Law and the Coming Environmental Catastrophe

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Repository Citation
LAW AND THE COMING ENVIRONMENTAL CATASTROPHE

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INTRODUCTION

We live in a time of critical uncertainty about the environment. We literally do not know whether our way of life will come crashing down within the relatively near future. Science is, or at least is reported to be, divided on the issue. Politicians seem determined to avoid the subject altogether, as witnessed by the Presidential "Non-Campaign" of 1996. This reluctance is understandable because solutions to address the catastrophe would be painful and might not even work. The fundamental environmental problem may be just too many people.

This paper is not about efforts to convince people that the environmental threat is real. That threat forms the background for the paper. We assume the catastrophe is coming and ask how law is responding to it. We acknowledge that we do not know with certainty whether we are in serious danger. Furthermore, we will not know for certain until the point at which it would be too late to respond, if the danger turned out to be real. That gap between knowledge and response time is why we look to law now.

We will put our conclusion here, at the beginning. Law’s response to the threat of environmental catastrophe has been mild—almost no response at all. The nation’s law schools have not turned serious attention to the crisis, and law has not responded substantively either. Environmental law has no sense of urgency about the environment. In addition, constitutional law, which has never evolved an environmental ethic, either stands mute in the face of looming crisis, or serves as a minor impediment to coping with the

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crisis. Fundamentally, we lawyers, law teachers, and law students go on about our business as if all were well.

This non-response will prove to have been wise if it turns out that the environmentalists were overreacting and that all was well. If not, the non-response of law will be condemned. We believe that the threat is very real. In that sense, writing this paper is as much witness as argument. If the catastrophe turns out to be real, everyone and every discipline will be judged by future generations based on our reactions today. If law turns out to be insignificant in this hour, or worse, blind and burdensome in the face of this crisis, the legal profession will be consigned to history's dustbin. The profession's insights and gifts will be judged worthless because it did not respond to humanity's greatest threat. Those of us alive in twenty-five years to witness the fruits of this generation's actions, will be asked by our grandchildren why we acted, or failed to act, as we did.

I. THE COMING ENVIRONMENTAL CATASTROPHE

The United Nations Environment Program's report on January 27, 1997, stated that, globally, human society is heading "towards an environmental precipice." The report mentioned several factors as contributing to the interrelated problems. Irreplaceable, renewable resources, such as land, fresh water, and air are being used or degraded beyond their capacity for natural renewal. Wilderness and biodiversity are diminishing under pressure from agriculture and expanding human population. The increasing use of chemicals is posing serious health risks, and unplanned urbanization is causing deterioration in adjacent ecosystems.


2 See id.
3 See id.
4 See id.
5 See id.
6 See id.
The report notes that while some efforts have been made to address these problems, the responses have been slow and insufficient.\textsuperscript{7} The report recommends more foreign aid, which does not seem to be forthcoming, in order to help distribute environmentally sound technology.\textsuperscript{8}

Of particular concern, especially given the subject of this paper, is the effect of destroying forests to build shopping centers and other new developments.\textsuperscript{9} The reduction of tree and other natural cover has led not only to increasing levels of carbon dioxide in the atmosphere, thus contributing to global warming, but also to serious erosion of soil.\textsuperscript{10}

Throughout the world, since 1972, some 500 million acres have been turned into deserts; and farmers have lost 480 million tons of topsoil, more than all of the topsoil on all US farmland. In recent years, growth in grain yields has not been making up for losses in grain growing land.\textsuperscript{11}

The estimated rate of deforestation in the world is sobering—one percent of forest disappears every year.\textsuperscript{12} At that rate, the world will be denuded of forest within the lifespan of children born today.\textsuperscript{13} Aside from its other effects, deforestation is linked directly to the loss of habitat that is forcing many species to the brink of extinction: more than ten percent of all bird

\textsuperscript{7} See id.
\textsuperscript{8} See id.


\textsuperscript{11} Id.

\textsuperscript{12} See WORLDWATCH MAG., Jan.-Feb. 1997, at back cover (citing figures provided by the World Wide Fund for Nature).

\textsuperscript{13} See generally id.
species and nearly one fourth of all mammal species are so threatened. \(^{14}\)

There is also the threat of ozone depletion. \(^{15}\) Just in the last few months it has been reported that the level of stratospheric ozone over Antarctica had dropped by forty-five to seventy-five percent by September, 1996 and that the resulting ozone hole covered the tip of Argentina a month earlier than in recent years; \(^{16}\) that Hawaii experienced a forty percent increase in ultraviolet light during the winter of 1994-1995 because the layer of stratospheric ozone over it reached a record low; \(^{17}\) that ozone depletion over Antarctica now is causing observable adverse effects on wildlife in the area; \(^{18}\) and that overall in 1995 ozone depletion was at record levels over northern middle latitudes. \(^{19}\)

The environmental threat that probably most engages the attention of people is the trend toward global warming. The reason for this may be that unlike the other environmental threats, people readily can understand how global warming threatens them. This is ironic because it may turn out that short-term disasters involving weather have little or nothing to do with global warming, although this is becoming less likely with every passing year. \(^{20}\)

People are quick to assume that disasters such as the deaths of 527 people in Chicago during the extreme heat wave of the summer of 1995 were

\(^{14}\) See id. at 7.


\(^{17}\) See Earthweek: Diary of the Planet for the Week Ending 12 July 1996, supra note 15, at C7.


\(^{20}\) See infra text accompanying notes 22-29.
caused by global warming.\footnote{See, e.g., Charles Arthur, Experts Warn Fossil Fuels Must be Curbed, INDEPENDENT (London), Dec. 1, 1995, at 17, available in 1995 WL 10816507 (citing the heatwave in Chicago as evidence that global warming is increasing); Philip Eden, The Weather: Phew, the Hottest July for 12 Months, DAILY TELEGRAPH (London), Jul. 23, 1995, at 28, available in 1995 WL 8021033.} No such direct link can be established.


Public appreciation of the danger of global warming was enhanced dramatically in September 1995, when parts of a draft report by the Intergovernmental Panel on Climate Change ("IPCC"), a United Nations ("U.N.") sponsored body of 1500 climate experts, somehow found its way onto the Internet.\footnote{See Scientists Seem to Think Warming Has Begun, GLOBAL WARMING NETWORK ONLINE TODAY, Oct. 18, 1995, available in 1995 WL 2266137.} The report suggested increasing scientific consensus that presently global warming was having serious weather consequences and that during the next century a host of weather-related problems would be likely to occur, including floods, hurricanes, droughts and coastal inundation.\footnote{See id.; William K. Stevens, Scientists See Warmer Earth Causing Major Disruptions; Focus: Global Warming, MONTREAL GAZETTE, Sept. 19, 1995, at B1, available in 1995 WL 6982448.}
When the IPCC issued its final report in December 1995, it stated flatly that recent rises in temperature could not be blamed on anything but human causes.\(^{28}\) In January 1996, public perceptions were heightened when *Newsweek* carried an extensive cover story blaming global warming not only for increased heat, but also for more intense winter storms, a more controversial claim.\(^{29}\)

The sort of haphazard reporting presented above does not, of course, prove anything. It is our intention only to show the potential seriousness of the present situation and that reasonable people might well believe that humanity faces unprecedented peril. The question now becomes, what is law's role in view of this danger?

