

AN ENVIRONMENTAL CALL TO ACTION

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The dust from the 2016 presidential election has not yet settled, but with each new transition appointment, the implications for environmental and energy policy grow more ominous.¹ Although nary a word about these issues was uttered on the campaign trail, the stars are aligning for a wholesale course reversal on more than 40 years of progress toward providing clean air and clean water for human communities, on domestic policies to slow the accelerating pace of species extinctions, and on nascent international efforts to confront the existential threat of climate change. In response, environmental protection advocates are gearing up for the fight of their lives, and the remaining pro-conservation forces in Congress are promising to hunker down for the long haul. But with executive appointees poised for regulatory rollbacks and Congress poised for legislative rollbacks, even that full court press may not be enough to avoid the unraveling of environmental law and with it, the very planet that sustains us.

This essay suggests that, given continued strong public support for protecting our communities and the environment from the ravages of human pollution and degradation, we might borrow a page from Larry Kramer's 2004 book on "popular constitutionalism," *The People Themselves*.² Kramer's central, and not uncontroversial, thesis that "the people" should be actively involved in the ongoing interpretation and enforcement of constitutional law follows from his historical and normative critique of the outsized role that our elite judiciary

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1. Among others, these include: (1) for Administrator of the Environmental Protection Agency, Scott Pruitt, the climate denying Oklahoma Attorney General who has championed many lawsuits to rollback EPA rules; (2) for Secretary of the Department of Energy, Rick Perry, the former Texas Governor aligned closely with the fossil fuel industry; (3) for Secretary of State, Rex Tillerson, the current CEO of ExxonMobil, a leading corporate sponsor of climate denying advocacy; and (4) for Secretary of the Department of the Interior, Ryan Zinke, a sitting Montana congressman who supports expanding oil and gas development and other resource extraction on federal public lands.

2. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

has come to play in resolving modern constitutional questions. A similar critique can be, and to some extent has been,³ leveled in the environmental law realm. Motivated by the most visible consequences of industrial development—rivers on fire, urban air chocked with smog, our majestic national symbol, the Bald Eagle, decimated by pesticides and headed toward extinction—the environmental statutes adopted in the early 1970’s aspired to lofty goals that most people could readily understand and support.⁴ Over the intervening decades, however, their implementation necessarily became embroiled in highly technical, science-based questions. The distance thereby created between the sausage-making process and the lives of ordinary citizens has allowed clever opponents to frame environmental protection efforts as “job killers” imposed by out-of-touch coastal elites. The question I pose here is: Can we use the stunning results of the 2016 election to breathe new life into what might be called “popular environmentalism”?

In response to economic and demographic dislocation, there is little question that a wave of populism is sweeping the globe. But in many places, it is a populism untethered to a positive vision for the future that threatens to pull us into the expanding worldwide authoritarian undertow, where expediency and raw power trample democratic ideals. Cognitive scientists warn that progressives cannot win this epic struggle with facts and figures alone, no matter how frustrating that feels. Because our mental frames are inherently built on values,⁵ those advocating for ecological sustainability should, I submit, return to the movement’s roots and start by reframing the core arguments in moral terms.

In the end, most people want to bequeath a livable planet to their children and grandchildren, and public opinion polls continue to show majority support for policies that will do so, notwithstanding the 2016 election.⁶ That sentiment

3. See Michael Shellenberger & Ted Nordhaus, *The Death of Environmentalism: Global Warming Politics in a Post-Environmental World*, (2004), http://www.thebreakthrough.org/images/Death_of_Environmentalism.pdf.

