HUMAN RIGHTS AND ENVIRONMENTAL REGULATION

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"We can't manage effectively without trust."
–Jane Lubchenko, NOAA Administrator, 2010[1]

Because environmental regulators exercise vast discretion against a background of scientific uncertainty, the background assumptions they use to guide their decisionmaking are particularly influential. This article suggests that were federal regulators to view themselves as human rights decisionmakers, we might well see a new kind of regulatory decisionmaking emerge—one not only more responsive and transparent but also more likely to enjoy the trust of the American public. Drawing from the BP Oil Spill and the United States regulatory response to climate change this article shows how human rights norms might enrich domestic regulatory processes and help environmental regulators implement their statutory mission of protecting the public welfare. It demonstrates how interpreting domestic legal obligations through the lens of human rights would enhance a commitment to participation, fairness and accountability, thereby making the

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[1] Jane Lubchenko, *NOAA Administrator Takes Action on IG Report on Fisheries Enforcement*, NOAA NEWS, (Feb. 3, 2010), http://www.noaanews.noaa.gov/stories2010/20100203_inspectorgeneral.html (NOAA Administrator responding to an inspector general report highly critical of NOAA's enforcement policy).

domestic regulatory process not only better and fairer, but also more likely to be perceived as legitimate by the general public. The article concludes by pointing out some key obstacles the human rights approach for achieving environmental ends.

INTRODUCTION

The United States has a regulatory system in dire need of reform. Beset by failures like oil well blowouts,[2] coal mine explosions,[3] food and medical safety fiascos,[4] imploding financial markets,[5] and the bungled response to Hurricane Katrina,[6] the

[2] The National Commission on the BP Deepwater Oil Spill issued its final report in January 2011. The report can be found at http://www.oilspillcommission.gov/. Many of the key documents associated with the BP oil spill can be found on the Deepwater Horizon Unified Command website at http://www.deepwaterhorizonresponse.com/go/site/2931/. For a report detailing the regulatory failure aspects of the disaster, see Alyson Flournoy et al., *Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, and How the System Can Be Fixed to Avoid a Recurrence* (Oct. 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685606.

[3] *See, e.g.*, Howard Berkes and Dina Temple-Raston, *FBI Probes Massey Energy, Regulators in Mine Blast*, NPR (April 30, 2010), http://www.npr.org/templates/story/story.php?storyId=126419056; Ian Urbina and Michael Cooper, *Deaths at West Virginia Mine Raise Issues About Safety*, N.Y. TIMES, at A1 , *available at* http://www.nytimes.com/2010/04/07/us/07westvirginia.html.

[4] Michael Moss, *Peanut Case Shows Holes in Safety Net*, N.Y. TIMES (Feb. 8, 2009) (describing gaps and failures in regulatory oversight that made a massive peanut butter contamination problem possible); Rena Steinzor & Margaret Clune, *The Hidden Lesson of the Vioxx Fiasco: Reviving a Hollow FDA* Center for Progressive Reform (Oct. 2005) http://www.progressivereform.org/articles/Vioxx_514.pdf. For a detailed analysis of flaws in USDA's food safety oversight, see Phyllis Entis, USDA's Failed Salmonella Policy, EFOODALERTS (Aug. 3, 2011) Increasingly globalized trade only exacerbates the problem. For example, in its reporting about the tainted cough syrup that killed hundreds in Panama, the New York Times described "a poison pipeline stretching halfway around the world." Walt Bogdanich and Jake Hooker, *From China to Panama, a Trail of Poisoned Medicine*, N.Y. TIMES, May 6, 2007, at A1 (tracing the diethylene glycol tainted syrup from China, through Europe to Panama).

[5] *See, e.g.*, David Leonhardt, *Lessons from a Credit Crisis: When Trust Vanishes, Worry*, N.Y.TIMES, Oct. 1 2008, at A1; Sarah Knapton, *Financial Crisis: Home Safe Sales Soar as Trust in Banks Collapses*, THE TELEGRAPH, Oct. 10, 2008.

[6] Hurricane Katrina was a natural disaster of immense proportions; but, the failures to anticipate, prepare for, and respond to the hurricane were regulatory failures. From certifying inadequate levies, to permitting wholesale destruction of wetlands, to shortchanging emergency response planning, all of the regulatory agencies tasked with protecting New Orleans did not live up to their statutory

federal regulatory apparatus has floundered; indeed some call it broken.[7] Blatant manipulation of the science behind climate change and other policies creates a sense that regulation is just a political game.[8] As a result, the regulatory state has lost the trust of the American people. Indeed, in April 2010, the Pew Research Center reported that only 22% of Americans trust the federal government all or most of the time—among the lowest levels in the past fifty years.[9] Rebuilding that trust will require a significant

obligations. For a collection of various writings making this point, see *BP, Massey Coal Mine, Katrina: Unnatural Disasters, Years in the Making,* CENTER FOR PROGRESSIVE REFORM, http://www.progressivereform.org/katrina.cfm (last visited May 16, 2011).

[7] For a full development of this argument, see generally RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTEREST, GOVERNMENT, AND THREATS TO HEALTH, SAFETY AND THE ENVIRONMENT (2010).

[8] MARK BOWEN, CENSORING SCIENCE: INSIDE THE POLITICAL ATTACK ON DR. JAMES HANSEN AND THE TRUTH OF GLOBAL WARMING (2008); For a thorough exploration of this problem, see THOMAS O. MCGARRITY, *Defending Clean Science From Dirty Attacks by Special Interests, in* RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH 24 (Rena Steinzor & Wendy Wagner, eds., 2006) (documenting the ways that interest groups distort science to support political positions), SHELDON KRIMSKY, *Publication Bias, Data Ownership, and the Funding Effect in Science: Threats to the Integrity of Biomedical Research*, *in* RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH supra, at 61; see also CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 102–20 (2006). Allegations swirled for years that political appointees in the Bush administration heavily edited scientific testimony and government publications concerning climate change. In 2007, a House Committee Investigation concluded that the administration systematically manipulated climate change science to minimize the dangers of global warming. STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., POLITICAL INTERFERENCE WITH CLIMATE CHANGE SCIENCE UNDER THE BUSH ADMINISTRATION 16–32 (December 2007), *available at* http://www.lpl.arizona.edu/resources/globalwarming/documents/political-interference.pdf. Among the study's conclusions, political appointees edited agency reports "to exaggerate or emphasize scientific uncertainties or to deemphasize or diminish the importance of the human role in global warming." *Id.* at ii. In his inaugural address, President Obama promised to "restore science to its rightful place." President Barack Obama, Inaugural Address (Jan. 21, 2009) (transcript *available at* http://www.whitehouse.gov/blog/inaugural-address/).

[9] *See Distrust, Discontent, Anger and Partisan Rancor: the People and their Government*, PEW RESEARCH CENTER (Apr. 18, 2010), *http://pewresearch.org/pubs/1569/trust-in-government-distrust-discontent-anger-partisan-rancor* [hereinafter *Pew Report*]; Liz Halloran, *Pew Poll: Trust in Government Hits Near Historic Lows,* NPR (Apr. 18, 2010), http://www.npr.org/templates/story/story.php?storyId=126047343. While anti-government rhetoric surrounding the health care debate is likely to blame for some of the decrease, it is clear that there are serious trust problems that extend beyond the Tea Party fringe. For example,

governmental commitment to transforming "business as usual" and to renewing the link between regulation and the public purposes regulation is intended to serve.

One way we might begin is by transforming the regulatory perspective—those background assumptions that regulators use to guide their decisionmaking. These assumptions play a particularly important role in contexts like environmental regulation, where discretion is vast and scientific certainties are few.[10] Were federal regulators to embrace human rights norms, and view themselves as making decisions with human rights ramifications, we might well see a new kind of regulatory decisionmaking emerge—one more likely to garner the trust of a suspicious and distrusting public. This article makes the case for such a transformation, arguing that regulators should draw on human rights norms to help them grapple more effectively with issues of fairness and transparency.[11] Indeed, embrace of emerging human rights norms around participation, access to information, transparency, and intergenerational equity, can help regulators exercise their discretion in a fashion that not only supports rather than undermines regulatory legitimacy, but also leads to better, more sustainable decisionmaking.

This observation remains true despite intense disagreement about whether emerging international norms have coalesced into a free-standing environmental right cognizable under international

trust in EPA and FDA decreased by twelve percent and seventeen percent respectively over the past decade, though both agencies still held the trust of a slight majority of the American public. *Pew Report, supra*. Seventy-four percent thought the federal government did a fair or poor job of running its programs. *Id*.

[10] For recognition of this point in the context of the Clean Air Act, see Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1130, 1147 (D. C. Cir. 1980) (noting the wide policy discretion agencies have when making decisions "at the frontiers of science").

[11] For a detailed analysis of these stages of the regulatory process, see Kenneth W. Abbott and Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions in the Shadow of the State, in* THE POLITICS OF GLOBAL REGULATION 1 (Walter Mattli and Ngaire Woods, eds. 2009). While human rights norms might be of value to regulators across all aspects of regulation: from agenda-setting through negotiation and implementation to enforcement, this project focuses on the more general question of whether international human rights norms are an appropriate source for regulators to draw on in order to improve domestic environmental regulatory process, leaving for later work the specifics of how human rights might be used to transform each specific stage of the regulatory process.

human rights law.[12] The very characteristics that are advanced as undermining the validity of the claim to a free-standing human right to a wholesome environment actually offer support for the notion of incorporating human rights norms into the domestic regulatory decisionmaking process. If environmental decisions are in fact a constant trade-off between competing priorities, regulators need guideposts for exercising their discretion as they make decisions about these trade-offs. Emerging international norms associated with the putative right to a healthy environment focus on facilitating participation and providing meaningful information. Embracing these norms will help regulators keep the big picture in mind and might provide a welcome counterweight to deregulatory pressures stemming from free-market ideology. As such, incorporating these international human rights norms into the fabric of discretionary decisionmaking can help regulators resist the pressures of momentary expediency, by putting a thumb on the scale for overall system legitimacy and integrity.

Using human rights norms in this fashion begins with recognizing regulators as potential human rights decisionmakers. Once regulators view themselves in this light, the potential utility of international human rights discourse in domestic regulatory processes becomes clear. Lessons gleaned from the field of human rights can enrich domestic regulation by making the decisionmaking process more responsive, more transparent, and ultimately more likely to enjoy the trust of the American public. This argument is both prudential and normative—making the case that resort to environmental human rights norms is a good idea because these concepts can help regulators implement their statutory mission of protecting the public welfare. In short, this article advocates a form of regulatory borrowing.[13]

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[12] *See, e.g.*, RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE 36–47 (2009) (summarizing the philosophical debate); Gunther Handl, *Human Rights and Protection of the Environment: A Mildly "Revisionist" View* in HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION 117, 121 (A. Cançado Trindade ed.) (1992) (cautioning against misrepresenting aspirational environmental human rights concepts as hard law, and recommending avoiding "talismanic invocations of non-binding resolutions" and other forms of soft law).

[13] For a discussion of borrowing in the constitutional context, see Nelson Tebbe & Richard Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461 (2010) (defining constitutional borrowing as "the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends."). I use the term borrowing in much the same way,

Part I begins with a description of the regulatory enterprise—highlighting the need to make regulatory decisions under conditions of uncertainty and despite critical knowledge gaps. This section suggests that it is these aspects of regulatory decisionmaking that make it ripe for lessons from human rights. Part II offers a brief overview of international human rights law, and then provides an introduction to the emerging norms often associated with a putative human right to a healthy environment. Part III introduces the domestic environmental law questions that would most benefit if regulators borrowed from human rights. This section highlights some key deficiencies in current practices that borrowing from human rights might address. This section draws from the BP Oil Spill and the United States regulatory response to climate change to show how domestic regulatory processes might be enriched by international human rights norms. It demonstrates how interpreting domestic legal obligations through the lens of human rights would enhance a commitment to participation, fairness and accountability, thereby making the domestic regulatory process not only better and fairer, but also more likely to be perceived as legitimate by the general public. Finally, the article concludes by pointing out some key limitations of the human rights approach for achieving environmental ends and proposes some concrete steps to expand environmental rights beyond human rights.

I. THE REGULATOR AS POTENTIAL HUMAN RIGHTS DECISIONMAKER

Federal agencies make a wide range of discretionary decisions. For most of these decisions, there will be virtually no oversight: no court, legislature or public-minded group will challenge, or even closely examine, the agency's fidelity to its statutory mandate and/or the public's interest. The Supreme Court's *Chevron* decision,[14] which severely limits judicial oversight, only magnified this already existing phenomenon. Public Choice theory suggests that, under these circumstances, agencies will inevitably become rent-seekers, rather than public watchdogs, enforcers or investigators.

Public choice scholars have given particular attention to

but in the regulatory rather than constitutional context.

[14] Chevron v. NRDC, Inc., 467 U.S. 837, 844 (1984).

regulation in the environmental context.[15] The public choice theory has at its heart the conviction that legislation (and by corollary regulation) is a good to be sold in the marketplace to the highest bidder.[16] Thus, the public choice narrative posits that concentrated, economically powerful industries with significant economic stakes in regulatory decisions will win out against diffuse, public interests. Environmental law, which often benefits diffuse and relatively non-economic public interests at the expense of concentrated economic interests stands as something of a paradox for public choice theory. Responses to this critique, ranging from the republican moment theory of legislation and regulation[17] to Habermasean deliberative democracy, reflect extremely varied first assumptions about how and why human beings structure themselves into societies and groups. Regardless of which camp one inhabits, it is clear that this theoretical dialogue taps into something fundamental in environmental law—the multiple, often conflicting goals that surround environmental choices, and the power inequality inherent to so many regulatory dynamics between regulated communities and the public beneficiaries of environmental regulation. Recognizing this essentially contested nature of environmental decisionmaking, and the enormous power differentials between the subjects and beneficiaries of regulation, also means acknowledging the high stakes that surround many exercises of regulatory discretion. With the potentially immense social impacts flowing from these discretionary decisions in plain view, the quest to embed exercises of regulatory discretion within a value system takes on added urgency. Efficiency and market rationality offer one such structure, while human rights provides an alternative organizing principle, emphasizing a different set of social values. Indeed, human rights might be a tool for channeling

[15] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 5–65 (1971).

[16] For summaries of these public choice analyses, see STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 15, 19–21 (2008); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 61, 65 (1992). For a thorough, though skeptical analysis of public choice justification for environmental federalism see Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 636–41 (2001).

[17] Christopher H. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws, 1969-73*, 9 DUKE ENVTL L. & POL'Y F. 29 (1998).

regulatory discretion toward paths more likely to maximize overall social benefit, and away from paths giving undue weight to narrow, albeit powerful, special interests.

The inquiry into the human rights agency of environmental regulators is of particular importance in the United States because the United States does not currently recognize any constitutional environmental rights.[18] Thus, any arguments for recognition and implementation of substantive environmental rights must either derive those environmental rights from statutory enactments, state constitutional rights to a healthy environment,[19] or existing federal

[18] Often constitutionalization is interpreted to be a key signal that a state has accepted the validity of human rights norms. The first meaningful attempt to enshrine environmental rights in the United States constitution came in 1968 when Wisconsin Senator Gaylord Nelson proposed a constitutional amendment which read: "Every person has the inalienable right to a decent environment. The United States and every state shall guarantee this right." Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 120 (1997) (citing H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968)). This and similar subsequent attempts to include environmental rights in the United States constitution failed, though Senator Nelson's proposed amendment certainly did much to raise awareness about then-looming environmental issues. *Id.* at 120, citing H.R.J. Res. 1205, 91st Cong. (1970).

[19] For a description of constitutional environmental rights, see Rebecca M. Bratspies, *On Constitutionalizing Environmental Rights,* in LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE *209, 221–13* (Penelope A. Andrews & Susan Bazilli, eds., 2008). While these constitutional rights are important, by themselves they do not vitiate the need for a human rights approach to environmental regulation. As is true with most constitutional environmental rights around the world however, these state-guaranteed environmental rights are typically formulated in open-ended language, seeking consensus on an abstraction without actually resolving the complicated moral and political questions implicated by environmental rights. Some formulations are wholly aspirational, while others can offer a normative hook for courts and regulators seeking to 'green' interpretations of domestic law. *See, e.g.*, Jona Razzaque, *Human Rights and the Environment: the National Experience of South Asia and Africa,* Joint UNEP-OHCRC Expert Seminar on Human Rights and the Environment: Background Paper No. 4, 14-16 (2002). *See also* Alan Boyle, *Human Rights or Environmental Rights? A Reassessment,* 18 FORDHAM ENVT'L L. REV. 471 (2007). While the same criticisms have been leveled at human rights, there is a growing body of law and scholarship focused on pinning down the content of rights like participation, transparency and equity. Given the overlap between constitutional environmental rights, statutory rights, and human rights norms surrounding the environment, an appreciation for those human rights might help law makers and regulators operationalize those constitutional and statutory environmental commitments. *See, e.g.*, Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law,* 25 Ga. J. Int'l & Comp. L. 287, 292–311, (1996) (providing a survey of the varying ways that national courts have deployed international human rights);

constitutional rights.[20]

When legislating in the environmental area, Congress has been prone to grand statements and sweeping language.[21] Profound underlying questions about the relative weight of competing priorities and the proper role for agencies vis-à-vis the public they serve are typically left unanswered by broad-brush statutory enactments. Their resolution is delegated to the discretion of regulatory agencies which are tasked with transforming lofty legislative pronouncements into a functional regulatory program. In shaping the contours of the regulatory scheme, agencies must balance competing objectives, make choices about priorities, simplify and standardize, and generally exercise a great deal of discretion. Unless this exercise of discretion runs counter to an explicit statutory command or is otherwise arbitrary and capricious, courts are reluctant to interfere with the balance that is struck.[22] How agencies exercise their discretion is thus the single

Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation,* 98 AM. J. INT'L L. 82, 85 (2004) (making the point that human rights call into question positive law that is insufficiently respectful of internationally-articulated values).

[20] Some have argued that international law directly creates environmental rights that states are bound to implement. *See e.g.,* Amicus Brief of Sierra Club and Earthrights International, *Beenal v. Freeport McMoran* (Nov. 13, 1998) http://www.earthrights.org/sites/default/files/publications/amicus-brief-beanal-v-freeport-mcmoran.pdf; Hari M. Osofsky, Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations, 20 Suffolk Transnat'l L. Rev. 335, 368-81 (1997). In order to focus on the more modest claim that international human rights norms can usefully inform regulators seeking to implement rights grounded elsewhere, this article brackets that argument.

[21] For example, the Clean Water Act identified *eliminating* the discharge of pollutants into navigable waters of the United States as a goal to be met by 1985. Clean Water Act §101(a)(1), 33 U.S.C. § 1251 (2006). The National Environmental Policy Act announces a national policy of using all practicable means "to create and maintain conditions under which man and nature can exist in productive harmony." National Environmental Policy Act § 101(a), 42 U.S.C. § 4331(a) (2006).

[22] This does not mean that courts fail to police the processes by which agencies strike that balance. Under the "hard look" doctrine, for example, courts carefully examine the rulemaking process to ensure that proper procedures have been followed and that statutorily-mandated factors have been considered. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1982) (articulating what became known as the State Farm "hard look" test and finding that failure to consider alternatives amounted to arbitrary and capricious agency action.) However, outside of satisfying themselves that agencies have considered statutorily-identified factors and employed appropriate procedures, judicial review of the actual regulatory choices made through an exercise of

most important factor in determining whether environmental statutes produce an equitable distribution of environmental risks and benefits across society, and whether the statutes succeed in achieving their environmental objectives. At the regulatory level, decision makers are grappling with some of the precise moral and political questions that international human rights law has developed to address.

Yet, human rights lawyers have so far rarely waded into these waters, instead focusing their creative thinking about law and legal arguments on the context of litigation, courts and judges. As a result we have seen human rights arguments increasingly being used as new or supplemental rationales for judicial decisions.[23] With all due respect for that strategy, there are many other legal venues besides the courtroom in which human rights ideas might make a difference. As Professors McDougal and Lasswell memorably pointed out,[24] there are other legal decisionmakers

regulatory discretion is extremely limited. *See* Administrative Procedures Act, 5 U.S.C. § 706 (2006).

[23] For example, human rights arguments featured prominently in successful petitions to the Supreme Court in Lawrence v. Texas, 539 U.S. 558, 573–78 (2003) (referencing decisions of the European Court of Human Rights); Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (pointing out that the court's decision was in line with the "overwhelming weight" of virtually unanimous international opinion); and Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (relying in part on European decisions to conclude that executing the mentally retarded violates the Eighth Amendment). The failure of human rights arguments in Castle Rock v. Gonzales, 545 U.S. 748 (2005) prompted a new lawsuit before the Inter-American Commission on Human Rights: Gonzales v. United States. All legal documents relating to this case can be found at http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS/CaseDocs. For a discussion of the import of the Inter-American Commission's 2007 ruling that it had jurisdiction to hear the case, see *Inter-American Commission on Human Rights Holds US Responsible for Protecting Domestic Violence Victims*, AMERICAN CIVIL LIBERTIES UNION (Oct. 9, 2007), http://www.aclu.org/womens-rights/inter-american-commission-human-rights-holds-us-responsible-protecting-domestic-violen. Nothing in this article is intended to denigrate this use of international human rights principles. Instead, the argument is that there is much more that might be done to use those principles to transform domestic law in the United States. For an excellent exploration of the myriad ways that human rights might be used in the United States, see BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008).