## II. Law's Response to the Crisis

This paper is an example of what Professor James Huffman has called "apocalyptic environmentalism."\(^{30}\) That is, it assumes facts of which we cannot be certain—that humans are in danger of rendering the world either uninhabitable or barely habitable—and then insists that people respond as if the danger were true.\(^{31}\) Indeed, that is precisely what we aim to do. Taking seriously Professor Huffman's term, "apocalypse," it would be hard to act in any other way. It would be natural to expect law to respond on all levels to a potential apocalypse. Of course, if one is skeptical that any such disaster is imminent, one would oppose any course of dramatic action. However, from the perspective of approaching apocalypse, law's reaction looks meager.

Law has responded on three levels to environmental problems in

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\(^{28}\) *See Report by the Intergovernmental Panel on Climate Change*, U.N. GAOR, 11th Sess., Agenda Item 7(b) at 4, U.N. Doc. A/AC.237183 (1995). "[E]missions of certain radiatively active gases that result from human activities are substantially increasing the atmospheric concentrations of these gases and that these increases will cause additional warming of the earth's surface." *Id.* para. 42.

\(^{29}\) *See* David A. Kaplan, *This is Global Warming?*, *Newsweek*, Jan. 22, 1996, at 20.


\(^{31}\) *See id.*
general and to the coming environmental crisis in particular: through teaching, through imaginative projection, and through substance. We examine each of these below, in turn.

A. The Teachings of Law

Although the content of law itself has a pedagogical effect, we are referring here to a narrower subject. We are looking primarily at the work of law teachers, both in class and in the wider world. The primary environmental impact of law teaching has been to introduce thousands of law students to the problems of the environment through courses in environmental law and related subjects. While the following comments are not meant as an exhaustive survey of environmental law materials, they are an accurate overview of the tendencies of the field.

Judging by the mainstream environmental law textbooks, there is a certain shared ideology in these courses. For example, one way or another, the books introduce the student to the science of ecology and what might be called the environmental perspective.32 We do not mean that the books, courses, and teachers share a conclusion as to what should be done about environmental problems. One of the important dividing lines in the environmental field concerns the proper role of market solutions, for example. Generally, however, all of the courses will use The Tragedy of the Commons33 to bring students to the awareness that natural resources are not inexhaustible, that a regime of total non-regulation can lead to serious environmental harms, and that these harms are potentially more dangerous than students may think at first. This approach, which could be labeled the “moderate environmental ethic,” sensitizes the student to environmental threats, but also assumes that the world is a “resource” for people to use rather than an intrinsically valuable, functioning system, to which humans

32 See, e.g., ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW SCIENCE AND POLICY, 1-70 (2d ed. 1996); THOMAS J. Schoenbaum and RONALD H. Rosenberg, ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS, 1-17 (3d ed. 1996). There are a number of such books that are similar on these points.
33 See Garrett Hardin, The Tragedy of the Commons, 162 SCI. 1243 (1968).
have no inherent right of access.\textsuperscript{34}

Some environmental law materials go beyond the moderate environmental ethic, introducing a more radical environmental ethic, such as assessing and attacking the "wise use movement"\textsuperscript{35} or introducing issues of intergenerational equity, overpopulation, ozone depletion, global warming and biological diversity\textsuperscript{36}—all the components of the coming environmental catastrophe. What is potentially radical in such material is not just the subject matter, but also its sense of urgency.

Overall, however, one could not consider the contribution of law schools to students' environmental awareness to be substantial. In the first place, most environmental law courses are of the moderate viewpoint. In addition, the subject of environmental law remains a fringe item—not bar testable and generally not considered essential to a legal education. Environment (or nature) has not been added to will, autonomy, efficiency, society or order as a fundamental organizing principle for law. Law schools are not organized around the theme of the environment.

Law teachers teach in ways other than just the classroom, of course. Many members of the legal academy are involved heavily in efforts to deal with the issues of global warming and other interrelated, pressing environmental problems, mostly through legal writing.\textsuperscript{37} Some of these works have been quite influential.\textsuperscript{38} Some of these works have passionately

\textsuperscript{34} See generally id.


\textsuperscript{36} See, e.g., WEINER ET AL., INTERNATIONAL ENVIRONMENTAL LAW, chs. 3, 8, and 9 (1994).

\textsuperscript{37} A recent computer-aided search of the phrase "global warming" in the law review data base yielded 379 entries, most of which turned out to be articles by law teachers in the United States and abroad, of recent vintage and of high quality, attempting to deal with the severe environmental problems we face. The list also contained some fine student work. See, e.g., Adam L. Aronson, Note, From "Cooperator's Loss" To Cooperative Gain: Negotiating Greenhouse Gas Abatement, 102 YALE L. J. 2143 (1993).

proposed new visions for the relationship of law to the environment.  

It is not in denigration of this body of work that we point out that it does not reflect "Teachings of Law." By the phrase "Teachings of Law," we mean a reflection of the professional norms of law. Expressions of environmental concern, whatever their particular content, do not do that.

To see this, imagine a symposium among American lawyers concerning the exclusionary rule. Although there would be strong disagreements about the rule's utility and desirability, there would be an identifiable and widely shared consensus among the lawyers that under some circumstances guilty persons will be protected properly by procedures designed in general to protect the innocent. This consensus would not be shared, at least to the same extent, however, by a collection of Americans taken at random.

The reader easily can repeat the above thought-experiment in realms of individual liberty and procedural regularity because these are areas in which the professional norms of law are well developed. In contrast, the only professional norm that American law associates with nature is the fostering of private property.

The teachers of environmental law have failed to generate a consistent environmental perspective within the legal profession. Again, we do not mean that lawyers should be expected to agree about the "what to do" issues, but lawyers could be expected to share a realization of the importance of the environment and the vulnerability of human institutions. Thus far, this realization is lacking. At this late hour, law still lacks an environmental

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B. Law’s Imagined Future

One way that law both illustrates and changes its understanding of the universe is by projection into the future. Thus, with regard to the environment, it can be asked, what does law imagine the environmental future to be like?

The reader may suppose that there will be as many imagined futures as there are writers of law documents, but this is the case only insignificantly, in details. A look at any judicial opinion concerned with the future, such as Mapp v. Ohio, shows law’s assumption that the future will be basically like the present. For example, it is assumed by all the Justices in Mapp that there will not be a military coup on the one hand or the kind of breakdown in public order, on the other, that would render the niceties of constitutional criminal procedure irrelevant.

It appears that law is not yet concerned about what the environmental future holds. Environmental law casebooks, for example, do not devote chapters to the subject, with titles such as “Law in an Age of Environmental Catastrophe.” Judicial opinions do not address the subject; nor, by and large, do law review articles.

There are some exceptions to these observations. In the law review field, in which one would expect to find more imaginative projections than in case law, there have been several efforts to deal with a serious environmental breakdown in the relatively near future. For example, in 1991, Professor Robert Fischman envisioned the effect of rising sea levels on attempts to protect coastal wetlands. Significantly, Professor Fischman introduced his subject as “an example of the challenge that global warming

41 Except, that is, for the fostering of private property alluded to above, which we do not consider to be an “environmental” norm.
42 367 U.S. 643 (1961) (applying the exclusionary rule against the states).
presents to American property law." Thus, one could imagine a spate of articles with titles such as, *The New Regime of Beachfront Property Law in Nevada*. Although this suggestion is lighthearted, it is true that the power of law’s imagined future lies in its focus on the ordinary details of legal life. These ordinary details remind us, in a memorable way, of the severity of the problems that we face.

