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Actions and Reactions: The Evolution of Environmental Common Law and Judicial Activism in India and the United States

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ACTIONS AND REACTIONS: THE EVOLUTION OF
ENVIRONMENTAL COMMON LAW AND JUDICIAL ACTIVISM IN
INDIA AND THE UNITED STATES

Elizabeth Fata

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“Never doubt that a small group of thoughtful committed citizens can change the world; indeed, it’s the only thing that ever has.”¹

What is a court really, but a group of thoughtful committed citizens? Yet when extending this philosophical sentiment to a supposedly apolitical, unbiased judiciary, does the adage somehow become tainted? Should judges be changing the world or simply maintaining and enforcing the status quo? This paper seeks to explore those two seemingly opposed perspectives through the real life prototypes of environmental law in India and the United States. This note will additionally conclude that the most effective and legally sound path to effectuate environmental protection is for the United States Judiciary to adopt the right to a clean environment as a fundamental one.

With common British roots, India and the United States present a unique opportunity for comparison, especially in the field of environmental law. Both countries encompass a colossal amount of territory and support large populations. Yet they differ vastly in many respects, including the state of their environment and the resulting health and wellbeing of their citizens. This paper will address the evolution of each country’s environmental

· J.D. Candidate, 2016, University of Miami School of Law; B.S. 2012, University of Florida. Many thanks to Professor Williamson for his continued guidance on this endeavor and the University of Miami International and Comparative Law Review for their facilitation and review. Additionally, I would like to thank my family—Faye, Alan, Johnathon, and Josh—for their ongoing inspiration, support, and encouragement of my love of nature, law, and everything in between.

¹ *Margaret Mead (1901-1978) An Anthropology of Human Freedom*, THE INSTITUTE FOR INTERCULTURAL STUDIES (Nov. 19, 2015), <http://www.interculturalstudies.org/Mead/biography.html>.

policy within its court system and the societal changes that served as the catalyst for those advancements. The paper will focus specifically on judicial activism and the growth of environmental law in the common law system. It will further discuss why each country's courts were able to take such radically different approaches and how the U.S. approach is in need of a substantial paradigm shift.

Part I will provide some background on both countries' environmental conditions and a foundational overview of the Indian governmental system. Part II will address the common law remedies to environmental harms that existed in both countries before the development of legislative remedies and the expansion of each country's environmental movements. Part III will then discuss the catalyst that motivated each country to earnestly consider the environmental destruction and degradation occurring around it. Part IV will focus on the common law developments in the new era of judicial activism and social change in each country. Finally, Part V will focus on why the two countries had such divergent paths after the 1970s, and the pros, cons, and implications of each approach. The paper will conclude in Part VI with a recommendation for the U.S. Judiciary to adopt a new perspective.

I. SETTING THE SCENE: THE ENVIRONMENTAL AND GOVERNMENTAL BACKDROP

Due to a multitude of factors, environmental conditions in India and the United States are suffering. As of yet, the actions of both governments have been insufficient to reverse the trend of environmental degradation. In a

survey of 178 countries' environmental conditions, India ranked 155th.² Today, India's capital city, Delhi, is the most polluted city in the world.³ In a survey of the top twenty world economies, thirteen of the world's twenty most polluted cities were in India.⁴ 70 percent of the surface water in India is polluted,⁵ and smoke from cooking fires alone—not even considering other types of air pollution—claims about one million lives every year.⁶ Poverty remains both a cause and consequence of resource degradation.⁷

In comparison, the United States' environmental conditions ranked 33rd out of 178 countries on the environmental performance index.⁸ Although this puts the U.S. in the top 20 percent for best environmental conditions worldwide, between 40 and 45 percent of all surface water in the U.S. is still polluted,⁹ and the aggregate of all types of air

² *India*, ENVIRONMENTAL PERFORMANCE INDEX, YALE U., <http://epi.yale.edu/> (last visited Feb. 8, 2015).

³ *Indian Winter*, THE ECONOMIST, <http://www.economist.com/news/leaders/21642172-narendra-modi-should-learn-chinas-mistakes-its-too-late-indian-winter> (last visited Feb. 7, 2015).