4. For example, the first sentence of the National Environmental Policy Act of 1970 reads: “The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” 42 U.S.C. § 4321. Likewise, the stated objective of the Clean Water Act of 1972 is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. To meet this objective, Congress declared “the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.” *Id.*

5. See generally GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE (2004).

6. For example, Gallup environmental trend polls show that, in 2016, 56 percent of respondents agreed with the statement that “protection of the environment should be given priority, even at the risk of curbing economic growth,” versus 37 percent who agreed that “economic growth should be given priority, even if the environment suffers to some extent.” *Environment*, GALLUP, <http://www.gallup.com/poll/1615/environment.aspx> (last visited Jan. 20, 2017). Similarly, a Pew Research Center poll conducted from November 30 to December

should be our touchstone. Especially in the “post-truth” world in which we find ourselves at this moment in history, where scientific facts are dismissed as irrelevant or unimportant,⁷ environmental advocates would be wise to fall back on the movement’s first principles, repeating them often and loudly. Mr. Trump used this psychological stratagem to capture the White House; the difference is that environmental champions actually have scientific truth and moral righteousness on their side.

So what might a values-centric strategy look like? First off, environmental lawyers and activists need not abandon their traditional tools. In the deregulation battles that are sure to come, legal experts undoubtedly will argue strenuously at every turn against dilution of the Obama Administration’s environmental legacy—much of it in the form of rules adopted after years of stakeholder processes and significant compromise—both at the agency (deregulatory) rulemaking stage and then in the courts.⁸ By design, liberal democracies, and the administrative bureaucracies that ultimately do their bidding, grind slowly and deliberately. And the courts grind even more slowly still. An approach that uses legitimate government processes to delay the dismantling of hard-won environmental protection is the same game that corporate stakeholders frequently play, in reverse, to avoid new rules requiring polluters to internalize

5, 2016 found that 59 percent of respondents agree that stricter environmental laws and regulations are worth the cost as compared to 34 percent who believe that such regulations cost too many jobs and hurt the economy. Kristen Bialik, *Most Americans Favor Stricter Environmental Laws and Regulation*, PEW RESEARCH CENTER: FACT TANK (Dec. 14, 2016), <http://www.pewresearch.org/fact-tank/2016/12/14/most-americans-favor-stricter-environmental-laws-and-regulations/>.

7. For its Word of the Year 2016, the Oxford Dictionaries chose “post-truth,” an adjective defined as “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.” *The Word of the Year 2016 Is...*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> (last visited Jan. 20, 2017).

8. These Obama-era rules, often enacted because a Republican-dominated Congress refused to take up affirmative legislation, include, among others, the so-called “Clean Power Plan” rule (addressing power plant carbon emissions as the first step toward implementing the historic international Paris Agreement under the United Nations Framework Convention on Climate Change), the “Waters of the United States” rule (addressing gaps in implementation of the Clean Water Act left by a spate of confusing Supreme Court cases), the mercury and toxic standards rule (addressing mercury and other toxic emissions from power plants), the cross-state pollution rule (addressing downstate protection against upstate ozone and particulate emissions from power plants), the general haze rule (addressing industrial plant air emissions), and the methane emissions rule (addressing methane, a powerful greenhouse gas, and other toxic emission at oil and gas fields). Ironically, as Oklahoma Attorney General, EPA Administrator nominee Scott Pruitt championed red state and industry legal challenges to each and every one of these rules. Most observers believe that EPA will quickly commence administrative rulemaking proceedings to rescind at least some, if not all, of the rules. The two other prongs of a deregulation strategy are: (1) declining to defend in court those rules that are still under legal challenge by industry; and (2) declining to enforce rules that remain on the books, a tactic that is difficult to counter because the exercise of such “prosecutorial enforcement discretion” is essentially unreviewable by the courts.

the social costs of their actions. Smart, savvy environmental lawyers in non-profit organizations, government agencies, and to some extent the private sector will surely lead these legal efforts.

