dillard, *Antecedent Law: The Law of People-Making*, 79 MISS. L.J. 873, 895-99 (2010).

conflicting value of perfect national security without ever perfectly satisfying any of those values.

The right is based upon the objective values of the things the right protects: consent, autonomy, and wilderness, the last being something humans have throughout the history of our species had easy access to but which in the flash of two centuries has been almost eradicated. That the right is based on objective values is important. That means it is to be protected, irrespective of subjective preference, market outcomes, and the democratic process. Just as the right to vote is not contingent on what the majority thinks or the people actually voting, the primary right is not defeated by counterarguments about mass personal preference. As will be discussed below, wilderness is also objective in another sense: it is an object with the potential to be converted to any number of subjective uses, each valuable to different groups of humans users, but which remain in its unconverted, or objective, state.

Before proceeding to justify and develop the contours of this right, it is worth pinning down certain key conceptions.

A. Foundational Conceptions

To begin with, to speak of individual rights is to speak of autonomy. All individual rights assume that there exists a range of individual behavior, or conduct, which is worth protecting from others.[19]

The concept of "autonomy" can be unbundled into various conceptions.[20] Two such conceptions are what Joseph Raz calls the "the simple principle" and "valuable autonomy."[21] The former (which I will refer to as the failed form of autonomy) is the

19. RAZ, MORALITY, *supra* note 8.

20. Privacy and autonomy are closely related concepts but I focus on the latter because privacy seems to commonly involve questions about personal information, which is not particularly relevant to the primary right. That said, Ruth Gavison's conception of privacy as being completely inaccessible to others is similar to what I call "bare autonomy" herein. *See* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980); *but cf.*, Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856, 1910 nn. 231-32 (1971).

21. RAZ, MORALITY, *supra* note 8.

presumption in favor of protecting, under the guise of intrinsically valuable freedom, all conduct as equally valuable without regard to the specific value or disvalue we may find in the particular conduct at issue.[22] . This is simply the view that autonomy involves choosing to do, and doing, whatever one wishes. In my view it is a form of intellectual laziness, the broad claim that one ought to be able to do anything, everything, and nothing at once, which masks him or her avoiding the trouble of thinking it all through and delineating the oughts from the noughts. Raz critiques this form of autonomy in favor of what he calls valuable autonomy.[23]

For Raz, "[a]utonomy is valuable only if exercised in pursuit of the good," and valuable autonomy is the presence and active pursuit of morally valuable options in life (i.e., the option to become a doctor, but not a mass murderer; to save a person, but not torture them; to be literate, but not illiterate; to care for animals, but not abuse them).[24] Raz rejects the moral relativism and subjectivism that underlie claims to a general right to be free, finding that we value freedom only once we have certain capacities, and then only because it lets us do things that are good, things we objectively value.[25]

A third form of autonomy, which I will call "bare autonomy," is the state of being physically individuated from other persons and their influence, or becoming literally independent from others and therefore self-determining. The term bare autonomy is novel but the conception can easily be derived from the common conception of individual autonomy.[26] It is this form of autonomy

22. *See* RAZ, PRACTICAL REASONS, *supra* note 8, at 11-18; *see generally* Regan, *supra* note 8.

23. RAZ, MORALITY, *supra* note 8, at 381.

24. RAZ, MORALITY, *supra* note 8, at 381. *See also* Leslie Green, *Un-American Liberalism: Raz's 'Morality of Freedom'*, 38 TORONTO L.J. 317, 324-25 (1988).

25. RAZ, MORALITY, *supra* note 8, at 381.

26. According to the Stanford Encyclopedia of Philosophy:

> Individual autonomy is an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces. . . .
>
> . . . Put most simply, to be autonomous is to be one's own person, to be directed by considerations, desires, conditions, and characteristics

that the primary right is meant to protect, being "free" as in when one says "she broke free," or "she was finally free of him."

Bare autonomy is the conceptual inverse of being subjected to the influence, control and power of other humans.[27] It borrows from Isaiah Berlin's concept of negative liberty, which at its core refers to the absence of constraint by others.[28] Bare autonomy goes one step further, and recognizes that to the extent other persons have changed the non-human environment they have exercised power over others. They have interfered with me and others being free of their influence, being free of what Locke called the "Will of any other Man,"[29] and thus free of the subjective changes they make and will upon the world. They have interfered with my relationship to the objective world making me subject to their influence, their changes, and thus their will. They and their will have gotten in the way, standing between me and a world without their will, or what we call wilderness, or non-polity, or the absence of others' influence or will, a conception which I deal with more below.

As will be discussed, one can see that the purest form of bare autonomy would be obtained by living in wilderness, free of all human influence. This is a state of affairs comparable to Ruth Gavison's perfect privacy: being completely inaccessible to others.[30] Or, borrowing the words of Justice Brandeis when he referred to the right to privacy, it is "the right to be [literally] let

> that are not simply imposed externally upon one, but are part of what can somehow be considered one's authentic self.

John Christman, *Autonomy in Moral and Political Philosophy*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 1 (Edward N. Zalta ed., 2009). Though Christman does not discuss bare autonomy as a form of autonomy, he uses the word "one" six times in describing the basic conception of individual autonomy, creating an overwhelming sense of individuation, of the act of one individuating oneself from others.

27. The focus is on humans, as opposed to other species, because humans as a species seem to have a special capacity to influence the world and are the agents we exclusively award personhood to in the model of the social contract.

28. *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122 (1969).

29. *See infra* note 35 and accompanying text.

30. *See* Gavison, *supra* note 20.

alone – the most comprehensive of rights and the right most valued by civilized men.[31]

31. Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

As an aside, United States constitutional jurisprudence can be reinterpreted to create a helpful analogy for understanding all of these conceptions, between what we are calling the primary right and privacy in modern substantive due process. Of course there is no express right to exit in the constitution. Yet substantive due process, and specifically the right to privacy it recognizes, are comparable. How can we justify the fundamental right of privacy (or for some who see a change in the jurisprudence after *Lawrence v. Texas,* 539 U.S. 558 (2003), liberty) as it appears in modern substantive due process? Readers may have guessed how the primary right relates to this problem already. It is well known that in the Court's modern substantive jurisprudence it recognizes a continuum (or spectrum) of liberty. *See* Roe v. Wade, 410 U.S. 113, 169 (1973). Could the vague fundamental right to privacy or liberty the Court invokes on occasion as a right protecting interests inside the polity, be tacitly speaking to (and bundled together with) the value of bare autonomy outside of the polity?

How are we to make sense of Justice Kennedy's use, in *Lawrence v. Texas*, of the oft-critiqued statement from *Planned Parenthood v. Casey* which described the heart of U.S. constitutional liberty as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," and asserted that "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State"? 539 U.S. at 574. Are these claims meaningless as some have said? *See, e.g.*, Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1577 (2004).

Consider that the Court's description of liberty in Lawrence ties back to *Griswold v. Connecticut* and *Olmstead v. United States* before it. Simplified, the Casey quote describes what the Court in *Griswold*, and Justice Brandeis in his dissent in *Olmstead*, described as "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). One cannot seriously argue that this is a meaningless statement, any more than one can argue that the statement "leave me alone" is meaningless. Defining one's self and one's concepts, or being autonomous and self-determining, is like defining anything else; it is the act of setting the thing apart from its surroundings to permit an identity.

That said, there are degrees of being left alone. A woman permitted by the state to terminate her pregnancy without interference from that state and others is left alone more than if she were not permitted to do it. But she is not literally alone. She is still part of the system of rights and duties, and is not alone in that sense. The state and others are ready to swoop down upon her if she acts in certain other ways. Being literally let alone, or autonomous and self-determining, would only be possible outside of the system of rights and duties, and indeed, beyond the control and influence of others. I am hardly "let alone" in my fenced backyard, relative to how I would be "let alone" to explore a

The concept of bare autonomy will not be acceptable to many who view humans as inextricably connected,[32] though their critique may prove more descriptive than normative. Again, the concept may also seem foreign to some liberals who view autonomy more as the absence of restraint, than the more comprehensive and demanding notion of autonomy as the absence of others' influence. However, it is not clear how one can value individual autonomy without also valuing bare autonomy, unless one abandons individuation, which is at the core of the former.

The obvious challenge to the conception of bare autonomy is that even if one could leave all polities, one simply cannot walk away from morality and its system of rights and duties. However, this challenge can actually help us understand the conception of bare autonomy. If we define morality as Dworkin does – as how we treat others – then we will understand that walking away from morality is exactly what is meant by the primary right: the right not to be treated by others paired with the dual correlative duties not to treat them.[33] Humans in wilderness are obligated to practice relative noninterference. This is not as abstract as it may sound, but is consistent with a

wilderness free of human influence. If we consider the *Casey* and *Olmstead* quotes as referring to a continuum of being "let alone," then the far end of the continuum, or bare autonomy, is only the complete and meaningful exit from all polities.

Of course the Supreme Court was never referring to bare autonomy per se; the cases in question had nothing to do with the far end of the continuum and were very much about living within a system of rights and duties. That is not the point of showing that the Court's statement refers to a continuum that logically includes bare autonomy (though, assuming one values consent, there is arguably a strong basis for developing the primary right via the "implicit in the concept of ordered liberty" test). Rather, the point here is that to the extent the Court relies on that continuum as something valuable on which to base a claim of right, it might have been implicitly recognizing the value of an outside form of autonomy, bare autonomy, as well as an inside form. More importantly, as is discussed below, that recognition ties back to like statements in the Framers' account of the rights of man, and in Locke's work before that.

At the very least, it is possible the Court has inadvertently bundled together various forms of autonomy, simultaneously relying on all of the distinct interests the rights protect to amass support in those reading the Court's opinions.

32. *See* Christman, *supra* note 26, § 3.2.

33. This is what makes collective exercise of the primary right complex, if not impossible, and why I refer to exit rather than secession.

commonplace, everyday notion familiar to backcountry hikers known as the wilderness ethic. If morality is how we treat others, wilderness is that we do not.