⁴ *India: Green Growth - Overcoming Environment Challenges to Promote Development*, THE WORLD BANK (Mar. 6, 2014), http://www.worldbank.org/en/news/feature/2014/03/06/green-growth-overcoming-india-environment-challenges-promote-development?cid=SAR_TTWBSAREN_EXT.

⁵ *India-Environment*, ENCYCLOPEDIA OF THE NATIONS, <http://www.nationsencyclopedia.com/Asia-and-Oceania/India-ENVIRONMENT.html> (last visited Feb. 8, 2015).

⁶ THE ECONOMIST, *supra* note 3.

⁷ THE WORLD BANK, *supra* note 4.

⁸ ENVIRONMENTAL PERFORMANCE INDEX, *supra* note 2.

⁹ Patricia Hemminger, *Water Pollution: Fresh Water*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/water_pollution.aspx#2 (last visited Feb. 9, 2015).

pollution in the U.S. causes 200,000 deaths annually.¹⁰ While these are not inspiring statistics, the environmental conditions in the U.S. seem pristine in comparison to the abysmal circumstances in India.

Before conducting a comparison of the environmental laws that have impacted these sobering statistics in India and the United States, it is important to first note the similarities and differences in their legal systems and governmental structures. For the purposes of this note, I will focus on exploring the structure of India's government and judiciary and assume the reader possesses a more in-depth understanding of the United States legal system.

India's common law system originated in the early 1700s after the British East India Company first appeared in Indian Territory.¹¹ The British quickly established their system of law in the three major cities now known as Chennai, Mumbai, and Kolkata.¹² Almost fifty years later, in 1772, the cities' British court systems began to expand outward into the rest of the country and quickly replaced the old Mughal system that had been in place for over three centuries.¹³

Over the next 200 years, the court systems continued to develop and change as the British Crown took control of

¹⁰ Jennifer Chu, *Air pollution causes 200,000 early deaths each year in the U.S.*, MIT NEWS (Aug. 29, 2013), <http://newsoffice.mit.edu/2013/study-air-pollution-causes-200000-early-deaths-each-year-in-the-us-0829>.

¹¹ *Brief History of Law in India*, THE BAR COUNCIL OF INDIA, <http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/> (last visited Jan. 5, 2015).

¹² *Id.* These cities were known as Madras, Bombay, and Calcutta respectively.

¹³ *Id.*

India.¹⁴ A segregated Indian Supreme Court developed, which excluded all legal professionals not of English, Irish, or Scottish origin.¹⁵ In 1950, India adopted its first national constitution¹⁶ with the goal of promoting social welfare by empowering even the weakest members of society.¹⁷ However, the legal profession remained segregated until 1986 when the profession of law was opened to all legal professionals regardless of race, nationality, or religion.¹⁸

Today, under the Indian Constitution, the Indian government is structured somewhat similarly to that of the United States.¹⁹ Although India has a parliamentary system, it has separate executive, legislative, and judicial branches.²⁰ The executive branch, similar to that of the U.S., is charged with the execution of India's laws.²¹ The president, who is the head of state, ceremoniously heads this branch.²² However, for practical purposes, the prime minister, who is head of government, leads the country with the assistance of his cabinet members.²³ The legislative branch, on the other hand, has two primary houses of Parliament: the Rajya Sabha and the Lok Sabha.²⁴ These Houses of Parliament elect the Prime Minister, who is then considered a member. The

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ THE BAR COUNCIL OF INDIA, *supra* note 11.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ SOUMYAJIT MITRA, CORP COUNSEL'S GUIDE TO DOING BUSINESS IN INDIA 9:23 (Kochhar & Co. and Kenneth A. Cutshaw eds., 2014).

²¹ THE BAR COUNCIL OF INDIA, *supra* note 11.

²² MITRA, *supra* note 20.

²³ MITRA, *supra* note 20.

