

For Ourselves and Our Posterity: A Constitutional Environmental Right

While environmental law emerged as a recurring subject of litigation only in the post-Nixon era, the Constitution became the binding framework of the United States in 1788 (Kepner). The right to clean air, water, and a healthy environment, therefore, is naturally not enumerated in the Constitution, but our nation's founding document nonetheless guarantees this right today. It does so universally and in holding with well over a century of court precedent. The right to a clean environment must exist because of substantive due process and the Constitution's implicit protections.

Due process was introduced into the U.S. legal system with the Fifth Amendment, which guarantees that "no person shall [...] be deprived of life, liberty, or property without due process of law" (U.S. Const. Amend. V, §1). The Fourteenth Amendment, through its reiteration of the Fifth Amendment's Due Process Clause, accordingly applies this restriction to state governments (U.S. Const. Amend. XIV, §1). In combination, these clauses have been interpreted to protect individuals against the infringement of rights "implicit in [...] ordered liberty" (*United States v. Salerno*). In other words, implicit rights—freedoms that underlie the Constitution but are not themselves expressly stated—are protected through due process. This protection of unenumerated yet fundamental rights forms the basis for substantive due process, an expansion upon the original due process clauses. Still, for an unenumerated prerogative to become a universally protected right, it must align with *Salerno's* definition of "ordered liberty." 1997's *Washington v. Glucksberg* clarified this interpretation, requiring that rights be "deeply rooted" in U.S. history and tradition to be considered "fundamental" enough for due process protection (521 U.S. 702). The Supreme Court, however, also ruled in the landmark *Obergefell v. Hodges*

decision that “history and tradition guide [due process interpretations] but do not set its outer boundaries,” especially when it comes to decisions regarding society’s future and progression (576 U.S. 644). The *Washington* and *Obergefell* tests put forward two key questions when offered to support the right to a clean environment: is a clean environment central to U.S. history and tradition, and is it necessary for the nation’s advancement?

Even in a world without excess carbon emissions, industrial pollution, and destructive oil extraction, America’s Founding Fathers recognized the threat of an impure environment. Thomas Jefferson himself emphasized the importance of preservation rather than exploitation, having written, “If [man] could, he might during his own life, eat up [the spoils] of the lands [...] and then the lands would belong to the dead, [...] not the living” (Jefferson). President Theodore Roosevelt signed the Antiquities Act of 1906 and established countless parks out of respect for the natural beauty bestowed upon the United States—respect that would later see a resurgence with the 1962 release of Rachel Carson’s *Silent Spring* (Scott). The relationship between the environment and human heritage also extends far beyond modern American history: an estimated 13,000 ancient cultural sites in the Southeastern United States are at risk of being lost or damaged with a projected three-foot rise in sea levels due to climate change (Anderson, et al.).

Environmental degradation’s inevitable impact on the United States’ present and future is equally clear. The Pentagon has warned that “increasing temperatures; changing precipitation patterns; and more frequent, intense, and unpredictable extreme weather conditions caused by climate change are exacerbating existing risks.” The United States Court of Appeals for the Ninth Circuit delivered an arguably harsher warning in *Stop H-3 Ass’n. v. Dole*, writing, “Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this

planet's natural resources" (740 F.2d 1442). Because of its significance in American history and its inevitable impacts on the United States' future generations, the right to a clean environment matches *Salerno's* definition of a right within the concept of "ordered liberty."

Without the right to a clean environment, the implicit requirements to preserve due process are violated. The nature of this right is comparable to that of other constitutional rights currently in practice. Just as the right to speak freely requires air for dissenters to breathe, so does every other fundamental right require an environment in which to live (*Moore v. City of East Cleveland*). The Supreme Court has recognized implicit rights to secure due process and other enumerated rights, so it must also recognize the right to a clean environment. There must be a standard for environmental quality to sustain life—even if only so that all other constitutional rights may be protected and exercised.

It is true that modern understandings of environmental preservation would have been largely foreign "to those attending the Constitutional Convention in Philadelphia [over] 200 years ago", as the US District Court for the Southern District of Texas provided in *Tanner v. Armco Steel Corp* (340 F. Supp. 532). But the Due Process Clause does not apply to only those that were protected when the 14th Amendment was ratified, and to suggest that it should is to contradict over a century of court precedent. Its scope has changed over time, and an originalist view on this issue denies the existence of substantive due process itself. (*Planned Parenthood of Southeast Pennsylvania v. Casey*). Some interpretations of the Takings Clause of the 5th Amendment, which prevents private property from being taken without just compensation, also stand in opposition to the right to a clean environment (U.S. Const. Amend. V, §1). *Nebbia v. New York*, however, put an end to the socially regressive *Lochner v. New York* era with a

powerful conclusion that addresses such an application of the Takings Clause: “neither property rights nor contract rights are absolute” (291 U.S. 502; 198 U.S. 45). Unenumerated rights are equally deserving of protection, and they must not be infringed upon by interests other than those for the common good (*Schenck v. United States*).

Implied rights supported by the Due Process Clause remain at the foundation of everyday life for many Americans. *Meyer v. Nebraska* maintained the right to teach world languages in classrooms, and *Skinner v. Oklahoma* reaffirmed the right to procreate in the face of a forced sterilization program (262 U.S. 390; 316 U.S. 535). Now, in the face of a global climate crisis, rulings referencing substantive due process to support the right to a clean environment are not only valid but entirely necessary. The Constitution’s “blessings of liberty” were not just extended to ourselves—to the present generation—but to our posterity. Without the constitutional right to a healthy environment, no other constitutional right truly exists.

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