A more dramatic example of this power of projection is Dr. Ranee Khooshie Lal Panjabi’s criticism, in 1993, of the “world’s polluting nations” for their failure to take seriously the “disaster just waiting to happen” to the peoples of low lying areas in the world, most of whom, he wrote, are vulnerable and unable to defend themselves. It is these islands and low-lying areas that simply will disappear within a relatively short time.

In terms of judicial opinions, there have not been many opportunities for consideration of what global warming may portend. One exception is *City of Los Angeles v. National Highway Traffic Safety Administration*. In *National Highway*, California cities, the State of California, and the Natural Resources Defense Council (“NRDC”) sued the National Highway Traffic Safety Administration (“NHTSA”) over its decision not to prepare environmental impact statements covering its setting of certain corporate average fuel economy standards.

The most important aspect of the case for our purposes was the court’s divided decisions, first, that the NRDC had standing to challenge the model year 1989 standard, but, second, that on the merits the decision of the

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44 Id. at 565.
46 Id. at 532.
49 912 F.2d 478 (D.C. Cir. 1990).
50 See id. at 482.
NHTSA not to issue the environmental impact statement was not improper. The panel divided, with Chief Judge Wald and then-Judge Ruth Ginsburg holding that the NRDC had standing and Judges Ruth Ginsburg and D.H. Ginsburg next holding that no impact statement had been necessary.

The standing and merits determinations in National Highway were related. In both, the question essentially was, would the fuel economy standards set by the agency cause environmental harm by way of global warming? If so, the plaintiff would have standing to sue and an environmental impact statement should have been issued.

Chief Judge Wald and Judge D.H. Ginsburg differed about whether the petition should be partially granted or denied, but they also seemed to disagree about the dangers of global warming. To be sure, Judge Ginsburg set forth the plaintiff’s allegations about global warming, but then described the harm as “the environmental nightmare [the plaintiff] hypothesizes.” Furthermore, Judge Ginsburg stated, the decision to set fuel standards at 26.5 miles per gallon rather than 27.5 miles per gallon would generate so small “a contribution to the quantum [of greenhouse gases] necessary to produce the projected catastrophe” that the plaintiff lacked standing to challenge the decision.

In contrast to Judge Ginsburg, Chief Judge Wald not only made the point that a continuation of global warming poses an imminent threat to our environment, but, in response to the argument that the added levels of gases

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51 See id.
52 The opinion stated that the government agency had not behaved in an arbitrary and capricious manner in finding that its setting of fuel standards would have no “significant environmental effect.” Id. at 490.
53 See id. at 482.
54 See id. at 483-85, 493-95.
55 Id. at 483. We acknowledge that we impliedly are criticizing Judge Ginsburg for stating what we ourselves state above, that no one can be sure that global warming and the other aspects of the environmental crisis are in fact happening. We think, though, there is an important difference between taking action in light of a threat and forestalling action because of uncertainty. Judge Ginsburg at least should acknowledge that this particular hypothesis is not going to be proved or disproved until it is too late to take effective action.
56 See id. at 484.
at issue in the case were simply so small as to be "but an insignificant tributary to the causal stream leading to the overall harm," Judge Wald stated that "the evidence in the record suggests that we cannot afford to ignore even modest contributions to global warming."

The judges disagreed about the severity and imminence of the global warming disaster. A small contribution to an imminent calamity is much more likely to gain judicial attention than is a small contribution to something uncertain. Unfortunately, the opinions in National Highway did not describe the disagreement sufficiently to have clarified the differing views about global warming. Still, the case moves a step towards forcing law to take a stand with regard to the truth of claims about the peril we face. Law inevitably may be forced to confront its assumption that the future will be more or less like the past. Perhaps law can project crisis.

C. Law's Substance

How has law responded substantively to the coming environmental catastrophe? Here, one must distinguish between positive responses — those aspects of law that attempt to deal with the environmental crisis—and negative responses, which are those aspects of law that prevent or retard dealing with it. In the positive vein, or at least potentially positive, are environmental law itself, common law, and constitutional law, both federal and state. In the negative vein are limits on standing and the takings clause.

Environmental law constitutes law's primary response to the danger of environmental catastrophe. The American public law of environmental protection, as opposed to the common law approach of nuisance, for example, is commonly dated from the enactment of the National

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57 Id. (Wald, C.J., dissenting)
58 Id. at 501 (Wald, C.J., dissenting)
59 We do not intend this terminology to be a substitute for "good" and "bad." Obviously, a positive response to the environmental crisis would be bad if it entailed broad loss of human liberty.
Environmental Policy Act of 1969.\textsuperscript{61} Earlier statutes also have proven to be significant either directly or indirectly in terms of global warming and other environmental issues.\textsuperscript{62}

A number of current domestic laws bear on the major threats to the environment. For example, Congress gave the Environmental Protection Agency broad authority to limit chlorofluorocarbons ("CFC's") in the 1977 Clean Air Act Amendments.\textsuperscript{63} The 1990 amendments to the Clean Air Act added a new program for the regulation of acid rain.\textsuperscript{64} Biodiversity is promoted by section seven of the Endangered Species Act.\textsuperscript{65}

Large-scale threats to the environment of the type considered in this paper generally are not treated by domestic environmental law. That is, despite the existence of broad domestic regulatory programs, the general assumption is that global environmental threats must be dealt with at an international level.\textsuperscript{66} In fact, there have been notable successes at this level,


\textsuperscript{66} The typical environmental law textbook deals with domestic hazardous wastes, domestic water, and air pollution and then suddenly will shift to a global perspective to discuss the emerging threats of ozone depletion, population growth, global warming, deforestation, and so forth. \textit{See, e.g.,} SCHOENBAUM & ROSENBERG, \textit{supra} note 32. This organizational approach obscures the extent to which these problems are not entirely global. For example, some nations, notably the industrialized states, particularly the United States, contribute far more to these problems than do other nations. For another example of a somewhat misleading global perspective, focusing on deforestation in tropical forests, but avoiding the issue of deforestation in the United States, see Donald A. Brown, \textit{Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the
including the 1987 United Nations Montreal Protocol, which called for a freeze on the production and consumption of CFC's and halons at 1986 levels in the industrialized nations followed by a ten-year, fifty percent reduction. 67

Unfortunately, compared to the specific threat to the ozone layer, the threat of global warming has not led to similarly specific international commitments. In the first place, not everyone agrees that warming is taking place, or if it is, to what extent, 68 nor do people agree whether such warming in any event would be bad for humans, or whether expensive precautions would be advantageous and/or cost effective. 69 Secondly, the complexity of the problem assures that no one step will be a solution.