[24] S*ee generally* HAROLD. D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY (1992) (exploring the question of authoritative decisionmaking in exhaustive, and sometimes excruciating detail); *see also* Rebecca M. Bratspies, *Rethinking*

besides judges, and other ways to influence authoritative decision besides litigation.[25] Their concept of "authoritative decisionmaking,"[26] which Michael Reisman explained as a process of communication involving "policy content, authority signal and control intention,"[27] offers a more nuanced way to think about the relationship between law, policy and society.

For example, each day regulators make an uncounted number of discretionary decisions with legal effect. Taken together, these decisions influence nearly every aspect of our lives. Yet, there is rarely much attention paid to the possibility of considering these regulatory decisionmaking processes as a means to advance core human rights values. This article proposes to change that by using international human rights norms to flesh out the regulatory processes already present in United States administrative law, albeit in nascent form, that locate human rights and human dignity

Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development, 32 YALE J. INT'L L. 363, 370–77 (2007).

[25] *See* MYRES S. MCDOUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER ix (1987). Much of the scholarship associated with the New Haven School that McDougal and Lasswell founded has been criticized as opaque and impenetrable. *See, e.g.*, Bratspies, *supra* note 24, at 390; Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust,* 42 U. KAN. L. REV. 557, 594 (1994); Phillip R. Trimble, Review Essay, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 818-20 (1990); *See also* John N. Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 665 (1968); Richard A. Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 234–35 (1964). Nevertheless, the core ideas of the "authoritative decision maker" with the power to advance "human dignity" may be of value in any attempt to expand the reach of human rights norms beyond the courtroom into administrative decisionmaking. *See* HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY (1992); MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY (1981); MYRES S. MCDOUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980); and Myres S. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, 4 S.D. L. REV. 25 (1959).

[26] Authoritative decisionmaking is a central concept in New Haven School theories. It represents the synthesis of effective control with a legitimated process comporting with the "shared expectations of the members of a community about how decisions should be taken." Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 195 n.15 (1968).

[27] W. Michael Reisman, *International Lawmaking: A Process of Communication,* 75 AM. SOC'Y INT'L L. PROC. 101, 113 (1981).

squarely in the center of the regulatory enterprise.

This point differs slightly from Anne-Marie Slaughter's insights about the roles played by transnational networks.[28] Rather than focusing on linkages between regulators across jurisdictions that can be used to develop consensus approaches to regulation, this article instead emphasizes the agency of regulators as authoritative human rights decisionmakers. Thus, the focus is more on "bringing human rights home"[29] than on processes for voluntarily coordinating national environmental policies across the globe. That said, the extensive transnational network discourse informs this analysis of how regulators might fruitfully incorporate human rights into regulatory decisionmaking in order to enrich and improve the domestic regulatory process. In particular, this analysis seeks to remedy the human rights community's tendency to neglect the wider panoply of legal decisionmakers as potentially receptive audiences with the power to implement human rights norms in their decisionmaking processes. Human rights norms surrounding access to information and participation might be particularly useful in this context. Learning from human rights developments in these areas might dramatically improve the regulatory process, providing regulators with new tools for generating broad-based participation. Having all the values and interests at stake in environmental protection decisions adequately represented in the decisionmaking process will enhance the legitimacy and long-term success of the regulatory project. In other words, human rights norms might offer "authoritative decision makers" a tool for re-interpreting their existing environmental mandates in a fashion that will not only improve the regulatory decisions themselves, but will also help those decisions command more trust and respect from the regulated community and the public beneficiaries of regulation.

Having identified regulators as authoritative decisionmakers whose decisions have potential human rights implications, we now

[28] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 167–69 (2004). *See also* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); David T. Zaring, *Rulemaking and Adjudication in International Law*, (Soc'y of Int'l Econ. Law Working Paper no. 21/08, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156930.

[29] For an explanation of this idea, see generally ALBISA, SOOHOO & DAVIS, *supra* note 23.

now turn to international human rights law in order to examine its utility within the domestic regulatory context. The next section will first distinguish this proposed regulatory incorporation of human rights from existing invocations of human rights law in the environmental context. It will then delve into the specific aspects of international human rights law of most interest in the domestic regulatory context.

II. WHAT INTERNATIONAL HUMAN RIGHTS CAN OFFER UNITED STATES ENVIRONMENTAL LAW

To date, the primary avenue by which international environmental norms emerging from human rights theory have entered the United States legal discourse has been through Alien Tort Claims Act[30] suits alleging that environmental wrongs violated the law of nations. The thrust of the argument has therefore been focused on *whether* there is a human right to a healthy environment. United States domestic courts have so-far resisted the invitation to find such a right, under either international human rights[31] or in domestic constitutional rights,[32]

[30] The Alien Tort Claims Act, 28 U.S.C. §1350 (2006), enacted in 1789, creates federal district court jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* [hereinafter ATCA]. The Act was largely dormant until the Second Circuit decided, in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), that because human rights were "well-established, universally recognized norms of international law," the Act provided access to United States courts for victims to sue perpetrators of human rights abuses. *Id.* at 888.

[31] For example, not a single ATCA case alleging violation of environmental rights has been successful. The reasons for rejecting environmental ATCA claims or for refusing to even reach those claims vary—but read as a group, these cases document an unwillingness of the courts to lead in this context. *See, e.g.*, Flores v. Southern Peru Copper Corp., 414 F. 3d. 233, 256-262 (2d Cir. 2003) (affirming dismissal of ATCA environmental claim on the ground that the human rights to life, health and sustainable development were not yet definite enough to be *jus cogens* norms); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (dismissing environmental alien tort claim suit on political question doctrine grounds); Aguinda v. Texaco, Inc. 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (finding that Principle 2 of the Rio Declaration might constitute a binding international environmental norm but dismissing the case on *forum non conveniens* grounds); Beanal v. Freeport-McMorran, Inc. 969 F. Supp. 362, 383 (E.D. La. 1997) (finding that environmental tort allegations did not allege a violation of a "universal, definable and obligatory" international norm); Amlon Metals v. FMC Corp. 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (finding that Principle 21 of the Stockholm Declaration did not constitute a binding international norm). *But see* Oposa v. Factoran, G.R. 101083, 224 SCRA 792, 804-805 (Jul. 30 1993) (refusing to dismiss environmental claims under political

often concluding instead that the legislative and executive branches of government are better suited to establish environmental rights. A primary objection to the notion of recognizing independent environmental human rights is that "the evolution of environmental protection measures has involved a constant reordering of socio-economic priorities, of accommodating, adjusting or offsetting mutually restrictive if not exclusive public policy objectives."[33] Among the major sticking points is the question of who would hold such a right[34] and whether the right would have to account for future generations and group rights.[35] In an ever-more integrated, globalized world, how would the right to a healthy environment be enforced and would the right have any limits?[36]

question doctrine and recognizing a justiciable "right to a balanced and healthful ecology"); Séverine Fiorletta Leroy, *Can the Human Rights Bodies be Used to Produce Interim Measures to Protect Environment-Related Human Rights?* 15 REV. EUR. COMM. & INT'L ENVTL. L. 66, (2006) (arguing that human rights bodies are an appropriate forum to protect human rights).

[32] Indeed, federal courts have repeatedly declined the invitation to interpret existing constitutional language as including environmental rights. *See, e.g.*, Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1429 (9th Cir. 1989) (declining to find a fundamental constitutional right to a wholesome environment within the equal protection clause of the Fourteenth Amendment); Izaak Walton League of Am. v. Marsh, 655 F.2d 346 (D.C. Cir. 1981) (declaring that generalized environmental concerns do not constitute a constitutionally protected liberty or property interest); Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971) (same). In the early 1970's, a string of district court cases fleshed out this position, most notably Gasper v. Louisiana Stadium and Exposition District, 418 F. Supp. 716 (E.D. La. 1976) (stating that the courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments); Haggadorn v. Union Carbide, 363 F. Supp. 1061 (D. W. Va., 1973); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 535 (S.D. Tex. 1972) ("The Ninth Amendment, through its 'penumbra' or otherwise, embodies no legally assertable right to a healthful environment."); and Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army, 325 F. Supp. 728, 738-39 (D.C. Ark. 1970) (holding that there is no Constitutional right to a healthy environment under the Fifth, Ninth or Fourteenth Amendments), aff'd, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973). For a discussion of these cases, *see* Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 112-17 (1997).

[33] Handl, *supra* note 12, at 121.

[34] It is possible to make too much of this claim. *See* John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 171 (2009) (making the point that many human rights agreements have been interpreted to require that states not only avoid directly violating the rights involved but also protect the enumerated rights from private conduct that interferes with their enjoyment).

[35] Boyle, *supra* note 19 (raising these questions).

[36] The recognition of a human right does not mean that any interference with

These are certainly important and interesting questions. However, there are other questions about these international law principles worth asking under United States domestic law. For example, as EPA uses its authority under the Clean Air Act to regulate greenhouse gas emissions how should the agency confront questions of equity and justice, and how should it account for transnational impacts of climate change—all questions to which international human rights norms already speak.[37]

Unfortunately, discouraged by this "no" to the question of *whether* there is an already-recognized human right to a healthy environment, many human rights campaigners abandon law in favor of the political process. Those still committed to law as a vehicle for achieving human rights typically redouble their efforts with the courts.[38] Yet, there is another, often-overlooked avenue to incorporating human rights into domestic policy. Human rights norms can provide regulators with a normative framework for structuring and interpreting their regulatory discretion.[39] Because

that right by any actor, anywhere in the world violates a legal duty. *See* Amartya Sen*, Elements of a Theory of Human Rights,* 32 PHIL. & PUB. AFF. 315, 340 (2004)*;* John Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 27-28 (2008). Indeed, the provision in Article 2 of the International Convention on Economic, Social and Cultural Rights for "progressive realization" is an acknowledgment that full realization of these rights sometimes involves commitments beyond the immediate capacity of states. International Covenant on Economic and Social and Cultural Rights,, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200 (XXI) A (Dec. 16, 1966) [hereinafter ICESCR].This critique about the contours of human rights is separate and apart from the more fundamental objection that an overemphasis on rights may actually interfere with social change by obscuring recognition of social duties and fragmenting accountability. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF SOCIAL DISCOURSE 14 (1991).

[37] Of course, there is also the question of whether an analytical framework that developed in response to active and direct government abuses offers the right tools for responding to the ravages of climate change, which is primarily the result of private economic activity. While government policies obviously facilitate and channel private economic activity through the exercise of governmental licensing, taxation and police powers, there is at least arguably a difference between these regulatory activities and the kinds of direct government activities that human rights law has typically addressed.

[38] Many of the instances in which there is the most pressure for invoking human rights discourse involve the environmental rights of indigenous peoples. Given the tenuous historical relationship between indigenous groups and international law, and the ambiguities of group rights as human rights, the Draft Declaration on Indigenous Rights notwithstanding, it is difficult not to notice the irony of this use of human rights principles.

[39] Joseph Raz has persuasively argued that when we state that 'X' has a right, we are asserting that 'X' has interests which are sufficiently weighty to impose

environmental human rights norms typically prioritize transparency, responsiveness and accountability, they can help regulators engage in environmental decisionmaking that enhances rather than undermines public trust in environmental regulation.[40] In many ways, the international environmental human rights norms have developed in parallel to United States domestic law, grappling with many of the same perplexing questions about how to balance competing priorities, what to do about uncertainty, and what levels of transparency and participation are critical for overall regime legitimacy and fundamental fairness. Just as international law has been influenced by innovations in United States law, regulatory interpretation of domestic law can be informed by concepts developed internationally.

Under such an approach, each environmental decisionmaking point becomes an opportunity for realizing a human rights vision under domestic law because each such decision involves exercises of discretion by government actors. That regulatory discretion would be shaped and channeled differently were it informed by a human rights vision of environmental protection.

The rest of this section lays the groundwork for this claim about the utility of human rights norms in domestic regulatory decisionmaking. The first part provides an overview of the critical normative role human rights plays in international law and society. With that background, the second part examines the history of environmental rights under international and supra-national law, focusing on the relationship between environmental claims and human rights. Finally, the third part introduces three emerging norms that are closely associated with human rights in the environmental context: prior informed consent, transparency and participation. This section not only explains each norm, but also highlights the aspects most likely to be of use to domestic

obligations on others. JOSEPH RAZ, THE MORALITY OF FREEDOM 166 (1986). Even without establishing specific environmental rights, domestic environmental law clearly follows this Razian formula—imposing obligations in order to protect the weighty environmental and health interests of both society as a whole, and of its individual members. This parallelism between recognized interests and imposed obligations, suggests that the ideas and concepts fleshed out in the human rights context about environmental decisionmaking may provide useful models for fleshing out the contours of the obligations under domestic environmental law.

[40] For a discussion of what it takes to establish "regulatory trust", see Rebecca M. Bratspies, *Regulatory Trust,* 51 ARIZONA L. REV. 575 (2009).

regulators.

A. *An Introduction to International Human Rights*

The idea of human rights—inalienable, universal rights to which all are entitled simply by virtue of being human[41]—stands out as a significant achievement of twentieth-century legal thought. While the intellectual history behind human rights certainly traces its roots back to the Enlightenment,[42] the specific principles we think of as human rights emerged from the more immediate and bloody context of Nazi genocide in the early decades of the twentieth-century.[43] Since the acceptance of the Universal Declaration of Human Rights in 1948,[44] the concepts of human rights have increasingly been accepted as the governing norms for state behavior.[45] Unsurprisingly in light of its moment of

[41] *See, e.g.*, ROSALYN HIGGENS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 98 (1994) ("a human right is a right held vis-à-vis the state by virtue of being human"). Article 1 of the Universal Declaration of Human Rights reads: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another with brotherhood." Universal Declaration of Human Rights, Art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) A (Dec. 10, 1948) [hereinafter Universal Declaration]. For a discussion of the philosophical underpinnings of universal human rights, see JACK DONNELLY, HUMAN RIGHTS IN THEORY AND PRACTICE 18-26 (1989).

[42] For a discussion on this point, see Amy Sinden, *Climate Change and Human Rights,* 27 J. LAND RESOURCES & ENVTL. L. 255, 259–62 (2007); HISKES, *supra* note 12, at 26–30; TOM CAMPBELL, RIGHTS: A CRITICAL INTRODUCTION 5–10 (2006).

[43] *See* JOHN P. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATION: A GREAT ADVENTURE 12 (1984)(describing World War II as a catalyst for human rights.) For a marvelous overview of the significance of the Universal Declaration and its origins, see generally Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States,* 32 AM. U. L. REV. 1 (1982).

[44] The vote in the United Nations was 48-0, with 8 abstentions. Universal Declaration, *supra* note 41.

[45] Indeed, compliance with human rights norms is often the major criteria for categorizing states as "liberal" and therefore legitimate. *See e.g.*, JURGEN HABERMAS, BETWEEN FACTS AND NORMS 84-104 (William Rehg, trans. 1998); THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Ann-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); *see also* Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 18-22 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds 1999) (describing the embrace of human rights as a global norm cascade). Although the delegates that adopted the Universal Declaration were careful to state that it was a statement of

birth, the Universal Declaration responds to the central international legal challenge of the twentieth century—the proper limits of state power vis-à-vis individuals who are members of marginalized racial, ethnic or religious minorities. As such, international human rights law deals mainly with how people should be treated by government and its institutions.[46] The International Human Rights Covenants[47] and the proliferation of rights treaties that followed[48] further detail the scope and reach of human rights described in the Universal Declaration.

Although we are only one decade into the new century, it is already clear that the widespread adoption of international human rights treaties did not draw a line under incidents violating basic human rights. Abuses continue, and neither the Universal Declaration, nor the Genocide convention[49] nor the International Criminal Court,[50] have put an end to them.[51] Not only have human

principles rather than a binding treaty, Eleanor Roosevelt's prediction that the Universal Declaration would become "an international Magna Carta" was not far off. *See* Eleanor Roosevelt, *On the Adoption of the Universal Declaration of Human Rights* (Dec. 9, 1948), http://www.americanrhetoric.com/speeches/eleanorrooseveltdeclarationhumanrights.htm.

[46] *See generally* Thomas Pogge, *The International Significance of Human Rights*, 4 J. OF ETHICS 45, 47 (2000) (noting that for human rights to be implicated, the offending conduct must be in some fashion official); *see also* John H. Knox, *Diagonal Environmental Rights*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 82 (2009).

[47] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI). A/RES/2200 (XXI) A (Dec. 16, 1966) [hereinafter ICCPR] and ICESCR, *supra* note 36.

[48] *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2142 (XXI), U.N. Doc. 2142/XXI (Oct. 26, 1966).

[49] Convention on the Prevention and Punishment on the Crime of Genocide, G.A. Res. 260 (III), U.N. Doc. No. A/RES.260/III A (Dec. 9, 1948), (entered into force Jan. 12, 1951). For updates, see THE CAMPAIGN TO END GENOCIDE, http://www.genocidewatch.org/.

[50] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

[51] Though within the jurisdiction of the court, the ICC has yet to charge a defendant with genocide. *See Situations and Cases before the ICC*, *available at*: http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/. In 2008, the ICC Prosecutor requested a warrant for arrest for Sudanese President Omar Hassan al-Bashir for atrocities in Darfur which included ten counts of genocide, but the court declined to accept the prosecutor's request. As a result, the Prosecutor proceeded with an arrest warrant based on crimes against humanity

rights not eliminated rights-violating conduct by states, but the growing proliferation of non-state actors raises a whole new set of challenges that a state-based vision of human rights is hard pressed to address. Profound questions remain about the utility of relying on international human rights to respond to abuses committed by non-state actors, particularly multinational corporations.[52]

Even as old human rights problems linger, the new century (and millennium) brings new challenges. In particular, environmental problems confront us ever more acutely. Each day brings new evidence that human activity is dramatically and irreversibly altering the entire planet: unraveling the life support systems on which we and all other living creatures depend. The defining moral issue and social justice challenge of the twenty-first century may well be the tragic effects of climate change, just as genocide and the struggle against oppression of stigmatized groups was the defining challenge of the twentieth century.

Amy Sinden has called human rights law "the law's best response to profound, unthinkable, far-reaching moral transgression."[53] It should thus come as no surprise that many are eager to invoke the "law's best response" in response to climate change. And, indeed there are invocations of international human rights norms throughout the climate change discourse as legislators, regulators and advocates seek to deploy "the power of human rights"[54] in this new struggle.

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and war crimes. *See* Press Release: ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur, *available at* http://www.icccpi.int/menus/icc/press%20and%20media/press%20releases/press%20 releases%20%282008%29/a. While limited prosecution for genocide has taken place in ad hoc tribunals, including the ICTR in Rwanda, as well as the ICTY, it has been used in limited circumstances, and has not been attempted by the ICC. *See* Press Release: Rwanda International Criminal Tribunal Pronounces Guilty Verdict in Historic Genocide Trial, U.N. Press Release AFR/94 L/2895 (Sep. 2, 1998), *available at* http://www.un.org/News/Press/docs/1998/19980902.afr94.html; *See also* Jorgic v. Germany, Eur. Ct. H.R.(5th Section) (2007), Appl. No. 74613/01 (confirming universal jurisdiction for the crime of genocide and affirming genocide conviction of a Serbian national by a German court).

[52] For a more detailed exploration of this point, see Rebecca M. Bratspies, *Organs of Society: A Plea for Human Rights Accountability for Transnational Enterprises and Other Commercial Entities*, 13 MICH. ST. J. INT'L L. 9 (2005); *see also* John H. Knox, *Horizontal Human Rights*, 102 AM. J. INT'L L. 1 (2008).

[53] Sinden, *supra* note 42 at 257.

[54] *See generally* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS

B. *Environmental Rights Under International Law*

In making the argument that environmental regulators should rely on human rights to inform their decisionmaking, it is important not to overstate the relationship between human rights and environmental rights. Human rights and environmental protection trace their origins back to very different legal traditions and sources. To over-generalize, human rights are rooted in the natural law tradition in international law while environmental law is the product of a much more state-centered positive law tradition.[55] More significantly, environmental law does not have protecting human beings *qua* individuals at its core in the same fashion that human rights law does. Indeed, environmental law's most distinctive feature is that it responds to the ramifications of human impacts on the natural environment.[56] By contrast, even when invoked in the environmental context, human rights focus on protecting the human victims of environmental degradation[57] rather than on protecting the environment itself.[58] Human rights are, after all inherently anthropocentric.[59] This distinction helps explain why the two legal discourses have evolved along very different tracks. That said, there are obvious points of intersection

AND DOMESTIC CHANGE (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds. 1999).

[55] One must be careful not to make too much of this distinction. As Gunther Handl notes, most international lawyers agree that human rights law involves overlapping positive and natural law concepts. Handl *supra* note 12, at 120; *See also* Sohn, *supra* note 43, at 16–18.

[56] For a rich exploration of this point, see Richard J. Lazarus, *Restoring What's Environmental about Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703 (2000).

[57] *See, e.g.*, Krytatos v. Greece, COU-144342 Eur. Ct. H. R. (1st Section) (2003), Appl. No. 41666/98 at ¶ 52. (concluding that nothing in the European Convention on Human Rights provided "general protection of the environment as such."); Metropolitan Nature Reserve v. Panama, Case 11.533, Inter-Am. Comm'n H.R., Rep. No. 88/03 OEA/Ser.L/V/II.118, doc. 70 rev ¶ 34 (2003) (rejecting as inadmissible the attempt to assert a claim to protect a nature reserve from development on behalf of all citizens of Panama).

[58] NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 277 (2002); Handl, *supra* note 12, at 138–39.