Identifying a right as "*the* primary right" connotes more than the logical ordering of rights in a system of rights, or the assertion that the right is foundational or an ultimate trump card. In this case, "primary" carries teleological implications: "the primary right" is the right that existed before systems of rights. It exists in a literal state of wilderness, outside of and prior to human society and civilization.

Finally, "polity" and "power" must be understood in terms of a continuum, or degrees, of control and influence that others exert upon the individual. At one extreme lies absolute control by humans over another human, forced labor in a prison camp, for example. At the other extreme lies the absolute of bare autonomy, self-determination, and lack of human otherness experienced by the individual alone in the wilderness. The absolute power, control, or influence of one human over another is thus the conceptual inverse of bare autonomy.

Traditional exit right and secession theories address the space between these poles, where we find varied systems of legal rights and duties usually enforced by the threat of force and groups entering and exiting those systems of power (polities) for any number of reasons. In contrast, the primary right addresses a move towards the far end of the continuum, towards bare autonomy.

One can think of this in terms of the concepts of power and political obligation.[34] The latter is the duty I have to obey the laws of any given polity. The former refers to my being subject to another's will or influence. If everyone but me disappeared from the United States today, I would presumably be under no political obligation to others, not subject to any particular rights or duties that come with the legal system, because there would be no one to owe the duties to or demand the rights from. However, I would still be largely subject to others' will and influence – as well as the system of rights and duties that permitted that will and influence – because those persons cut down the trees, paved the

34. I owe this point to Dov Fox.

land, polluted the rivers, and exterminated the animals. I would be living in a world of others' making and be made subject to it. Whether I would be better off there – in the remnants of society – than I would be in the same space ten thousand years ago is irrelevant. That is a matter of welfare. The point is that though I am not under political obligation, I am subject to others' power. But the concept of autonomy can be broadened enough to give an alternative to both political obligation *and* power. Whatever autonomy means inside a polity, humans cannot be free in a very tangible sense if they are bounded in by one another, if others stand between them and the non-human world. The primary right seeks to prevent that.

B. The Primary Right Is an Exit Right, a Right to Not Consent to Others' Power, Control, and Influence

Bearing these analogies and conceptions in mind and assuming one justifies polities by whether they are consented to and those within them can exit or leave, we can begin to define the primary right. Significantly, the very idea of a human right only matters in the context of inter-human conduct, that is, how we treat each other. Thus, the most fundamental question in dealing with claims of human rights is first whether we will treat each other at all.

We see this in traditional liberal political theory, and its reliance on a state of nature as a default backdrop to political relations. For Locke, "[m]en being . . . by nature all free, equal, and independent, no one can be put out of this estate [natural liberty] and subjected to the political power of another without his own consent."[35] Indeed, as a normative matter, it is perhaps liberalism's core principle (or at least one that we can here derive from the principle of consensual government)[36] that persons ought to be able to walk away from one another, refusing to

35. JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT ¶ 95 (1690), *reprinted in* THE TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1960) [hereinafter, LOCKE]; *see also* JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT 213 (2002); JEREMY WALDRON, THE DIGNITY OF LEGISLATION 137 (1999).

36. *See* Gerald Gaus & Shane Courtland, *Liberalism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 1.1 (2010) (emphasis added) (citations omitted).

consent to the power, control, and influence of others when they wish in order to be let alone.

> In two different ways, liberals accord liberty primacy as a political value. (i) Liberals have typically maintained that humans are naturally in "a *State of perfect Freedom* to order their Actions . . . as they think fit . . . without asking leave, or depending on the Will of any other Man." Mill too argued that "the burden of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition. . . . The *a priori* assumption is in favour of freedom . . ." . . . This might be called the *Fundamental Liberal Principle*: freedom is normatively basic, and so the onus of justification is on those who would limit freedom, especially through coercive means. It follows from this that political authority and law must be justified, as they limit the liberty of citizens. Consequently, a central question of liberal political theory is whether political authority can be justified, and if so, how. It is for this reason that social contract theory . . . developed . . . Insofar as they take as their starting point *a state of nature* in which humans are free and equal, and so argue that any limitation of this freedom and equality stands in need of justification (i.e., by the social contract), the contractual tradition expresses the Fundamental Liberal Principle.[37]

Rousseau said:

> I am presupposing here what I believe I have demonstrated, namely that in the state there is no fundamental law that cannot be revoked, not even the social compact. . . . Grotius even thinks that each person can renounce the state of which he is a member and recover his natural liberty and his goods by leaving the country.[38]

For Rousseau, and many others whose thinking frames our own thinking and basic assumptions about government today, the social compact was the "one law that by its nature requires unanimous consent," because "civil association is the most voluntary act in the world," and "no one can, under pretext

37. *Id.*

38. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 79 (Donald A. Cress trans. & ed., Hackett Pub. Co. 1987).

whatever, place another under subjection without his consent."[39] He called that consent, one's voluntary association, the "primitive contract."[40]

1. The primary right requires complete exit

The primitive contract, a core principle in liberal political theory, is thus that persons should be free to not consent to others' power, control, and influence. Should we then have the choice to be free from sovereigns, other persons, their "will" in the form of the changes they make, and influences they have on the world altogether? Is the state of nature to which we would then return synonymous with wilderness or parts of the world – non-polities – where human influence is minimized or eliminated? Rousseau's and Locke's words could be read to say we should and that it is synonymous. Taking exit right theory to its logical conclusion does the same.

A right to exit is a right to walk away from any particular system of rights and duties. It protects what Richard Epstein calls that act of "picking up stock and going elsewhere."[41] The right is not only a bedrock of, and "crucial" to, liberal theory,[42] but it is required by Rawls' principles of justice.[43] It is also a key to Nozick's utopia, where it is the only right (tied to a concomitant but conditional right to enter) people have.[44] Intuitively we value it highly – imagine not being permitted to move, to leave the bad and declining neighborhood in which you live.

However, the received wisdom of exit rights theory appears to be that we can only opt out of subjugation to one sovereign for another. Ronald Dworkin makes this point in *Law's Empire*,

39. *Id*. at 8.

40. *Id*.

41. Richard A. Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEMP. PROBS. 147, 149 (1992).

42. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 566 (2001) ("If commons property can succeed only by giving up the right to exit, a liberal commons is indeed an oxymoron."); s*ee also* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1066 (2007).

43. *See* Mark D. Rosen, *Establishment, Expressivism, and Federalism, Symposium: Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 669, 704 (2003).

44. *See* Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1423 n. 215 (1997).

where he critiques tacit consent as a basis for the legitimacy of modern democracies. He argues that the decision not to emigrate is insufficient to constitute consent to be governed for reasons that are very relevant to thinking about a primary right:

> Consent cannot be binding on people, in the way this argument requires, unless it is given more freely, and with more genuine alternative choice, than just be declining to build a life from nothing under a foreign flag. And even if the consent were genuine, the argument would fail as an argument for legitimacy, because a person leaves one sovereign only to join another; he has no choice to be free from sovereigns altogether.[45]

Others have argued that "a state of unencumbered individuality . . . can just as easily be exercised by a desire to enter into another culture,"[46] or even that "an individual's secession claim is ridiculous; a town's only slightly less so; a county's somewhat more plausible; and a state or federal region's paradigmatic."[47] Rawls almost suggests the same when, in his discussion of what "space" is necessary in a just society to allow the full range of conflicting values, he makes clear that "the idea of sufficient space is metaphorical."[48] The Supreme Court did much the same in *Wisconsin v. Yoder* when it explicitly labeled Thoreau's freedom as merely a "philosophical and personal" choice and contrasted that with the Amish's legitimate religious withdrawal from society, thereby denigrating and using Thoreau's freedom as a foil to defend what the Court saw as the Amish's valid religious claims.[49]

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45. RONALD DWORKIN, LAW'S EMPIRE 193 (1986).

46. Darren C. Zook, *Decolonizing Law: Identity Politics, Human Rights, and the United Nations*, 19 HARV. HUM. RTS. J. 95, 116 (2006); *see also* Leighton McDonald, *Can Collective and Individual Rights Coexist?*, 22 MELBOURNE U. L. REV. 310, 331 (1998) ("[W]hether or not an individual is entitled to leave their cultural group in such circumstances is inevitably a question to be faced by the group to which emigration is sought.").

47. Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT'L L.J. 553, 583 (2010).

48. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 154-55 nn. 29-30 (2001).

49. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

Contrary to all of these claims, to the extent one accepts a right to exit one must also accept the right to exit completely. Exit is the right "to withdraw or refuse to engage . . . to dissociate, to cut oneself out of a relationship with other persons."[50] In terms of positive law, according to Hanoch Dagan and Michael Heller, "certain rights of exit – such as the right to emigrate from one's homeland – are now considered basic human rights, which are, as such, inalienable and nonwaiveable."[51] In addition to the Universal Declaration of Human Rights which Dagan and Heller cite, Article 12(2) of the International Covenant on Civil and Political Rights grants every person a right to leave *any* country, including his or her own.[52]

And to the extent one accepts the right to exit, one must accept the right to exit completely. What does the right otherwise refer to? The international right to emigrate from one's homeland discussed above does not permit the state to impose a duty on those emigrating to keep one foot in the country or periodically return. Similarly, while Dagan and Heller find that some disincentives can be imposed prior to exit, their discussion of the value of exit as a precept of liberalism never suggests those exiting could be required to associate post-exit.[53] Such a requirement would frustrate the purpose of the right because one would never be free to truly walk away. Moreover, a right to leave *any* country, like that recognized above, implies a right to leave all countries.

Also, what are the consequences of Dworkin's assumption, above, holding true? One of the more powerful consequentialist arguments in favor of complete exit rights is that they incentivize organizations, in this case states, to compete for members. If members cannot completely leave the least objectionable state, perhaps to form a state of their own, the baseline for competition and innovation is skewed and states are not really competing. We can never do better than the least objectionable state.