Nevertheless, some steps to deal with global warming have been taken internationally. In June 1992, representatives from more than 150 governments signed the Framework Convention on Climate Change at the Earth Summit in Rio de Janeiro. 70 The convention took effect on March 21, 1994, after having been ratified by fifty-five signatories. 71 Unfortunately, the convention was not a legally binding agreement to reduce, or even hold current, the atmospheric level of greenhouse gases. It is unclear when an actual global warming treaty will be negotiated. 72

Overall, environmental law has made an unquestionable contribution

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Critical Need to Develop Sustainable Development Programs at State and Local Levels in the United States, 5 DICK. J. ENVTL. L. POL'Y 175, 191-92 (1996).


69 See PERCIVAL, supra note 32, at 1295-98 (referring to a number of these matters).


72 See Aronson. supra note 37, at 2149.
to attempts to deal with all sorts of serious environmental problems. Conversely, if the question is one of urgency and focus, then it is evident that no straightforward statutory regime exists either to prevent the coming environmental crisis or to deal with its consequences.

This should come as no surprise. Law, whether enacted by statute, regulation, or treaty, tends to track closely society’s collective values. The political will to deal with the possibly dark environmental future does not yet exist. The American public continues to live in an optimistic dream world, lulled into false confidence by corporate assurances that no environmental catastrophe is imminent. Until that political climate changes, American public environmental law will remain important but limited.

Another aspect of law’s substantive response to environmental issues is common law, basically private and public nuisance law. Nuisance law is important in environmental law today, in the area of just compensation for a taking of private property. The reason for this importance is that a property owner could never demand compensation based on the continuation of a nuisance. We will return below to that aspect of nuisance law. Here, we ask a different question—not, could nuisance law serve to allow regulation, but could the common law of nuisance itself help to protect people from the coming environmental catastrophe?

Whether particular conduct qualifies as a private nuisance depends primarily on whether “the gravity of the harm caused outweighs the utility of the conduct.” If particular uses of property harm the property interests of others by causing global warming, for example, the property owner should be liable, just as the owner would be liable if his smelting operations

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74 See John A. Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 COLUM. J. ENVTL. L. 1, 7 (1993).
destroyed the value of a neighbor’s land. Similarly, in the realm of public nuisance, the enjoyment of the natural environment, without depletion of ozone and with temperatures within otherwise normal limits, would seem to constitute “a right common to the general public,” and thus subject to injunction and damages. Therefore, at first glance, nuisance law would seem a promising field for imposition of environmental liability.

Nuisance law cannot fulfill this promise, however. In the first place, such suits today are not likely to survive preemption defenses. But even if they did, the actions ultimately would fail on the merits. This is because, unfortunately, no one defendant, or group of defendants, could be shown to be directly and uniquely responsible for the condition of the earth’s environment, and no plaintiff is blameless. In sociological terms, what everyone is responsible for, no one is responsible for.

The broadest substantive area of law that could be thought relevant to the coming environmental crisis is federal and state constitutional law. In order to analyze constitutional issues in the environmental area, two distinctions must be noted. First, one can look at constitutional law as both a positive and negative environmental force as those terms were defined above. Negative uses of constitutional law include such doctrines as standing and takings of private property without just compensation. Here,

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76 See, e.g., St. Helen’s Smelting Co. v. Tipping, 11 H.L.C. 642 (1865) (holding copper smelting operation liable for damages diminishing the value of a neighbor’s land).

77 The Restatement (Second) of Torts defines a public nuisance as “an unreasonable interference with a right common to the general public.” Restatement (Second) of Torts, supra note 75, § 821B.


79 This is similar to the reasons why, ninety years ago, the State of Missouri was unable to obtain injunctive relief against Chicago’s dumping of raw sewage into a tributary of the Mississippi River; Missouri itself permitted some such discharge, and it was uncertain whose sewage caused the complained of health effects. See Missouri v. Illinois, 200 U.S. 496 (1906).

80 See supra Part II.C.
however, we are looking for positive environmental uses of constitutional law. A positive use of constitutional law would be one that authorizes or even mandates public action to protect the environment. The second distinction is the related point that there is a difference between authorizing public action and mandating it. The most important constitutional issue, as we shall see, is the question of mandating public action.

In terms of authorizing legislative action by the states, the significance of the coming environmental catastrophe is that public initiatives designed to protect us from it are clearly authorized by the police power. Of course, such initiatives must be consistent with individual constitutional rights, but that is true of all government action within our system. The only constitutional limit that has emerged particularly in the area of state environmental legislation is that such legislation cannot deal with environmental problems by discriminating against the interests of citizens of other states.81

In terms of permissible Congressional legislation, there has been little question since *Hodel v. Indiana*82 that Congress can act under the Interstate Commerce Power83 to protect the environment. The recent challenge to Commerce Clause jurisprudence implicit in *United States v. Lopez,*84 while significant in other ways, is not sufficiently foundational to impinge on Congress’ environmental powers. In the environmental field, both economic effects and interstate movement, which *Lopez* may be read to require, almost always are present. One structural constitutional limitation on Congress that has emerged, in a fashion similar to the anti-discrimination principle at the

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83 U.S. Const. art. I, § 8, cl. 3.

state level, is the prohibition on mandatory federal use of state officials to carry out federal policy. But this is a limitation on how, not whether, Congress can act. It is not an important impediment to federal environmental policy.

Thus, it appears that at the federal and state levels, sufficient government power exists to take action to deal with the environmental crisis, as long as such actions satisfy constitutional protections for individual rights, notably the takings clause. Radical action has not taken place, however, to address the danger we are in. Worse, some actions taken by government, such as road building, themselves contribute to the environmental crisis. A constitutional question thus presents itself—is there a constitutional principle under which the legislative branches of government could be bound by the courts in the area of the environment as they are, for example, in the area of free speech? That is, is there, or could there be, a fundamental right to a healthy environment?

Fundamental rights in constitutional law are those rights with which the government may not interfere without some extraordinary justification. Fundamental rights have been both textual and non-textual. A constitutional right to a healthy environment theoretically could operate to prevent the government from harming the environment. It could, however, operate in a different way. Such a right might be used to force the government to legislate or regulate in order to protect the environment more aggressively than it does currently. We will call the first use of a fundamental right a passive right and the second, an affirmative right.

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87 Some scholars use the term “noninterpretive.” See, e.g., Ira Lupu, Constitutional Theory and the Search for the Workable Premise, 8 DAYTON L. REV. 579, 583 (1983). Although, as Ronald Dworkin has said, the idea that there are interpretations of the constitutional text that are really interpretations and interpretations that are not really interpretations is “unintelligible.” Ronald Dworkin, Unenumerated Rights: Whether and How Roe Should be Overruled, 59 U. CHI. L. REV. 381, 387-88 (1992).
In terms of a passive right to a healthy environment, the courts have not interpreted the Federal Constitution to contain such a guarantee. Thus, today, there is no constitutional ground, other than perhaps rational basis review, upon which to challenge any government action allegedly harming the environment.

Furthermore, given the controversy that Roe v. Wade has stirred over non-textual rights, such a passive environmental right is unlikely to be inferred in the near future. The criticism of “finding” rights that are not “in” the Constitution has made the courts more cautious in recent years about such implications. In addition to this general judicial reluctance, a right to a healthy environment is a poor candidate for judicial recognition as a fundamental right because it lacks aspects of “personal autonomy” and “independence” that one may attribute to the word “liberty” in the due process clauses of the Fifth and Fourteenth Amendments. One may say, of course, that without a healthy environment, nothing recognizable as liberty is possible. This certainly is true, and the authors would be moved by such an argument, but the courts today would not be.