[59] *See* Alan Boyle, Human Rights and the Environment: A Reassessment, 1-3 (2010), http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=GccCLN-brmg%3D&tabid=. . . ; See Dinah Shelton, *The Links Between International Human Rights Guarantees and Environmental Protection* 22 (University of Chicago, Center for International Studies, 2004), http://internationalstudies.uchicago.edu/environmentalrights/shelton.pdf (pointing out that "[h]uman rights are by definition anthropocentric.").

and overlap between environmental rights and human rights.[60]

The first formal international law recognition of the links between environmental protection and human rights occurred in the Stockholm Declaration, adopted by the 1972 United Nations Conference on the Human Environment. Principle 1 of this Declaration proclaims that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears the solemn responsibility to protect and improve the environment for present and future generations.[61]

The 1992 United Nations Conference on the Environment and Development[62] (UNCED or the Rio Conference) focused global attention on environmental concerns and more particularly on the unsustainable nature of human activities. More importantly, the Rio Declaration marked a global recognition that human activity was undermining the integrity of natural systems on which human life and society depend. Yet the Rio Declaration did not, as some had hoped, announce a human right to a healthy environment. In fact, considering the fact that such language had been proposed and rejected from the Declaration, Rio may in fact represent a

[60] Philippe Sands, *Sustainable Development: Treaty, Custom and the Cross-fertilization of International Law*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 43 (Alan Boyle and David Freestone, eds. 1999); *see also* MYRES S. MCDOUGALL, HAROLD LASSWELL AND LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 38-44 (1980) (taking for granted that there is a direct relationship between environmental protection and human rights).

[61] U.N. Conference on the Human Environment, June 5-16, 1972, *Stockholm Declaration*, ¶ 6, U.N. Doc. A/CONF.48/14 (June 16, 1972), *reprinted in* 11 I.L.M. 1416, 1417. Dinah Shelton has repeatedly argued that the Stockholm Declaration explicitly tied environmental protection to human rights. Dinah Shelton, *Human rights and the environment: what specific environmental rights have been recognized?* 35 DENVER J. INT'L L.& POL. 129, 130-34 (2006); Dinah Shelton, *Environmental Rights*, in PEOPLE'S RIGHTS 185 (Phillip Alston, ed. 2001). Certainly, Conference Secretary General Maurice Strong opened the Conference with a speech that drew heavily on both the U.N. Charter and the Universal Declaration of Human Rights. Maurice Strong, Conference Secretary General, Opening Statement at the 1972 U.N. Conference on the Human Environment Stockholm, *available at* http://www.mauricestrong.net/20080626103/speeches2/speeches2/stockholm.html.

[62] United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, *Rio Declaration on the Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, at 3, (Aug. 12, 1992) [hereinafter *Rio Declaration*].

significant step away from such a commitment. From Rio onward, an explosion of international treaty-making produced a wealth of multilateral environmental agreements covering everything from access to environmental information[63] to greenhouse gas emissions[64] to persistent organic pollutants.[65] None of these agreements have employed an explicit human rights framing, and most do not mention human rights.[66]

Yet that does not mean there have been no international initiatives concerning the human right to a healthy environment. In 1990, the UN General Assembly adopted a resolution declaring that "all individuals are entitled to live in an environment adequate for their health and well-being."[67] In 1994, the United Nations' Draft Principles on Human Rights and the Environment proposed explicitly consolidating these norms into an articulated right to a "satisfactory environment"[68] by declaring that "[a]ll persons have the right to a secure, healthy and ecologically sound environment."[69] As proposed, this right would encompass the

[63] Aarhaus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447, *available at* http:// www.unece.org/env/pp/documents/cep43e.pdf [hereinafter Aarhaus Convention].

[64] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 148.

[65] U.N. Environment Programme, Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 U.N.T.S. 119.

[66] Two regional agreements do recognize environmental rights: the African Charter on Human and Peoples' Rights, June 27, 1981, art. 24, 1520 U.N.T.S. 217 [hereinafter African Charter], states that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development," and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, art. 11, O.A.S.T.S. No. 69, 28 I.L.M. 161 [hereinafter American Convention], recognizes the right of "everyone . . . to live in a healthy environment."

[67] G.A. Res. 45/94, U.N. Doc. A/RES/45/94, par. 1 (Dec. 14 1990).

[68] Draft Principles on Human Rights and the Environment, UN Doc. E/CN.4/Sub.2/1994/9, Annex I (1994) [hereinafter Draft Principles]; *See also,* Human Rights and the Environment, final report prepared by Mrs. Fatima Zohra Ksentini, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1994, ¶ 261. Principle Two of the Draft Principles further proclaimed: "All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible."

[69] Draft Principles, *supra* note 68, at princ. 1. This proposition was reaffirmed by the International Law Institute in its 1997 Strasbourg Session, and by Article 1 in the 1999 Bizkaia Declaration issued by UNESCO and the UN

right to be free "from pollution, environmental degradation and activities that adversely affect the environment"[70] as well as a positive right to "protection and preservation of the air, soil, water, and the essential processes and areas necessary to maintain biological diversity and ecosystems."[71] Fifteen years later, however, the prospect for any such clear declaration of a human right to a healthy environment seems quite distant.[72]

Even as progress stalled on articulating a free-standing human environmental right, other parts of the Draft Principles on Human Right and the Environment seem to have some legs. For example, Principle 15 specifically provided that:

All persons have the right to information concerning the environment. This includes information, howsoever compiled, on actions and courses of conduct that may affect the environment and information necessary to enable effective public participation in environmental decision-making. The information shall be timely, clear, understandable and available without undue financial burden to the applicant.. [73]

Principle 18 of the Draft Human Rights Accord elaborates on this broad endorsement of participation, explaining that the right to participate extends to "planning and decision-making activities and processes that may have an impact on the environment and development."[74] Similarly, Principle 20 provides that "All persons have the right to effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of

High Commissioner for Human Rights. International Law Institute Session of Strasbourg, *Environment Resolution*, Sep. 4, 1997, *available at* http://www.idi-iil.org/idiE/resolutionsE/1997_str_01_en.PDF; International Seminar on the Right to the Environment, Bizkaia, Spain, Feb.10-13, 1999, *Declaration of Bizkaia on the Right to the Environment*, 30 C/INF.11 (Feb. 14, 1999) *available at* http://unesdoc.unesco.org/images/0011/001173/117321E.pdf.

[70] Draft Principles, *supra* note 68., at princ. 5.

[71] *Id.* at princ. 6.

[72] As Gunther Handl cautions, "it is one thing to acknowledge that human rights provisions are amenable to being, and have been, used to secure incidental environmental objectives. It is something altogether [sic] to proceed from this evidence to the postulation of an existing fundamental right to a clean environment." Handl, *supra* note 12, at 128 (cautioning against misrepresenting aspirational environmental human rights concepts as hard law, and recommending avoiding "talismanic invocations of non-binding resolutions" and other forms of soft law).

[73] Draft Principles, *supra* note 68, at princ. 15.

[74] Draft Principles, *supra* note 68, at princ. 18.

such harm."[75] Together, these provisions envision a panoply of rights that track, almost exactly, the procedural rights endorsed by Principle 10 of the Rio Convention.[76] This commitment to participation was ratified, albeit on the state level, in the Epoo Convention[77] then enshrined as an individual right in the Aarhus Convention.[78] The United Nations Framework Convention on Climate Change similarly provides for public participation.[79]

These conventions, along with relevant international tribunal decisions, declarations and soft law instruments, have generated a host of international norms in the context of environmental rights.[80] At the same time that these concepts are being elaborated,

[75] Draft Principles, *supra* note 68, at princ. 20.

[76] Principle Ten provides: Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. *Rio Declaration, supra* note 62.

[77] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Fin., Feb. 25, 1991, Art. 3, *available at* http://www.unece.org/env/eia/documents/legaltexts/conventiontextenglish.pdf. The Espoo Convention guarantees non-discriminatory public participation in environmental impact procedures. *Id.* Art. 2(6) provides that "[t]he Party of origin shall provide an opportunity to the public in areas likely to be affected to participate in relevant impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the Party of origin." *Id.*

[78] The Preamble to the Aarhus Convention "recognize[s] that adequate protection of the environment is essential to human wellbeing and the enjoyment of basic human rights, including the right to life itself." Aarhus Convention, *supra* note 63.

[79] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107. In particular Article 4(1)(i) obliges states to "encourage the widest participation . . . including that of non-governmental organizations." *Id.* at art. 4(1)(i) Article 6 requires that parties promote and facilitate public access to information and public participation. *Id.* at art. 6.

[80] Over the past few decades, there has been increased linkage between human rights and environmental protection. In particular, scholars have written extensively about the viability of substantive environmental rights claimed as human rights, and of procedural rights in environmental decisionmaking claimed as human rights. *See e.g.*, Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 GEO. INT'L ENVTL. L. REV. 73, 74 (2008); Louis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*,

there is also a vigorous debate about whether they have coalesced into a new customary law—the right to a healthy environment.[81] Rather than wade into those murky waters, this article brackets the question of whether these emerging norms amount to an international human right to a wholesome environment. Regardless of whether these environmental norms amount to a human right on their own, they undoubtedly enrich our understanding of human rights clearly articulated in the Universal Declaration[82] and the Human Rights Conventions[83] like the right to life,[84] health,[85] culture[86] and property.[87] Justice Weermantry, for one, has characterized protecting the environment as "a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself."[88]The United Nations Human Rights Council recently

12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 9 (2001); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to the Environment,* 28 STAN. J. INT'L L. 103, 105 (1991).

[81] Handl, *supra* note 12, at 117; Phillip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 610–12 (1984). *See generally*, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996). Along these lines, not a single alien tort claim case alleging violation of environmental rights has been successful. *See supra* note 31 and accompanying text.

[82] Shelton, *supra* note 80, at 129-132.

[83] The two main human rights covenants are the ICESCR, *supra* note 47, at 49 and the ICCPR, *supra* note 47, at 52. There are numerous other human rights covenants including: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on Rights of Child, the Convention on Elimination of All Forms of Discriminations against Women, the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, and the Inter-American Convention to Prevent and Punish Torture.

[84] Universal Declaration, *supra* note 41, at pt. I, art. 3.

[85] *Id.* at art. 25. ICESCR. *supra* note 36 at Art. 12. One limitation of relying on the right to health as the basis for environmental rights is that, like all rights in the ICESCR, it is subject to "progressive realization" which means that its contours depend on the resources of the state concerned. ICESCR, *supra* note 47, at art. 2.

[86] *Id.* at art. 27, ICESCR , *supra* note 36 at Art. 15.

[87] *Id.* at art. 17. Because of the politics of the cold war, the right to property was not codified in the ICCPR and the ICESCR. It is, however, guaranteed by the African Charter, *supra* note 66, at art. 14; American Convention, *supra* note 66, at art. 21; European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.1, art. 1, Mar. 20, 1952, E. T.S. No. 5, 213 U.N.T.S. 221.

[88] See Babčikovo-Nagymaros Project (Hung v. Slovk.), 1997 I.C.J. 7, 91

reaffirmed that climate change "has implications for the full enjoyment of human rights" and proposed a detailed analytical study of the relationship between climate change and human rights.[89]

Moreover, these emerging environmental norms certainly represent a gathering international consensus about the relationship between states and individuals vis-à-vis the environment, and about the association between international environmental norms and already-established human rights.[90] As interpretive tools, these norms can assist decision makers in the domestic regulatory sphere regardless of their precise status under international law.

C. *Key Environmental Human Rights Norms of Use in Regulatory Decisionmaking*

This section provides a brief introduction to the human rights norms of prior informed consent, participation and transparency. These international rights are not limited to the environmental decisionmaking context, nor are they the only human rights that might be relevant to environmental decisions. However, these rights are particularly important in the environmental context, and they also overlap significantly with statutory decisionmaking procedures already enshrined in domestic law. Given, this overlap, they are of particular interesting to anyone looking to use human rights to promote better regulatory decisionmaking.

One means by which international human rights discourse has intersected with environmental protection has been litigation in which communities argue that their justiciable human rights are violated by activities that promote climate change. Along these lines, the Inuit people filed a petition with the Inter-American Commission on Human Rights claiming that the acts and omissions of the United States with respect to climate change are violating their human rights by destroying their Arctic home.[91]

(Sept. 25) (Separate Opinion of J. Weermantry).

[89] Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development,* U.N. HRC, 7th Sess., U.N. Doc. A/HRC/7/L.21/Rev.1 (Mar. 26, 2008). The resolution was adopted without a vote.

[90] *See* Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights,* 24 STAN. ENVTL. L. J. 71, 91-94 (2005) (proposing a four variable matrix for assessing whether environmental harms constitute human rights violations).

[91] Petition to the Inter-American Commission on Human Rights Seeking

Although it made headlines, the suit has so far gone nowhere.[92] Communities in Africa's Niger Delta had more success suing Shell Oil[93] on the theory that its wasteful practice of "gas flaring," which contributed more greenhouse gas emissions than all of the other sub-Saharan African sources combined, constituted a human rights violation.[94] There is also a growing body of precedent concerning

Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), *available at* http://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf. For an in depth discussion of the Inuit Petition, see Hari Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous People's Rights*, 31 AM. INDIAN L. REV. 675 (2007).

[92] The Inuit petition was dismissed without prejudice in 2006. Andrew C. Revkin, *Inuit Climate Change Petition Rejected*, N.Y. TIMES, Dec. 16, 2006, at A9. The Commission held hearings in early 2007. *See* Martin Wagner, *Testimony Before the Inter-American Commission on Human Rights* (Mar. 1, 2007), *available at* http:// www.ciel.org/Publications/ IACHR_Wagner_Mar07.pdf; *see also* Sheila Watt-Cloutier, *Global Warming and Human Rights*, http://www.earthjustice.org/library/references/Background-for-IAHRC.pdf.

[93] Gbemre v. Shell Petroleum Development Co., Suit No. FHC/CS/B/153/2005, Order (Nov. 14, 2005), *available at* www.climate-law.org/cases. Shell has reportedly failed to comply with the court order directing it to cease this wasteful practice. Press Release, Climate Justice, Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again (May 2 2007) *available at* http://www.climatelaw.org/cases/country/nigeria/media/2007May2/. The World Bank estimates that the quantity of gas being flared and vented annually amounts to twenty-five percent of the United State's annual natural gas consumption. Indeed, the quantity of natural gas flared in Africa each year equals half of that continent's power consumption. Press Release, World Bank, Oil Producing Countries, Companies Can Help Mitigate Impact of Climate Change by Reducing Gas Flaring, (Nov. 10, 1996) *available at* http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/EXTGGFR/0,,contentMDK:21126868~pagePK:64168445~piPK:64168309~theSitePK:578069,00.html. Similarly, the African Commission on Human and People's Rights found that Nigeria violated rights of the Ogoni people by aiding and participating in oil extraction in their region. Soc. and Econ. Rights Action Ctr. v. Nigeria OAU Doc. CAB/LEG/67/3 rev. 5, ¶¶ 2, 52-57, *available at* www1.umn.edu/humanrts/africa/comcases/155-96.html (hereafter "Ogoniland Case"). The Commission concluded that Nigeria violated the right to health and the right to a healthy environment guaranteed by the African Charter. The Ogoniland Case involved a challenge to the practices of disposing toxic wastes from oil production directly into the environment, as well as to lax production practices that had resulted in numerous oil spills. *Id.* at ¶ 2. *See generally* Dinah L. Shelton, Decision Regarding Communication 155/96 (Soc. and Econ. Rights Action Ctr./Ctr. for Econ. and Soc. Rights v. Nigeria). Case No. ACHPR/COMM/A044/1, 96 AM. J. INT'L L. 937 (2002).

[94] World Bank, *Memorandum of the President of the International Development Association and the International Finance Corporation to the*

environmental issues as human rights violations in both the European[95] and Inter-American human rights systems.[96] These cases help put flesh to the bones of the emerging international norms about the environment.

In particular, this jurisprudence, together with the various human rights and environmental regimes, establishes some clear principles that can enrich domestic regulatory deliberations. Most notable among these are three procedural rights: the right of prior informed consent;[97] access to environmental information;[98] and

Executive Directors on an Interim Strategy Update for the Federal Republic of Nigeria, ¶ 15, 23633-UNI (Feb. 13, 2002), *available at* http://www.climatelaw.org/cases/case-documents/nigeria/report/section3/doc3.7.pdf. Perhaps the most famous case invoking human rights in the struggle between oil development and environmental protection was *Wiwa v. Shell*, which Shell Oil settled on the eve of trial for $15.5 million plus other compensation. Brought under the United States Alien Tort Claims Act, the case alleged Shell Oil's complicity in torture and crimes against humanity for the execution of poet and environmental activist Ken Siro Wiwa. The case notably did not make an environmental human rights argument, in part because prior ATCA jurisprudence has refused to consider environmental claims under this statute. *See* Complaint and Demand for Jury Trial, Wiwa v. Dutch Royal Petroleum Co., No. 96 Civ. 8386 (S.D.N.Y. Nov. 8, 1996), *available at* http://ccrjustice.org/files/11.8.96%20%20Wiwa%20Complaint.pdf.

[95] Budayeva v. Russia, COU-154684 Eur. Ct. H.R. (1st Section) (2008), Appl. No. 15339/02 at 26; Taskin v. Turkey, COU-143829 Eur. Ct. H.R. (3rd Section) (2004), Appl. No. 46117/99; COU-144343 Fadeyeva v. Russia, Eur. Ct. H.R. (Former 1st Section) (2005), Appl. No. 55723/00; COU-157040 Lopez Ostra v. Spain, Eur. Ct. H.R. (grand Chamber) (1994), Appl. No. 16798/90; COU-144301 Guerra & Others v. Italy, Eur. Ct. H.R. (Grand Chamber) (1998), Appl. No, 14967/89. For a scholarly exploration of these cases, *see* Loukis Loucaides, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 167-191 (2007); Richard Desgagne, *Integrating Environmental Values into the European Convention of Human Rights*, 89 AM. J. INT'L L. 263 (1995); Dinah Shelton, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, 32 ENVTL. POL. & L.158, 162 (2002) (surveying decisions).

[96] *See* Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Rep. No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 ¶¶ 3–5, 60 (2004) [hereinafter Maya case]; Mayagna (Sumo) Awas Tingni Community v Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereinafter Awas Tingni case]; Yanomani Indians v. Brazil, Case 7615, Inter-Am. Comm'n H.R., Rep. No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 (1985). Several other claims have been held admissible: Yakye Axa Indigenous Community of the Enxet-Lengua people v. Paraguay, Case 12.313, Inter-Am. Comm'n H.R., Rep. No. 2/02, doc.5 rev. 1 at 387 (2002); The Kichwa Peoples of the Sarayaku community and its members v. Ecuador, Case 167/03, Inter-Am. Comm'n H.R., Rep. No. 62/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 at 308 (2004).

[97] The right of advanced informed consent is the centerpiece of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain

participation.[99] The following sections will describe each right in turn and will highlight how these procedural rights relate to precautionary decisionmaking: another emerging international norm, albeit one that is quite controversial in the United States.[100] (The substantive international environmental norms of: intergenerational equity;[101] common but differentiated responsibilities;[102] and the polluter pays principle[103] will not be discussed in this analysis.) These international norms can help regulators better implement existing domestic laws governing public participation in environmental decisionmaking. This observation bears an obvious relationship to recent new

Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, art. 1, 38 I.L.M. 1734 [hereinafter Rotterdam Convention], *available at* http://www.pic.int/en/ConventionText/RC%20text_2008_E.pdf. It also plays a central role in the regimes created by the Cartagena Protocol and the Declaration of the Rights of Indigenous Peoples. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 2226 U.N.T.S. 208 [hereinafter Cartagena Protocol]; Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter Indigenous Declaration].

[98] The Aarhus Convention is the most notable articulation of this right. In particular, Article 1 of the Aarhus Convention guarantees access to information, public participation, and access to justice in environmental matters. Aarhus Convention, Art. 1, *supra* note 63.

[99] *See id.*

[100] This is probably the most controversial of the emerging norms. *See generally*, THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION (David Freestone & Ellen Hay, eds., 1995). For a full discussion of how this principle played out in the dispute between the United States and the European Union over genetically modified agricultural crops, *see* GREGORY SHAFFER AND MARK POLLACK, WHEN COOPERATION FAILS (2009).

[101] EDITH BROWN-WEISS, IN FAIRNESS TO FUTURE GENERATIONS 17–46 (1989). Intergenerational equity is also invoked in Art. 1 of the Aarhus Convention, *supra* note 63.

[102] Dinah Shelton, *Describing the Elephant: International Justice and Environmental Law*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 55–63 (Jonal Ebbesson & Phoebe Okowa, eds., 2009). *See, e.g.*, Philippe Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW, 54–66 (Winfried Lang, ed., 1995) (describing all the emerging international environmental law principles listed in the text above).

[103] The polluter pays principle dates back to the Trail Smelter Arbitration and is among the most venerable and well-established principles of international environmental law. For a full discussion of the Trail Smelter Arbitration, including edited versions of the decisions themselves, *see generally* REBECCA M. BRATSPIES & RUSSELL A. MILLER, TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (2006).

governance scholarship,[104] but differs from that line of reasoning because it advocates interpreting existing procedures through a human rights lens in order to develop a more robust understanding of existing statutory goals and procedures, rather than suggesting new procedures to achieve additional governance goals.

The following sections briefly sketch out the contours of these key international environmental norms, with an eye toward highlighting those aspects most likely to be relevant to domestic environmental regulators looking for guidance as they engage in discretionary decisionmaking.

Prior Informed Consent

A mainstay of modern medical ethics, informed consent requires that physicians obtain the voluntarily consent of a patient, which must be based on adequate information, before subjecting that patient to medical procedures.[105] Rooted in the principle of "autonomy in medical decisionmaking," informed consent reflects the notion that a fundamental aspect of personhood is the freedom from unwanted or unauthorized physical contact.[106] In short, this legal concept, which flows from traditional tort law, recognizes that the essence of being a person, rather than an object is the ability to have some say in what happens to one, particularly with regard to bodily integrity. Thus, prior informed consent is a profound recognition of the humanity of those whose consent is being sought.