Likewise, those environmental organizations with lobbying capacity – or who might quickly develop it—will play a pivotal role in holding back the legislative dam that seems about to burst. Congress has not significantly touched our bedrock environmental laws for decades, even though many could benefit from surgical updating to better address contemporary threats, for fear that any legislative reopening will be their complete undoing. With a virtual lock on the executive and legislative branches at the federal level, those advocating for environmental deregulation are now salivating at the prospect of breaking open the Clean Water Act, the Clean Air Act, the Endangered Species Act, the National Environmental Policy Act, and other core statutes. In the absence of a credible veto threat at the White House and in the presence of a congressional membership that is arguably the most anti-government in our lifetimes, the environmental caucus in Congress faces an enormous challenge. First, Senators, aided by their colleagues in the House, must use the confirmation process to daylight and publicize the radical agendas of many appointees who hope to undermine the very mission of the agencies they would head. And second, pro-environment members of Congress must use the imperiled Senate filibuster and other procedural maneuvers to avoid legislative disaster. Here, too, the knowledge and skills that lawyers bring to the table will be critical for preparing friendly legislative staff to engage this “all in” struggle.

But if we learned anything from this election, it is that we need to win (or recapture) the hearts and minds of the public. My fear is that traditional executive, legislative, and judicial branch tactics, which worked more or less successfully during the environmental deregulatory zeal of the Reagan and Bush years, cannot alone save the day. The zeitgeist unquestionably has changed. Today, our technical efforts as lawyers, scientists, and economists need a more explicit moral underpinning. There is little use, for instance, in taking to the floor of Congress (or the pages of Facebook) to argue the indisputable science of climate change when the fossil fuel industry so successfully invokes the shibboleth that pollution reduction rules are really just “Obama’s war on coal” and on America’s coal-mining families. It is not enough to point out the obvious: Why on earth would Obama want to wage a war on coal miners? To gain public salience and traction, we need to ground the unassailable scientific arguments (about the devastating global and personal health impacts of coal mining, for example)⁹ and the evidence-based economic arguments (about the inability of

9. Ironically, coal miners and their families suffer the greatest harm from our continued reliance on this fossil fuel, experiencing the same air quality and climate impacts as the general public from coal combustion, as well as much more immediate and concentrated personal health impacts associated with workplace, residential, and localized exposure to coal dust. *See, e.g.,* ALAN H. LOCKWOOD, ET AL., COAL’S EFFECT ON HUMAN HEALTH: A REPORT FROM PHYSICIANS FOR SOCIAL RESPONSIBILITY (2009), <http://www.psr.org/assets/pdfs/psr-coal->

coal to compete in the marketplace without increased government subsidies, for example) in the language of values and rights. Ironically, environmental advocates have quite deliberately distanced themselves from such language over the years in an effort to enhance their legitimacy and credibility among the corporate, academic, and political elites.

This is where “popular environmentalism” enters the equation. Those who care deeply about the future of the planet must come together to fashion a cohesive message that carries the moral imperative of sustainable ecosystems to the steps of the Capitol and the courthouse. At least 92 nations—notably not including the United States—have recognized the right to a healthy environment as a fundamental human or civil right.¹⁰ As American democracy roils and churns in response to the disheartening election of Donald Trump, why not make the modest mantra “a right to a healthy environment” the central organizing principle of a reinvigorated movement? Grounded in the concept of a livable future for all communities, this simple idea could become the rallying cry for everything from ensuring clean water in Flint, Michigan to slowing the carbon emissions that are rapidly melting the polar ice caps and producing unprecedented coastal flooding and human misery around the world.¹¹

And here, too, is where we circle back to Larry Kramer’s notion of popular engagement. While legal and scientific elites have, in recent years, carried the ball in the executive, legislative, and judicial arenas, the people themselves have a significant role to play in promoting the basic human right to a healthy environment. The First Amendment guarantees “the right of the people . . . to petition the Government for a redress of grievances.”¹² Ordinary members of the public, with no specialized legal or scientific expertise, can organize marches and protests, instigate media campaigns and voter drives at every level of government, and circulate initiatives and petitions, including potentially a nationwide petition for a constitutional amendment that enshrines the right to a healthy environment in our governing blueprint for democracy. Some of these efforts may succeed; unquestionably, many will fail. But the larger goal of such coordinated action is to create deep, diverse, and durable public support for the basic concept of a sustainable future and its importance to each and every person

fullreport.pdf.