These conclusions are all the more certain in the realm of a possible affirmative use of a constitutional right to a clean environment to force the government affirmatively to protect the environment. If it is unlikely that a passive right to a healthy environment would be recognized by the courts, it is inconceivable that the present United States Supreme Court would countenance judicial oversight of legislative and executive efforts to protect the environment to ensure that such efforts go far enough. Even in the realm of the acknowledged constitutional right of abortion, the Court never has held

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89 This caution helps to explain the Supreme Court’s unwillingness to recognize a fundamental right in the context of state laws criminalizing consensual homosexual sexual relations in Bowers v. Hardwick, 478 U.S. 186 (1986), its inability to forge clear guidance in cases about the substantive rights of involuntarily-committed mentally retarded persons in Youngberg v. Romeo, 457 U.S. 307 (1982), and persons in a permanent vegetative state in Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990).
that there exists an affirmative right to government assistance.\textsuperscript{91} Furthermore, the Court stopped short of finding affirmative rights to other sorts of governmental aid in the early 1970s.\textsuperscript{92}

The irony of these observations about the federal constitution and the environment is that the same conclusions could be drawn about the state constitutions, although some state constitutional texts encompass an environmental constitutional right.\textsuperscript{93} Even in Pennsylvania, where the state constitution clearly grants a right to a healthy environment,\textsuperscript{94} courts have not required any more of the government than compliance with all applicable statutory provisions when the government itself acts in ways that might threaten the environment.\textsuperscript{95} The Pennsylvania courts have never relied on the state constitution to force the government to regulate more aggressively to protect the environment. Surprisingly, state constitutions have proven no more significant to the protection of the environment than has the Federal Constitution.\textsuperscript{96}


\textsuperscript{94} Article I, Section 27 of the Pennsylvania Constitution provides as follows:

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

\textsuperscript{95} See Ledewitz, supra note 93, at 69-75.

\textsuperscript{96} A potential exception to this statement is the public trust doctrine, under which states are deemed to hold title to certain natural resources in trust for their citizens. See generally Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970). In 1983, the California Supreme Court overturned the traditional preference for established private uses of navigable watercourses in favor of public uses. See National Audubon Soc. v. Superior Court, 658 P.2d 709 (Cal.
While constitutional law has not played a positive role in protecting the environment, it has, unfortunately, played a role in burdening governmental efforts to provide environmental protection. Two constitutional law doctrines have been utilized by private interests to restrict environmental protections: standing and takings. It appears to us, however, that as presently construed, neither doctrine significantly limits the power of the government to deal with the coming environmental catastrophe.

The standing case most often relied upon to limit private party access to the federal courts to enforce environmental regulations and statutes is *Lujan v. Defenders of Wildlife.* In *Lujan,* the Supreme Court denied members of an environmental organization standing to challenge the decision of the Secretary of the Interior that Section 7 of the Endangered Species Act applies only to actions within the United States. At first glance, *Lujan* appears to be an insignificant limit on standing. The plaintiffs sued only to require consultation between the Secretary of the Interior and other government agencies to ensure that agency action abroad would not further endanger the survival of endangered species. In the two sections of the

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1983). Unlike other constitutional, or quasi-constitutional, rights, the public trust doctrine has the potential to create enforceable legal rights of private citizens to sue to enforce the public's interest as well as to create a legal duty in the state to preserve natural resources. See Anna R.C. Caspersen, Comment, The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife, 23 B.C. ENVTL. AFF. L. REV. 357, 358 (1996).

Nevertheless, the public trust doctrine has not played a role in dealing with the coming environmental crisis. In the first place, the doctrine always has applied to traditional natural resources. Lawyers, being scientifically illiterate for the most part, have to our knowledge never even asked courts to treat stratospheric ozone and the global climate as natural resources. Habitat, or wilderness, might be a more likely source for a broader natural resource conception. Even here, the public trust doctrine has never applied to private property as such. In any event, the public trust doctrine has not yet achieved wide application even in the field of traditional natural resources, such as water rights. See Michael C. Blum & Thea Schwartz, Mono Lake and the Evolving Public Trust in Western Water, 37 ARIZ. L. REV. 701 (1995).

98 See id.
99 See id. at 558.
opinion that reflect a majority holding. Justice Scalia wrote that the plaintiffs lacked standing because they could not show that they would be directly affected by the possible elimination of certain animal species in particular foreign locations. The plaintiffs did not claim that they would visit the particular area within a certain time. A desire to study the animals in question was held not to be enough, by itself, to establish standing. A plaintiff must be able to show how he or she will be affected by the alleged unlawful conduct. Justice Scalia also rejected the claim that a procedural injury, such an allegedly unlawful decision not to consult with the Secretary, could be enforced by anyone. Procedural rights are “special” in the sense that if a procedural right is ignored, an affected party has standing notwithstanding the fact that the government’s compliance with procedure might not change the content of the resulting decision. But the plaintiff still must be able to show that the decision that was taken without proper procedure itself, affected the plaintiff. Otherwise, the plaintiff would be attempting to vindicate the interest that all citizens have in ensuring that the government operates according to law. But that interest never has been held to be sufficient to ground standing.

There is no obvious reason why Lujan should be considered to be relevant to the context of laws attempting to deal with the coming environmental crisis. To see this, imagine that dramatic legislation were enacted to prevent further global warming. Imagine also, that the legislation contained the same sort of general standing provisions that were present in Lujan. A plaintiff trying to enforce the provisions of this hypothetical statute would be able to assert that he or she is “directly affected” by the threat—global warming—that the statute is designed to assuage. Of course, everyone on earth is affected directly by this particular threat, but widespread

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100 On the merits, Justice Scalia wrote for a majority only in sections III-A and IV.
101 See Lujan, 504 U.S. at 563 (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).
102 See id. at 564.
103 See id. at 563.
104 See id. at 572.
105 See id. at 572 n.7.
harms can ground standing.\footnote{106}

In addition, even if standing limits did prove difficult to satisfy, that would narrow only the opportunities for private enforcement of environmental statutes and regulations. Administrative enforcement and even criminal enforcement still would be available. So standing is not truly a problem. The constitutional doctrine that is considered a serious threat to environmental protection is not standing, but rather the takings clause.\footnote{107}

In the takings area, as in standing, there is a recent case capable of expansion in the future, but which as yet, is not that significant. In the area of takings, that case is \textit{Lucas v. South Carolina Coastal Council}.\footnote{108} In \textit{Lucas}, the plaintiff bought two residential lots on a South Carolina barrier island, intending to build single family homes. At the time of the purchase, the lots were not subject to South Carolina’s coastal building permit system.\footnote{109} Subsequent to the sale, however, the State enacted new legislation that barred the plaintiff from erecting any permanently habitable structures on the property.\footnote{110} The plaintiff sued on the ground that the new legislation deprived him of all economically viable use of the property, thus constituting a taking. The Supreme Court agreed.\footnote{111}

\footnote{106} “While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way.” \textit{id.} at 581 (Kennedy, J., concurring in part and concurring in the judgment). \textit{But cf.} Florida Audubon Soc. v. Bentsen, 94 F.3d 658, 667, n.4 (D.C. Cir. 1996) (“[T]he plaintiff must show that he is not simply injured as is everyone else, lest the injury be too general for court action.”).