50. Dagan & Heller, *supra* note 42, at 568.

51. *Id.* at 569 n.79 (citing Universal Declaration of Human Rights, art. 13, G.A. Res. 217(III)(A), U.N. GAOR 3d Sess., pt. 1 at 71, U.N. Doc. A/810 (1948)).

52. International Covenant on Civil and Political Rights, art. 12(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

53. *See generally* Dagan & Heller, *supra* note 42.

Moreover, there would seem to be a direct relationship between the reasonableness of exit and the degree to which one is committed to the polity in question. How committed can you really be if exit were virtually impossible?

But the claim that a right to exit includes a right to completely exit need not rely on positive law or consequentialist arguments. Conceptually, if consent is to contribute in any way to legitimizing the use of power, one must have the option not to consent. Further, if we believe that the use of power must be justified – that is, that we can differentiate between legitimate and illegitimate power – then we must justify any and all power, control or influence, exerted by one person upon another. Again, conceptually, once one withdraws consent, what legitimacy does the state (or any other person) have to *any* amount of your continued association? To the extent consent is necessary to justify the power, control, and influence of others, it is necessary to justify any power, control and influence.

The primary right must, therefore, include the right to an alternative to being a part of any polity at all. Forcing one to submit against his or her will to *some* sovereign, albeit the one found least objectionable, or even to some small amount of that sovereign's influence, vitiates consent-based justification for the authority of the state, in violation of what Rousseau called the "primitive contract."[54]

2. The primary right imposes duties not to interfere

Once one has walked away from a particular system of rights and duties, how is one entitled to any duty of continuing noninterference held against that system and its members to keep them at bay?

The right to exit is "antecedent to government"[55] and "a prerequisite for liberty."[56] It is neither created, nor extinguished,

54. ROUSSEAU, *supra* note 38, at 106.

55. Steven G. Calabresi, "*A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, Symposium: Reflections on United States v. Lopez*, 94 MICH. L. REV. 752, 776 (1995).

56. Dagan & Heller, *supra* note 42, at 570.

by the polity one wishes to leave. That is, after all, why the exit right is unique and primary, and also valuable, preventing the polity a person leaves from simply recapturing him or her as an outsider now incapable of asserting duties. The right to exit also exists conceptually before legal regimes because, as Pufendorf and the many other theorists cited herein like Rousseau, Grotius, and Locke have argued, the very legitimacy of the civil law system is itself based on consent.[57]

The duty of continuing noninterference called for by the primary right must therefore be based on a different order of rights and duties that exists independent of the civil law system. Just as fundamental human rights constitute a meta-system of positive law and moral rules that exists a level above domestic legal systems (codified in treaty through state consent), the right of exit is an imperative that exists above or outside any consent-based system of social order. Thus, even though one has walked away from a particular system of rights and duties he or she is entitled to a duty of continuing noninterference held against that system and its members.

This does not mean that all fundamental human rights apply in wilderness. The primary right is again unique in that it is "antecedent to government," indeed to social interaction of any kind, and therefore it arguably exists one level above the system of fundamental human rights, as a fundamental meta-human right. As described in more detail below, "wilderness," in its ideal form, is the place where a person can experience the ideal of absolute individual autonomy. Because the primary right right-holder would be outside of all human interaction, there is no reason to conceive of, let alone assert, any other human rights. He or she is alone, outside of morality, bound only by the exclusive correlative duties imposed by the primary right not to influence others – duties that would logically encompass many of the fundamental human rights, like respecting others' right to life. This is why the ideal nonpolity is not just a physical wilderness but outside of any jurisdiction; if the duty not to

57. *See* SAMUEL PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO 160-61 (James Brown Scott ed., William Abbot Oldfather trans., Clarendon Press 1931) (1672).

influence others is taken seriously, it is not clear what role any law would play.

To the extent that the right-holder interacts with other persons, he or she moves along the polity continuum of human influence, away from absolute autonomy towards traditional systems of rights and duties. From this logic, it is now clear why the primary right is a right of exit rather than secession: while groups of persons can secede together to take advantage of *in vacuis locis* and establish a community, that new community is itself a polity with attendant traditional rights and duties. While respecting the primary right will require the creation of non-polity spaces, and doing so would make it easier for groups of people to secede by giving them the space they need, this would merely be a knock-on benefit flowing from the primary right. The primary right protects the right of individuals to leave even those new polities and is therefore distinct from the right to secede.

Note that the primary right also places a correlative duty on the right-holder, in a state of non-polity, not to influence others. In other words, the right goes both ways. This means that the right would require persons capable of practicing relative noninterference.

C. Differentiating the Primary Right from Traditional Exit Rights

The primary right differs from traditional conceptions of exit rights in at least five ways. First, as discussed, the literature on exit rights has focused on the act of choosing among polities, rather than the choice of no polity at all. Second, proponents of exit rights tend to base the right almost exclusively on what I have called above the failed form of autonomy, subjective preference, which is antithetical to the form of autonomy, bare autonomy, which is protected by the primary right.[58] Third, exit rights tend also to be seen as held by individuals against the state, whereas it is other persons generally that threaten the

58. *See, e.g.*, Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 444-45 (2002) ("[T]his personal right of exit is a negative freedom in the sense that the right itself is indifferent in principle to the uses to which it is put.").

conditions that the primary right protects. Fourth, exit rights are usually argued from highly abstract political, economic, and/or cultural perspectives, rather than in terms of the literally physical and empirically demonstrable non-human and nonpolity world we call wilderness and to which the primary right refers.[59] Fifth, while the realist critique that exit is infeasible poses a significant threat to the cogency of traditional exit rights,[60] it actually works in favor of the normative primary right. Consider Christopher Eisgruber's argument that the right to refuse to allow outsiders into a given polity seriously undermines the validity of the "choice" to remain in or exit from one's own polity, thereby posing a significant challenge to traditional exit theory:

> [The] Consent Principle ignores the consent of the excluded. In a world without scarcity, that omission might be excusable. We might imagine individuals banding together voluntarily in a Lockean wilderness, free to take what they wanted so long as they honored the Lockean proviso's instruction to leave 'enough and as good . . . for others.' In such a world, I could not object if you refused to admit me into your society. You could demand that I find friends of my own and form another society elsewhere - and the demand that I go elsewhere would not be onerous since, by hypothesis, elsewhere would be 'enough and as good' as what you have. But ours is a world of scarcity; after Americans claim their nation's bounty, there is not 'enough and as good' left for the rest of humanity. When we exclude others, they do have reason to complain.[61]

In contrast to traditional exit rights, Eisgruber's argument actually supports a primary right claim because the difficulty of exit acts as a reason that we *ought* to protect and further the primary right. The sort of scarcity Eisgruber refers to is not an inevitable condition. Rather, both the difficulty of leaving one's own society and the limitations on places one can go are the

59. *See* Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL'Y 753, 783 (2000) (arguing in favor of one's right to exit by opting out of paying taxes for and receiving the benefits of particular state programs).

60. *See* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 165 (2003).

61. Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 68 (1997).

product of a failure to protect the *in vacuis locis* that the primary right demands.

III. The Primary Right Requires Access to Wilderness

A. The "State Of Nature" Is a Literal Wilderness

That we ought to be able to withdraw consent and leave polities, and that we might call that right primary in some sense is not particularly exciting. But, if we accept that autonomy and meaningful consent require an option to exit all polities, we must consider how that option is realized. How can an individual walk away from one polity without joining any other system of rights or duties? Must one go to sea to establish new political communities, as modern day "seasteaders" suggest?[62] What would prevent states from eventually extending their borders seaward to prevent that? In answering this question – which, until now, has remained largely unaddressed in our literature – we find a connection between the quote from Thoreau at the very beginning of this essay, Locke's ideas about consent, and Rousseau's primitive contract; that connection lies in what may be called nature, non-polity, or the non-human world.

Liberalism draws its origins from Locke's conceptual model describing the shift from the state of nature to governed states. Yet, despite the glaring presence of the concept of *nature* (a space that is not merely pre-government, but also pre-political) in that model, liberalism has failed to recognize the distinction Thoreau saw between "absolute freedom and wildness, as contrasted with a freedom and culture merely civil."[63] In this section, I will argue that for Locke, nature or wilderness was an essential component of consent which legitimated polities, or the exercise of power. It constituted the preexisting default backdrop, or primary state of affairs, against which inter-personal relations were structured. For Locke, the option to exit, or to withhold consent, was realized in the existence of a state of nature – a literal, physical space in the natural world: wilderness.

62. *See* THE SEASTEADING INSTITUTE, *supra* note 6.
63. Thoreau, *supra* note 1.

Locke describes the state of nature for persons as "*a state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."[64] It was a place "free and unpossessed"[65] in which there were few others to compete with for the "vast [w]ilderness of the [e]arth."[66] Locke writes, "there could be then little room for [q]uarrels or [c]ontentions about [p]roperty so establish[e]d. . . . Nor was this *appropriation* . . . any prejudice to any other [m]an, since there was still enough, and as good left; and more than the as yet unprovided could use."[67] Most significantly, he writes that in the original state of nature the act of social compact was one which "any number of men may do because it injures not the [f]reedom of the rest; they are left as they were in the [l]iberty of the [s]tate of [n]ature."[68]

The existence of a "residual state of nature"[69] was clearly a necessary condition for the social compact to be legitimately based on consent. Only because individuals had the option not to join the social compact, could individuals be bound by the social compact without its infringing upon their autonomy. Thus, we can reasonably infer that Locke's theory of political authority presumes a right to completely exit all polities.[70] The residual state of nature is wilderness, and without it social compacts cannot be the product of consent, and become illegitimate.

This interpretation is supported by Locke's writings about America and by the tradition of thought taken up by the Framers to justify declaring independence and to distinguish their conduct from acts of treason – i.e., the mutinous overthrow of the government – against England. Locke saw America, in all its

64. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8 (C.B. Macpherson ed., 1980) (emphasis added).