10. David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENV’T MAG. (July-Aug. 2012), <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>.

11. Academic scholarship is only now beginning to knit together the idea of human dignity with protection of the environment, even spawning its own new journal. See generally Erin Daly & James R. May, *Bridging Constitutional Dignity and Environmental Rights Jurisprudence*, 7 J. HUMAN RIGHTS & THE ENV’T 218, 218-242 (2016) (“[E]nvironmental rights advocates have been slow to recognize the connection between environmental and human rights generally, and slower still to see how environmental harms threaten human dignity.”).

12. U.S. CONST. amend. I.

on the planet. Only when environmental values are elevated, once again, in the popular consciousness will we be able to shine a white hot spot light on the dealings of those who would undermine such values.

The Standing Rock Sioux protest in North Dakota, where thousands of Native Americans, environmental activists, veterans, and others have stood for months in solidarity against rubber bullets, water cannons, tear gas, pepper spray, and winter blizzards to resist the Dakota Access Pipeline, demonstrates the potential efficacy of popular action, even before the Trump administration takes office.¹³ In both their tactics and their careful words, the Standing Rock “water protectors” viscerally understand that the struggle must be expressed in the language of bedrock human rights and values, not couched in the technical jargon of environmental science or risk assessment.¹⁴ No matter what the accident probabilities assigned by expert consultants, most people understand intuitively, based on our shared national experience of such incidents as the BP oil platform spill in the Gulf of Mexico and the Exxon Valdez oil tanker spill in Alaska, that oil infrastructure can and does fail, leading to potentially devastating ecological consequences for local communities. The Standing Rock organizers appreciate this threat at a gut level and have used their historic tradition of peaceful resistance to capture the nation’s attention.

Lawyers can be part of these popular revolts, both personally and as professionals providing advice and counsel to community organizers. At Standing Rock, for instance, lawyers have huddled in camp tents to advise protestors, and there is now a nationwide call for lawyers to represent the hundreds of water protectors who have been arrested. If environmental and other social protests ramp up around the nation and if local police respond with widespread arrests, a new army of legal warriors will certainly be necessary. Because there are insufficient experienced criminal defense attorneys to adequately represent even the existing day-to-day caseload in our sprawling criminal justice system, the organized bar will need to step forward and provide legal training and services to social justice activists willing to endure arrest. Young lawyers are perfectly poised to take the lead in responding to this challenge.

I suspect there will be an equally critical need for outside legal assistance to those truth-tellers within government agencies who are willing to remain on the inside and expose illegal or immoral conduct by political appointees. Such

13. See Phil McKenna & Cassi Alexandra, *Video: Standing Rock ‘Water Protectors’ Who Refuse to Leave and Why*, INSIDE CLIMATE NEWS (Dec. 12, 2016), <https://insideclimatenews.org/news/12122016/standing-rock-protectors-dakota-access-pipeline-trump>. See also Josh Barajas, *Police Deploy Water Hoses, Tear Gas Against Standing Rock Protestors*, PBS NEWS (Nov. 21, 2016), <http://www.pbs.org/newshour/rundown/police-deploy-water-hoses-tear-gas-against-standing-rock-protectors>.