\footnote{109} \textit{See id.} at 1008.

\footnote{110} \textit{See id.} at 1009.

\footnote{111} \textit{See id.} at 1019.
The decision in *Lucas* has excited a great deal of comment, but because the Court's holding will only apply where the government has denied *all* economically viable use of a plaintiff's land, it will not affect most governmental action, even in the face of looming environmental catastrophe. Because of that narrow context, the case is of limited direct significance. Indeed, Justice Scalia's opinion in *Lucas* specifically noted that "categorical treatment" of takings claims that avoids "case-specific inquiry into the public interest advanced in support of the restraint" is limited to two instances: "physical 'invasion' of . . . property" and the situation in *Lucas* itself—denial of "all economically beneficial or productive use of land." The opinion pointedly did not criticize, even impliedly, the outcomes of prior case-specific analyses.

Of course, the Court's interpretation of the takings clause is very much in flux. The *Lucas* opinion itself will come to mean a great deal more if the Court decides to apply its analysis to portions of an owner's land rather
than all of it. Furthermore, in the area of public access to private land, which is not likely to be directly at issue when the government restricts development to protect the environment, the Court certainly has been pursuing a more pro-private property approach. The time may come, perhaps soon, when takings law really becomes an active impediment to protecting us from the coming environmental catastrophe. We do not think, however, that time has arrived yet.

What has emerged from this excursion through law’s responses to the environmental crisis is that there has been no consistent response. Law today neither recognizes a crisis and deals with it, nor denies the existence of the crisis. Furthermore, it does not courageously protect individual rights against government intrusion in the face of crisis. We could call law at this moment not quite irrelevant, but almost.

There are, however, other important aspects of law beyond what lawyers say. Thus far, we have dealt with what the law says expressly, in its authoritative voice. We now turn to the meanings law implies.

III. The Political Rhetoric of the Takings Clause

As this article is being prepared, attention is focused on the case of Bernadine Suitum, an 82-year-old widow who has become a symbol for the property rights movement in the United States. Mrs. Suitum wanted to build a retirement home on the shore of Lake Tahoe, but her plans were blocked by the Tahoe Regional Planning Agency, which deemed her property a wetland area important to protecting the lake. Unlike the plaintiff in Lucas, Mrs. Suitum has not been deprived of all economic benefit from the land.

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116 See Lucas, 505 U.S. at 1016-17 n.7.
117 If the government restricts a landowner’s development options only to grant access to the public, one may ask whether environmental protection was the true goal of the restriction.
118 See, e.g., Dolan v. City of Tigard, 512 U.S. 374 (1994) (finding unconstitutional a city’s policy of requiring a landowner to dedicate a portion of her property in floodplain as a public greenway).
because of the possibility of sale of transferable development rights. The case was argued before the Supreme Court on February 26, 1997.120

It is not clear whether the Supreme Court will decide any important takings issues in Mrs. Suitum's case. In her case, the district court concluded, and the Ninth Circuit panel agreed, that the case was not ripe because she had not applied for transfers of development rights.121 The Justices were widely reported to have been sympathetic during oral argument to having Mrs. Suitum's claim adjudicated on the merits.122

Mrs. Suitum's case is an important aspect of the vigorous private property rights movement in the United States. In recent years, wise-use and allied groups have grown into a national political force.123 Such groups have won a number of legislative victories either restricting government authority to interfere with property rights or requiring the payment of compensation for regulatory limitations on property prerogatives.124

Environmentalists have become alarmed at the arrival of this movement and have sought to counter it, without much success. Professor Gerald Torres expressed this frustration in a recent essay,125 asking "How have [property rights] proponents been able to weave a socially and legally compelling story?"126 Thus, Torres concedes, as anyone must, that the private property story in America recently has been, and probably always has been, politically compelling.127 Torres sees that the property rights phenomenon is

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121 See Suitum, 80 F.3d at 362.
122 Justice O'Connor's comment from the bench was reported as: "My goodness, why not give this poor elderly woman the right to go to court?" Justices Get Impatient, supra note 120.
124 See generally id.
126 Id. at 10.
127 See id. at 8.
not strictly legal, but is a political and narrative event.\textsuperscript{128}

The takings clause is very important to the property rights movement, but it does not function in that context as a legal norm. Rather, the takings clause functions as an organizing framework for a constitutional vision independent of what judges and law professors think and say. So, Mrs. Suitum's case to the contrary notwithstanding, courts are not crucial to the private property movement.

Professor Torres sums up the basic arguments\textsuperscript{129} of the property rights movement as follow:

1) Property ownership is tied to political power. The right to own real property is, in fact, the basic right. It undergirds all civil rights and civil liberties.

2) The Takings Clause of the Fifth Amendment to the U.S. Constitution directly limits the power of the state to expropriate private property unless those owners are compensated at the unregulated exchange value of the property.

3) Because of this limitation, the state is using regulation to achieve without compensation what the Constitution would prohibit if the government acted directly.

4) This move is a deliberate attempt to expand the power of the state at the expense of property owners and to the detriment of all citizens.

5) The regulatory zeal of the state "makes enemies of the majority of Americans" and is part of the mistaken belief that the government can do things better than people can.

\textsuperscript{128} See id. at 14-24.
\textsuperscript{129} See id. at 9.
6) Any government action that limits development potential of real property, where that action is not aimed at preventing an immediate public harm, is a compensable taking. Compensation is required regardless of the value left in the parcel after the regulation is enacted or the reciprocal benefit conferred by the limitation.

7) The environmental motivation behind much of the regulation of private property is antihuman (footnote omitted).

The reader can see how significant the takings clause is in this list. But this takings clause is in no sense based on what courts have said about it. For that matter, the movement's interpretation is not based on history or text. The model for what is happening with regard to the takings clause was recently and effectively described by Professor James Pope, who traced through the 1930's what he called, "Labor's Constitution of Freedom." According to Professor Pope, union activists had their own view of what the Constitution promised and, in effect, created an alternative narrative universe.

Professor Pope's model can be seen at work in a number of disparate political movements in both America's past and present. A good example is the National Rifle Association ("NRA") and the Second Amendment.

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132 See id. at 943.

Another example is the death penalty abolition movement and the Eighth Amendment. In a similar fashion, Professor Robert Cover earlier described slavery abolitionists as "constitutional utopians." One way to tame such creativity with legal texts is to bring a movement's vision into the courtroom. Confrontation with legal institutions tends to deaden textual creativity. The movements whose interpretations fare best politically, as the rhetorical success of the NRA shows, are the ones that stay out of law's institutional structure.

Another way to counter such constitutional creativity is with an alternative constitutional account—often one backed by the overwhelming power of the cultural elite—as in the case of the opponents of labor. But in forging an alternative constitutional account, the "other" group, in our case environmentalists, has the same problem of resisting judicial interpretive frameworks. Unfortunately, the environmental movement, concerned with countering Supreme Court opinions, has not yet engaged in popularly accessible interpretation in regard to the takings clause.