²⁴ *Government of India*, ELECTIONS.IN, <http://www.elections.in/government/> (last visited Feb. 8, 2015).

executive and legislative branches, much like the U.S., are required to work closely with each other.²⁵ Both the executive and legislative branches have limited powers, and the judiciary acts as a check on both branches.²⁶

The similarities between the U.S. judiciary and Indian judiciary are largely procedural. Similar to the U.S., a key role of the Indian judiciary is to interpret the Constitution so as to uphold the constitutional values that the framers envisioned and to safeguard the fundamental rights of individuals.²⁷ While India's Constitution originally envisioned a Supreme Court with one Chief Justice and seven other judges, the legislature has rapidly expanded that number to thirty judges.²⁸ Interestingly, the proceedings in the Supreme Court of India are conducted solely in English, as mandated by the Indian Constitution.²⁹

II. COMMON LAW AND COMMON GROUND: A PRE-LEGISLATIVE DISCUSSION

With a basic understanding of the Indian governmental structure in mind, this paper proceeds by exploring the development of the environmental fields in both countries before diving into the current state of affairs in India and the United States. Exploring each country's environmental background is central to fully appreciating the distinctions that exist today. The roots of environmental

²⁵ *Id.*

²⁶ *See id.*

²⁷ MITRA, *supra* note 20.

²⁸ *History, SUPREME COURT OF INDIA*, <http://supremecourtfindia.nic.in/history.htm> (last visited Feb. 8, 2015).

²⁹ *Id.*

law in both India and the United States came in the form of public and private nuisance claims under common law.³⁰ Black's Law Dictionary defines a public nuisance as "an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property."³¹ In India, this same principle was used to prevent the public health from being jeopardized by private businesses.³² Nuisance claims remained an important remedy in both countries until the rapid development of codified anti-pollution laws during the 1960's and 1970's.

A. INDIA

The innate respect for environmental rights in India can be dated back to ancient religious scripture.³³ The Arthashastra, a Sanskrit text dating back before 300 B.C., stated: "It [is] the dharma of each individual in society to protect Nature, so much so that people worshipped the objects of Nature."³⁴ Yet, it was not until 1905, in pre-industrialized India, that the earliest reported case relating

³⁰ Josh Gellers, *Righting Environmental Wrongs: Assessing the Role of Legal Systems In Redressing Environmental Grievances*, 26 J. ENVTL. L. & LITIG. 461, 478 (2011) (discussing common law remedies for environmental claims).

³¹ *Nuisance*, BLACK'S LAW DICTIONARY (9th ed. 2009).

³² Gellers, *supra* note 30, at 478.

³³ *Id.* at 477.

³⁴ *Id.* at 477-78 (citing Madan Lokur, Judge, Delhi High Court, IX Green Law Lecture at Convocation Ceremony of Centre for Environmental Law Students of WWF-India: Environmental Law: Its Development and Jurisprudence 1 (2006)).

to environmental pollution was heard.³⁵

In *J.C. Galstaun v. Dunia Lal Seal*, the Calcutta High Court of India sat in judgment of a shellac factory that was discharging liquid effluents into a municipal drain.³⁶ The discharge ran through the drains and into the front yard of the plaintiff's home, causing both a noxious smell and a health risk.³⁷ Ruling in favor of the plaintiff, the court found that the defendant had no right to release its discharge into municipal drains and granted the plaintiff both injunctive relief and damages.³⁸

B. THE UNITED STATES

In the United States, similar nuisance cases began arising in the context of environmental degradation. In *Missouri v. Illinois*,³⁹ for example, the state of Missouri sued Illinois and the Sanitary District of Chicago for dumping raw sewage into a tributary that led to the Mississippi River and eventually to the city of St. Louis.⁴⁰ Missouri claimed that, as a result of the untreated dumping, the water that flowed through the city was unfit to drink and had caused a

³⁵ Arpita Saha, *Judicial Activism in Curbing the Problem of Public Nuisance on Environment* 11 (Nov. 2009) (unpublished paper, National Law University, Jodhpur), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1439704.