14. See Michael Bennett Cohn, *Dakota Access Pipeline Standing Rock Standoff: Behind the Front Lines*, NEWSWEEK (Nov. 28, 2016), <http://www.newsweek.com/2016/12/09/dakota-access-pipeline-protest-standing-rock-sioux-525894.html>.

courageous whistleblowers were central players, for instance, in the biggest scandal ever to rock the Environmental Protection Agency. In the early 1980's, under the leadership of Reagan-appointed EPA Administrator Anne Gorsuch, who made no secret of her desire to neuter and dismantle the very agency she ran, so-called "orphan" toxic waste sites left behind by departed corporate polluters were threatening public health in communities all across the country. Congress enacted the national Superfund program in 1980 to fund immediate cleanup efforts, leaving the legal liabilities to be sorted out later in the courts. Under Gorsuch's watch, Assistant Administrator Rita Lavelle, in charge of the new Superfund program money, used her authority to slow-walk program implementation and to funnel funding to her political allies in "sweetheart deals" and away from some of the communities that needed it most.¹⁵

In response, career EPA staffers, most prominently Hugh Kaufman, secretly disclosed information to the press that led to congressional hearings and, ultimately, the resignation of Gorsuch, Lavelle, and much of the agency's top leadership team under a cloud of scandal.¹⁶ Despite internal retaliatory efforts by Lavelle, Kaufman and his colleagues succeeded in toppling the political management by leaking "virtually every budget draft and controversial memo to the press and to a growing number of [Gorsuch's] critics in Congress."¹⁷ Lawyers should start thinking now about how to create civil society networks that will foster and protect such publicly-spirited engagement by career employees across a broad swath of agencies, including the EPA, at a time when Congress as a whole may be less sympathetic. First, we have to convince sympathetic individual members of Congress to provide a receptive ear and media representatives to provide a receptive platform for those who would serve as watchdogs of democracy. And then we must figure out how would-be agency whistleblowers can make their voices heard without destroying their own lives.

At the same time, environmental advocates must do a better job of marrying their sustainability message to the economic anxieties that played a key role in the 2016 election. Notwithstanding whatever setbacks on climate policy we are doomed to face in the short term, the world is inevitably, inexorably transitioning to a non-fossil fuel economy. That inescapable fact portends a massive technology shift in every sector—energy, transportation, industrial, military—not only in the United States, but around the globe. As the world's most innovative and entrepreneurial nation, the United States is poised to reap the economic benefits that will accrue to the first-movers in many of these sectors.

15. For a compelling story of how these actions affected—and are still affecting—one community in Colorado, see Joel Dyer, *How Reagan and the Largest EPA Scandal in History May Explain Why Valmont Butte Is Still Contaminated*, BOULDER WEEKLY (Feb. 9, 2012), <http://www.boulderweekly.com/news/how-reagan-and-the-largest-epa-scandal-in-history-may-explain-why-valmont-butte-is-still-contaminated>.

16. See ROBERTA ANN JOHNSON, WHISTLEBLOWING: WHEN IT WORKS—AND WHY 54-62 (2003).

17. *Id.* at 60.

Failing to seize that opportunity through the adoption of appropriate policies and incentives will cede the ground to other countries – precisely the opposite of what the President-elect promises.

In order to overcome the “jobs versus environment” mischaracterization that has so often plagued conservation efforts, environmental advocates must forge alliances and find common cause with those focused on worker rights and, more generally, civil rights. One of many examples of such a broadened coalition is the Labor Network for Sustainability, founded in 2009 on “an understanding that long-term sustainability cannot be achieved without combining three elements: 1) environmental protection, and in particular addressing climate change; 2) economic fairness, in particular addressing income inequality and jobs; and 3) social justice, in particular eliminating prejudice and defending human and civil rights and democracy.”¹⁸ That organization recently issued a report showing that in the five states touched by the controversial Keystone XL pipeline, putting people to work on needed repairs to the aging infrastructure of drinking water, sewer, and gas pipelines would create five times as many jobs as the construction of a new oil pipeline.¹⁹ Widespread dissemination of such information within communities that have not historically prioritized environmental concerns can begin to rebut the fearmongering perpetuated by those deeply invested in our unsustainable fossil fuel economy. And because such information actually aligns with the new administration’s talking points on infrastructure spending priorities, it also provides the basis to start calling Mr. Trump to account for his campaign rhetoric. As with almost every resistance strategy, those trained in rigorous legal thinking and conflict resolution will have a vital part to play as intermediaries, as educators, and as advocates.