For this reason, as the concept was imported into the international environmental arena, it became closely identified with environmental human rights. The Basel Convention[107] and

[104] *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 270 (1998); Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation,* 54 DUKE L. J. 795 (2005); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought,* 89 MINN. L. REV. 342, 356-61 (2004).

[105] Barbara L. Atwell, *The Modern Age of Informed Consent*, 40 U. RICH. L. REV. 591, 596 (2006). *See also* JESSICA W. BERG, ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 12–16 (2001).

[106] Atwell, *supra* note 105 at 594.

[107] Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57, 131 (1992). *See* Article 4(1)(c) ("Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes if the state of import does not consent in writing to the specific import").

the Cartagena Protocol[108] both contain explicit provisions requiring prior informed consent from affected states. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals in International Trade is the definitive statement of international law on this point.[109] Parties to the Convention commit not to export certain specified chemicals to the other state parties unless those states explicitly consent.[110] The Convention secretariat acts as a clearinghouse for these state decisions and provides other support to facilitate state implementation of the Convention.

These treaty-based consent instruments mark an impressive international statement about the centrality of prior informed consent. However, they share a common limitation. They treat prior informed consent as an aspect of state sovereignty. Their principle achievement is to insert the national government as a gatekeeper between private actors that wish to engage in a particular transaction involving hazardous substances. The thinking behind this requirement is that the private actors are likely not giving adequate attention to the public concerns inherent in such a transaction. The state's consent is therefore solicited to ensure that public concerns are not compromised by the otherwise private decision. This requirement also seeks to rectify one of the lingering effects of colonialism—the exploitation of national resources by foreign entities conducted without attention to the

[108] Article 19(3) of the United Nations Convention on Biodiversity provides: "The Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organisms resulting from biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity." Convention on Biological Diversity of the United Nations Conference on the Environment and Development, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79. The Cartegena Protocol on Biosafety implements this directive by including a provision that requires advanced informed agreement by the importing party prior to the first international transboundary movement of living modified organisms for intentional introduction into the environment. Cartagena Protocol, *supra* note 97, at 1031. For an explanation of the import of this provision; *see also* Sabrina Safrin, *The Biosafety Protocol: A Landmark International Agreement*, 10 MICH. ST. U. DETROIT C. L. J. INT'L L. 63, 68–69 (2001).

[109] Rotterdam Convention, *supra* note 97.

[110] The Rotterdam convention came into force in February 2004, and currently has 131 signatories. It is the successor to a voluntary set of procedures developed by UNEP and FAO in the late 1980s, and is thus also an interesting example of how soft law can harden into binding international obligations.

costs and benefit of that exploitation for the state in which those resources are found.

While certainly important for international equity, this focus on prior informed consent as an aspect of national sovereignty means that the impact of these procedures is relatively limited. They require only that the state consent to activity within its borders that originates from outside the state, and offer no protection to sub-national units unwilling to host activities consented to by the state.[111] These international prior informed consent provisions do nothing to respond to the well-documented problem of states authorizing exploitation with little or no attention to the needs of the populations most directly affected.[112] Particularly with regard to indigenous peoples, this problem has long been a vexing aspect of international development aid and investment.[113]

Responding to this serious gap in international law, there is a long tradition of soft law instruments recognizing the need for prior informed consent at the sub-national level.[114] In particular,

[111] This is not universally true for international soft law documents. For example, Article 26(d) of the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of their Utilization, provides for obtaining consent, where appropriate, from indigenous and local communities. Article 29 also points out that consent might be required from multiple levels of government within the state. Of course the contours of the "where appropriate" caveat are left to the discretion of the state. Similarly, the Council of Parties to the Convention on Biodiversity has agreed that states should recognize community rights in traditional knowledge, and develop appropriate local prior informed consent procedures. Decision V/16 of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Article 8(j) and Related Provisions, Annex: Programme of Work, I. General Principles, at 143, UNEP, U.N. Doc. UNEP/CBD/COP/5/23 (2000), *available at* http://www.cbd.int/decision/cop/?id=7158.

[112] For a description of why states cannot always be trusted to protect their citizens, especially indigenous peoples, *see* Rebecca M. Bratspies, *The New Discovery Doctrine* 31 AM. INDIAN L. REV. 253 (2007).

[113] *SEE E.G.* Gillette Hall & Harry Patrinos, Indigenous Peoples, Poverty and Development (APRIL 2010) (UNPUBLISHED MANUSCRIPT), *available at* http://indigenouspeoplesissues.com/attachments/article/5065/5065_IP-Poverty-Development2010.pdf; PRESS RELEASE, UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, PERMANENT FORUM ON INDIGENOUS PEOPLES, INDIGENOUS GROUPS CALL FOR HALT BY FOREIGN COMPANIES TO LAND USE FOR OIL MINING, HR 4985 (MAY 21, 2009), *available at* http://www.un.org/News/Press/docs/2009/hr4985.doc.htm.

[114] *See* Indigenous Declaration, *supra* note 97; International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, ILO No. 169.

the World Bank has made some progress in articulating the need for prior informed consent from indigenous and local stakeholders in its funding priorities.[115] The recently adopted Declaration of Indigenous Rights emphasizes prior informed consent as an aspect of the right to property, the right to culture and the right to indigenous people's sovereignty.[116] The gap between the letter of these documents and their implementation notwithstanding, this concept is continually being further developed and refined in the international arena.

At least one international human rights court has interpreted human rights as requiring significantly more from prior informed consent. The Inter-American Court of Human Rights has recognized prior informed consent as a central aspect of the right to property and the right to culture for indigenous groups.[117] This interpretation of prior informed consent protects sub-national units, particularly indigenous groups, from the actions of the state.[118] This interpretation is wholly consistent with the African Commission's human rights ruling in the Ogoniland Case.[119] Both cases upheld the right to meaningful consultation, which necessarily entails meaningful opportunities to be heard and to participate in development decisions affecting the communities.[120]

The United States is not a signatory to either the treaties or

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[115] *See* Robert Goodland, *Free, Prior and Informed Consent and the World Bank Group*, SUSTAINABLE DEV. L. & POL'Y, Summer 2004, at 66, 66; Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, SUSTAINABLE DEV. L. & POL'Y, Summer 2004, at 43, 49; Report on Free Prior and Informed Consent, U.N. Econ. & Soc. Council Inter-agency Support Group on Indigenous Issues, ¶ 46 E/C.19/2004/11 (May 2004) [hereinafter UNESC]; World Bank Group, STRIKING A BETTER BALANCE: THE EXTRACTIVE INDUSTRIES REVIEW (2003), *available at* http:// go.worldbank.org/PIW55278X0 (recommending that prior informed consent be obtained from local communities); LYLA MEHTA & MARIA STANKOVITCH, OPERATIONALIZATION OF FREE PRIOR INFORMED CONSENT 5, 10 (2000).

[116] Indigenous Declaration, *supra* note 97, at arts. 10–11, 19, 28–29.

[117] Maya, *supra* note 96, ¶¶ 3–4, 60–61; Awas Tingni, *supra* note 96, at 151; Case of Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (Ser. C) No. 145 (June 15, 2005).

[118] For a discussion of the relationship of prior informed consent to human rights, *see* James S. Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

[119] Ogoniland, *supra* note 93.

[120] Maya, *supra* note 96; Ogoniland, *supra* note 93 at ¶¶ 52-53.

many of the soft-law agreements that require prior informed consent, nor has it consented to the jurisdiction of the Inter-American Court. As a result, neither the treaties nor the tribunal decisions are legally binding on the United States. Nevertheless, there is much that United States domestic regulators might learn from the developing international notion of prior informed consent that would be informative as those regulators implement analogous requirements under domestic law. In particular, domestic regulators might internalize the notion that it is the government's responsibility to empower the individuals and groups most affected by environmental problems in order to facilitate their participation in decisionmaking that will affect them.[121]

Access to Information and Transparency

The European Court of Human Rights has on more than one occasion evaluated procedures for environmental decisionmaking through a human rights lens. Article 10 of the European Convention on Human Rights guarantees freedom to receive and impart information. Although this provision creates neither a right to access information nor a duty to disclose information, subsequent legal developments, in particular Council Directive 2003/4[122] have fleshed out this right as requiring access to environmental information.[123] Reading Article 10 with Articles 2 and 8, the European Court of Human Rights has concluded that information about environmental risks must be made available to those likely to be affected.[124] This requirement includes an obligation for the state to provide access to studies and

[121] This topic is taken up again in the Environmental Justice portion of Section III.

[122] Dir. 2003/4/EC, of the European Parliament and of the Council of Europe of 28 January 2003 on Public Access to Environmental Information, 2003 O.J. (L 41) 26, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF.

[123] In particular, Article 1 of Directive 2003/4 requires, as a matter of course, that environmental information be "progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information." *Id.* at 28.

[124] COU-143829 Taskin v. Turkey, Eur. Ct. H.R. (3rd Section) (2004), Appl. No. 46117/99, ¶¶ 98–99 (citing the Aarhus Convention, Principle 10 of the Rio Declaration and the 2003 Council of Europe Recommendation); COU-143827 Oneryildiz v. Turkey Eur. Ct. H.R. (Grand Chamber) (2004), Appl. No. 48939/99 ¶ 90.

assessments carried out as part of the environmental and economic policy decisionmaking process.[125]

At the same time, the Aarhus Convention preamble explicitly recognizes the nexus between environmental protection and human rights.[126] Article 1 provides that "in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice."[127] These three, interrelated rights, which find elaboration throughout the rest of the convention, give legal force to the ideas enshrined in Principle 10 of the Rio Declaration.

The European Court of Human Rights has also weighed in on the scope of a right of access to information. Under certain circumstances, the ECHR has concluded that this right to information can require much more from the state than merely having a procedure for providing information that is requested. Instead, this right can sometimes include a positive state duty to inform, not merely a right of access to information.[128] This jurisprudence lines up with the Aarhus Convention's positive duty to inform, which extends beyond merely having a process for providing requested information.[129] Interpreting this requirement, the European Parliament and the Council of Europe have concluded that the Convention imposes an obligation for states to take the measures necessary "to ensure that public authorities organise [sic] the environmental information which is relevant to

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[125] COU-143829 Taskin, ¶¶ 98–99; *see also* COU-157044 Giacomelli v. Italy, Eur. Ct. H.R. (3rd Section) (2007), Appl. No. 59909/00 ¶ 124.

[126] Aarhus Convention, *supra* note 63.

[127] *Id*, at Art. 1. *See also* U.N. Econ. & Soc. Council [ECOSOC], Econ. Comm'n for Europe, *The Aarhus Convention: An Implementation Guide*, U.N. Doc. ECE/CEP/72 (2000). The Aarhus Convention operates under the assumption that access to information and participation improves environmental protection. *See generally* Jenny Steele, *Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach*, 21 O.J.L.S. 415 (2001) (arguing that enhanced participation may lead to better environmental protection while emphasizing the problem-solving benefits associated with this approach). *But see* Maria Lee & Carolyn Abbot, *The Usual Suspects? Public Participation Under the Aarhus Convention*, 66 MOD. L. REV. 80, 86 (2003) (questioning whether public access to information and participation improves environmental protection).

[128] COU-144301 Guerra, ¶¶ 60–62.

[129] Aarhus Convention, *supra* note 63, at Art. 5(1)(c).

their functions and which is held by or for them, with a view to its active and systematic dissemination to the public."[130]

While none of these developments bind the United States, that fact alone does not end the conversation about their possible usefulness. As many law professors are fond of reminding their students, an otherwise nonbinding legal precedent, norm or principle becomes so-called "persuasive authority" precisely because it *persuades* the decision maker.[131] As domestic regulators grapple with the interpretation of analogous provisions under United States law, it may well make sense for them to draw examples and lessons from this well-developed parallel body of knowledge about access to information.

Public Participation

Recent events demonstrate the ever-widening scope of the right to participate. In December 2009, Micronesia challenged the renewal of a Czech refinery's operating permit on the ground that regulators had to consider the facility's outsized carbon footprint and the transboundary effects these emissions would have in Micronesia.[132] By demanding the right to participate in this domestic Czech regulatory decision, Micronesia dramatically re-interpreted conventional notions of public participation. Czech

[130] European Parliament and of the Council of Europe, Public Access to Environmental Information, Dir. 2003/4/EC, Art. 7(1), *available at* http://eur-lex.europa.eu/LexUriServ/%20LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF.

[131] There has been very little attention paid to the role of persuasive authority in the regulatory context. One interesting study on the role of persuasive authority in the context of judicial decisionmaking by the Canadian Supreme Court is Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003). *See also* Fredrick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1943 (2008) (pointing out that a "judge who is genuinely persuaded by an opinion from another jurisdiction is not taking the other jurisdiction's conclusion as authoritative . . . [r]ather, she is learning from it . . .).

[132] *See, e.g.*, James Kanter, *A Pacific Island Challenge to European Air Pollution*, NEW YORK TIMES (Jan. 18, 2010); Veronica Webster, *Micronesia Challenges Czech Coal Plant Extension*, Bellona, (Jan. 18, 2010), http://www.bellona.org/articles/articles_2010/micronesia_CEZ. Their argument was that Czech domestic law required consideration of the transboundary effects from the Prunerov plant, the largest single emitter in the Czech republic, which has a greenhouse gas footprint more than 40 times that of all of Micronesia. The Request for an EIA can be found at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=163624.

authorities agreed to Micronesia's request, and are conducting a review under international auspices.[133] According to Greenpeace, this move is intended to be the opening salvo as states vulnerable to climate change explore new avenues to challenge decisions on projects that contribute to climate change. [134]

Although not directly framed in the language of human rights, this decision will have obvious implications for the ongoing discourse about the relationship between public participation and human rights. This normative relationship is underscored in the European Court of Human Rights' jurisprudence suggesting that, at least for some decisions, participation in the decisionmaking process by those affected by environmental decisions is a basic human right.[135] Additionally, the Aarhus Convention, which explicitly links participation and human rights, requires a right to participate as a basic element of its framework of environmental process.[136] Under the Convention, states are required to inform the public of a proposed activity in an adequate, effective, and timely manner; to provide a reasonable timeframe to inspect materials, to make comments; and to promptly inform the public about the ultimate decision.[137] However, the Convention's requirements go far beyond this minimal vision of public participation.

The Aarhus Convention gives detailed and specific meaning to the generic 'right to participate' that is a central principle to most democratic theory and is viewed throughout much of the world as a fundamental human right as well as a right created by positive law.[138] While the United States is not a party to the Aarhus Convention, and therefore is not bound by its provisions, that does not preclude the US from learning from the experiences of those states that are. For example, one important aspect of the Convention's public participation provisions is that they apply not

[133] Leos Rousek, *Micronesia Gets Power-Plant Review,* WALL ST. J. (Jan. 27, 2010).

[134] Background Briefing, Greenpeace, Legal Steps Taken By the Federated States of Micronesia against the Prunerov II coal-fired power plant, Czech Republic (2010) *available at* http://www.greenpeace.org/raw/content/international/press/reports/teia_fsm.pdf.

[135] COU-143829 Taskin at ¶ 98 (interpreting Art. 8 of the European Convention).

[136] Aarhus Convention, *supra* note 63, at Art. 6.

[137] *Id*.

[138] *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS 330–86 (William Rehg, trans., 1998).

only to particular projects but also to overall planning and policy development.[139] Public participation at these earlier, less visible stages of decisionmaking can help shape the context within which particular projects are proposed, authorized or rejected. Indeed, the very drafting of the Convention modeled this kind of participatory inclusion, with NGOs taking an unusual and prominent role in the drafting, negotiation and implementation of the Convention.[140] This type of approach might have resonance in the ongoing domestic debate over the scope and timing of public participation in United States rulemaking.

International law has devoted considerable time and energy fleshing out the contours of prior informed consent, participation and transparency and access to information. This accumulated pool of wisdom offers a valuable resource to United States regulators as they seek to improve domestic regulation. Because of some striking similarities in the domestic and international regimes, United States regulators might fruitfully draw on the intellectual fruits of these international law labors.

III. TESTING THE THEORY: HUMAN RIGHTS IN UNITED STATES ENVIRONMENTAL REGULATION

The United States has historically been in the environmental vanguard—leading the world in developing innovative substantive and procedural requirements like: environmental impact statement, innovative transparency mechanisms like the Freedom of Information Act and the Toxic Release Inventory, and the notion that regulatory standards can be used to force the development of more environmentally-sound technologies. For decades, public

[139] Aarhus Convention, *supra* note 63, at Art. 7. The Convention does not, however, give citizens a means to directly invoke the right to live in an adequate environment. *See, e.g.*, TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 180 (2005).

[140] *See* Jerzy Jendroska, *UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters: Towards More Effective Public Involvement in Monitoring Compliance and Enforcement in Europe*, NAT'L ENVTL ENFORCEMENT J., July 1998, at 35; Sean T. McAllister, *The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, 10 COLO. J. INT'L ENVTL. L & POL'Y 187, 189 (1999); Jeremy Wates, *The Aarhus Convention: a Driving Force for Environmental Democracy*, 2 J. EUR. ENVTL. & PLAN L. 2, 9–10 (2005) (arguing that presence of NGOs at the negotiations helped steer the convention towards solving the problems that it sets out to tackle).

sentiment in the United States overwhelmingly supported this environmental regulatory apparatus.[141] Yet, over the last decades, the United States has become an environmental laggard—failing to participate in key international environmental regimes,[142] and eroding regulatory rigor by overreliance on simple-minded cost-benefit analyses.[143] At the same time, allegations of environmental injustice continue to dog many environmental regulatory processes.[144] As a result, the United States environmental regulatory system has lost much of its momentum. With environmental regulation and administrative law stagnating or regressing, an infusion of new ideas from international human rights law might help regulators chart a new regulatory course that will better protect the environment while also building public trust in the regulatory process.

To examine this point, we will begin by examining how the norms of prior-informed consent, participation, and transparency and access to information are already constructed in domestic law, and will identify the points where these existing domestic instantiations of these international norms fall short. This section

[141] Harris Polls have consistently shown at least 2/3 of Americans support stricter environmental regulation. *See, e.g.*, Harris Poll, *Do We Want More or Less Regulation of Business—It All Depends on What is Being Regulated* (June 10, 2010), *available at* http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/407/Default.aspx (reporting sixty-six percent support); Harris Poll, *On the 25th Anniversary of the EPA Strong Public Support for It and For Effective Environmental Policies*, (Dec. 6, 1995), *available at* http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-ON-25th-ANNIVERSARY-OF-EPA-DECEMBER-2-STRONG-PUBLI-1995-12.pdf (reporting fifty-six percent support more funding for EPA). Sixty-one percent of Americans also report that they are either active participants in the environmental movement or are sympathetic to it. Lydia Saad, *On 40th Earth Day, Image of Green Movement Still Positive*, GALLOP (April 22, 2010), http://www.gallup.com/poll/127484/40th-Earth-Day-Image-Green-Movement-Positive.aspx.

[142] The United States is not a party to the Kyoto Protocol, the Convention on Biodiversity, the Law of the Sea Convention, the Rotterdam Convention on Prior Informed Consent, the Espoo Convention on Environmental Impact Assessment, the Stockholm Convention on Persistent Organic Pollutants or the Basel Convention on the Transboundary Movement of Hazardous Wastes, to name a few.

[143] For an elaboration of this point, *see, e.g.*, Lisa Heinzerling & Frank Ackerman, PRICELESS: ON KNOWING THE COST OF EVERYTHING AND THE VALUE OF NOTHING (2004).

[144] *See* Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy*, 38 Envtl. L. Rep. 10287 (2008), and *infra* Part III.C.

will then highlight two key challenges for domestic environmental decisionmaking: uncertainty and environmental justice. Finally, this section will end by showing how a closer embrace of international norms within the domestic regulatory process might begin to overcome those challenges.

A. *The Existing Regulatory Scaffolding*

One of the most important procedural innovations in United States environmental law is the role that citizen suit provisions play in enforcing environmental laws. It is also an area where domestic regulation stands to benefit the most from an infusion of new ideas from international human rights.

Almost every anti-pollution law authorizes citizens to act as "private attorneys general" and sue to enforce environmental laws when regulators fail to live up to statutory enforcement duties.[145] These laws permit citizens to bring enforcement against violators, and to sue to force agencies to discharge nondiscretionary duties. Through these provisions, Congress has authorized citizens to become directly involved with the process of enforcing environmental standards and to pursue their environmental interests when the state fails to do so on their behalf. These statutes thus provide for individual enforcement of duly promulgated environmental standards, should the government fail to do so in its representative capacity.

In addition to environmental statutes that create specific public enforcement rights, additional legislative enactments create a clear set of participatory rights and requirements. For example, the Administrative Procedure Act requires that "agenc[ies] shall give interested persons an opportunity to participate"[146] in proposed rulemaking decisions and to "petition for the issuance,

[145] The following environmental laws, *inter alia,* provide citizen enforcement authority: the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2006); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (2006); the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) (2006); the Clean Air Act, 42 U.S.C. § 7604 (2006); the Endangered Species Act, 16 U.S.C. § 1540 (2006); the Safe Water Drinking Act, 42 U.S.C. § 300j-8 (2006); the Toxic Substances Control Act, 15 U.S.C. § 2619 (2006); the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (2006); Emergency Planning and Community Right to Know Act, 42 U.S.C. §11046.