65. LOCKE, *supra* note 35, ¶ 121.

66. *Id.* ¶ 36.

67. *Id.* ¶¶ 31, 33 (emphasis added).

68. *Id.* ¶ 95.

69. *See* Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 42-44 (2007).

70. *Id.*

wildness, as a "second Garden of Eden,"[71] arguably synonymous with, or at least close to, a residual state of nature. It seems reasonable that if Locke's conception of the state of nature had nothing to do with wilderness and could just as easily be achieved by the dissolution of a government in Europe, he would not have made the distinction between America and Europe. Locke's state of nature was a physical, rather than an exclusively juridical, concept that was virtually synonymous with the absence of other persons' control and influence.[72] The fact that he saw America as empty (rightly or wrongly) obviously mattered to him.

The Framers relied heavily on Locke's ideas,[73] asserting their right under the laws of nature to declare independence. Inspired by Locke's promise of a land "free and unpossessed," they assumed "among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them," in order to "institute new Government."[74] Clearly, the Framers read in Locke's theory a right to return to the state of nature, to opt out of existing political systems, rather than a right merely to join some then-existing polity other than England. It was central to justifying their act of constituting a legitimate new government that they viewed the New World as essentially *in vacuis locis*, where they were under Natural Law and from which they could opt into a new social compact.

Whether the Framers respected the possibility of humans' autonomy from each other enough to preserve the non-human world or not is irrelevant. The point is that they actually practiced something very much like the right. They did so, but without the safeguards and the correct structure of rights and duties to ensure that others in the future could do the same, and perhaps a better job of it.

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71. BARBARA ARNEIL, JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM 72, 110-11 (1996).

72. *See generally* Dillard, *supra* note 69.

73. Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 365, 383 (1929) ("The conveyance of natural law ideas into American constitutional theory was the work preeminently – though by no means exclusively – of John Locke's Second Treatise on Civil Government . . . .").

74. THE DECLARATION OF INDEPENDENCE paras. 1, 2 (U.S. 1776).

Regardless, it is clear, first, that Locke envisioned that some would consent to the compact while others might not, instead choosing to remain in a state of nature, to literally remain in the natural world outside all human polities; and, two, that Lockean consent requires, therefore, the option to remain in the state of nature. More specifically, Lockean consent requires the option to remain in, or return to, the wilderness.

But somehow in the hundreds of years over which Locke's state of nature model has been developed and built upon, liberalism has obscured the connection between meaningful consent to be governed and nature in the sense of the non-human natural world, or wilderness. Nature, as it appears in the concept "state of nature," always seems to remain an abstract component for theorists. It became and remains synonymous with an abstract original condition:

> For Locke, Kant, and Rawls, not only is the state of nature primary, in the sense of coming first in order either historically or conceptually, but conclusions derived from it are also primary, in the sense of coming first in predominance. Or, as Dworkin would have it, institutions, and ideas that come later in order than those derived from the abstract original condition are always to be tested against, subjected to, and vulnerable to being 'trumped' by the principles derived from the abstract original condition.[75]

Why should the "state of nature" be reduced to an "abstract original condition?" The physical, primitive, non-human world – or what we call wilderness – seems like the antithesis of abstract. Nature is certainly less abstract than things like the social compact, human institutions, and law itself. Again, wilderness is the physical manifestation of the original condition, the possibility of being able to break off from other persons and become autonomous (singular) because one is not hopelessly surrounded by them. Isn't it reasonable that "the state of nature" means exactly what it says and that it refers to a moment in human development when the natural world dominated humans

75. Peter Stillman, *Hegel's Analysis of Property in The Philosophy of Right*, 10 CARDOZO L. REV. 1031, 1038-39 (1989).

and controlled the human condition no less than for any other species?

Where else but the non-human world or wilderness can one be free from what Locke called the "Will of any other Man" including the changes others make and influences they have upon the world? Is real property the best version of nature and the non-human that liberalism can offer us, so that wilderness is reduced to one's backyard? And if nature, as used in the "state of nature," means not just the absence of particular juridical human relations, but also the literal presence of wilderness rather than civilizing influence of man, what does that mean for liberalism's principle that humans ought to be able to walk away, to be let alone and autonomous, by refusing to consent to the control and influence of others? Polities are meant to give humans the benefits they cannot get in the wilderness, not take away the benefits they had in wilderness by eradicating it.

B. Defining Wilderness

For the purposes of this essay, it is most useful to conceive of wilderness as a physical space absent of human power, control, and influence, or an objective backdrop free of human subjectivity. Here we have to be careful to avoid what I will call the "territory trap," or the learned inclination to see physical and juridical space as a defined territory surrounded by other defined territories. Moving what remains of wilderness into such a territory would entail significant human influence, in contravention of the right. Rather, limited human polities must form in, and be surrounded by, the backdrop or default of wilderness. Non-polity is the space between. That is the only way the right works, and reasonable access to something at least approaching the ideal of the non-human world is ensured. It is not unlike the world today, with human polities divided by oceans that are, or until the past several decades were, largely non-human.

Such an approach comports not only with Locke's ideas about the state of nature, but also with more modern views and uses of the term. The Wilderness Act of 1964 and its precursors draw

their theoretical origins from the wilderness movement, a social movement that strove towards "liberal perfectionism"[76] and conceived of wilderness as an "environment of solitude."[77] Wilderness initially received legal protection in the 1920's under a Forest Service regulation creating and setting aside certain "primitive areas."[78]

But the Wilderness Act of 1964 goes further in stating that the express purpose of the Act is "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States . . . ."[79] Toward that end, it finds that "[a] wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[80] The definition is further refined later in the Act to describe land "retaining its primeval character and influence,"[81] affected "primarily by the forces of nature, with the imprint of man's work substantially unnoticeable,"[82] and which "has outstanding opportunities for solitude or a primitive and unconfined type of recreation."[83] Similarly, the Endangered Species Act's primary purposes are to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."[84]

Significantly, the Wilderness Act does not require wilderness to be a space absolutely devoid of humanity. The Act expressly recognizes that wilderness areas must be managed and presupposes that wilderness areas exist within the jurisdiction of

76. Jedediah Purdy, *The Politics of Nature: Returning Democracy to Environmental Law*, 119 YALE L.J. 1122, 1161 (2010).

77. *Id.* at 1165.

78. Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 71 (2010).

79. Wilderness Act of 1964, 16 U.S.C. § 1131(a) (2006).

80. *Id.* § 1131(c).

81. *Id.*

82. *Id.*

83. *Id.*

84. Endangered Species Act § 2(b), 16 U.S.C. § 1531(b) (2006).

a given polity. Likewise, the Endangered Species Act provides for the careful management and conservation of species within a polity, not unfettered access to complete biodiversity and its sufficient natural habitat. I am not suggesting that either the Wilderness or the Endangered Species Acts enshrine the primary right – that would be an odd assertion in light of what I have said about the antecedent nature of the right. Rather, like the Court's use of the concept of privacy, I suggest that with these Acts, Congress recognized a spectrum of human control and influence on the non-human world and the value of creating duties on others to ensure access to places and species under relatively little human control and influence.

C. The Primary Right Is Not So Special After All: Positive Law, Like The Primary Right, Protects Wilderness

We can define the particular duties created by the primary right, keeping in mind that, like all general statements of rights out of the context in which they are applied, the description is merely a placeholder. This is especially true of the primary right, where properly balancing it against competing interests will involve empirical analyses across many disciplines. Regardless, we can initially think of the primary right as an individual's general claim-right to duties of noninterference by others with (1) the rightholders' reasonable access to wilderness, as well as (2) access to complete biodiversity and its sufficient natural habitat.[85] The right is paired with the same dual correlative duties on the rightholder not to influence others. The latter duty preserves the biodiversity of the non-human world, wilderness writ large;[86] the former preserves its local representation. The duty to not interfere with reasonable access allows persons the "genuine alternative choice" that Dworkin refers to above,[87] allowing meaningful consent to the polity they are in. Together, these related duties protect the necessary conditions and the

85. *See supra* Part III.

86. By "writ large" I mean the wilderness or nonhuman as it exists throughout the world as opposed to locally or in one place.

87. Dworkin, *supra* note 45.

tangible places and things, which make the act of consent to polities of persons possible, because one cannot consent to other persons' influence and control if no alternative exists. The right involves many more Hohfeldian relations[88] that will not be discussed here.

These duties (which work in favor of one another, with access promoting the creation of wilderness and vice versa) break up a more general duty not to interfere with access to the non-human world, ensuring the possibility of exit from all polities and thus places from which to consent to human power, control, and influence. What then is the non-human world in a world filled with billions of humans? Presumably, since the word human generally refers to our species, the term "non-human" refers to all other species in existence, and the term "world" refers to the physical locations in which they live, or their natural habitats (this is, incidentally, the general approach taken in the Endangered Species Act). So, to preserve access to the non-human world requires preservation of non-human species and their habitats. Why must the biodiversity be complete? Remember how the concept "wilderness" works in the primary right – it is in part a theoretical ideal but also refers to actual places in the world, much the way free speech is an ideal but also refers to the actual speech that is permitted once the ideal is balanced against other values, like national security. The ideal of wilderness in the primary right is the far end of the spectrum of human influence, an ideal which makes thinking about how one place is more wild than another possible. The ideal is the complete non-human world, or complete biodiversity and its sufficient natural habitat, but that ideal is then balanced against the human polities in that world, much like the ideal of free speech is balanced against the ideal of national security. Each must make room for the other. Again, the picture that will emerge then is not a state called Wilderness, to which all of the non-human world has been relegated, but polities in a sea of wilderness, islands of consensual human political association in a sea of non-polity.

88. Regarding the constituent elements of legal rights generally, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, in* FUNDAMENTAL LEGAL CONCEPTIONS 65 (1923).