It is possible, for example, to oppose the narrative of the property rights movement with an account of nuisance law and property law as a traditional exception to the takings clause. The message is that nuisance and related doctrines have been flexible concepts and that there is no

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136 Calling this process "creativity" depends on one's point of view. It could be said of the NRA, for example, that its interpretive fancy is just irresponsible. See Torres supra note 125 at 9. On the other hand, a creative thinker like Hugo Bedau inevitably will examine a constitutional concept like "cruel and unusual punishments . . . quite apart from attending centrally to the issues as they have been shaped during the past decade or so by the Supreme Court's own pronouncements . . . " Bedau, supra note 134, at 128. In a democracy as strongly influenced by the courts as this one, there is a strong tendency to defer to judges' interpretations of constitutional texts.

137 See Pope, supra note 131, at 984-88.

justifiable ground upon which to limit them to pre-existing common law outcomes, as the majority in *Lucas* seems to do.\textsuperscript{139} This strategy is legally necessary to counter the Supreme Court’s artificial limitation in *Lucas* on a traditional exception to the requirement of compensation for even total loss of value of land. This sort of argument attempts to retain the possibility of serious legislative efforts to protect environmentally sensitive land in the face of a somewhat hostile Supreme Court. Politically speaking, however, this is not an interpretation of the takings clause at all.

In order to understand this, imagine speaking about takings in the context of Mrs. Suitum’s land. Mrs. Suitum wants to build a normal house on a lake. No matter how one puts it, Mrs. Suitum’s house is not a nuisance. Nor does it interfere with any background property principles, at least not as people generally understand their property rights. Building a house on a lake is something many Americans have done and, unless terms are to lose all normal meaning, calling this activity a nuisance or the violation of a public trust, even as an analogy, would be politically incoherent to any intended audience. This is why Mrs. Suitum’s lawyers, savvy representatives of the politically committed Pacific Legal Foundation, say: “Mrs. Suitum has done nothing wrong. . . . She hasn’t violated any permit requirements. She hasn’t violated any environmental laws. She hasn’t harmed sensitive wetlands or endangered species. She hasn’t done anything except apply for a permit to build one modest house.”\textsuperscript{140}

This is effective rhetoric because it locates the claims of the property rights movement squarely within the Western tradition of individual autonomy, and hence individual liberty, and therefore can unselfconsciously ask for compensation. Mrs. Suitum, it says to the American people, has done nothing but what you all have done.

\textsuperscript{139} In *Lucas*, the Court acknowledged that no compensation needs to be paid in the case of prohibition of “harmful or noxious” uses of land. See 505 U.S. at 1022. Justice Scalia’s majority opinion did not limit the principle of non-compensation to regulation of traditional nuisances, but did restrict non-compensation in the case of the loss of all economic value to a “pre-existing limitation upon the landowner’s title.” *Id.* at 1028-29.

Is there a story for understanding the takings clause that would deny compensation to Mrs. Suitum and make a politically coherent environmental statement? It would have to be a story that rings true, even if it is, at first, unpopular. There is such a story and it is one that the property rights movement already attributes to environmentalists. It is the story of the harm humans do.

Despite the view of Chief Justice Rehnquist to the contrary, it generally has been accepted that government may regulate to reduce or eliminate harm to the public interest and that when doing so reduces property value, no compensation need be paid. Justice Scalia’s opinion in *Lucas* acknowledges this tradition and does not entirely reject it. The problem with that approach, according to Justice Scalia, is that all human activity can be characterized as harmful. Thus, if harm prevention were all a legislature needed to avoid paying compensation, compensation would never be paid, except in the case of “stupid staff,” that is, a staff too stupid to figure out how to call their law harm prevention.

This “if-we-allow-this-then-the-‘limit’-is-no-limit” argument should sound familiar to anyone who has read *United States v. Lopez*, the case that held that Congress could not prohibit guns in schoolyards under the Commerce Power. *Lopez* did not actually teach anything about the limit of the Commerce Power except that if the law at issue were permitted, there would be no limit. Similarly, *Lucas* teaches us little about takings except that if the legislature takes all value, there generally will have to be compensation. These cases are about line drawing and nothing else.

If Justice Scalia had wanted to, we think he could have said something meaningful in *Lucas* about the nature of harm. For one thing, it is not actually true that all human activity can be persuasively characterized

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141 For an account of Chief Justice Rehnquist’s view, see PERCIVAL ET AL., *supra* note 32, at 1016-17.
142 See *Lucas*, 505 U.S. at 1022 (stating that no compensation need be paid in order to prohibit harmful uses of land).
143 See *id.* at 1015-1019.
144 See *id.* at 1026 n.12.
as harmful. Sometimes it is the case that the legislature will be distributing a benefit rather than preventing a harm. That was the situation, for example, in *Nollan v. California Coastal Commission*, where the evident purpose of the easement across the landowner’s beachfront property was to distribute to the public that which the landowner owned, a great view and access to the ocean.

It is not difficult to see that the planned house in the *Lucas* case might actually harm a fragile beach. No one wants what the landowner has. No park is planned there. This human activity is potentially truly harmful.

We do not see anything in the *Lucas* opinion that questions the harm that building this house may cause. Two factors were relied on by the Court to establish that building the house was not nuisance-like. One factor was that this type of building “has long been engaged in by similarly situated owners” and the other was that “similarly situated” owners still are permitted to build. In other words, other humans have harmed the environment in this way before, and they still do. What prevents the Court from acknowledging a broad principle that harm is the limit of compensation is not that so much human activity can be characterized falsely as harmful, but that so much human activity is, in fact, harmful.

Mrs. Suitum’s proposed house is another good example of the harm that ordinary private property use can cause. Her house is not a nuisance, but rather, it is simply a harm. In addition, it is a harm not because there is something wrong with the house, not because the site is particularly sensitive, and not because the area is so densely populated. Mrs. Suitum’s proposed house causes harm because she is a human being, and human beings, particularly in the industrialized West, do not live in harmony with the natural order. That is why each one of us always wants to own the last house developed on Lake Tahoe.

In the most elementary economic/Kantian sense, we all want a free

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146 Justice Scalia states that one cannot distinguish harm from benefit “on an objective, value-free basis . . .” *Lucas*, 505 U.S. at 1026.
148 See id.
149 See 505 U.S. at 1031.
ride for ourselves, yet at the same time, we want to act differently from the way we want others to act. We want the right to cut down trees while we continue to breathe oxygen created by the trees of others. We want to have a beautiful view of a lake though our homes detract from just that beauty by adding runoff to the lake. We are used to thinking of our ordinary activities as benign, as they once were, in effect. When there were fewer people, we could ignore the ordinary harms of private property and speak legally as if we caused no harm. Now our harms accumulate.\(^{150}\)

The principle of fundamental human harm is one that the environmental movement could present to the American people. The message would be that new development entails significant harm even when it is just an “ordinary” use of private property. The world cannot afford the loss of trees, the new roads, the demand for water, the destruction of cropland and so forth. Any development that does not utilize existing facilities will have to be considered proscribable without compensation.\(^{151}\) This does not mean that development will stop. There are places where the activity of people does not harm the earth. But those are places people already occupy and are within the limits of what people already do.