³⁶ Govind Narayan Sinha, *A Comparative Study of the Environmental Laws of India and the UK with Special Reference to Their Enforcement* 170 (Aug. 2003) (unpublished LL.M. dissertation, University of Birmingham) (on file with the University of Birmingham Research Archive), available at <http://etheses.bham.ac.uk/220/1/Sinha03LLM.pdf>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 200 U.S. 496 (1906).

⁴⁰ *Id.*

substantial increase in disease, particularly typhoid fever.⁴¹ Given the fact that there was no statutory authority for the claim, the Court entertained Missouri's complaint on the grounds of public nuisance to the residents of the state of Missouri.⁴² The Court found, however, that Missouri was unable to sufficiently prove harm or causation.⁴³ The case, nevertheless, illustrates the historical legal theory that was the bedrock in the U.S. common law system for claims of environmental degradation.⁴⁴

As common law nuisance began to be eclipsed by statutory law in the 1970s, both countries took a sharp detour away from their historical common law roots. In India, human rights came to the forefront following a rapid abandonment of fundamental rights. In the United States, citizens had the luxury of creating their own social movement based on both the intrinsic and the real value of environmental protection. At this point, the countries' paths diverge.

III. BIG BANG: THE CATALYST FOR AN ENVIRONMENTAL MOVEMENT

A. INDIA: A STATE OF EMERGENCY

The catalysts for human rights in India—and thus environmental rights—consisted of two major events in Indian history: Prime Minister Indira Gandhi's issuance of a

⁴¹ *Id.* at 499, 517.

⁴² *See id.* at 518.

⁴³ *Id.* at 525–26.

⁴⁴ *See also* *Wisconsin v. Illinois*, 388 U.S. 426 (1967); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658 (Tenn. 1904).

state of emergency, and, later, the Bhopal disaster. Indira Gandhi served as Prime Minister from 1966 to 1977.⁴⁵ During her term, the Allahabad High Court found Gandhi guilty of dishonest election practices and misuse of public funds.⁴⁶ The turmoil accompanying this decision led Gandhi and the sitting President to declare a state of emergency for the entire country.⁴⁷

The Emergency period lasted from 1975 to 1977 and brought with it a wave of civil liberty restrictions and political changes.⁴⁸ Among the liberties curtailed were freedom of press, restrictions on political opposition, and other fundamental rights.⁴⁹ Meanwhile, the Indian government curbed the power of the Supreme Court to address these concerns.⁵⁰ Through these amendments, Gandhi sought to bar review of elections, including her own, and stripped the courts of their power to review constitutional amendments.⁵¹ The 42nd Amendment further limited civil rights and placed restrictions on all lower courts and any opposition movements.⁵²

During the state of emergency, the Supreme Court largely acquiesced to Gandhi's rule and the restrictions imposed on fundamental and human rights.⁵³ After the

⁴⁵ See Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT'L L. 216, 243-45 (2010) (discussing the restriction of rights during the state of emergency in India).

⁴⁶ *Id.* at 243.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Mate, *supra* note 45, at 243.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 244.

emergency era ended however, the Court took it upon itself to repair the injuries that had been inflicted on the rights of Indian citizens.⁵⁴ Their main strategy was to strengthen human rights protections and restore the fundamental rights that were in theory protected under the Constitution.⁵⁵ The Court began by hearing cases of the crimes and abuses committed by those in power during the emergency regime.⁵⁶ In addition, restrictions on the national media were lifted and coverage of the abuses of human rights and oppression of civil liberties began.⁵⁷

Just as the Indian people were beginning to recover from the emergency era, disaster shook the country. On the night of December 2, 1984, in the city of Bhopal, the Union Carbide chemical plant leaked toxic gas into the air over a heavily populated twenty-five square mile area.⁵⁸ The resulting deaths and injuries made the tragedy one of the worst industrial disasters in history.⁵⁹ Each responsible party shifted blame to another, and the ensuing litigation failed to provide any acceptable future deterrent.⁶⁰ In an attempt to avoid another devastating environmental disaster, the government of India enacted major legislative reforms.⁶¹ The

⁵⁴ Gellers, *supra* note 30, at 478.