Another way to think of rights as ideals is to consider how we compensate persons whose rights have been violated. It is physically impossible to restore a person who has been tortured to the state of affairs they were in before the torture. But we use that theoretical state of affairs, or alternatively the state of affairs they would have been in had they not been tortured, as an ideal when determining how they are to be compensated for the violation of their right not to be tortured. The same can be done with the primary right – we can use an ideal non-human world to practically reason in that direction.

It is vital to see that we currently live under positive legal duties, backed by force, that point towards something like the norm I am calling the primary right. Wilderness, as used in the Wilderness Act of 1964, required that wilderness areas be "administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas."[89] Both it and the Endangered Species Act are enforceable, under penalty, by federal agencies.[90]

Analogues to these duties exist in international law. Instruments such as the Convention Concerning the Protection of the World Cultural and Natural Heritage, the Convention on Biological Diversity, the Stockholm Declaration of the United Nations on the Human Environment, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, among others, seek to protect the non-human world.[91]

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89. 16 U.S.C. § 1131(a) (2006).

90. *See generally* 16 U.S.C. §§ 1531—44 (2006); 16 U.S.C. §§ 1131—1136 (2006).

91. *See, e.g.*, Convention on Biological Diversity, pmbl., Jan. 5, 1992, 1960 U.N.T.S. 1087 ("[C]onservation of biological diversity is a common concern of humankind . . . ."); U.N. Envtl. Programme, *Declaration of the United Nations Conference on the Human Environment,* June 16, 1972, *available at* http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503; Convention on International Trade in Endangered Species of Wild Fauna and Flora, pmbl., Mar. 3, 1973, 27 U.S.T. 1087 ("Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come . . . ."); Convention for the Protection and Preservation of

To be clear, while there are duties imposed on us by positive law that parallel the core duties that make up the primary right (and other areas of law we would not immediately think of and which will not be discussed here, like the common law of false imprisonment), the primary right – like other fundamental human rights – need not *rely* on positive law. The primary right provides a theoretical basis for and explains positive law norms, and its reflection in positive law is evidence of the right. However, the right is not contingent on positive law. The state cannot give that which comes before it. Whether it was the Framers seeing themselves as having found a state of nature in which to form a new polity, or wilderness advocates creating primitive spaces away from others, both represent moves along the same spectrum. The far end of that spectrum would be the total absence of human control and influence, and that concept – even if theoretical – acts as a point from which to measure, whether we are measuring the imposition of a noisy road in woods we occupy, or the threat of foreign soldiers crossing our border to enforce a tax. Without that point we have no absolute from which to measure the degree to which others control and influence us – a frightening prospect if one values the bare autonomy of being "let alone," the value of complete exit from all polities. Wilderness, or the ideal of the far end of the spectrum (as opposed to federal wilderness areas or the Framers' America) is thus the value – part and parcel of consent – at the base of the primary right.

the World Cultural and Natural Heritage, pmbl., Nov. 23, 1972, 27 U.S.T. 37 ("Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world"); Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, pmbl., Oct. 12, 1940, 56 Stat. 1354 ("Wishing to protect and preserve scenery of extraordinary beauty, unusual and striking geologic formations, regions and natural objects of aesthetic, historic or scientific value, and areas characterized by primitive conditions.").

IV. THE PRIMARY RIGHT IN ENVIRONMENTAL LAW THEORY

A. Linking Liberal Political Exit Theory and Normative Environmental Law Theory

To date, the fields of liberal political exit theory and normative environmental law theory (if not environmental ethics more generally), have remained essentially separate. It is true that others have posited forms of complete exit. For example, Abner Greene refers to "complete exit" when discussing the withdrawal of religious communities like the Amish.[92] Perhaps Nicolaus Tideman makes the argument closest to mine in his article *Secession as a Human Right*,[93] which derives a compelling argument for a right to secede from the premise that people have rights to themselves. However, none of these arguments ground the right in wilderness or bare autonomy, instead connecting the right to environmental ethics.

It is also true that environmental law theory has gone so far as to assert that wilderness can further human freedom, but it has not treated such freedom as a form of autonomy that grounds a first generation human right. Rather, the approach has relied on instrumentalist and utilitarian arguments to support the claim. For example, James Huffman and others have explored the direct relationship between the concepts of freedom and wilderness,[94] but their arguments are premised upon a particular political system (e.g. the United States) and seem to proceed from essentially instrumentalist claims for protecting wilderness: wilderness should be protected because its continued existence facilitates particular values other than bare autonomy and consent to political association, be it the failed form of autonomy (loss of wilderness narrows the total range of human choices),[95]

92. Abner S. Greene, *Kiryas Joel and Two Mistakes about Equality*, 96 COLUM. L. REV. 1, 6 (1996).

93. *See generally* Nicolaus Tideman, *Secession as a Human* Right, 1 J. MORAL PHIL. 19 (2004).

94. *See* James Huffman, *Wilderness and Freedom*, 16 IDAHO L. REV. 407 (1980).

95. *See* Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1326-27 (1974); Shea

equal protection,[96] or the First Amendment.[97] Indeed, the relationship between wilderness and freedom has been so "instrumentalized" as to suggest that it can be quantified and traded in a market system.[98] Such arguments can be problematic because they often view liberal principles as competing against wilderness values, or because they are based on the rights of future generations.[99]

Moreover, where environmental ethics and human rights have intersected, the claim is to a very different human right than the one advanced here: a right to an environment adequate to human health and well-being, or a clean and safe environment.[100] Other attempts to articulate a human right to the environment also usually sound in the area of so-called "second generation rights," which are less accepted as "rights" to begin with than civil and political rights, and which are valued progressively rather than absolutely, making these claims weaker tools for environmental law than the primary right.

By linking environmental ethics and political exit theory, the primary right can help environmental scholars facing the difficulty of finding an objective theoretical foundation or baseline for protecting the environment – but using the primary right in this sense will not go without criticism. A. Dan Tarlock has

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Coulson, *Liberty, Property, and the Environment: Rethinking Environmental Law in Canada*, 26 WINDSOR REV. LEGAL & SOC. ISSUES 49, 65-67 (2009).

96. *See* A. Dan Tarlock, *A Wilderness. Bill of Rights, by William O. Douglas*, 19 STAN. L. REV. 895 (1967) (book review).

97. Scholars who see the First Amendment as a source for environmental protection espouse, for example, the value of "an understanding of the true relationship between man and nature." *See* Carole Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107 (1997).

98. *See generally* Jan G. Laitos & Rachael B. Gamble, *The Problem with Wilderness*, 32 HARV. ENVTL. L. REV. 503 (2008); PARTHA DASGUPTA, HUMAN WELL-BEING AND THE NATURAL ENVIRONMENT (2004).

99. *See, e.g.*, Martin Schonfeld, *Population Growth and the Preservation of Wilderness*, 31 J. SOC. PHIL. 414, 414-28 (2001).

100. *See, e.g.*, James Nickel, *The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification*, 18 YALE J. INT'L L. 281 (2003); TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 1 (2005); Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 19 (2001).

argued that environmental law is incompatible with our U.S. constitutional jurisprudence because the environment, rather than human dignity, is the focal point of environmental protection, and because environmental regulation calls for affirmative state action (positive rights) rather than preventing state oppression (negative rights).[101]

Kent Greenawalt goes further, arguing that a religious or non-rational basis is needed to support environmental protection because:

> [u]nless one puts the justification in terms of psychological health or in terms of a needed corrective to present human ignorance of future possibilities, the claim that people should respect nature in its own right and should try to preserve species is not one that can be grounded successfully in rational argument.[102]

In arguing that a non-rational or religious foundation is appropriate, Greenawalt asks:

> If crushing one stone raises no moral question, why does destroying the Grand Canyon raise a question except in terms of aesthetic and other losses to people and to other creatures warranting moral consideration? Why should the life of one nearly extinct snail darter count for more than the life of one salmon, if the salmon's capacities are at least as great?[103]

There have been many attempts to circumvent this problem. With regard to wilderness areas, some have argued for assigning property rights to wilderness areas, which could then be traded in the market.[104] Jedediah Purdy has attempted to revise our conventional approach to environmental law without resorting to market solutions by arguing that our historic discourse about the

101. *See* A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 223-26 (2004).

102. Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011, 1039 (1986).

103. *Id.* at 1037.

104. Laitos & Gamble, *supra* note 98.

value of protecting the environment is sufficient to generate democratic change.[105]

In contrast to these, the primary right approach claims access to wilderness and its local representation as an objective human right (or meta-human right, as described above), irrespective of subjective market preference or the democratic process. The basis for the right is not religion, but the value of autonomy that can exist only through the uniquely objective concept of wilderness. Wilderness is not an instrument for autonomy; rather, it is the physical realization of the entirely secular value of bare autonomy and meaningful consent, which are purely rational, liberal, and political values. Wilderness must be preserved because without it one could not revoke one's consent to be subjected to others' influence. To respond to Tarlock's point, what value is more central to human dignity than autonomy – the ability and praxis of declining other persons' control and influence in order to self-determine? And why would I care if the persons forcing themselves on me are representatives of the state or fellow citizens? It is the imposition of power or polity that matters, not who is imposing.[106]

Furthermore, to Greenawalt's point, destroying the Grand Canyon raises more of a question than crushing a stone because of the great degree of influence the act would have on the non-human world and thus persons right to leave all polities and access it. That is why climate change is so offensive to those who love wilderness – it represents such a loss of bare autonomy in a world from which we can exercise the possibility of consent to influence by others, or to instead be let alone.

Thinking along these lines may give the best reasons to justify things like the September 10, 2008 acquittal of six Greenpeace activists charged with intentionally damaging the

105. Purdy, *supra* note 76.

106. Alternatively, we can evade the state versus private actor distinction by noting that the state has monopolized the right to use the violence we would otherwise use against the offending private actors, and therefore become complicit.

UK coal-fired power station at Kingsnorth.[107] While the jury may have been persuaded by the defense's arguments about the activists' preventing the greater harm to property caused by climate change, a better moral justification might have been that the operators of the plant had crossed a theoretical threshold and were violating the primary right.