The harm principle we are outlining here is just what is meant by calling environmentalists “antihuman.”\(^{152}\) Professor Torres calls that claim “rather incredible,”\(^{153}\) but we think we understand it. The question is whether one thinks that people are ruining the world. We do.

Law does not, perhaps cannot, accept the principle of human harm. This is consistent with law’s enthrallment with the human, which is a commitment that is narcissistic in comportment and indifferent to nature in practice. Since we think that law cannot respond to the coming environmental catastrophe without examining that world view, we end this

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150 “Now it is clear that with ceaseless repetition, even seemingly innocuous actions such as driving a car or cutting down a tree can influence the physical and chemical systems that govern the earth.” CHERYL SIMON SILVER, ONE EARTH ONE FUTURE: OUR CHANGING GLOBAL ENVIRONMENT (1991).

151 The actual decision to regulate or proscribe, however, would lie with the legislature.

152 See supra note 130.

153 Torres, supra note 125, at 9 n.37.
IV. LAW'S THEOLOGY AND THE COMING ENVIRONMENTAL CATASTROPHE

Like the student in the book, *Ishmael*, who insisted that the West has no myths, we expect to hear that law does not have a theology. If by theology one means the traditional concept of God, that is so. American law has been rigorously secular for most of the twentieth century.

If we mean by theology, an account of what is most real in the universe, then of course law has such an account. The most pervasive aspect of law’s theology is a thoroughly anthropocentric world view. We do not mean by this that the environment has been granted no protection by law. Law’s perspective about the environment, however, emphasizes the importance of the environment to humans. A representative example of this theology at work is Professor James Huffman’s largely critical review of Vice-President Al Gore’s book, *Earth in the Balance*. Huffman entitles his review, *Civilization in the Balance*. Thus, Huffman wants to set man and his works—“Civilization”—in contrast and opposition to “Earth.” On one level, this is pretty funny. It is as if humans knew how to build “Civilization” somewhere else, and just happen to be on Earth for the time being. On a deeper level, we see here the resistance to any suggestion that nature has claims of its own and that we, ourselves, are part of nature.

Law had an opportunity to adopt a nature-based perspective in 1972. In *Sierra Club v. Morton*, members of the Sierra Club who favored leaving Mineral King Valley in an undeveloped state brought suit to challenge the decision of the United States Forest Service approving a ski resort development project. The Court held that the plaintiffs lacked standing.

In his justly famed dissent in that case, Justice William Douglas proposed...
that nature be permitted to sue in court for its own protection, a perspective that has been rejected thoroughly by the Court. Today we can see Justice Douglas’ wisdom, for it is clear that the abstract and artificial quality of standing cases like *Lujan* comes about just because endangered species are not able to sue for themselves, even though it is specifically law’s intention to protect them.

Even within the anthropocentric perspective of law, not all views are alike. The most human-centered view is that of law and economics, which defines environmental problems as a situation in which “one or more resources is not being used so as to maximize human satisfactions.” It may be that the environmental crisis we face cannot be addressed without a healthy dose of private market principles—indeed that is likely the case. A mind set, however, that sees the entire universe in terms of human satisfactions, is not going to see well enough to save itself, no matter how efficient its tools.

Other current views within the legal community, although much more sensitive to the qualities of nature than law and economics view tends to be, still judge nature from a human perspective. Thus, we are told to protect the environment because of the qualities it embodies, or because of our obligation to the next generation, or, most beautifully we think, because

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158 See id. at 741; see also Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450 (1972).
160 There are, of course, other voices within the world of economics. See, e.g., Kenneth E. Boulding, *The Economics of the Coming Spaceship Earth, in ENVIRONMENTAL QUALITY IN A GROWING ECONOMY* 3 (Henry Jarrett ed., 1971).
161 We realize that nature-based perspectives do exist outside law. See, e.g., Lynn White, Jr., *Continuing the Conversation, in WESTERN MAN AND ENVIRONMENTAL ETHICS* 55 (Ian G. Barbour ed., 1973).
humans are members of a community of life.\textsuperscript{164}

All these anthropocentric perspectives share an important flaw. They tend toward ethics of a distasteful type. They ask whether we should impose burdens on people that they do not want to bear because of the particular moral views of the one doing the proposing. Inevitably, these perspectives end in moral carping.

On the other hand, anthropocentric views are not all bad. An anthropocentric view might be advantageous in the face of the coming environmental disaster. After all, nature does not have an environmental crisis, humans do. Elevated temperatures, thinned ozone, expanded deserts, deforestation, and so forth will not end life on earth. The earth is likely to have millions and perhaps billions of years in which to evolve new forms of life after humans are extinct; but humans are not likely to flourish or even cope well with the conditions that are coming.

An anthropocentric view should be able to recognize this and take the necessary steps. Indeed, as conditions worsen in the next century, environmental preservation probably will come to be seen not as a matter of ethics at all, but as a matter of simple human survival. So law may turn out to have an honored place in the natural history of planet earth. Its anthropocentrism may alert it to danger, but we see few signs of such awareness.

We could end here, with a hope that humanity will act in time to prevent disaster. We must add, however, that we are not really satisfied with the thought that eventually humans in general and law in particular will wake up and take steps to ameliorate the environmental crisis. Aside from the fact that the awakening may come too late, without more action, humans still will fail to acknowledge their absolute and unalterably inextricable dependence on nature.\textsuperscript{165} It is in that refusal that the seed of the next disaster germinates.

What is lacking in these anthropocentric accounts is a sense that the

\textsuperscript{164} See ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE viii (1987).

\textsuperscript{165} Now here, in humankind’s inexorable dependence upon nature, which is a given of human experience, is the “objective, value-free” perspective Justice Scalia seeks. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992).
unfolding environmental crises show that humans are being judged. This is a religious perspective, whether the judgment is that of a personal God, whose earth this is, or is a reflection of an impersonal structure of the way things are, to which humans must ultimately submit, as indeed all the universe submits. What else can you do with the way things are but submit?\(^{166}\)

It is at just this point—the question whether humans are beyond being judged—that we see the radical division between the secular and the religious. That division is absolutely not a matter of creches and school choice. It is a matter of a certain way of seeing reality. And on that divide, law and lawyers, even some lawyers who champion religious rights, stand totally on the secular side.

We will be reminded that far from containing the seed of rescue from environmental catastrophe, the Judeo-Christian tradition has encouraged the abuse of nature.\(^{167}\) We are well aware of this, but are not dismayed. It is not religion and tradition that are speedily destroying the capacity of the earth to sustain human life. That indictment must be laid at the door of the heirs of the enlightenment: science, economics, law and liberal government.\(^{168}\) Perhaps when all admit their sin with regard to the earth, true healing will take place.

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\(^{166}\) We are saying that nature operates not unlike Emerson’s suggestion in his great essay, *Compensation*, in *The Essays of Ralph Waldo Emerson* 53 (The Belknap Press 1979).

\(^{167}\) See White, *supra* note 161.

\(^{168}\) This was Reinhold Niebuhr’s important criticism of the enlightenment roots of liberal government, namely that this heritage is based on man’s worship of self. See REINHOLD NIEBUHR, *The Nature and Destiny of Man* 102 (1941).