[146] Administrative Procedure Act, 5 U.S.C. § 553(c) (2006).

amendment, or repeal of a rule."[147] As the D.C. Circuit noted two decades ago:

> [u]nder our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility and amenity of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall.[148]

Note how similar these rights are to aspects of the emerging environmental norms of access to information and prior informed consent that are part of the putative right to a healthy environment.[149] Some argue that these environmental rights have largely been read out of the domestic environmental statutes. NEPA, in particular, has been interpreted to create predominantly procedural, rather than substantive rights.[150] As a result, its putative role as an "environmental Magna Carta"[151] and as a "national charter for protection of the environment"[152] has been blunted. At the same time, unambiguous environmental commitments in the Clean Water Act, the Clean Air Act and other environmental statutes have been interpreted creatively to diminish environmental rights into mere "interests" that can be weighed against costs and other "interests." This framing creates a structural disadvantage because the environmental stake, which

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[147] *Id*. § 553(e).

[148] Sierra Club v. Costle, 657 F.2d 298, 400–01 (D.C. Cir. 1981).

[149] *See* MYRES S. MCDOUGALL, HAROLD LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 38-44 (1980) (taking for granted that there is a direct relationship between environmental protection and human rights).

[150] *See* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (concluding that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 356 (1989) ("NEPA merely prohibits uninformed rather than unwise agency action."). *See also* Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989) ("NEPA does not work by mandating that agencies achieve particular substantive environmental results . . . . NEPA ensures that that the agency will not act on incomplete information, on ly to regret it later.").

[151] Richard A. Liroff, *NEPA Litigation in the 1970s: A Deluge or a Dribble?*, 21 NAT. RESOURCES J. 315, 316 (1981). *See also* Comm. on Merchant Marine and Fisheries, Admin. of the Nat'l Envtl Policy Act, H.R. Rep. No. 92-316, at 1 (1971).

[152] Council on Environmental Quality, Purpose, Policy and Mandate, 40 C.F.R. § 1500.1(a) (2009).

has dwindled into an "interest," must frequently face off against property interests, which are given the status of rights.[153] More fundamentally, the doctrines of standing[154] and political question[155] have been used to limit the scope of who can access the courts in order to claim these rights. Would-be environmental litigants find themselves at a cross-road— with their main path of past vindication, the courts, becoming less available. The legislature has not indicated much appetite to fill this void, indeed a host of environmental proposals have languished in the past few Congressional sessions.[156]

Even without new laws and despite access to the federal courts becoming more difficult, human rights norms might still be a tool for more effectively realizing the environmental rights guaranteed under federal law. Achieving this outcome entails recognizing that regulators sit in a locus of "authoritative decisionmaking," and bringing human rights norms to the regulators themselves. In particular, the international norms of prior informed consent, participation and transparency and access to information might help regulators apprehend and employ their existing regulatory discretion in a fashion more likely to achieve environmental outcomes, and at the same time more likely to rebuild public trust in the regulatory enterprise. In short, a human

[153] For a description of this consequences flowing from this unequal weighting of property interests and environmental interests, *see* Rebecca Bratspies, *On Constitutionalizing Environmental Rights*, *in* LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE (Penelope E. Andrews & Susan Bazilli eds., 2008).

[154] Indeed, the Supreme Court recently complicated the standing question in a fashion that is likely to have repercussions for environmental plaintiffs. Summers v. Earth Island Institute, 555 U.S. 488, 492, 496 (2009), *available at* http://www.law.cornell.edu/supct/html/07-463.ZS.html. For a discussion of these issues, *see generally* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT (1996).

[155] The Second and Fifth Circuits have recently allowed global warming nuisance suits against power companies to go forward, concluding that the political question doctrine did not bar the suit. Connecticut v. American Elec. Power Co., 582 F.3d 309, 315 (2d Cir. 2009); Comer v. Murphy Oil USA, 585 F.3d 855, 860 (5th Cir. 2009). A California District Court contemporaneously reached a directly contrary result in Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009).

[156] Most notably, despite considering more than a dozen bills, the 111th Congress failed to adopt any climate change legislation. For a description of the various proposals, *see* Resources for the Future, AN INTRODUCTION TO CLIMATE CHANGE LEGISLATION, http://www.rff.org/News/Features/Pages/climate-change-legislation-introduction.aspx (last visited May 23, 2011).

rights framing might reshape the contours of what is currently considered appropriate exercise of discretion in order to make regulatory decisionmaking more transparent, more responsive and more fair.

Nowhere is the need for new regulatory approaches clearer than in the nascent regulatory response to climate change—the most pressing regulatory challenge of our lifetime.[157] The regulatory response began in earnest when EPA announced its intention to regulate greenhouse gas emissions under Section 202 of the Clean Air Act[158] and announced reporting rules for stationary sources.[159] Rapidly on the heels of these announcements, the SEC issued greenhouse gas guidance.[160] Far more will be required, and many agencies will find themselves forced to grapple with regulatory challenges presented by climate change—ranging from the Army Corps of Engineers rethinking wetlands development as storm intensities magnify, to the Fisheries and Wildlife Service (FWS) accounting for climate change in designating and protecting endangered species, to the Department of Transportation reconsidering CAFÉ standards.

These agencies, and many others, face hard choices that will impose significant costs on the public in order to (they hope) confer benefits. Worse, regulators will not be able to avoid making high stakes regulatory choices that implicate poorly understood risks. Under these conditions, trust in the agency decisionmaking processes will be particularly important. Without confidence that the agency procedures are fair and inclusive and that the agency is

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[157] For a description of the social and political response to climate change to date, *see* Joshua P. Howe, Making Global Warming Green: Climate Change and American Environmentalism, 1957-1992 (Summer 2010) (unpublished PhD thesis, Stanford University) (copy on file with author). For the history of climate science, *see* THE DISCOVERY OF GLOBAL WARMING (Spencer Weart et al., eds. 2003).

[158] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). This regulatory initiative has been under siege by industry groups seeking to prevent any regulation of their carbon emissions. *See* Leslie Berliant, *Industry Turning to Legal Action to Stop EPA Regulation of Greenhouse Gases*, SOLVECLIMATE BLOG (June 14, 2010), http://solveclimate.com/blog/20100614/industry-turning-legal-action-stop-epa-regulation-greenhouse-gases.

[159] Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260, 56,266 (Oct. 30, 2009).

[160] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010).

making decisions in the public's interest, there is a real danger that any choices made under conditions of uncertainty will provide fodder for anger, social disaffection and cynicism. Agencies are often put in this role. Given the pervasive scientific uncertainty surrounding many environmental regulatory decisions, Congress has often elected to vest expert regulators with significant discretion to assess risks, probabilities and costs.[161] Courts are often reluctant to second-guess these expert decisions made on the "frontiers of scientific knowledge."[162] Thus, getting the initial regulatory decisions right is critical.

The struggle over information and decisionmaking in the context of climate change is clear. In rulemakings, lawsuits and public opinion, a handful of scientists and environmental groups jockey for influence against industry-funded climate deniers.[163] Lost in the cacophony is any genuine public dialogue[164] about the rapid environmental changes we are witnessing,[165] or what those

[161] NRDC v. EPA, 824 F.2d 1146, 1153 (D.C. Cir. 1987) (stating that "Congress chose instead to deal with the pervasive nature of scientific uncertainty and the inherent limitations of scientific knowledge by vesting in the Administrator the discretion to deal with uncertainty in each case").

[162] Ethyl Corp. v. EPA, 541 F.2d 1, 29 (D.C. Cir. 1976) (quoting Amoco Oil Co. v. EPA, 501 F.2d 722, 740-41 (D.C. Cir. 1974)). This deference makes the allegations that the Bush administration suppressed "politically inconvenient" scientific information about climate change particularly disturbing. *See* sources cited in 249-251 infra.

[163] *See* NAOMI ORESKES & ERIK CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 169-215 (2010) [hereinafter Oreskes 2010]; STEPHEN H. SCHNEIDER, SCIENCE AS A CONTACT SPORT (2009); Aaron M. McCright & Riley E. Dunlap, Anti-Reflexivity: The American Conservative Movement's Success in Undermining Climate Science and Policy, 27 THEORY, CULTURE & SOC'Y 100 (2010); *see also* PAUL R. EHRLICH & ANN H. EHRLICH, BETRAYAL OF SCIENCE AND REASON (1996).

[164] Frustration with this situation recently made headline news when Former Vice President Gore lambasted climate skeptics for poisoning the possibility of reasoned discourse on climate change. *See* Lauren Morello, *Gore Flings Barnyard Epithet at 'Organized Climate Change Critics,* N.Y.TIMES, Aug. 9, 2011, http://www.nytimes.com/cwire/2011/08/09/09climatewire-gore-flings-barnyard-epithet-at-organized-cl-54197.html?scp=1&sq=gore%20climate&st=cse. For a detailed account of how a handful of climate skeptics have shut off debate, *see* Oreskes 2010.

[165] *See, e.g.*, Morris A. Bender, et al., *Modeled Impact of Anthropogenic Warming on the Frequency of Intense Atlantic Hurricanes*, 327 SCIENCE 454 (2010); John M. Broder, *Past Decade Warmest on Record, NASA Finds*, N.Y. TIMES, Jan. 22, 2010, http://www.nytimes.com/2010/01/22/science/earth/22warming.html.

changes will mean for our carbon-based economy.[166] As the United States grapples with the proper balance between the nation's immediate economic crises and its long-term sustainability interests,[167] regulators should consider drawing on human rights norms to make regulatory responses fairer, more transparent and more effective.

B. *Balancing Expertise and Participation*

Because agencies rest a bit uncomfortably within a constitutional system premised on a separation of powers, regulators are often reluctant to acknowledge the political implications of their discretionary decisionmaking. Instead, they tend to portray the questions within their purview as scientific and technical rather than political. The main advantage of such a characterization is that it renders the decisions in question susceptible to expert decisionmaking. One unfortunate side effect of this 'expert-izing' of regulatory decisionmaking is that framing regulatory decisions as based on expertise has a direct and limiting impact on how agencies approach issues of participation, transparency and access to information.[168] Another is that it allows regulators to dismiss, or even be contemptuous of the risk

[166] *See* Doug Koplow & John Dernbach, *Federal Fossil Fuel Subsidies and Greenhouse Gas Emissions: A Case Study of Increasing Transparency for Fiscal Responsibility*, 26 ANN. REV. ENERGY ENVIRON. 361 (2010). Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy,* 38 ENV. L. REP.: NEWS AND ANALYSIS 10,287 (2008). As of this writing (August 2010) atmospheric carbon concentrations were 392.24 ppm—representing an increase of 2 ppm a year since 1959. Current carbon concentrations are available at the website of the organization 'CO_2 Now,' www.co2now.org.

[167] For example, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, and The Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, both embody these contradictions with their dual emphasis on increasing domestic fossil fuel production and also increasing energy efficiency and alternative fuels to reduce greenhouse gas emissions. President Obama's recent decision to open vast portions of the continental shelf to oil and gas exploration suggests that this focus on increasing domestic production remains unchanged, even as the President also expresses commitments to lowering the United States' carbon footprint. *See, e.g.*, John M. Broder, *Obama to Open Offshore Areas to Oil Drilling*, N.Y. TIMES, March 31, 2010, at A1, *available at* http://www.nytimes.com/2010/03/31/science/earth/31energy.html.

[168] *See generally* Sheila Jasanoff, *Technologies of Humility: Citizen Participation in Governing Science*, 41 MINERVA 223 (2003); P.E. SLATTER, BUILDING EXPERT SYSTEMS: COGNITIVE EMULATION 37 (1987) (describing the tendency of experts to take their own lack of knowledge about a hypothesis as evidence of its falsity).

preferences and priorities expressed by the public, thereby bracketing questions surrounding different perceptions about acceptability of risk,[169] and directing regulatory attention away from low-probability, high risk scenarios.[170]

The temptation toward an expertise framing is easy to appreciate. Certainly, regulators must pay attention to science, and make decisions supported by evidence. That means avoiding decisions based on either political expedience or wild swings of public opinion. But, rarely are regulatory decisions wholly about science. Instead, most regulatory decisions are about policy—choosing which risks are acceptable in a democratic society, and then deciding who should bear those risks. In making those kinds of choices, regulators should always be mindful of the limits of technical expertise[171] to answer questions of acceptability and equity.

One problem with framing regulatory decisions as wholly scientific rather than a combination of scientific and social decisionmaking is that such a framing makes it easy to ignore the social aspects of a regulatory decision, and to dismiss concerns articulated by the general public. Experts are notorious for overestimating the importance of their field of expertise and underestimating what other perspectives might contribute.[172] They

[169] There is a growing body of empirical data that one's perceptions of risk are shaped by one's cultural frame. Yale's Cultural Cognition Project, for example, has persuasively demonstrated that individuals process information about risk in a fashion that fits their cultural predispositions. Dan M. Kahan, et al., The Second National Risk and Culture Study: Making Sense of Progress in the American Culture War of Fact (Yale Law School, Public Law Working Paper No. 154, 2007), *available at* http:// papers.ssrn.com/sol3/ papers.cfm?abstract_id=1017189.

[170] *See, e.g.*, John McQuaid, *The Gulf of Mexico Oil Spill: An Accident Waiting to Happen*, Environment 360 (May 10, 2010) http://e360.yale.edu/content/feature.msp?id=2272; Alyson Flournoy et al., *Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, and How the System Can Be Fixed to Avoid a Recurrence* 14-20, 29-31 (Oct. 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685606 (arguing that without a mandatory worst case analysis low-probability, high risks scenarios are neglected). For a full description of these scenarios and how they are often neglected in economic analysis, *see* Frank Ackerman, Elizabeth A. Stanton, and Ramón Bueno, *Fat Tails, Exponents, Extreme Uncertainty: Simulating Catastrophe in DICE*, 69 Ecological Economics 1657 (2010).

[171] I have previously written about the problems associated with regulatory expertise. *See* Bratspies, *Regulatory Trust*, *supra* note 40.

[172] *See generally* Jasanoff, *supra* note 168; SLATTER, *supra* note 168. Brian Wynne's work documenting the disastrously wrong advice that so-called experts

are often less willing than are laypeople to reflect on the status of their own knowledge,[173] a situation that can obscure significant gaps in information. This intellectual hubris[174] is further exacerbated by the tendency to defer to the opinion of an "expert" in public discourse, even when the opinion concerns matters beyond (and sometimes only distantly related to) the person's area of expertise. This kind of "expert haloing" unfortunately lends itself to strategic behavior by those with an interest in hampering regulatory responses to otherwise obvious problems.[175] For example, by the late 1980s, climate experts had concluded with surprising unanimity that the increased releases of greenhouse gases from human activities would significantly raise the earth's temperature in the next century.[176] Yet two decades later, so-called experts (albeit not climatologists) are still opining to the contrary, allowing politicians and industry groups to continue claiming that the connection between carbon emissions and climate change is unproven.[177]

Framing a regulatory choice as an expert rather than a social choice not only gives license to this particular kind of

provided to Cumbrian sheepherders in the wake of Chernobyl highlights how prone experts are to the pitfall of not appreciating key aspects of a problem. Brian Wynne, *Misunderstood Misunderstanding: Social Identities and Public Uptake of Science*, 1 PUB. UNDERSTAND. SCI. 281, 283–87 (1992). Wynne describes the inconsistency between "the certainty pervading public scientific statements and the uncertainties involved in actually attempting to create definite scientific knowledge in . . . novel and open-ended circumstances." *Id.* at 293.

[173] Wynne, *supra* note 172, at 298.

[174] Holly Doremus, *Precaution, Science and Learning While Doing in Natural Resource Management*, 82 WASH. L. REV. 547, 567 (2007). Sheila Jasanoff asserts that modern societies have applied analytic ingenuity to developing "technologies of hubris." JASANOFF, *supra* note 168, at 238.

[175] This is not to suggest that only expert decisionmaking is subject to strategic behavior. However, an expertise-based decisionmaking framework may be less prepared to cope with this kind of strategic behavior because it presumes a detached neutrality as a core attribute of experts.

[176] Stephen H. Schneider, *The Greenhouse Effect: Science and Policy*, 243 SCIENCE 771, 771 (1989).

[177] *See* ORESKES 2010, *supra* note 163; SCHNEIDER, *supra* note 163; Naomi Oreskes, Erik M. Conway, & Matthew Shindell, *From Chicken Little to Dr. Pangloss: William Nierenberg, Global Warming, and the Social Deconstruction of Scientific Knowledge*, 38 HIST. STUD. NAT. SCI. 109 (2008); THE UNION OF CONCERNED SCIENTISTS, SMOKE, MIRRORS & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO'S TACTICS TO "MANUFACTURE UNCERTAINTY" ON CLIMATE CHANGE (2007), *available at* http://www.ucsusa.org/assets/documents/global_warming/exxon_report.pdf.

obstructionism, it also creates a high hurdle to participation by those less comfortable and familiar with expert discourse. Language, education and resource limitations can impede the ability to participate in administrative processes. The fact that these impediments are typically neither explicit nor legal barriers to participation does not resolve the problem. Regulators must confront the unfortunate reality that those facing the greatest barriers to participation are often those most likely to wind up bearing the greatest environmental burdens.[178] When the available processes for public participation wind up effectively excluding the most vulnerable portions of the affected population, the decisionmaking process fails. Not only do the resulting gaps in information and perspective make it less likely that the regulatory decisions will protect all of society, but the process itself winds up undermining rather than enhancing public trust in the regulatory process. When they ignore the problem of differential access to participation mechanisms, regulators become vulnerable to the accusation that they are trying to pass an insider dialogue off as a genuine public discourse.[179] Recognizing this as a problem can be the first step to revitalizing the laws that foster public participation in environmental decisionmaking. In taking these steps, human rights norms can provide guidance. Before exploring that guidance in detail, however, it is worth considering how a human-rights mediated move from an expert framing to a social decisionmaking framing can help regulators respond to the profound critique of existing regulatory decisionmaking leveled by the environmental justice movement.

C. *The Challenge of Environmental Justice*

Administrative agencies are mandated to protect all Americans, not just those who can afford lawyers, lobbyists and

[178] Bratspies, *Regulatory Trust*, *supra* note 40, at 621–22.

[179] This is a criticism that has been leveled at MMS in its regulation of offshore drilling. For example, in at least two instances, MMS officials stated there was no possibility of a deepwater blowout. One of those instances was in response to a direct question by the agency's head of environmental division about the possibilities of a blowout. The official response was reportedly "it is impossible". Jason DeParle, *Minerals Service Had a Mandate to Produce Results*, N.Y. TIMES, Aug. 7, 2010, at A1, *available at* http://www.nytimes.com/2010/08/08/us/08mms.html (quoting Hammond Eve, former director of MMS's environmental division, as characterizing the agency as "pro-industry to the point of being blind").

experts. Environmental justice advocates have long complained that existing United States environmental laws systematically fail to achieve their promise for discrete and predictable segments of society—namely poor communities of color. These advocates make the case that race, poverty and pollution are inextricably and inappropriately linked.[180] They point to the disproportionate siting of locally-undesirable land uses (LULUs), that typically come with a significant pollution load, in poor and minority communities,[181] and the lack of access those same communities often have to greenspace, parks and other environmental amenities.[182] Remedying this situation requires paying deliberate attention to how social, economic and power inequities play out during the regulatory decisionmaking process in order to break the existing association between race and environmental hazards.[183] Among

[180] *See* Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 15, 16-19 (Robert D. Bullard ed., 1993).

[181] *See* Robert W. Collin & William Harris, Sr., *Race and Waste in Two Virginia Communities*, *in* ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 93, 98-100 (Robert D. Bullard ed., 1993); *see also* STEVE LERNER, DIAMOND: THE STRUGGLE FOR ENVIRONMENTAL JUSTICE IN LOUISIANA'S CHEMICAL CORRIDOR (2006) (giving the detailed story of one environmental justice community); ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990) (documenting environmental injustice).

[182] *See, e.g.*, ROBERT GARCÍA ET AL., THE CITY PROJECT, ECONOMIC STIMULUS, GREEN SPACE, AND EQUAL JUSTICE 8–9 (2009), *available at* http://www.cityprojectca.org/blog/wp-content/uploads/2009/04/stimulus-green-space-justice-200904294.pdf.

[183] *See* Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 118-125 (2003) (identifying how insights from environmental justice might be incorporated into environmental decisionmaking); Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration* 26 HARV. ENVTL. L. REV. 459, 484-96 (2002) (theorizing that decision-making processes must pay attention to distributional justice and to disparities in power and social capital if they are to avoid re-inscribing inequality). The federal government recently embraced this approach, adopting an Environmental Justice Memorandum of Understanding that committed federal agencies to identify and address environmental justice issues. EPA, *Memorandum of Understanding on Environmental Justice and Executive Order 12898*, http://www.epa.gov/compliance/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf. For a general overview of the environmental justice approach, see Osofsky, *supra* note 89, at 88–107; Robert E. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVT'L L. REP. 10,681, 10,681–10,688 (2000). For surveys of the many studies demonstrating the link between race and environmental risks, see JAMES P. LESTER ET AL., ENVIRONMENTAL INJUSTICE IN THE UNITED STATES: MYTHS AND REALITIES (2001); Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV.

the most recent examples of how lack of attention can perpetuate environmental injustice are the allegations that the majority of wastes generated from the cleanup of BP's oil spill are being disposed of in communities of color.[184]

Environmental justice questions have been a focus of public attention for decades. The 1982 demonstrations against the siting of a hazardous waste landfill in predominantly African-American Warren County in North Carolina are typically identified as the birth of the environmental justice movement.[185] Shortly thereafter, government[186] and private reports[187] began providing hard data for the contention that hazardous waste facilities and contaminated sites were disproportionately more likely to be located in minority communities. Based in part on these studies, EPA concluded that racial and ethnic minorities were disproportionately exposed to pollutants of all kinds and that African-American children had disproportionately high blood lead levels (which leads to an array of adverse health effects).[188] At the same time, the National Law

1031, 1069–77 (2003) (reviewing studies documenting the inequitable distribution of locally undesirable land uses).

