The Secret Lives of Environmental Rights

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PAC ENVIRONMENTAL LAW REVIEW

ESSAY

THE SECRET LIVES OF ENVIRONMENTAL RIGHTS

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ABSTRACT

Do constitutional environmental rights change hearts and minds? How could they? This Essay describes three possible hypotheses of the relationships among constitutional environmental rights, meaning, and behavior: The Separate Domains Approach, The Constitutive Approach, and The Mutually Constitutive Approach. The theories underlying these hypotheses, and explored in this Essay, may provide some insight into constitutional environmental rights and how they may evolve throughout generations.

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“Rightly proud is the generation that manages to get its ethics enshrined in law. (Although history demonstrates that one generation alone is rarely enough to achieve this kind of truly radical change. Generational cooperation across time is crucial.)”

Constitutional environmental rights live two lives. One is in the courts, expressed by litigants, lawyers, and judges. The other is on the land, embodied by communities, planners, administrative agencies, and the people tasked with environmental and natural resources management. These two lives are interconnected. And both give law meaning. Life on the land influences life in the courts in ways that will be familiar to legal audiences. Standing, for example, requires that a litigable dispute over constitutional rights has a real connection to what actually happens on the land. Similarly, life in the courts affects life on the land. Public debate over ongoing litigation, as well as judicial opinions, can influence the ways in which individuals and communities view and interpret the right. But this is a thin description of how constitutional environmental rights work. There is, of course, a rich body of legal scholarship on how these amendments work, or may work, in the courts. This focus on litigation and adjudication is mirrored in critiques of constitutional environmental rights, warning that either amendments would lead to a flood of litigation or that judges would interpret them to be meaningless. Legal scholarship lacks similarly robust examinations of how constitutional environmental rights work on the ground.


My hope in this symposium Essay is to outline some of the theoretical groundwork for future qualitative and quantitative empirical studies of how and whether environmental rights work across landscapes and time. The ways in which communities, non-profits, and state agencies engage with the environment are not solely determined by what happens in courts. But how might constitutional rights to a healthy environment influence how rules, cultural expectations, and behavior changes across these groups? In other words, how might environmental rights alter institutions, if at all? This Essay examines the theoretical basis of three potential hypotheses for how environmental rights influence, or fail to influence, institutions outside of grand legal fora (e.g., courts and legislatures). There are many other reasonable hypotheses than just the three presented below. And, for that matter, it is possible that all three theories are at work at the same time, appealing to different kinds of people, and leading to varied results within even a single jurisdiction. I chose these three hypotheses because they encapsulate the common assertions of both critics and advocates of constitutional rights to a healthy environment.

Below I proceed by introducing each hypothesis and providing a key example of the hypothesis at work. Each hypothesis is then briefly followed by a discussion of some of the flaws of the theory along with a discussion of what one might expect to see if that hypothesis were at work in a jurisdiction with a constitutional right to a healthy environment.

I. HYPOTHESIS 1: THE SEPARATE DOMAINS APPROACH

Law is what lawyers do. In jurisdictions with constitutional environmental rights, no one outside of the legal field or closely related fields are aware of constitutional environmental rights. Therefore, they do not impact institutional change outside of litigation, except as a result of litigation.

Robert Ellickson’s classic investigation of how ranchers in Shasta County, California, resolve cattle trespass disputes is a useful example of this hypothesis at work. After extensive research and interviews with cattle ranchers, he found that rather than relying on law, the community of


6. By “institutions” I mean the formal (de jure) and informal (de facto) rules that are collectively agreed to and generally followed through collective action. See Karrigan Börk & Sonya Ziaja, Amoral Water Markets?, 111 GEO. L.J. 1335 (2023) (discussing, in part, loose definitions of “institution” in the context of water markets).

ranchers in Shasta developed their own shared expectations and norms to manage border disputes. Law stayed in the courts; on the land, it was reputation and social norms that controlled expectations, behavior, and sanctions.

The trouble with this theory, at least as formulated here, is that the borders of epistemic communities are not airtight. Put another way, social norms do not exist in a vacuum. They belong to people who live on landscapes. Both people and landscapes, usually, belong to a state with laws. Elinor Ostrom’s work on the commons complicates this first hypothesis. Yes, communities can and do develop informal rules and methods of sanctions to govern their landscapes; but, the success of that local governance depends in part on whether it is successfully nested within the law.

Nonetheless, if this hypothesis were at work in a state with a constitutional right to a healthy environment, what kind of meaning might that right have to people there? If law is for lawyers, one might expect to find that people are more or less unaware of the existence of the right. Or, if they are aware, people may consider the right to be “just words” and have no meaning in their lives.

II. HYPOTHESIS 2: THE CONSTITUTIVE APPROACH

Law shapes hearts and minds. Where constitutional environmental rights exist as fundamental rights, the weight of fundamental rights will shift institutions and the beliefs of people.

This hypothesis comes from Clifford Geertz’s 1983 essay in which he argues that law is “constructive . . . constitutive . . . [and] formational.” In other words, law does not simply reflect society; it creates society. As a

8. Id. at 1, 40, 52–53.
9. Id. at 1, 57.
11. Id. at 1.
14. See id. (noting also that law is, of course, not the sole catalyst of culture. For a summary of Geertz’s argument, along with context for its discussion of law and society, critical legal studies, and feminist progeny, see Menachem Mautner, Three Approaches to Law and Culture, 96 Cornell L. Rev. 839, 848–855 (2011).
consequence, a constitutive approach considers the values at stake in law creation.\textsuperscript{15}

The constitutive approach holds that law, by its participation in the constitution of culture, also participates in the creation of the mind categories through which individuals perceive the social relations in which they take part — i.e., . . . what they are entitled to do to others, and the self-perceived identities of individuals and groups.\textsuperscript{16}

In other words, in the constitutive approach, law does not just change social outcomes, it changes the way we think.