None of this will be easy. In fact, the work of resisting widespread retrenchment and simultaneously embedding a more robust and enduring ethic of ecological sustainability in our public policies—maybe even in our Constitution—will be exceedingly hard. But that does not mean it is hopeless, or not worth the candle. Every small step builds toward the greater good. For example, two days after the election, environmental lawyers in Oregon survived a motion to dismiss their truly path-breaking lawsuit, against the “United States of America,” seeking to vindicate their clients’ “substantive due process right” to a healthy environment. In her meticulous 54-page order, Judge Ann Aikin drew heavily on Justice Kennedy’s opinion in the same-sex marriage case:

I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the

18. *The Network*, LABOR NETWORK FOR SUSTAINABILITY, <http://www.labor4sustainability.org/about/making-a-living-on-a-living-planet> (last visited Jan. 20, 2017).

19. See Kristen Sheeran et. al, *The Keystone Pipeline Debate: An Alternative Job Creation Strategy*, LABOR NETWORK FOR SUSTAINABILITY, http://www.labor4sustainability.org/files/__kxl_main3_11052013.pdf (last visited Jan 20, 2017).

“foundation of the family,” a stable climate is quite literally the foundation “of society, without which there could be neither civilization nor progress.”²⁰

The plaintiffs were allowed to proceed to the next phase of litigation, the court explained, in large part because of the way they framed their grievance:

[T]hey assert the government has caused pollution and climate change on a catastrophic level, and that if the government’s actions continue unchecked, they will permanently and irreversibly damage plaintiffs’ property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children’s) ability to live long, healthy lives. Echoing *Obergefell*’s reasoning, plaintiffs allege a stable climate system is a necessity condition to exercising other rights to life, liberty, and property.²¹

There is reason to doubt whether Judge Aiken’s constitutional eloquence will survive appellate scrutiny, despite the court’s careful doctrinal analysis and application.²² So perhaps the court’s moving words are best viewed as a first ray of hope and resistance among the many we must ignite across the nation. But we are not likely to make much progress if we talk only, or primarily, in terms of parts per million or megawatts. Like the plaintiffs and their counsel in the Oregon case, even sophisticated environmental lawyers—perhaps especially sophisticated lawyers who are trained to be dispassionate presenters of technical facts and complex statutes—must be willing to articulate their clients’ grievances in the values-laden language of rights and responsibilities. After all, protecting what is left of the natural world is no longer a matter of policy preference or economic efficiency; it is, quite literally, a matter of life and death.

My larger point is this: Lawyers and law students who care about these issues must shake off their understandably deep despair—and the law school-honed instinct of many to stand coolly above the political fray—and get to work building the moral edifice, the necessary alliances, and the institutional capacity to make ecological sustainability more than a luxury good for an affluent society, easily cast aside in times of social, political, or economic turmoil. As those with the privileged educational training to make a difference, we must use every tool at our disposal—and some we may not yet have thought of—to ensure that a healthy and sustainable environment becomes an abiding fundamental right for all humanity. With the fate of the Earth at stake, anything less is unacceptable.

20. *Kelsey Cascadia Rose Julianna v. The United States of America*, Case No. 15-1517, slip op. at 32 (D. Or. Nov. 10, 2016) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)).

21. *Id.*

22. Such rights-based language is not often rewarded in the environmental law arena. As Judge Aikins noted, Senior Ninth Circuit Judge Alfred Goodwin recently lamented the “wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits.” Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 785, 785 (2015). Judge Goodwin remains optimistic, however, admonishing the judiciary “to take another long and careful look at the barriers to litigation created by modern doctrines of subject matter jurisdiction and deference to the legislative and administrative branches of government.” *Id.* at 788.