[184] Daisy Hernandez, *Here's Where BP is Dumping its Oil Spill Waste*, COLORLINES, Aug. 4, 2010, http://colorlines.com/archives/2010/08/heres_where_bp_is_dumping_its_oil_spill_waste.html; Krissah Thompson, *Concerns over oil move inland as detritus piles up*, WASH. POST, Aug. 16, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/15/AR2010081503185_2.html?sid=ST2010081503271.

[185] LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 19 (2001) (also offering alternative starting points); Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 9 (1995).

[186] *See* U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 1 (1983), *available at* http://archive.gao.gov/d48t13/121648.pdf.

[187] *See* COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTE AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTES SITES 15 (1987) (documenting that race was the most significant factor in determining the location of commercial hazardous waste facilities).

[188] *See* EPA, Environmental Equity: Reducing Risks for All Communities 7-10, 15 (1992). These conclusions were later confirmed by a slew of advisory committee reports. NAT'L ADVISORY COUNCIL FOR ENVTL. POLICY & TECH., FINAL REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE (1999), *available at* http://www.epa.gov/ocem/nacept/reports/pdf/title_vi_report.pdf; *see also* NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, ENVIRONMENTAL JUSTICE IN THE PERMITTING PROCESS (2000), *available at*

Journal found racial disparities in the enforcement of federal environmental laws.[189] Recognizing the potential of these findings to undermine the legitimacy of the entire regulatory enterprise, President Clinton issued Executive Order 12,898.[190] This order directed federal agencies to make environmental justice part of their mission.

The Obama administration has made environmental justice one of its environmental priorities.[191] Guidance issued in July 2010 identified achieving environmental justice as an EPA priority, and directed that environmental justice be factored into every agency decision.[192] Yet, as the concerns surrounding disposal of the BP oil spill waste demonstrate, actually transforming regulatory decisionmaking to better reflect the environmental justice principles of "fair treatment and meaningful involvement"[193] is no easy task.[194]

EPA's recent efforts to define and integrate environmental justice are an important step forward. Now, it, along with the other agencies of the federal government, needs to heed the GAO's repeated calls for measurable benchmarks for assessing progress toward environmental justice.[195] In developing these benchmarks,

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http://www.epa.gov/environmentaljustice/resources/publications/nejac/permit-recom-report-0700.pdf; NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, INTEGRATION OF ENVIRONMENTAL JUSTICE IN FEDERAL AGENCY PROGRAMS (2002), *available at* http://www.epa.gov/environmentaljustice/resources/publications/nejac/integration-ej-federal-programs-030102.pdf.

[189] Marianne Lavelle et al., *Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation*, NAT'L L. J., Sept. 21, 1992.

[190] Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. VI 1998).

[191] *See, e.g.*, Memorandum from Lisa P. Jackson, Administrator-designate, EPA, to All EPA Employees (Jan. 23, 2009) (committing the agency to taking "special pains to connect with those who have been historically underrepresented in EPA decisionmaking, including the disenfranchised in our cities and rural areas, communities of color, native Americans, people disproportionately impacted by pollution . . . "), *available at* http://www.eenews.net/features/documents/2009/01/23/document_gw_07.pdf.

[192] U.S. ENVTL. PROT. AGENCY, EPA'S ACTION DEVELOPMENT PROCESS 1, 3 (2010), *available at* http://www.epa.gov/environmentaljustice/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf.

[193] *Id.* at 3.

[194] *Id.*

[195] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1140T, ENVIRONMENTAL JUSTICE: MEASURABLE BENCHMARKS NEEDED TO GAUGE EPA PROGRESS IN CORRECTING PAST PROBLEMS 13 (2007), *available at* http://www.gao.gov/new.items/d071140t.pdf; U.S. GOV'T ACCOUNTABILITY

the body of knowledge that has grown up around international human rights offers some useful guidance. The well-developed international procedures for prior informed consent, participation, access to information and transparency may be instructive as regulators grapple with how to internalize environmental justice. In particular, these international norms can help regulators: clarify ambiguities in key statutory terms; identify appropriate affirmative steps to promote wider participation in regulatory decisionmaking; and offer models for analyzing environmental justice issues as part of routine agency processes. In short, human rights norms can help regulators give existing regulatory processes a new normative gloss—one more likely to generate progress in responding to the thorny problem of delivering environmental justice.

Starting from the principle that communities are entitled to participate fully and meaningfully in decisions affecting them, numerous laws require consultation and even local consent before certain activities can proceed. The NEPA regulations specifically state that NEPA procedures must "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[196] Unfortunately, environmental justice has highlighted how selectively this promised transparency and participation is achieved, and how much environmental inequality exists across a wide swath of regulatory decisionmaking.[197] Indeed, there is often strong

OFFICE, GAO-05-289, ENVIRONMENTAL JUSTICE: EPA SHOULD DEVOTE MORE ATTENTION TO ENVIRONMENTAL JUSTICE WHEN DEVELOPING CLEAN AIR RULES (2005), *available at* http://www.gao.gov/new.items/d05289.pdf.

[196] 40 C.F.R. § 1500.1(b) (2010).

[197] *See* Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 484-96 (2002) (describing why provisions for participation, without specific attention to inequality, are not likely by themselves to provide remedies for environmental justice issues); Sheila R. Foster, *Meeting the Environmental Justice Challenge: Evolving Norms in Environmental Decisionmaking*, 30 Envtl. L. Rep. 10992, 10993 (2000) (explaining how standard agency risk assessment and management processes often fail to provide affected environmental justice communities with a meaningful role in regulatory decisionmaking). For a description of the scope and scale of environmental injustice, *see* JAMES P. LESTER ET AL., ENVIRONMENTAL INJUSTICE IN THE UNITED STATES 13–14 (2001) (demonstrating the correlation between high minority populations in a community (particularly African American) and environmental harms); John A. Hird & Michael Reese, *The Distribution of Environmental Quality: An Empirical Analysis*, 79 SOC. SCI. Q. 693, 711 (1998) (demonstrating that race and ethnicity are correlated with environmental quality); Evan J. Ringquist, *Equity and the Distribution of*

resistance to even recognizing that environmental inequities exist, or ought to be viewed as a problem of structural inequality in society[198]. Changing things will be even more difficult.

Full and meaningful participation involves access to decisionmaking processes concerning the environment, and may require that regulators provide resources (such as expert assistance) needed to ensure a level playing field. For example, in response to the BP oil spill, EPA's Department of Environmental Justice offered community grants for the purpose of facilitating meaningful involvement in the responses to the spill by developing information about, or capacity in, affected communities.[199]

The Obama administration has expressed a commitment to transparency, marking a significant break from the prior Bush administration.[200] However, these basic building blocks of

Environmental Risk: The Case of TRI Facilities, 78 SOC. SCI. Q. 811, 818 (1997) (finding a strong correlation between race, class and toxic release distributions.). For some of the limitations of existing regulatory tools to implement environmental justice, *see* U.S. COMM'N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 57 (2003), *available at* http://www.usccr.gov/pubs/envjust/ej0104.pdf (finding that of the 124 Title VI complaints filed with the EPA by January 1, 2002, only 13 cases were processed properly, and none were accepted for investigation). For some possible ways to improve environmental justice implementation within existing regulatory frameworks, *see* Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617 (1999) (identifying potential environmental justice opportunities in permitting decisions and arguing that EPA is increasingly willing to find and exercise discretionary environmental justice authority); Eileen Guana, *EPA at Thirty: Fairness in Environmental Protection,* 31 Envtl. L. Rep. 10,528, 10,532-33 (2001).

[198] For example, the Bush Administration proposed eliminating race as a consideration in environmental justice. *See Manu Raju,* EPA's Draft Equity Plan Drops Race as a Factor in Decisions, Inside EPA (July 1, 2005). In its response to a scathing Inspector General Report, the Bush EPA stated that disagreed that E.O. 12,898 required the agency to identify and address environmental effects on minority and low income communities. OIG, EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice (2004), *available at* http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf. For a sample of the typical scholarly method of rejecting environmental justice, *see* Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75 (1996).

[199] U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL JUSTICE COOPERATIVE AGREEMENTS IN SUPPORT OF COMMUNITIES DIRECTLY AFFECTED BY THE DEEPWATER HORIZON OIL SPILL IN THE GULF OF MEXICO 4, (2010), *available at* http://www.epa.gov/compliance/ej/resources/publications/grants/bp-spill-grants-rfp.pdf.

[200] On his first day in office, President Obama issued a Memorandum to the

regulatory trust are too important to be left to the vagaries of particular administrations. Incorporating human rights norms into the fabric of regulatory decisionmaking would depersonalize human rights compliance, thereby helping to ensure implementation regardless of who holds the White House and who is head of the agency.

One thing a human rights framing for the Environmental Impact Statement (EIS) process discussed below might accomplish would be to help significantly expand participation in public decisionmaking, as well as transparency and access to information. Such a result would greatly enhance both the perceived legitimacy of the EIS process and its overall usefulness.[201] Paying attention to

heads of executive departments and agencies on the Freedom of Information Act establishing a presumption in favor of disclosure of information. President's Memorandum on the Freedom of Information Act, 74 FED. REG. 4683 (Jan. 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/. This Presidential Memorandum was a direct response to the Memorandum produced by Attorney General Ashcroft during the George W. Bush administration in which Ashcroft was widely perceived as creating a default in favor of secrecy rather than disclosure. Memorandum from John Ashcroft, U.S. Attorney General, to Heads of All Federal Departments and Agencies (Oct. 12, 2001), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/Ashcroft%20Memorandum.pdf. Attorney General Holder followed up with a Memorandum implementing the President's directive. Memorandum from Eric Holder, U.S. Attorney General, to Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf. President Obama later issued another, related Presidential Memorandum on open government. Memorandum on Transparency and Open Government, 74 FED. REG. 4685 (Jan. 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/transparencyandopengovernment/. Peter Orszag, President Obama's Director of the Office of Management and Budget, followed up with a memorandum directing federal agencies to concretize President Obama's transparency Memorandum by increasing the information they made available online, and improving the quality of information they made available. *See* Memorandum from Peter Orszag, Dir., Office of Mgmt. & Budget, to the Heads of Executive Departments and Agencies, (Dec. 8, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf (identifying transparency, participation and collaboration as the cornerstones of open government, and expressing the intent to "create and institutionalize a culture of open government.").

[201] Along these lines, a cornerstone of the European Union's 2001 White Paper on Governance was a plan to democratize expertise by adopting new guidelines "on [the] collection and use of expert advice in the Commission to provide for the accountability, plurality and integrity of the expertise used." COMM'N OF THE EUR. COMMUNITIES, EUROPEAN GOVERNANCE: A WHITE PAPER 19 (2001), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf. Some scholars challenge the premise of this White Paper—the notion that increased participation represents democratization, at

the ramifications of power and the exclusionary role that unmediated expert discourse often plays could make NEPA's EIS processes far more inclusive and rigorous. Such a decisionmaking process would ensure that regulators, the regulated community and the public beneficiaries of regulation shared an investment in regulatory policy, and would set new expectations about fulfillment and maintenance of regulatory promises.[202]

Participation

Informed participation by citizens is the heart of much of modern environmental law in the United States. The ideal of a truly mutual learning process between government regulators, the regulated community and the beneficiaries of regulation is the best way to both recognize "the profound impact of man's [sic] activity on . . . the natural environment . . . ,"[203] to develop "a national policy which will encourage productive and enjoyable harmony between man [sic] and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment . . . ."[204]

The most famous embodiment of this ideal is the National Environmental Policy Act (NEPA), the grand-daddy of all environmental statutes. Enacted in 1969, NEPA mandates that the environmental consequences of government activities be given due consideration. To that end, NEPA requires that the government

least in the context of the European Union. *See, e.g.*, Symposium, *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* (Jean Monnet Working Paper 6/01) (presenting an array of views), *available at* http://www.jeanmonnetprogram.org/papers/01/010601.html; *see also* Ludger Radermacher, *The European Commission's White Paper on European Governance: the Uneasy Relationship Between Public Participation and Democracy*, 3 GERMAN L. J. (2002), http://www.germanlawjournal.com/print.php?id=125.

[202] *Cf.* Wendy A. Bach, *Welfare Reform, Privatization, and Power*, 74 BROOK. L. REV. 275, 309 (2009); *see also* Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1 (2010) (describing what such a system might look like).

[203] National Environmental Policy Act, 42 U.S.C. § 4331(a) (2006).

[204] National Environmental Policy Act, 42 U.S.C. § 4321. To that end, NEPA explicitly commits the federal government to: "(1) fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assur[ing] for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings . . . ." National Environmental Policy Act, 42 U.S.C. § 4331(b).

identify and consider the environmental consequences of its actions before making major decisions.[205] This statute has been replicated widely around the world, and has become a mainstay of international environmental decisionmaking.[206]

Specifically, NEPA requires that any federal agency contemplating a "major Federal action significantly affecting the quality of the human environment" conduct an EIS[207] in order to

[205] Specifically, NEPA requires that for "major Federal actions significantly affecting the quality of the human environment," agencies must provide a detailed statement on:

> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's [sic] environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C). *See also* 40 C.F.R. Pt. 1508 (2010) (implementing regulations); Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983) (NEPA obligates an agency to consider "every significant aspect of the environmental impact of a proposed action.").

[206] NEPA has been emulated in over eighty countries. *See* Maria Rosário Partidário & Ray Clark, *Introduction*, *in* PERSPECTIVES ON STRATEGIC ENVIRONMENTAL ASSESSMENT 3, 3 (Maria Rosário Partidário & Ray Clark eds., 2000) (describing diffusion and evolution of environmental impact assessment requirements internationally); C. Wood, *What Has NEPA Wrought Abroad?*, *in* ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 99, 100, 107–09 (Ray Clark & Larry Canter eds., 1997). Environmental impact assessments are also required in numerous international conventions. *See, e.g.*, Protocol on Environmental Protection to the Antarctic Treaty art. 3.2(c), Oct. 4, 1991, 30 I.L.M. 1461 (1991) (entered into force Dec., 1997). An entire international convention is now devoted to the topic. *See* Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (1991). Environmental impact assessments (EIAs) have become integral to most countries' decisionmaking and are an important component of multilateral development banks' lending procedures. World, Operations Manual OP 4.01: Environmental Assessments (Feb. 2011) Bank http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html. The Convention on Environmental Impact Assessment requires that "[t]he Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities." *See id.*, art. 2(1).

[207] Under certain circumstances, the agency may comply with its NEPA obligations by producing an Environmental Assessment (EA) in lieu of an EIS. 40 C.F.R. § 1501.4 (2010). The regulations define an EA as a "concise public

develop, assemble and analyze environmental information.[208] The EIS must set forth sufficient information for the general public to make an informed evaluation,[209] and for the decisionmaker to "consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action."[210] Indeed, the "heart of the environmental impact statement" is the analysis of alternatives to the proposed action that "rigorously explore[s] and objectively evaluate[s] all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly dicuss[es] the reasons for their having been eliminated."[211]

Although as described NEPA was explicitly intended to further substantive environmental goals, the EIS requirements it imposes on agencies have been interpreted as essentially procedural rather than substantive.[212] Thus, the EIS does not mandate outcomes[213] but instead acts to protect the integrity of

document" that briefly describes the need for, alternatives to, and environmental impacts of the proposed federal action. *Id.* § 1508.9. If the agency determines based on the EA that the proposed federal action will not significantly affect the quality of the human environment, it then makes a "finding of no significant impact" (FONSI), *id.* § 1508.13, and it need not prepare an EIS. *Id.* § 1501.4. Because the participation and transparency concerns are identical, this article groups the EIS and EA/FONSI process under the rubric EIS for purposes of discussion.

[208] 42 U.S.C. §4332(2)(C). The specific requirements for an EIS are set out in the regulations implementing NEPA. 40 C.F.R. Parts 1502, 1508. For a roughly contemporaneous account of how NEPA was "designed to alter the existing channels of communication in policy making affecting the environment" see Helen M. Ingram, *Information Channels and Environmental Decision Making*, 13 NAT. RESOURCES J. 150, 161 (1973).

[209] *See* Natural Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 93 (2d Cir.1975).

[210] County of Suffolk v. Sec'y of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

[211] 40 C.F.R. § 1502.14(a). The purpose of this process is to allow reviewers to "evaluate their comparative merits." *Id.* § 1502.14(b).

[212] *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 228 (1980) (announcing that "NEPA requires no more" than that federal agencies consider environmental impacts in compliance with procedural duties imposed by the Act); Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978) (stating that NEPA duties, although intended to further "significant substantive goals for the Nation," imposed duties that are "essentially procedural").

[213] NEPA ". . .does not mandate particular results, but simply prescribes the necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S.

agency decisionmaking by giving assurance that "stubborn problems or serious criticisms have not been swept under the rug."[214] As "the outward sign that environmental values and consequences have been considered during the planning stage of agency actions,"[215] the EIS is intended to "insure a fully informed and well-considered decision."[216]

To that end, NEPA commits "all agencies of the Federal Government" to the collection, use, and dissemination of information on the environment.[217] Federal agencies must, of course "initiate and utilize ecological information in the planning and development of resource-oriented projects."[218] Those informational requirements do far more than just ensure that *agencies* are well informed**.** Federal agencies also have a positive obligation to "make advice and information useful in restoring, maintaining, and enhancing the quality of the environment" available to States, counties, municipalities, institutions, and individuals.[219] One consequence of this requirement is that interested persons are entitled to access government information in order to facilitate their participation in this process. There is no doubt that NEPA was intended to provide detailed environmental information to the public to permit meaningful participation.[220]

Intended to build public trust in the legitimacy and appropriateness of the agency's ultimate decision, these procedural requirements make the agency identify and account for the environmental costs and benefits of the proposed action as part of

332, 350 (1989). For a critique of this approach, *see* TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 180–81 (2005) (noting that procedural rights alone may do little to countervail the dominant presumptions in favor of development and economic interests).

214 Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973).

215 Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).

216 Vermont Yankee, 435 U.S. at 558.

217 *See* 42 U.S.C. §4332.

218 42 U.S.C. § 4332(H).

219 42 U.S.C. § 4332(G).

220 *See* Thomas O. McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 804 (1977) (evaluating NEPA in light of its purpose of disclosing relevant environmental information to the agencies, Congress, and the public); Kenneth M. Murchison, *Does NEPA Matter?—An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557, 609, 611–12 (1984) (asserting that environmental organization would be "far less effective" without information created in NEPA process).

the decisionmaking calculus. Although the agency has considerable discretion in balancing the competing values implicated in any decision, the EIS requirement shines the bright light of informed public scrutiny on that discretionary exercise of power. The assumption is that an appropriate level of substantive environmental protection will flow from the participatory and transparent agency decisionmaking process.

NEPA's overall environmental and administrative effectiveness has been subject to fierce debate. Some view the EIS requirement as a significant cause of regulatory ossification, while others claim it as the heart of successful environmental law. Regardless of which camp one finds more persuasive, there is no doubt that NEPA's procedural requirements have often acted as a significant check on agency actions. And NEPA has been the model for similar laws around the world.

Yet NEPA's current vision of access to information and public participation is triggered very late in the decisionmaking process. The Supreme Court has repeatedly limited the ability of interested citizens to challenge their inability to participate in the broader environmental planning processes,[221] even though those early processes inevitably structure how the agency exercises its discretion in subsequent project applications. Agencies are therefore free to proceed without public participation at these early stages of decisionmaking. However, agencies employing a human rights framing might decide that, regardless of whether participation at early junctures is required, that participation is valuable. After all, the Supreme Court's conclusion that citizens cannot demand the right to participate in early, agenda-setting agency decisions does not mean that agencies cannot elect to provide avenues for such participation. Lessons from the more expansive right to participate developed under international human rights law and further refined in the Aarhus Convention might be valuable in helping agencies understand why earlier participation

[221] *See, e.g.*, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 72-73 (2004) (finding that the public has no recourse to challenge the agency's overall policy decisions that do not amount to the proposed acceptance or rejection of specific projects); Kleppe v. Sierra Club, 427 U.S. 390, 398–406 (1976) (quoting Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 320 (1975)) (finding that NEPA only requires an EIS when an agency "makes a recommendation or report on a proposal for Federal Action" not when the agency sets the ground rules that will govern subsequent reports or recommendations).

is critical to the vitality of environmental decisionmaking and how that participation might be structured. Acting on that appreciation, regulators could choose to make the earliest stages of regulatory decisionmaking more transparent, and could develop opportunities for participation all along the regulatory pathway.

Transparency and Access to Information

It was none other than Louis Brandeis who wrote that "[s]unlight is said to be the best of disinfectants."[222] It is certainly not novel to propose transparency as a critical component of sound regulatory decisionmaking. Indeed, the core of the Administrative Procedure Act (APA) consists of rules for public notice, participation, and comment. The APA empowers citizens to interact with regulators through public meetings and written submissions.[223] These participatory rights are of vital importance to the democratic legitimacy of administrative decisionmaking. United States disclosure statutes like NEPA, the Freedom of Information Act[224] and the Emergency Planning and Community Right to Know Act[225] have been influential around the world. For example, the International Court of Justice recently declared that the environmental assessment process that grew out of NEPA has become customary international law.[226]

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[222] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1913). This line is often quoted, but its context is rarely remarked. Brandeis was writing about an unregulated banking system run amok. The parallels to today's headlines are striking. As such, this insight is as important today as it was ninety-five years ago.

[223] 5 U.S.C. §§ 552, 556, 557.