A constitutive approach to, for example, \textit{Brown v. Board of Education}\textsuperscript{17} would suggest that the case did more than just desegregate schools.\textsuperscript{18} Instead, in this view, the case changed how people thought about segregation.

A difficult aspect of this theory is how to tell whether the way people think and perceive has changed. Discourse analysis has been helpful to some scholars to peer behind what people say.\textsuperscript{19} But, there are still methodological challenges to ensure a researcher is getting a relevant sample and not reading what they want, or what they expect, into what others say or convey.

When applying the constitutive approach to constitutional environmental rights, one might expect to find, through interviews and examining written documents, changes to how people perceive environmental protection and environmental health. For example, interview subjects might note the importance of the environment, or perhaps talk about clean water or clean air as a right, whereas previously they had used other categories for their thoughts, feelings, and expectations about the environment.

\begin{itemize}
\item \textsuperscript{15} Holly Doremus, \textit{Constitutive Law and Environmental Policy}, 22 STAN. ENV'T L.J. 295, 298 (2003).
\item \textsuperscript{16} Mautner, \textit{supra} note 14, at 852.
\item \textsuperscript{17} 347 U.S. 483, 494 (1954).
\item \textsuperscript{18} See Mautner, \textit{supra} note 14, at 852 (describing an instrumentalist approach).
\end{itemize}
III. HYPOTHESIS 3: THE MUTUALLY CONSTITUTIVE APPROACH

Law and culture are interdependent and mutually constitutive.\(^20\) Where constitutional environmental rights exist, they influence culture, but culture also influences the meaning of the law.

Sally Engle Merry’s study of domestic violence in a Hawaiian plantation town after the passage of a 1973 law addressing domestic abuse helps to illustrate how this hypothesis works in practice.\(^21\) Her investigation concluded that law likely shaped the changing expectations and narratives of people.\(^22\) However, she is careful to note that “[c]hanges in the laws alone did not produce social changes.”\(^23\) The 1973 domestic abuse law needed a local feminist movement that created physical shelter, changes to the court system and judges, and funding from the state to create a mandatory treatment program for men convicted under the 1973 law.\(^24\) In Merry’s telling, culture grew from law, but the law needed culture in order to shape culture.\(^25\)

One of the difficulties of this approach is timing. In the example above, the 1973 law did not have any effect until decades later once additional social movements, physical structures, and an administrative apparatus developed related to the law.\(^26\) What becomes tricky about that when applied to new, or even long standing, constitutional environmental rights is that observers and citizens alike have no way of knowing if the law is simply dormant, waiting for culture to bring it to life, or if the law is a dud.

That particular draw back of the mutually constitutive approach makes it challenging to forecast what one might see through that lens in a jurisdiction with a right to a healthy environment. One the one hand, one might expect to see multiple additional institutions, physical places, and administrative changes that directly relate back to and give meaning to the constitutional right. For example, it might be reasonable to expect that state natural resource agencies may have adopted language and procedures to give the law effect. On the other hand, one might equally expect to see no development in civil society or the administrative state connected to the law—

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\(^20\) See generally Naomi Mezey, Law as Culture, 13 YALE J.L. & HUMAN. 35, 36 (2001) (arguing that law and culture should not be thought of as separable); Sally Engle Merry, Culture, Power, and the Discourse of Law, 37 N.Y. L. SCH. L. REV. 209, 209 (1992) (“[L]aw and society are mutually defining and inseparable.”).

\(^21\) See Merry, supra note 20, at 211–13.

\(^22\) Id. at 213.

\(^23\) Id. at 212.

\(^24\) Id. at 212–13.

\(^25\) Id.

\(^26\) See Merry, supra note 20, at 211–13.
just as Merry may have found had her study not included the nearly two decades of development since 1973.\textsuperscript{27} Because of the timing aspect of the mutually constitutive hypothesis, it becomes difficult to falsify if no culture related to the law exists yet.

\section*{CONCLUSION}

What do these three categories mean for the development and study of constitutional rights? And what might we have lost by missing a more complete understanding of how environmental rights work? The epigraph by Zadie Smith points us in a promising direction.\textsuperscript{28} If the work of enacting constitutional environmental rights is indeed about enshrining “new” ethics in law, what on-the-ground results are advocates hoping to realistically achieve? And what additional support may be needed to achieve those results?

Assuming, for example, that advocates hope to achieve lasting change in the way that states, organizations, and individuals think about and treat the environment, our three hypotheses come up with very different answers.

Our first hypothesis, “separate domains,” does not provide much hope outside of litigation. There would be consequences for litigants. But it would be unlikely that there would be broader societal impact.

Our second hypothesis, “the constitutive approach,” suggests first and foremost a need for solid empirical work in jurisdictions in which the constitutional right already exists to see if there are constitutive impacts, and if so, what values have changed, if any. Depending on those results, advocates could work to tailor new amendments.

Finally, our third hypothesis provides significant hope and potential pathways forward for environmental rights advocates. As with the constitutive approach, some ground research would need to be done. Through that research, though, it may be possible to better understand what civil, societal, and institutional supports are needed to give meaning to the law and how that meaning has changed, if at all, over time and geography.

This Essay is a small step on that path. Engaging with constitutional environmental rights from the perspective of theory and on the ground brings crucially important aspects of the life of the law back into scholarship and practice. Without these, we are left with only one facet of what constitutional rights may be able to accomplish.

\textsuperscript{27} Id. at 211–13.
\textsuperscript{28} Smith, \textit{supra} note 1.