B. Solving Environmental Law Theory: Of Baselines and Wilderness

By now it should be obvious that a strong candidate for a baseline of environmental regulation is the background environment itself, both the one in which humans occupy, and the non-human world. But, where on the continuum of human power, control and influence, do we draw the boundaries of the primary right? As with any right, bright-line boundaries are difficult to establish in the abstract. That said, I suggest we can draw a line around that which is reasonably necessary to preserve an exit option out of human polities and into the wilderness. This requires at least two things: preventing the loss of other species in their natural habitat with whom one can interact (especially as those species evolve), and ensuring that access to local wilderness areas is at least reasonable (for example, reachable by a short drive). This would allow persons who do not consent to the dominant influence of other persons to exit, while allowing for all the other forms of human activity we find valuable. Again, unlike Purdy's approach, the primary right approach treats the imperative to preserve and restore wilderness as an objective fact of human autonomy, not subject to the opinions of others in political or economic markets.

The one variable that might make reasonable access to wilderness impossible, human population, would of course have to be taken into account. While it is often unclear what one means by overpopulation (begging the question over *what*), the primary right provides a useful standard: again, do you, at this moment, as you read these lines, have reasonable access to the nonhuman

107. *See* John Vidal, *Climb Every Chimney*, THE GUARDIAN, Sept. 12, 2008, *available at* http://www.guardian.co.uk/environment/2008/sep/12/activists.kingsnorth.

world? We can easily speculate how much easier the right would be to protect and further, for all of us, had human population not sextupled in the Twentieth century alone. That said, the fact that the primary right may not be fully realized because of human population levels does not make the imperative to strive for the ideal any less absolute. According to Daniel Farber, "most constitutional rights represent baselines that are subject to override, but only by particularly powerful government interests. For example, the First Amendment does not create an absolute right, but the norm of free speech nonetheless functions as a powerful baseline."[108] The norm, or ideal, of free speech that Farber describes is the theoretical point from which claims to a right to free speech are launched, and from which fulfillment of the right is measured. In the same way, wilderness is the norm, or ideal, from which claims to the primary right are launched, and from which fulfillment of the right is measured.

Farber critiques Cass Sunstein's use of a neutral baseline in evaluating environmental regulation. Sunstein objects to the idea that "the interest in clean air and water, and in a safe workplace, should be seen as a 'right' in the sense of something that will not be balanced against other social interests."[109] Instead, for Sunstein there is no presumptive allocation of entitlements, and individual interests in polluting or preserving the environment are weighed equally. Farber analogizes this approach to Ronald Coase's objection "to the notion that someone making an intrusive noise should be seen as invading the rights of a neighbor; the neighbor can equally well be seen to be invading the noisemaker's rights by demanding quiet."[110] Farber asserts that Sunstein's neutral baseline for evaluating environmental law flies in the face of "the two primary interests deserving of protection" that Sunstein himself identifies: human welfare and autonomy.[111] Farber points out, "someone who has developed cancer, as a result of involuntary environmental

108. Daniel Farber, *Playing the Baseline: Civil Rights, Environmental Law, and Statutory Interpretation*, 91 COLUM. L. REV. 676, 685 (1991).

109. *Id*.

110. *Id*. at 686.

111. *Id*. at 687.

exposure, has also suffered very serious losses of welfare and autonomy."[112]

Contrast Sunstein's approach with the primary right approach. Using the norm of reasonable access to wilderness (defined to require complete biodiversity and its sufficient natural habitat) as a baseline, the primary right would guide many regulatory outcomes for air and water quality, especially where the behavior at issue has global impacts, like carbon emissions, upon the litmus paper represented by wilderness. Similarly, the primary right would favor the sounds in wilderness over Coase's noisemaker, an advertiser wishing to blast commercials via loudspeakers into the Gila Wilderness for example. In other words, hikers trump snowmobilers.

And yet, the primary right approach also has the advantage of being truly neutral. Unlike Sunstein and Coase's seemingly neutral system, the primary right uses the non-subjective non-human world as a starting point. Even using regulatory, statutory, or constitutional baselines, as Sunstein does elsewhere, seems arbitrarily subjective (favoring one group over another) relative to the immaculate pre-human neutrality of wilderness. In a world of competition between various subjective uses of scarce resources, non-use is more equitable than any particular use because it is the only choice that avoids favoring one human over another, by instead linking the decision to and favoring the non-human, or that which came before the various subjective uses. The fact that non-use may coincide with some humans' preference is irrelevant – the decision is based on the original state of the resources. Like an adult settling a dispute between children over a piece of cake, it really is a fair choice to say that none may have it.

Consider in this regard the common debate over whether wilderness and the non-human world ought to be valued instrumentally or intrinsically. The primary right allows us to exit the "intrinsic versus instrumental" debate by providing a unique, third way of valuing wilderness, seeing it as "objectively valuable." Wilderness is objective not just in the sense that we can objectively verify human influence in the non-human world,

112. *Id.*

or even in the sense that wilderness has objectively intrinsic or instrumental value, but in the sense that wilderness or any other natural resource is an object with the potential to be converted to any number of uses, each subjectively valuable to different groups of humans users.[113] The default state of the world, however, is unconverted, natural wilderness. An unused natural resource, a nonpolity, or a place in a state of wilderness, is thus objective or neutral, relative to the various subjective uses to which it could be put. In this sense wilderness is "objectively valuable" because it has not been reduced to a subjective use. When we alter the non-human we are not just dominating it, but dominating others who might have appreciated its objective state.

C. Dividing Environmental from Non-Human Law

Much of the confusion described above could be attributed to simple semantics. Interior decorators use the term "environment," but it hardly seems fitting to treat the preservation of species and their habitats in the same vein as where we place rugs and light fixtures. We might therefore call the creation of a manicured park, which seems to be at best a Platonic imitation of the non-human world, an improvement in the environment. But by calling the regulation of humans with the non-human world "environmental law," we immediately treat the world as a singular environment and erase the human and nonhuman divide – conceptually erasing the non-human world, the world before humans, entirely. It becomes "ours," the presumed consenters', communal environment to treat. As discussed below, this is a convenient frame for polluters and tends to make invisible key factors that degrade the non-human world like population growth. Changing the frame to non-human law preserves, in the term itself, the subject of the law's protection.

113. Obviously, non-human animals use natural resources. However, they will not be discussed here, primarily because non-human animals are generally not seen as capable of creating social contracts.

V. COUNTERARGUMENTS AND FREQUENTLY ASKED QUESTIONS

Some will claim that the primary right is not something people want – that it is not preferred enough over conflicting interests to survive market choices and the democratic process. But the claim that the primary right ought to be respected is a thoroughly first generation (political) human rights argument for protecting the non-human world. The rights-based argument is premised upon the intrinsic worth of autonomy and consent, and the wilderness that is necessary to protect these values. It posits that autonomy is a non-commensurable value that trumps subjective preference, instrumental value, and the maximization of utility. As such, just as the right to vote is not contingent on what the majority thinks or people actually voting, the primary right is not defeated by counterarguments about personal preference.

Modern authority has breezed past the requirements of the primary right so much so that the claims made herein will appear fantastical to the average thinker, more than some minds (the sort that believe in "green consumption") can take in as Tocqueville wrote of early Americans:

> To break through almost impenetrable forests, to cross deep rivers, to brave pestilential marshes . . . those are exertions that the American readily contemplates, if it is a question of earning a guinea; for that is the point. But that one should do such things from curiosity is more than his mind can take in.[114]

Many persons simply do not have the disposition or capacity to respect particular rights.[115] They must assert their will upon the world and cannot simply let others alone. We should not expect them to do so. That is the whole point – I need not expect

114. Purdy, *supra* note 76, at 1140 (citing ALEXIS DE TOCQUEVILLE, JOURNEY TO AMERICA 335 (J.P. Mayer ed., George Lawrence trans., 1962) (1959)).

115. *See, e.g.*, Greenawalt, *supra* note 89, at 1021-22 ("[P]erhaps only human beings with a minimal level of moral capacity . . . may qualify as bearers of rights who are owed justice."). The author continues by stating, "Moreover, an attitude that animals and nature are not to be dominated contributes to less domineering and aggressive attitudes among people and thus enhances human social existence." *Id.* at 1024.

them to cease from asserting their will on me or others, or feel the need to waste my time convincing them to do so, because I need not deal with them at all. I should be able to walk away from them and their influence, making them irrelevant without relation to me. Their incapacity, their inability to practice relative noninterference, does not defeat the right. The rights-based argument treats the value upon which the right is based, autonomy, as a non-commensurable liberal value that trumps subjective preference and the maximization of total utility.

That said, the primary right is not simply an attempt to hoist libertarians opposed to environmental protections on their own petard, nor to work a *reductio* on liberal political thought, nor to default to the remaining generation of human rights argument, by claiming that second and third generation arguments for the natural environment have largely failed (especially in light of our inability to regulate anthropogenic causes of climate change). Rather, it is an honest attempt to explore the meanings and limits of autonomy and consent, proceeding from a human rights framework of assumptions.

There would no doubt be desirable consequences in protecting the right, relevant to climate change, urban sprawl, the loss of species, and the spread of toxins; this would also include social changes, not the least of which would be how thoughtful persons come about bringing others into the world. Further, it seems obvious that any collection of political systems will produce more utility if the polities within it are incentivized to attract members rather than compel their membership because no real alternatives exist. Nevertheless, the arguments made herein spring from the intrinsic value of autonomy and consent, rather than the usefulness or instrumental value of having the right. As such, the primary right is not particularly vulnerable to speculative counterarguments about the dangerous consequences of recognizing such a right, such as effects on economies.

Another argument against the claims made herein is that realizing anything close to the primary right for all persons is simply infeasible. This argument fails because it often presumes that the voluntary behavior most responsible for preventing access to the non-human world, the creation of humans or

unlimited human procreation, is somehow inevitable, like rain falling from the sky. That is not the way having children works.