[224] The Freedom of Information Act, 5 U.S.C. § 552 (2006). For example, the Aarhus convention, and 2003 Kiev Protocol on Pollutant Release and Transfer Registers clearly owe an intellectual debt to both the Freedom of Information Act and the Community Right to Know Act's Toxic Release Inventory (TRI). *See* U.N. Econ. Comm'n for Europe, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (The Aarhus Convention), June 25, 1998, U.N. Doc. ECE/CEP/43, reprinted in 38 I.L.M. 517 (1999) (guaranteeing Europeans access to environmental information, and a role in environmental decisionmaking, as well as providing access to courts).

[225] *Supra* note 220. The Emergency Planning and Community Right-to-Know Act's Toxic Release Inventory provides the public with detailed information about toxic chemicals in use across the country, which can be accessed in user-friendly form at Scorecard: The Pollution Information Site, http://scorecard.goodguide.com/ (last visited Apr. 18, 2011). Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §11001 et seq. (2000).

[226] Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010

Taken together, these laws not only "make[] environmental protection a part of the mandate of every federal agency and department";[227] they also "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[228] While statutes focus on providing information, they leave the decision of how to use that information to individuals and the public as a whole. Thanks to former Vice-President Gore's Reinventing Government[229] initiative, a significant proportion of United States' government information is readily available on the internet.[230] Availability of this information

I.C.J. 135, ¶¶ 204–05 (Apr. 20) (finding that the duty to undertake an EIA when there is a risk of transboundary pollution has achieved customary international law status, even though international law does not specify the exact scope and content of such an EIA.) In a separate opinion in this case, Judge Cançado Trindade opined that the precautionary principle had also attained the status of customary international law. *See id.* ¶¶ 62–96, 103–13 (Apr. 20) (separate opinion of Judge Cançado Trindade).

[227] Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

[228] 40 C.F.R. § 1500.1(b) (2010).

[229] *See, e.g.*, Vice-President's Reinvention Initiatives http://clinton4.nara.gov/WH/EOP/OVP/initiatives/reinventing_government.html (characterizing as "e-government" the move to make critical public documents available on the internet.) The 1993 Report he oversaw, *From Red Tape to Results: Creating a Government That Works Better*, was one of the first government documents made available on the internet. National Partnership for Reinventing Government, History, http://govinfo.library.unt.edu/npr/whoweare/historypart1.html. Major priorities included putting government documents online, making sure that public officials could be reached via internet, and developing the infrastructure for on-line transactions. National Partnership for Reinventing Government, *Results of E-Government Initiatives* http://govinfo.library.unt.edu/npr/initiati/it/egovresults.html. *See also* Kristin R. Eschenfelder et al., Assessing U.S. Federal Government Websites, 14 Gov't Info. Q. 173 (1997) (describing various Clinton era e-government initiatives, many of which were either recommended by Gore's Reinventing Government initiative). Vice-President Gore was also intimately involved with the National Information Infrastructure Project, which implemented many of the recommendations of Vice-President Gore's Reinventing Government report. *See Administration White Paper on Communications Reform*, http://ibiblio.org/pub/academic/political-science/internet-related/NII-white-paper. For a description of the initiatives that Vice-President Gore oversaw, *see generally* AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: THE REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993).

[230] Even this baseline vision of transparency rooted in the principle of free access to government information is often under siege. Under Attorney General John Ashcroft, for example, the Department of Justice indicated that it would support agency denials of access to information, a policy the Obama administration reversed during its first day in office. *See* sources and discussion

for public assessment and comment is important.

Unfortunately, these statutes too often fall short of creating genuine opportunities for public participation in the regulatory process.[231] For example, NEPA has a very thin vision of public access to information. It posits an initial flow of information from the government to the public, and then a responsive flow from the public to the government. As such, it elides the role that power differentials play in making the NEPA process accessible to some but not others. For example, EISs typically involve an expert analytic framework that can erect high barriers to participating in the dialogue at all.[232] Legitimate positions and voices not fluent in, and thus unable to fit into, the dominant discourse are often excluded.[233] Along the same lines, turf wars between professional subcultures within an agency—say between lawyers and economists—can also create bureaucratic obstacles that hinder the effective incorporation of diverse perspectives in the

supra note 200. During the eight years of the Bush Administration, routine denial of Freedom of Information Act requests became standard operating procedure at many federal agencies. Michael Doyle, *Bush v. FOIA*, SUITS & SENTENCES BLOG (Jan. 23, 2009, 9:21 AM), http://washingtonbureau.typepad.com/law/2009/01/is-it-possible-to-prove-how-much-the-bush-administration-impeded-the--freedom-of-information-act-put-another-way-just-how-h.html; *cf.* COAL. OF JOURNALISTS FOR OPEN GOV'T, STILL WAITING AFTER ALL THESE YEARS PART I 4 (2007) (describing the eighty-three percent increase in use of exemptions to deny FOIA requests between 1998 and 2007), *available at* http://www.cjog.net/documents/Still_Waiting_Narrative_and_Charts.pdf.

[231] For a summary of recent critiques of the state of transparency, see Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1014-15 (2008).

[232] This observation fits with Michel Foucault's assertion that "[t]here is no knowledge without a particular discursive practice; and any discursive practice may be defined by the knowledge that it forms." Edward W. Said, *An Ethics of Language: Review of Michel Foucault's The Archeology of Knowledge and The Discourse on Language*, *in* 2 MICHEL FOUCAULT: CRITICAL ASSESSMENTS 69, 74 (Barry Smart ed., 1994) (quoting Foucault's 1970-71 lectures).

[233] JASANOFF, *supra* note 168 at 239. For an empirical documentation of this form of exclusion in a different context, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices In Legal Process*, 20 HOFSTRA L. REV. 533, 566–75 (1992) (describing courtroom dynamics that systematically, if not necessarily intentionally, silence tenant voices). Gerald Torres describes the central importance to participation of narratives, and emphasizes that mistranslation between different narrative frames can hinder consideration of particular viewpoints. Gerald Torres, *Translation and Stories*, 115 HARV. L. REV. 1362, 1378–82 (2002). Jerome Bruner points out that stories can reveal competing normative assumptions about how the world should work. JEROME BRUNER, THE CULTURE OF EDUCATION 130–31 (1996).

decisionmaking process.

Moreover, the access required by the APA and NEPA only applies once an agency has developed a proposed course of action.[234] Citizens are routinely excluded from the earlier stages of the process—the forums in which substantive drafting decisions are made, agendas are set, and decisionmaking rules are established.[235] To the extent that agencies get in the habit of adopting private industry standards as their regulatory standards, as the Mineral and Mining Service, for example, did more than 100 times in its regulation of offshore drilling[236], the perceptual and substantive problems associated with this exclusion is compounded. Industry gets two bites at the apple—first, in a closed and private process, industry develops its consensus standard, and then in the public rulemaking based on that standard, industry gets a chance to comment on the proposed agency action. The beneficiaries of health and safety regulation, by contrast, are excluded from the private process by which industry develops its consensus standards, and only gets to participate once a notice of proposed rulemaking is published. Thus the public is, through no fault of its own, a 'Johnny come lately'—invited into the process only once an agency has largely committed itself to a particular course. Although an agency may modify a proposed action in light of public comments, those comments typically come too late in the process to be genuinely transformative. When regulators have already mapped out and published their intended approach, investing time, energy and effort in its proposed action, it is very difficult to convince them to radically switch gears—particularly because the consequence of such a switch is that the altered rule would no longer be the "logical outgrowth" of the originally proposed rule, thus mandating the commencement of a new rulemaking process.[237] It is therefore not surprising that regulators

[234] *See* sources cited *supra* note 221. For an exploration of some of the other limitations of the APA transparency procedures, see BACH, *supra* note 202, at 297–98 (discussing the exclusion of government contracting from notice and comment procedures); Alfred C. Aman, Jr., *Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest*, 6 IND. J. GLOBAL LEGAL STUD. 397, 415-16 (1999).

[235] *See* Home Box Office, Inc. v. Fed. Comm'ns Comm'n, 567 F.2d 9, 57-59 (D.C. Cir. 1977) (finding that the APA does not limit ex parte contacts before a notice of proposed rulemaking has been issued).

[236] *See* note 242 infra.

[237] *See, e.g.*, Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1105–07 (4th

have not been successful in creating more of an iterative process of mutual information sharing and priority identification with the general public.[238]

While the general public has had little opportunity to engage in reflexive rulemaking with agencies, regulators have had more success in creating these kinds of processes with regulated industry.[239] When problems are ill-defined and possible alternatives are obscure and unknown, industry has been viewed as best positioned to contribute valuable information that will make better and more informed decisions possible.[240] An overly cozy relationship between regulators and the regulated can reduce, and sometimes has reduced, these processes to mere paper pushing exercises.[241] The most extreme result has been the tendency in

Cir. 1985); Small Refiner Lead Phase-Down Task Force v. U.S. Envt'l Prot. Agency, 705 F.2d 506, 547 (D.C. Cir. 1983); *see also* Jack M. Beerman & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 893-900 (2007).

[238] This conception of how risk communication occurs is intended to avoid the 'science as propaganda' hazard about which Paul Feyerabend has written, while still leaving space for regulatory decisionmaking that values technical expertise. *See* PAUL FEYERABEND, SCIENCE IN A FREE SOCIETY 73-76 (1978); Cynthia Hardy, Nelson Phillips & Tom Lawrence, *Distinguishing Trust and Power in Interorganizational Relations: Forms and Façades of Trust*, 64, 69–72, *in* TRUST WITHIN AND BETWEEN ORGANIZATIONS (Christel Lane & Reinhard Bachman eds., 1998) (arguing that trust rests on reciprocal communication and is not reflected in communication undertaken to sustain asymmetric power relationships).

[239] The public uproar over the secrecy surrounding the Cheney Energy Task Force underscores how much differential access between industry and civil society representatives can affect perceptions of legitimacy. *See, e.g.*, Michael Abramowitz & Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy Report,* WASH. POST, July 18, 2007, at A1; Don Van Natta Jr., *Agency Files Suit for Cheney Papers on Energy Policy*, N.Y. TIMES, Feb. 23, 2002, at A1. For a full description of the two lawsuits over this incident, see *Cheney Energy Task Force*, SOURCEWATCH, http://www.sourcewatch.org/index.php?title=Cheney_Energy_Task_Force (last accessed May 28, 2011).

[240] *See, e.g.*, Tyler Priest, *The Ties That Bind MMS and Big Oil*, POLITICO, June 9, 2010, http://www.politico.com/news/stories/0610/38270.html (describing the Minerals Management Service as a "junior partner" to industry—dependent on it for technical expertise).

[241] The revelations about superficial and inaccurate emergency response plans prepared for the Gulf of Mexico underscore this point. *See, e.g.*, Frank James, *Oil Execs Grilled on Copycat Emergency Plans*, THE TWO-WAY: NPR'S NEWS BLOG, June 15, 2010, http://www.npr.org/blogs/thetwo-way/2010/06/15/127863551/oil-execs-grilled-for-identical-emergency-plans-walruses-and-all; Mike Soraghan, *Industry Claims of 'Proven' Technology Went Unchallenged at MMS*, GREENWIRE, June 2, 2010, http://www.eenews.net/public/Greenwire/

some agencies simply to adopt industry consensus standards as the official regulatory standards.[242] Such an approach does a disservice to the public both substantively and procedurally. On a substantive basis, not only do industry standards fail to push the development of new technology in order to achieve for better environmental performance, they rarely even reflect the best practices currently available across the industry.[243] As the National Commission on the BP Deepwater Horizon Oil Spill recently noted, consensus standards are too often lowest-common denominator standards.[244] As a procedural matter, the American Petroluem Institute (API)'s procedures for developing standards fall far short even of existing federal standards,[245] which are in

2010/06/02/1 (pointing out that many companies engaged in deepwater drilling in the Gulf of Mexico submitted identical spill response plans).

[242] For example, after the BP oil spill in the Gulf of Mexico, there was significant public attention to the fact that the Mineral Mining Service (MMS) had adopted 100 regulatory standards from voluntary practices developed by the American Petroleum Institute (an industry lobbying group). *See, e.g.*, Les Blumenthal & Erika Bolstad, *U.S. Agency Let Industry Write Offshore Drilling Rules*, MCCLATCHY, May 10, 2010, http://www.mcclatchydc.com/2010/05/10/93859/us-agency-lets-oil-industry-write.html. The actual number is 169. Standards Incorporated by Reference Database, STANDARDS.GOV, http://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.regulatory_sibr (last visited Apr. 10, 2011, 6:10 PM) (search with "American Petroleum Institute (API)" under the "Organization" tab and "Department of the Interior, Minerals Management Service (DOI/MMS)" under the "Incorporated By" tab).

[243] In the context of offshore drilling, the Coast Guard warned of this problem in 2002. Writing about spill response technologies in a simulation exercise, the U.S. Coast Guard (in an investigatory coalition led by Admiral Thad Allen, who would become President Obama's choice to be National Incident Commander for the Unified Command for the Deepwater Horizon Spill) warned that improved technologies "are not generally available and without requirements in place to require use of new response technologies, they will not be developed and deployed adequately." U.S. COAST GUARD ET AL., 2002 SPILL OF NATIONAL SIGNIFICANCE GULF AFTER ACTION REP. 1, 22 (2002), *available at* http://www.uscg.mil/history/docs/2002SONSAARfinalReport.pdf. The National Commission on the Deepwater Horizon Spill emphasized this point in its final report, cautioning that "without effective government oversight, the offshore oil and gas industry will not adequately reduce the risk of accidents, nor prepare effectively to respond in emergencies." NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER (REPORT TO THE PRESIDENT) 217 (2011), *available at* http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf.

[244] NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *supra* note 243, at 225 (characterizing this overreliance on private standards as creating a situation in which "API's shortfalls . . . undermined the entire federal regulatory system").

[245] Participation in API's procedure is limited to those deemed by API to

turn, inadequate to ensure full transparency and participation.

Further contributing to an unbalanced relationship between regulators, regulated communities and beneficiaries of regulation has been the manner in which the procedures enshrined in administrative decisionmaking allow the public into an expert discourse. Because of the highly technical nature of many rulemakings, the opportunity to participate is effective only for those able to translate their concerns into language that resonates within that discourse.[246]

Human rights norms might help domestic regulators move beyond a minimalist conception of transparency as public access to government information, and broaden reflexive rulemaking beyond regulated industries. A robust conception of transparency must grapple not only with access to government information but also with the equally significant issues of how and whether information is communicated in a fashion that fully enables public participation,[247] and who bears the costs associated with transparency. These latter questions are particularly important in the global warming context because, given the levels of uncertainty, the perceived legitimacy of any regulatory decision will be tied directly to the level of trust the public rests in the decisionmaker. Meeting this obligation more fully might sometimes entail simplifying and clarifying information to make it

"have a direct and material interest in the subject of a standard." AM. PETROLEUM INST., PROCEDURES FOR STANDARDS DEVELOPMENT 2 (3rd ed. 2006), *available at* http://mycommittees.api.org/standards/Reference/apistndrdsdevlpmntprcdrs.pdf. From API's perspective, striving for "balanced representation" means representation for operator-users, manufacturers, and consultants. *Id.* at 2–3. Notably absent from the list are affected communities or environmental groups. *See id.* at 2–10. By contrast, under the Administrative Procedures Act, any interested persons can participate in a rulemaking, 5 U.S.C §553(c), without in any way limiting the population that qualifies as "interested." *See* Sean Croston, *The Petition is Mightier than the Sword: Rediscovering an Old Weapon in the Battle Over Regulation Through Guidance*, 63 ADMIN. L. REV. 381, 393 (2011)(noting that a broad academic or policy interest in the topic is more than enough to qualify participation in an APA rulemaking or petition).

[246] *See supra* note 233 and accompanying text.

[247] For an exploration of this question in the context of public education, see Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 VILL. L. REV. 297, 318–25 (2008). More generally, *see also* Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 67, 68-69 (Seyla Benhabib ed., 1996) (providing a conception of the democratic process based on equal access to deliberative processes).

more accessible. At other times, when information is simply too technical to be accessible to lay readers and the wider community, fulfilling this obligation might mean providing the resources for interested groups to hire independent experts able to represent their interests in this process.[248] A decade ago, EPA's Science Advisory Board concluded that when properly structured, the kind of enhanced participation that human rights law contemplates can result in high-quality scientific decisions.[249]

Prior Informed Consent

Along the same lines, embracing rigorous prior informed consent procedures might be a way to address the significant perceptual disconnect that often exists between those making regulatory decisions and those affected by the decisions. There is often a profound distrust between the regulators and the intended beneficiaries of human health and environmental regulation, including the perception that the regulators share the world views, interests and values of the regulated parties, rather than those of the regulation's intended beneficiaries. The so-called revolving door between industry and government is emblematic of this problem. Those selected to head regulatory agencies often come from the industries they regulate, and then return to those industries after leaving the government. For example, President George W. Bush appointed Philip A. Cooney of the American Petroleum Institute as chief of staff of the White House Council on Environmental Quality.[250] After leaving that post after it was discovered that he had edited scientific reports in order to downplay evidence of climate change, Mr. Cooney went to work for Exxon Mobil.[251] Similarly, when David Lauriski became head

[248] There is some precedent for this kind of support for communities in the Superfund Technical Assistance Grants. *See* Env't Prot. Agency, *Technical Assistance Grants*, http://www.epa.gov/superfund/community/tag/ (last visited May 28, 2011).

[249] *See* U.S. ENV'T PROT. AGENCY, IMPROVED SCIENCE-BASED ENVIRONMENTAL STAKEHOLDER PROCESSES: A COMMENTARY BY THE EPA SCIENCE ADVISORY BOARD 1–2 (2001), *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/CEE3F362F1A1344E8525718E004EA078/$File/eecm01006_report_appna-e.pdf.

[250] *See* Andrew C. Revkin, *Bush Aide Softened Greenhouse Gas Links to Global Warming*, N.Y. TIMES, June 8, 2005, http://www.nytimes.com/2005/06/08/politics/08climate.html.

[251] Andrew C. Revkin, *Former Bush Aide Who Edited Reports is Hired by Exxon*, N.Y. TIMES, June 15, 2008, at A21.

of the Mine Safety and Health Administration, he promptly acted on a petition to water down worker protection regulations—a petition submitted by himself years earlier on behalf of his former employer Energy West Mining Company.[252] Upon leaving the government, Lauriski went to work for John T. Boyd Co., a mining consultancy.[253] Other examples abound.[254]

One of the major criticisms leveled at the Mineral and Mining Service (MMS), even before the BP oil spill, was that of a revolving door between industry and the agency.[255] A human rights-based approach to environmental regulation might have reshaped the regulatory prelude and response to the most significant United States environmental disaster—the BP oil spill in the Gulf of Mexico. As described above, the NEPA requirement that the agency prepare an EIS before making a decision about leasing already serves a number of purposes related to those captured by emerging international environmental norms. First, an EIS promotes transparency, by requiring the government to identify proposed actions and to solicit comments thereon. Second, an EIS promotes participation by allowing all interested to comment.[256]

However, the EIS requirement would be enhanced if it were interpreted in concert with the emerging international environmental norm of prior informed consent and the right to environmental information. These norms embody a different and more robust concept of public participation than currently seen in United States law. They require the government to make this right concrete by actively soliciting participation from those who might

[252] Christopher Drew & Richard A. Oppel Jr., *Friends in the White House Come to Coal's Aid*, N.Y. TIMES, Aug. 9, 2004, at A1.

[253] Christopher W. Shaw, CENTER FOR STUDY OF RESPONSIVE LAW, UNDERMINING SAFETY: A REPORT ON COAL MINE SAFETY 43 (2008), *available at* http://www.csrl.org/reports/UnderminingSafety.pdf.

[254] For example, Open Secrets keeps a cumulative list of individuals it claims have revolved between industry and regulatory agencies. Revolving Door: Top Agencies, OpenSecrets.org, http://www.opensecrets.org/revolving/top.php?display=G (last accessed May 28, 2011). The list totals in the thousands.

[255] *See, e.g.*, Mark Thompson, *Washington's Revolving Door: How Oil Oversight Failed*, TIME,June 9, 2010, http://www.time.com/time/nation/article/0,8599,1995137,00.html; Thomas Frank, *The Gulf Spill and the Revolving Door*, WALL ST. J., May 12, 2010, http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704250104575238562718885050.html.

[256] *See supra* notes 214–220 and accompanying text.

otherwise not participate in the decisionmaking process.[257] If NEPA were interpreted along those lines, voices that typically do not get attention before post-decisionmaking litigation, if indeed they are heard at all, would become an integral part of shaping the EIS inquiry itself. As a result, the government would hear a more diverse array of voices when they could do more good—when the government is deciding the scope of activity to investigate, rather than at a later litigation phase challenging a decision that is already a *fait accompli*. In particular, embrace of the human rights concept of prior informed consent would give affected communities the sense that they had some control over their destiny.

Overall, a human rights framing could help agencies facilitate wide-spread public participation, including those currently excluded, *de facto* if not *de jure.* Such a result would enhance the democratic legitimacy of regulatory decisionmaking under NEPA, and would also improve the quality of the actual decisions themselves.[258] This kind of participatory process also supplies the requisite "world known in common" that sociological research tells us is necessary for trust.[259] Because so much of the human

[257] *Cf.* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 654–67 (1992) (advocating for such requirements through environmental poverty law). *See also* Jason Corburn, *Environmental Justice, Local Knowledge, and Risk: The Discourse of a Community-Based Cumulative Exposure Assessment*, 29 ENVTL. MGMT. 451 (assessing the environmental justice credentials of cumulative risk assessments).