The comeback then is usually that while limitless procreation may not be physically inevitable, the primary right remains infeasible because there is a personal, limitless right to procreate. This too fails because the primary right trumps any so-called unlimited right to procreate, a claim of right that is doomed to failure, both legally and morally.[116] The primary right is feasible because of that trump, because the value it protects outweighs the only conflicting value it has to in order to be feasible in a logical ordering of rights and duties.

Note that the primary right is in a way superior to other human rights and interests in that it is tied to a concretely tangible and objectively valuable thing – wilderness – rather than relatively abstract concepts like religion, privacy, or free speech. We can empirically measure the degree to which wilderness is lost, and the degree to which we have access to it, and hence the status of the right. In this way it is a right built for praxis: the reader can decide now whether, and when, she or he will go experience the value, and where they will do it; she or he can also imagine what it would be like to live in a world where they could not do it, could not get away from others. Again, do you, at this moment, as you read these lines, have reasonable access to the non-human world? Because it corresponds to our experiences, you, the reader, can visualize it much more than you can visualize whether you enjoy other and more contingent

116. *See* Dillard, *supra* note 64; Carter Dillard, *Valuing Having Children*, 12 J.L. & FAM. STUD. 151 (2010) (exploring self-replacement as the only defensible objective value underlying the moral right to procreate); Carter Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367 (2009) (demonstrating the moral and legal duty a prospective parent has to be fit when he or she has a child, a duty arising from or creating correlative claim-rights shared by the state and prospective children); Carter Dillard, *Prospective Parents and the Children's Rights Convention*, 25 AM. U. INT'L L. REV. 485 (2010) (interpreting the Convention from a prospective-child-centered perspective, and exploring whether the Convention requires states to pursue policies that heighten prospective parents' perceptions of the duties they owe their prospective children before having them); Carter Dillard, *Future Children as Property*, 17 DUKE J. GENDER L. & POL'Y 47 (2010) (arguing that the broad, modern, privacy-based version of the right to procreate is in tension with an embedded constitutional principle that prohibits one class of persons (prospective parents) from treating another (prospective children) as property).

fundamental rights, like the right to counsel, to speak freely, or to be free of unlawful searches and seizures.

Contrast this with the praxis of the right to have as many children as you like, in whatever circumstances you wish: what concretely tangible and objectively valuable thing was Nadya Suleman, the so-called "Octomom," pursuing by having fourteen children?[117] Autonomy and privacy? Was whatever valuable thing she sought more valuable than those aspects of the non-human world that inspired our greatest works of art, poetry, and literature? In contrast to more ethereal rights, the primary right is built upon the concrete and objectively valuable ideal of reasonable access to the non-human world. I would rather share the world with spotted owls than the Duggars' umpteen children,[118] and, per the primary right, I have a right to do so.

Thus, even though traditional environmental regulation has been derided as hopelessly anti-liberal, negative, and contrary to human dignity, the primary right is the opposite – encouraging and urging persons to exercise their autonomy from each other in order to experience the non-human world, and thus incentivizing polities to attract rather than compel membership. If we honestly value polities created by consent then we value a world dominated by the natural spaces in between those polities, because those spaces give meaning to our active consent, our act of choosing.

Perhaps the best challenge to the claim that non-polity or wilderness can act as a baseline for a human right, and for environmental regulation, is the assertion that wilderness simply does not exist, that any divide between the human and non-human worlds is so obscure as to make wilderness an incoherent concept.[119] William Cronon might be seen as taking this position in his famous essay, *The Trouble With Wilderness*.[120] More than

117. *See* Ashley Surdin, *Octuplet Mother Also Gives Birth to Ethical Debate*, WASH. POST, Feb. 4, 2009, at C1.

118. *See generally* JIM BOB DUGGAR & MICHELLE DUGGAR, THE DUGGARS: 20 & COUNTING! RAISING ONE OF AMERICA'S LARGEST FAMILIES – HOW THEY DO IT (2008).

119. *See, e.g.,* EMMA MARRIS, RAMBUNCTIOUS GARDEN: SAVING NATURE IN A POST-WILD WORLD (2011).

120. *See* William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, *in* UNCOMMON GROUND: TOWARD REINVENTING NATURE 69

one commentator has criticized environmentalists' attachment to the human and non-human divide,[121] calling the "wild" an "empty concept" and arguing that "[h]uman domination of earth's ecosystems empties most of the meaning out of the concept of 'wild' today."[122] They assert that wilderness is a profoundly subjective aesthetic, rather than objectively verifiable state of affairs.[123] Others attack the divide as a social construct that distorts our view of reality and preserves legal doctrines, like the "Act of God" doctrine, that now make little sense, especially in light of anthropogenic climate change.[124]

There is a suspicious undercurrent of hostility towards those who would protect the non-human from the human in these critiques, and one could not have designed a better gift for corporate polluters than a straight-faced argument that there is no "environment" left to be protected. Regardless, these critiques do not pose a problem for the primary right for several reasons. First, these critiques usually conflate the ideas of the pre-human world with the non-human world; the primary right is based upon the latter, an ideal, as described below, one can practically reason about. Similarly, they are incoherent to the extent that they are, themselves, premised on a logical distinction between the human and the non-human, as when one refers to "human domination of the earth's ecosystems."[125] One extended critique sought to prove that the original state of nature never existed and thus that contemporary environmentalists should not try to restore it

(William Cronon ed., 1995). Fully exploring this point is beyond the scope of this essay but my sense is that Cronon may have been presuming something this essay does not about the inevitability of population growth when he made his critique.

121. Purdy, *supra* note 72, at 1127 n. 5 (providing a good summary of the more explicit claims).

122. *See* Jamison E. Colburn, *The Indignity of Federal Wildlife Habitat Law*, 57 ALA. L. REV. 417, 457 (2005).

123. *Id*. at 457.

124. *See generally* Jill M. Fraley, *Re-examining Acts of God*, 27 PACE ENVTL. L. REV. 669 (2010).

125. Colburn, *supra* note 122, at 457. Fraley's article critiques the notion of separating the human from the natural, but at one point she herself presumes the divide. *See* Fraley, *supra* note 124, at 682 ("Roast turkey, for example, may be visibly enhanced using beet coloring extracts. The beet coloring extracts are a naturally occurring, not human engineered product, but in nature the beet coloring would not be found within the turkey.").

through a series of studies showing that indigenous people destroyed much of the ecosystems they occupied – studies which were premised on the distinction between the ecosystems and the humans causing them damage.[126]

The ability to objectively distinguish a human from a non-human in the world is, as one commentator noted, one of the foundations of the study of anthropogenic climate change.[127] If we can identify humans and their power, control, and influence apart from their surroundings, the two are logically distinct, and to the extent we can measure a spectrum of human influence on the non-human world, the interest protected by the primary is coherent. If we can say that one place is more wild than another, or if we can envision a world without humans, or an ongoing diminishment in human influence on the non-human,[128] then practical reasoning based on the primary right is possible.

Secondly, because primary right analysis involves a continuum of human power, control and influence, rather than a simple dualistic description of the world as divided into the human and non-human, it avoids the oversimplification, which is usually the proper target of the critique. The objection that persons can never entirely reach the ideal, does not defeat the claim that the ideal might prove a basis for a right, any more than the claim that a state can never achieve perfect and universal suffrage defeats the right to vote, or that a state can never perfect free speech defeats rights aspiring to that ideal.

Thirdly, these critiques all seem leveled at *descriptions* of the divide between human and nature – something one would expect of scientific commentary. However, the primary right described herein is a normative concept, not a description of the physical world. Asserting that the Earth is dominated by humanity is no answer to the argument that we ought to be able to access places theoretically approaching the wilderness lying at the far end of the spectrum. The norm of free speech Farber refers to never relies on the actual predominance of free speech but on the ideal

126. *See generally* WILDERNESS AND POLITICAL ECOLOGY: ABORIGINAL INFLUENCES AND THE ORIGINAL STATE OF NATURE (Charles E. Kay & Randy T. Simmons eds., 2002).

127. Fraley, *supra* note 124, at 684.

128. *See generally* ALAN WEISMAN, THE WORLD WITHOUT US (2007).

of free speech to be asserted against the status quo. In other words, the *ought* of free speech to be asserted against the *is* of a lack of free speech. That is the whole point of asserting a right. The normative approach does not involve cold scientific observation of changes in the world, but hot anger at the ongoing loss of something valuable, followed by a search for the best way stop the loss, restore the world as close to the ideal as physically possible, and take compensation from those responsible for the restoration, and restitution where restoration falls short. In short, the danger lies not in falsely dividing humans from nature; the danger lies in the human world pushing the nonhuman world out of existence.

In addition to the counterarguments raised above, this essay has raised several questions among commentators that readers might find helpful and wish to have answered.

1) Would offering persons that wished to exit the polity a chance to live alone on a space station fulfill the primary right?

No, because the person on the station is, while alone and perhaps outside of the scope of particular political obligations, still in a world others made and therefore subject to their power. The primary right is pegged to wilderness as an ideal because wilderness represents places with relatively little human influence, the far side of a spectrum of human power. A space station is the opposite – and conflating it with wilderness is an example of the territory trap described above.

2) Will the primary right lead to a tragedy of the commons and does this defeat the right?

No. First, the tragedy of the commons is the overuse of commonly-owned resources. Owning the wilderness is antithetical to the ideal of non-polity. Second, the primary right specifically prohibits influencing others, so many uses, and certainly overuse, is prohibited. As such, the primary right works to protect spaces that would be subject to human overuse. Thirdly, as discussed above, the primary right forces us to look at the root cause of environmental degradation: human population

growth. Coincidentally, Garret Hardin, the author credited with recognizing the tragedy of the commons, also recognized population (and not common ownership) as the key cause of environmental degradation. His initial discussion of the tragedy of the commons and subsequent writings make that clear,[129] and not recognizing that when relying on the tragedy of the commons model is disingenuous to his work.