[258] The Danish Board of Technology offers a model for this kind of participatory approach—with members appointed from a wide-range of constituents and the Board acting as an advisor to Parliament. *See* Act on the Danish Board of Technology (Act No. 375/June 14, 1995) (Den.), *translated at* http://www.tekno.dk/subpage.php3?page=statisk/uk_act.php&toppic=aboutus&language=uk. For a first-hand account of participating in one such Board, see Casper Bruun Jensen, *Citizen Projects and Consensus-Building at the Danish Board of Technology: On Experiments in Democracy*, 48 ACTA SOCIOLOGICA 221 (2005).

[259] *Cf.* Harold Garfinkel, *Studies of the Routine Grounds of Everyday Activities*, 11 SOC. PROBLEMS 225, 227 (1964). Garfinkel's infamous breaching experiments underscore how basic these constitutive assumptions of a common set of rules are within a society. In some of these experiments, Garfinkel had students try to pay more than the price for an item at a store, shop by taking items from the grocery carts of others, and by changing the rules of tic-tac-toe mid-game. He used these experiments to demonstrate the existence of an unspoken set of assumptions about the course of everyday interactions, what he called a "common moral order of the facts of collectivity life." *Id.* at 239–43. His work showed that disruption of these expectations caused extreme distress, anger and anxiety.

rights discourse surrounding environmental rights focuses on participation and access to information, the NEPA EIS process is a place where learning from human rights norms might enrich the domestic regulatory process.

Because it would give typically under-represented groups a clearly-defined role in the conduct of an environmental assessment, the human-rights enhanced EIS process described above would also help promote an additional emerging international norm—intergenerational equity. Particularly where irreversible changes are contemplated, intergenerational equity would put a thumb on the scale for precaution—for sustainably managing and preserving rather than overexploiting resources. EPA has already begun to embrace this concept, rejecting a narrow economic vision of social welfare that denies the obligation of intergenerational equity either because we cannot know future preferences or because future generations are presumed to be wealthier and therefore more able to absorb costs that present generations pass on to them.[260]

In its December 2009 Endangerment Finding, EPA explicitly and repeatedly found that greenhouse gas emissions threatened the public health, and the public welfare of current and future generations.[261] EPA defended its consideration of future harms and future generations as appropriate given the time scale of expected effects.[262] In doing so, the agency harkened back to the earliest days of the Clean Air Act and to the judicial finding that the statute is precautionary in nature.[263] This judicial finding built on the

[260] Many environmental economists use ignorance of future preferences as grounds for rejecting calls for protecting the environment in the name of intergenerational equity. For these thinkers, intergenerational equity is satisfied whenever future generations are left a mix of social, natural and economic capital equivalent to what present generations enjoy. *See* Robert M. Solow, *Sustainability: An Economist's Perspective*, *in* ECON. OF THE ENV'T 179 (Robert Dorfman & Nancy S. Dorfman eds., 3d ed. 1993). Under this rationale, converting natural capital to economic capital has no effect on future generations because money and natural resources are fungible. For a critique of this point, see Bryan Norton, *Sustainability: Descriptive or Performative?*, *in* THE MORAL AUSTERITY OF ENVTL DECISIONMAKING 51, 57–62 (John Martin Gillroy & Joe Bowersox eds., 2002).

[261] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) [hereinafter Endangerment Finding].

[262] *Id.* at 66,514.

[263] *Id.* at 66,506–07.

Congressional legislative history indicating that the Clean Air Act was intended to prevent harm *before* it occurred and was thus precautionary rather than reactive.[264]

This decision to include harms to future generations within the realm of issues to be considered in assessing endangerment is clearly not a wholesale endorsement of the internationally-developing notion of intergenerational equity. Nor is it at all comparable to the Philippine Supreme Court's endorsement of the rights of future generations in *Oposa*.[265] It is, however, a beginning. In making this finding, EPA has opened a dialogue that may lead to genuine regulatory consideration of questions of intergenerational equity. In doing so, EPA acted solidly within the spirit of NEPA which states:

> "it is the continuing responsibility of the Federal government to use all practicable means, consistent with other essential considerations of national policy, to [ensure] . . . that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[266]

Similarly, the National Park Service Act specifically identifies the preservation of national parks and monuments for future generations as the fundamental purpose for which the Park Service was founded.[267] In addition, the Coastal Zone Management Act,[268] and the Nuclear Waste Policy Act[269] also identify protecting future

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[264] *Id.*

[265] *See* Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792 (S.C., July 30, 1993) (Phil.).

[266] National Environmental Policy Act, 42 U.S.C. § 4331(b).

[267] Section 1 of the National Park Service Act states:

> The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

National Park Service Act of 1916, 16 U.S.C. § 1 (2006).

[268] *See* Coastal Zone Management Act, 16 U.S.C. § 1452(1) (2006) (declaring a national policy "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations").

[269] Nuclear Waste Policy Act, 42 U.S.C. § 10131(a)(7) (2006) (finding that "appropriate precautions must be taken to ensure that [high-level radioactive] waste and spent [nuclear] fuel do not adversely affect the public health and safety

generations as part of their statutory purpose.

Throughout its endangerment finding, EPA relied extensively on the work of the Intergovernmental Panel on Climate Change (IPCC), particularly its 2007 Report.[270] This resort to the accumulated wisdom of an internationally-constituted (albeit intergovernmental) organization may signal a broader willingness to engage with and draw on international sources. Thus, the twin decisions to predicate the Endangerment Finding in part on harms to future generations, and in part on the scientific work compiled by the IPCC may indicate a new path for regulatory decisionmaking in the climate change context.

CONCLUDING NOTE

What makes environmental regulation so difficult is not necessarily a lack of commitment to environmental goods, but rather competing visions of how to balance between these goods and other social priorities. Too often environmental concerns are pitted against powerful economic interests in a zero sum fashion. For example, despite the worst environmental disaster in United States history, unabashed and explicit concerns for the continued viability of the deepwater drilling industry animated the *Hornbeck* decision striking down the Department of Interior's decision to impose a sixty-day deepwater drilling moratorium.[271] This moratorium was explicitly for the purposes of allowing the agency to learn from the disaster about the needed safety and environmental changes that were necessary to protect the public.

Because the regulatory prelude to the BP oil spill was also poorly managed, with inaccurate and incomplete NEPA documents rubber-stamped by the agency,[272] and safety inspections allegedly completed by the company itself,[273] it also raises the question of

and the environment for this or future generations").

[270] *See* Endangerment Finding, *supra* note 261, at 66,510–12 (*citing* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE WORKING GROUP II, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULERNABILITY (2007)).

[271] *See* Hornbeck Offshore Servs. v. Salazar, No. 10-1663, order at 6 (E.D. La. June 22, 2010). All of the court documents in the case can be found at http://www.laed.uscourts.gov/OilSpill/OilSpill.htm.

[272] *See* DEPT. OF INTERIOR, OFFICE OF INSPECTOR GEN., Investigative Report—Island Operating Company, et al. 7 (May 24, 2010) (describing how company personnel would fill out inspection forms in pencil and agency inspectors would trace the pencil writing in ink and then turn in the forms).

[273] National Commission on the BP Deepwater Horizon Oil Spill and

whether engagement with environmental human rights norms might have restrained the government and encouraged it to more fully exercise the regulatory powers it already possessed.[274]

When a government does not care about the environment and bends existing law to avoid giving it force, can human right norms make a difference? I think the answer is a resounding yes. A government bent on violating human rights can certainly do so. But, the existence of a vibrant culture of human rights means that it can no longer do so with impunity. If existing United States environmental regulatory processes had been imbued with more of a human rights sensibility it would have been much more difficult to play fast and loose with environmental requirements in the Gulf of Mexico. Because human rights discourse offers a well-institutionalized international regime,[275] it offers an attractive vantage point from which to begin the culture shift that will make scenarios like the BP oil spill less likely.

That said, the relationship between international law and domestic law is a fraught question in the United States. Several Supreme Court justices[276] and numerous elected representatives[277]

Offshore Drilling 81-85 (Jan. 2011); *see also* Juliet Eilperin, *US Exempted BP's Gulf of Mexico Drilling from Environmental Impact Study*, WASH. POST, May 5, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050404118.html.

[274] To say this is not to diminish the disastrous series of private decisions that BP made on the day of the blowout. These decisions are unquestionably the cause of the disaster. *See, e.g.*, *Letter from Reps. Henry Waxman and Bart Stupak on Behalf of the H.R. Comm. on Energy and Commerce to Tony Hayward, BP Chief Executive Officer*, WALL ST. J., June 14, 2010, *available at* http://online.wsj.com/public/resources/documents/WSJ-20100614-LetterToHayward.pdf (detailing five crucial decision points in the day before the Deepwater Horizon blowout at which BP made poor choices by electing to achieve cost savings at the expense of safety). However, the relaxed regulatory context undoubtedly contributed to the climate in which BP felt empowered to place its short-term profit interests over the public's safety.

[275] Regimes are typically defined as the principles, rules, norms and decisionmaking procedures around which expectations converge. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 185 (1982). *See also* Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599, 602 (1986) (offering a slightly narrower definition of regimes as the "norms and decisionmaking procedures accepted by international actors to regulate an issue area").

[276] Justice Scalia in particular has expressed hostility to the use of foreign law. For example, in 2004, Justice Scalia told the American Society of International Law that "It is my view that modern foreign legal material can never be relevant to any interpretation of, that is to say, to the meaning of the U.S. Constitution." *Scalia Skeptical about International Law in U.S. Courts*, MARIN INDEP. J. (San

are on record for the proposition that resorting to international law to understand United States law, particularly constitutional law, is inappropriate. In 2002, for example, Supreme Court Justice Clarence Thomas admonished his fellow justices not to "impose foreign moods, fads, or fashions on Americans."[278]

The recent healthcare debate underscored the political

Rafael, Cal.), Apr. 3, 2004, *available at* http://www.freerepublic.com/focus/f-news/1110916/posts. In various opinions, he has objected to the use of international law as inappropriate, irrelevant and ought to be rejected out of hand. Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) ("T]he basic premise of the Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand."); Lawrence v. Tex., 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (characterizing references to foreign and international law as "[d]angerous"); Atkins v. Va., 536 U.S. 304, 347 (2002) (Scalia, J., dissenting) (describing as "feeble" the courts references to world community opinion); Thompson v. Okla., 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (characterizing as irrelevant the consensus among most foreign nations prohibiting capital punishment for minors); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) ("We think such comparative analysis inappropriate to the task of interpreting a constitution . . . "). Justice O'Connor, by contrast, has stated that "conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts." Sandra Day O'Connor, Assoc. Justice of the U.S. Supreme Court, Remarks at the Southern Center for International Studies (Oct. 28, 2003), http://www.southerncenter.org/OConnor_transcript.pdf. She viewed this interchange, which she called "transjudicialism" as enriching United States law. *Id.*

[277] For example, while he was House Majority Leader, Tom DeLay characterized Supreme Court references to international law as "outrageous," and said that the House Judiciary Committee was reviewing the activities of Justices on the Supreme Court. *DeLay Rips Justice Kennedy*, FOXNEWS.COM, Apr. 20, 2005, http://www.foxnews.com/story/0,2933,154009,00.html. Numerous bills have been introduced in state legislatures and in Congress purporting to prohibit judges from referencing international or foreign law. S*ee* Aaron Felsmith, *Int'l Law and Foreign Law in the U.S. State Legislatures,* ASIL INSIGHTS, May 26, 2011, http://www.asil.org/insights110526.cfm (detailing the various bills and constitutional amendments against use of foreign law that have been introduced or passed in state legislatures since 2010). For news coverage of two recent proposals, *see* Scott Maxwell, *Politicians vs. Judiciary: A Misguided War*, ORLANDO SENTINEL, Mar. 15, 2011, http://articles.orlandosentinel. com/2011-03-15/news/os-scott-maxwell-judicial-assault-03120110315_1_casey-anthony-case-rulings-federal-courts (describing a proposed federal law); Michael Biesecker, *Bill Would Ban Courts from Using 'Foreign Law,'* NEWS OBSERVER, Apr. 28, 2011, http://www.newsobserver.com/2011/04/28/1159062/
bill-would-ban-courts-from-using.html (describing a North Carolina Law).

[278] Foster v. Fla., 537 U.S. 990, n.* (2002) (Thomas, J., concurring) (denying cert.).

tensions of looking outside our borders for regulatory models.[279] This isolationist stance finds support in a popularly-held Panglossian vision of United States law as the best, truest and fairest of possible legal systems. The logical corollary of this belief is a disinclination to look elsewhere for guidance—if what exists here is already the 'best of all possible worlds' any resort to foreign or international law will degrade rather than enhance domestic legal processes. This nativist approach is dead wrong, both factually untrue (the United States has an impressive legal system to be sure, but it has many structural flaws in urgent need of remedy) and analytically unproductive. Time is too short, and the problems we face are too grave to allow parochial boosterism to continue to keep valuable tools and information out of the hands of those sworn to protect the public from harm. We must be willing to both learn from the successes (and failures) of others, and allow them to learn from us in a similar fashion. Looking to international human rights law for models and ideas will improve domestic regulation both by encouraging regulators to make giving real content to environmental statutes a central part of their mission, and by offering them tools by which to do this.

To say this is not to deny that giving content to those rights remains an enormous challenge. Despite an impressive body of normative law, the on-the-ground, real world success in implementing the human rights norms that international law articulates is too often measured in inches. Progress is slow, even as environmental threats continue to mount. The identical, error-riddled spill prevention plans that the Mineral and Mining Service

[279] The so-called "tea party" movement grew from opposition to congressional attempts to reform health care in the United States. Much of the rhetoric fueling this opposition was the accusation that health reform proposals were too influenced by approaches to health care in countries other than the United States. For a typical example of this rhetoric, see *Intolerable Acts and Tea Parties*, FIX HEALTH CARE POL'Y, Mar. 22, 2010, http://fixhealthcarepolicy.com/health-care-news/intolerable-acts-and-tea-parties/#more-3256. Similarly, some prominent Republican political leaders have accused the administration of wanting "to turn us into France." *See, e.g.*, Evan McMorris-Santoro, *McConnell, Cantor and Paul Warn GOPers at KY Breakfast: Dems Will Destroy America!*, TALKING POINTS MEMO, Aug. 7, 2010, http://tpmdc.talkingpointsmemo.com/2010/08/paul-mcconnell-and-paul-warn-gopers-at-ky-breakfast.php (quoting McConnell as saying "We decided when they decided they were going to turn us into France, we were going to say no."); *see also* S.A. Miller & Sean Lengell, *McConnell: Democrats will 'turn us into France'*, WASH. TIMES, May 12, 2008, at A1.

rubberstamped for BP and other drillers in the Gulf of Mexico provides a stark reminder that the laws are only as good as those charged with enforcing them. Too often regulators have failed to implement key environmental laws like NEPA, and enforcement has been in half-measures. While the regulators sleep, environmental degradation and pollution continues largely unchecked.[280]

Regulators will need to sharpen their tools, and to wield them with vigor as they respond to climate change.[281] If we do not take effective actions, and soon,[282] the aggregate consequences of human activity may threaten the very existence of life on earth.[283] For example, Dr. James E. Hansen, Director of the NASA Goddard Institute for Space Studies, and NASA's top climate scientist, has stated: "In my opinion there is no significant doubt (probability > 99%) that . . . additional global warming of 2°C would push the Earth beyond the tipping point and cause dramatic climate impacts including eventual sea level rise of at least several meters, extermination of a substantial fraction of the animal and plant species on the planet, and major regional climate disruptions."[284]

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[280] Of course, some question the entire concept of "the natural"—pointing to millennia of human manipulation of ecosystems and species as evidence that there is no such thing. *See also* Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 CASE W. RES. L. REV. 51, 74-80 (2004) (situating various environmental visions of the natural in a religious context).

[281] For a prescription of what to do, see Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. REV. 237 (2011) (advocating for using a theory of diagonal federalism to develop more effective crosscutting regulatory approaches).

[282] *See* Mark Malloch Brown, *Window of Opportunity*, 17 OUR PLANET 2, at 5, (urging immediate action), *available at* http://www.unige.ch/gepp/Documents/op_english_17v2.pdf; *see also* James Hansen, et al., *Target Atmospheric CO_2: Where Should Humanity Aim?* 2 OPEN ATMOS. SCI. J. 217, 228–29 (2008) http://arxiv.org/ftp/arxiv/papers/0804/0804.1126.pdf (urging immediate action to reduce atmospheric carbon below 350 ppm).

[283] *See* FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE: 2006 6–8 (2007), *available at* http://www.fao.org/docrep/009/A0699e/A0699e00.htm; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Dec. 26, 1996, 1954 U.N.T.S. 3, 108–11; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE WORKING GROUP II, *Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 5-9 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf.

[284] Declaration of James E. Hansen at ¶ 81, Green Mountain Chrysler-

In the face of this impending catastrophe, the legal project seems stymied, with the international community unable even to negotiate an international successor agreement to the Kyoto Protocol,[285] and the United States Senate abandoning attempts to pass climate change legislation.[286] EPA is currently under siege[287]

Plymouth-Dodge-Jeep v. Torti, 508 F. Supp. 2d 295 (D. Vt. 2007).

[285] The failure of the United Nations Framework Convention on Climate Change conference, held in Copenhagen in December of 2009 to produce a binding agreement for reducing carbon emissions, is well recognized. *See, e.g.*, Markus Becker, *Gunning Full Throttle into the Greenhouse*, SPIEGEL ONLINE, Dec. 19, 2009, http://www.spiegel.de/international/world/0,1518,668111,00.html; John Vidal, Allegra Stratton & Suzanne Goldenberg, *Low Targets, Goals Dropped: Copenhagen Ends in Failure*, GUARDIAN, Dec. 19, 2009, http://www.guardian.co.uk/environment/2009/dec/18/copenhagen-deal. The so-called Copenhagen Accord, recognized at the close of the meeting did not live up to the aspirations of the participants either substantively or procedurally. *Copenhagen Accord 'disappointing': PM*, THE TIMES OF INDIA, Jan 3, 2010, http://www.timesnow.tv/Copenhagen-Accord-disappointing-PM/articleshow/4335542.cms (describing the Accord as a "face-saver" after states failed to agree on a plan to combat climate change); Mark Kenny, *Anger Over Copenhagen Accord*, HERALD SUN, Dec. 19, 2009, http://www.heraldsun.com.au/news/national/anger-over-copenhagen-accord/story-e6frf7l6-1225812063053 (describing frustration with the Accord); World Wildlife Fund, *The Copenhagen Accord: A Stepping Stone?* 4 (Jan. 2010) http://www.worldwildlife.org/climate/Publications/WWFBinaryitem20099.pdf (describing the Accord's weaknesses but also its potential). Substantively, the Accord allows states to set their own targets, and for the most part to verify their own compliance with those targets. *See* David Hunter, *Implications of the Copenhagen Accord for Global Climate Governance*, 5-8 (Spring 2010)(describing details of the Accord); Jo Couzins, *Fury as Climate Deal Recognized by UN*, SKY NEWS, Dec. 19, 2009, http://news.sky.com/skynews/Home/World-News/Copenhagen-Accord-Hailed-As-First-Step-By-World-Leaders-Branded-Toothless-By-Campaigners/Article/200912315504304?f=rss. Procedurally, the Accord was hatched between five countries and then "recognized" by the parties after negotiations on a new agreement ended in stalemate. John M. Broder, *Many Goals Remain Unmet in 5 Nations Climate Deal*, N.Y. TIMES, Dec. 18, 2009, http://www.nytimes.com/2009/12/19/science/earth/19climate.html?pagewanted=all; John Vidal et al., *Low Targets, Goals Dropped: Copenhagen Ends in Failure*, GUARDIAN, Dec. 19, 2009, http://www.guardian.co.uk/environment/2009/dec/18/copenhagen-deal.

There was much resentment over the last minute "take it or leave it" nature of this accord, once again underscoring the critical importance of transparency and participation to legitimacy. *Fury Erupts at UN Climate Talks,* Dec. 19, 2009, http://www.terradaily.com/reports/Fury_erupts_at_UN_climate_talks_999.html (quoting diplomats describing the Accord as a "coup de etat" and a "betrayal").

[286] Evan Lehmann, *Senate Abandons Climate Effort, Dealing Blow to President,* N.Y. TIMES, July 23, 2010, http://www.nytimes.com/cwire/2010/07/23/23climatewire-senate-abandons-climate-effort-dealing-blow-88864.html.

[287] *See U.S. House Battles Over U.S. EPA Greenhouse Gas Regulations*,

for its attempt to step into the breach and use its legal mandate under the Clean Air Act to regulate carbon dioxide,[288] thereby making some small regulatory step toward preserving and protecting the earth's ecosystems. It is clear that their work would be further improved by invocation of human rights norms to inform these existing environmental decisionmaking processes. It is not clear, however, that such an invocation would support rather than undermine the agency's political position. It would indeed be unfortunate were parochial conceptions of law to keep useful tools out of the hands of regulators amidst a growing sense of environmental crisis. Yet, the relationship between the legislature and regulators exercising delegated authority means that this vulnerability is an inherent aspect of choosing to focus on regulators as a locus of "authoritative decision." While there is much promise to pursuing that choice, the promise comes with short-term perils.

Yet over time, I am convinced that reasonable minds will prevail, and the obvious utility of looking to international human rights to improve domestic environmental regulation will silence, if not convert, the nay-sayers. The complex and ambiguous nature of the environmental challenges we face demands no less. Successfully responding to these challenges requires a dynamic balancing process capable of accounting for rapid technological change amidst conflicting national imperatives. Using human rights norms to interpret existing statutory rights and regulatory responsibilities can help build a more vibrant and effective environmental regulatory regime, and we cannot afford not to take advantage of that possibility.

ENV'T NEWS SERVICE, Feb. 9, 2011, http://www.ens-newswire.com/ens/feb2011/2011-02-09-01.html.

[288] *See supra* note 261 and accompanying text.