Also, were the primary right to cause the tragedy of the commons, that consequentialist argument would not *prima facie* defeat the right any more than claims that a right to be free of unreasonable search and seizure increase crime. The primary right is fully supported by the premises of autonomy, power, and consent described above, and if you accept them you must accept the right. Undesirable consequences are simply to be balanced against the right. Moreover, because the primary right has never been recognized in the world and protected as such, arguments about its consequences are speculative. That is, why they are mentioned, but not relied upon above.

3) Is non-polity or wilderness as described in this essay the same as wilderness as defined under domestic and international law? Because no legally defined wilderness area meets the ideal, is the right defeated?

No. As discussed above, this essay refers to positive law reflections of the ideal of the non-human world – i.e., duties imposed on us by the Wilderness Act – that parallel the core duties that make up the primary right, but the right need not rely on positive law and the two should not be conflated. The right stands on its own, assuming one accepts the premises regarding autonomy, consent, and power that it is derived from. The primary right provides a theoretical basis for and explains positive law norms, and its reflection in positive law is evidence that we value something very much like the right, but it does not

129. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); Garret Hardin, THE IMMIGRATION DILEMMA: AVOIDING THE TRAGEDY OF THE COMMONS (1995); Garret Hardin, THE OSTRICH FACTOR: OUR POPULATION MYOPIA (1999).

rely on positive law like the Wilderness Act. The primary right is a reason to change the law, and is not contingent upon it.

4) Does it matter which theory of political consent we use?

No. While persons might be able to consent expressly, implicitly, or hypothetically, one of the most important reasons for recognizing and respecting the primary right is that no form of consent is possible without an alternative to human polities. One cannot leave *any* country if one cannot leave, and truly leave, *all* countries.

5) Does the presence of many people in a given tract of wilderness constitute a violation of all their primary rights?

No, unless those persons are interfering with others' bare autonomy. This is not as theoretical as it sounds but is comparable to rules laid out under the Wilderness Act and its regulations, and inherent in what is commonly known as the "wilderness ethic." I am exercising something very much like a balanced version of the primary right when I hike alone for the day in Yosemite. But because I cannot reasonably access it due to traffic, and because others constantly cross my path, and because the flora and fauna have been degraded, and because the non-polity we call Yosemite is bordered and therefore halted by clusters of human influence, I am far from the ideal of non-polity. That ideal, and the primary right that protects it, are reasons to change existing policies, by weighing my interest in non-polity more heavily so that whatever is interfering with me approaching the ideal be stopped. Yosemite is not ideal, but it is closer to the ideal than Manhattan. Without the ideal I would not know that. Moreover, that ideal, and the construct of a human right that protects it, is useful legally because if Congress attempts to eliminate Yosemite by building strip-malls there, only seeing access to it as a fundamental right under the Constitution is likely to protect the area.

6) Does the primary right ensure Hobbesian chaos in wilderness by removing a dominant sovereign or polity?

No. Assuming the primary right is respected, it prohibits the interference with others, which was the central concern of Hobbes. If the right is being respected, persons in the wilderness will not interfere with others, much less kill, maim, or steal from them. Some will argue that recognizing the right would lead to such a state of affairs, but it could never be the proximate cause; people doing that which Hobbes feared is the proximate cause of such a state of affairs. Moreover, even where the primary right is the cause, such consequentialist arguments do not *prima facie* defeat the right.

7) Is non-polity or wilderness an euphemism for political anarchy, and thus a *reductio ad absurdum* of liberal political thought?

No. Non-polity is a relatively novel concept, especially as used in this essay. It is a description of an ideal, or value, which forms the basis of a human right, much the way the value or ideal of an education forms the basis for claims of a human right to be educated. Non-polity refers to the ideal of physical space absent human influence. In contrast, anarchy refers to the absence of government or political authority. The two differ in several ways. First, as discussed above, the ideal of non-polity requires one human alone in the wilderness, whereas anarchy traditionally refers to persons seceding and living together.[130] I distinguish the primary right from secession above – while the former makes room for the latter, that room is merely incidental. Second, anarchy is the absence of political obligation, which I distinguish above from the absence of power. Non-polity calls for the latter – not simply a wilderness void of government, but of human influence upon the person enjoying the right. Finally, because non-polity is an ideal, balanced against other rights and interests, it will likely never be fully realized the way anarchy has been and

130. *See* Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 634 n.8 (1991).

will be. One balance will be that non-polities will likely exist, physically, within the borders of polities and be subject to at least some form of contingent power, at the very least to protect the primary right. Balancing the right, as with all rights (like the right to free speech), does not defeat it. But the primary right, and the values it collects together conceptually, allow for the balancing to occur.

8) Is the primary right – a right to be stateless and live outside any of the nations – something generally regarded as undesirable?

Yes, depending on the competing rights and interests. As discussed above, the ideal of non-polity includes not being under the political authority of a state. While non-polities within polities might have to be balanced against competing rights and interests (so that Yosemite, while pristinely non-human, would still be under the jurisdiction of the United States, which is less of an influence on my bare autonomy than snowmobiles running past my camp there), the space between polities (the oceans for example) might provide a greater opportunity for statelessness. While some may regard being stateless as undesirable, that may be because they cannot return to any polity. There is nothing in the primary right itself that says we have to renounce any particular form of statehood. Other factors aside, a right to exit does not itself imply a bar to reentry.

9) Does anthropogenic climate change and other forms of worldwide environmental degradation mean the primary right is nugatory because the ideal it seeks has ceased to exist? Does the presence of political authority over wilderness areas vitiate the concept?

No. In fact, we are faced with mass environmental degradation and the threat of climate change *because of* the failure to articulate a first generation human right to a particular environment, ignoring the compelling weight that the notion of political consent carries in policy debates and opting instead to use less effective baselines for environmental regulation.

Firstly, as discussed above, the ideal at the core of the primary right, like ideals in all rights, must be balanced against competing ideals in other rights, e.g., much like the ideal of free speech is balanced against the ideal of national security. So not completely reaching the ideal of the primary right – such as the less-intrusive influence of being under a particular political authority that happens to never set foot in the wilderness at issue – is expected. We have a right to speak freely, even though that right has been balanced against national security concerns. We can likewise have a primary right that is balanced against others' right to live in the wilderness. But, just as it is physically impossible to restore a person who has been tortured to the state of affairs they were in before the torture, we use that pre-torture theoretical state of affairs to compensate them in vindication of their right not to be tortured. The same can be done with the primary right – we can use the ideal of the non-human world to practically reason in that direction. Secondly, while even wilderness zones would be very much the product of human influence in that we would have created them by law, non-human influences would, over time, supersede human influences to make them relatively non-human.

10) How would the right work "in real life?"

The primary right could be recognized and codified as a universal, international civil and political right through treaty, as a logical extension and part and parcel of other rights in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In addition, the right could be recognized by the United States Supreme Court under a disjunctive "implicit in the concept of ordered liberty"[131] fundamental rights analysis for all the reasons, given above, that the primary right is central to the ordering of liberty. If the Court can declare, without any textual footing, that procreation is protected under the Constitution as "one of the basic civil rights

131. Anthony C. Cicia, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 FORDHAM L. REV. 2241, 2256-57 (1996).

of man,"[132] it can recognize that right which makes consensual political association possible.

In either case, via international or domestic law, recognizing the right would at the least provide a basis to reweigh wilderness as a value in any legal dispute over the protection or restoration of wilderness so that it counts for more than a simple interest, much the way political speech counts for more than a simple interest when weighed against competing interests.

VI. CONCLUSION

This essay has introduced the concept of the primary right, a human rights claim to non-polity and wilderness based upon autonomy and consent. This right makes a valuable contribution to environmental law theory by clarifying that if we value the political autonomy that comes from the possibility of completely exiting all polities, we are compelled to value the non-human world and access to it. In other words, if you value autonomy and political consent, you also value the nonhuman world, and therefore would presumably want it to exist somewhat nearby. This essay adds to the literature by forcing us to see the non-human world as a medium by which humans exert power over each other, and by proposing that the baseline for environmental law – that field of law which regulates the relationship between humans and the non-human world – should be the non-human world itself. In the end, the primary right only asks that we be left alone, literally, that we have the right to be left alone.

The claims made herein are not meant to belittle other sufficient bases for a right to wilderness, such as diversity and knowledge. Every argument for the value of "diversity," in universities, in corporations, in politics, that is, the diversity among one species, speaks to a value that is dwarfed by the value of true and complete biodiversity in the nonhuman world. The value that biodiversity represents, which is the opposite of a viral human monoculture, could support the primary right. Even religious rights could suffice, at least of the thoughtful sort that truly value the non-human world and commands that we not

132. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

replace it with a human version. However, the primary right is markedly different from these; it is based upon the values of autonomy and consent, and thus responds directly to liberals that make the mistake of pitting individual autonomy and wilderness protection against one another. The primary right is also demanded as a human right, which is a way of making a demand when the speaker and those that agree with her see the thing to be protected as overriding many of the rules and interests that make up the status quo. So-called environmentalists, those that really value the political freedom Thoreau's absolute freedom and wildness represent, should have demanded this right long ago and taken the action necessary to secure it.

In the Senate debate on the 1964 Wilderness Act, Senator Frank Church of Idaho stated that "without wilderness this country will become a cage."[133] He may have meant that humans can never be free of human power, control, and influence if the non-human world ceases to exist. The primary right is a powerful, human rights-based argument preventing this. Future work will show that the primary right can be supported by positive law (both domestic and international), as further reflected in common law doctrines like false imprisonment, and that protecting and promoting the primary right is politically, economically, and culturally feasible. However, even if the claims made herein are eventually proven untrue, we are obligated, as a provisional matter, to protect wilderness and biodiversity while the debate is being resolved lest we lose the very thing we are debating.

133. Purdy, *supra* note 76, at 1172.