⁵⁵ *Id.*

⁵⁶ Mate, *supra* note 45, at 245.

⁵⁷ *Id.*

⁵⁸ Kathleen Crowe, *Cleaning Up the Mess: Forum Non Conveniens and Civil Liability for Large-scale Transnational Environmental Disasters*, 24 GEO. INT'L ENVTL. L. REV. 449, 453-54 (2012).

⁵⁹ Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223, 247-48 (2003).

⁶⁰ Crowe, *supra* note 58, at 454.

⁶¹ Rosencranz & Jackson, *supra* note 59, at 248.

Indian parliament passed the Environmental Protection Act of 1986 and the Ministry of Environment and Forests was established.⁶²

Even though the government had taken some steps to remedy the problem, the magnitude and severity of both the Bhopal disaster and Emergency Era led the judiciary to take its own independent steps to remedy these injustices. These two changes, the Emergency Era and the Bhopal disaster, were the true catalysts for judicial activism and expansion of the standing doctrine that would soon become an integral part of environmental litigation and the health of the country as a whole.

B. THE UNITED STATES: A SOCIAL MOVEMENT

While the Indian environmental movement and judicial activism were spurred by drastic political and environmental changes, the U.S. environmental movement was catalyzed by a social crusade that was much less politically charged. Many credit the true beginning of the environmental movement to the publishing and mass distribution of Rachel Carson's 1962 novel *Silent Spring*.⁶³ The book discussed the ecological impacts of pesticides and the impending ecological disasters sure to plague mankind.⁶⁴

At the same time, the post-World War II climate

⁶² *Id.*

⁶³ David Walls, *Environmental Movement*, SONOMA STATE UNIVERSITY (last visited Nov. 9, 2014), <http://www.sonoma.edu/users/w/wallsd/environmental-movement.shtml#mainContent>.

⁶⁴ Claire Riegelman, *Environmentalism: A Symbiotic Relationship Between A Social Movement and U.S. Law*, 16 MO. ENVTL. L. & POL'Y REV. 522, 532 (2009).

brought Americans increased income, a higher standard of living, and a shift from war to a focus on environmentalism.⁶⁵ With more free time and money, people began to take advantage of the natural resources around them for their recreational and aesthetic value.⁶⁶ The contribution of far more cars and highways simultaneously helped expand the number of National Park visits from 12 million in 1946 to 282 million by 1979.⁶⁷ Technology continued to expand with economic development, and the health of the land, animals, and people in the U.S. began to feel the impact.⁶⁸ With the contemporaneously advancing levels of education, perceptions about the intrinsic and real value of the environment underwent a radical transformation, and a social movement was born.⁶⁹

The environmental movement began to put pressure on the government to implement national environmental laws and regulations.⁷⁰ In the late 1960s and early 1970s, three prominent environmental groups formed, which still play a powerful and vital role in shaping environmental law today: The Sierra Club Legal Defense Fund, the Environmental Defense Fund, and the Natural Resources Defense Fund.⁷¹ In conjunction with the larger environmental groups, public demonstrations, meetings, media reports, and petitions were all used to pressure lawmakers and the Executive to act.⁷² When laws were

⁶⁵ Walls, *supra* note 63.

⁶⁶ Riegelman, *supra* note 64 at 534.

⁶⁷ Walls, *supra* note 63.

⁶⁸ Riegelman, *supra* note 64, at 534.

⁶⁹ Walls, *supra* note 63.

⁷⁰ Riegelman, *supra* note 64, at 537.

⁷¹ *Id.* at 534.

⁷² *Id.* at 536.

eventually passed, the movement took to the courts to enforce and strengthen the progress that had been made.⁷³ This national social pressure helped lead an environmentally conservative judiciary to bend to the will of the whole and effect permanent change in the area of environmental law.

IV. ROLLING STONES: THE EVOLUTION OF ENVIRONMENTAL JURISPRUDENCE

A. INDIA

The Indian court's willingness to embrace judicial activism did not end with the Emergency Era. Since then, the Courts have continued to reinvent themselves, assuming the role of "the last resort of the oppressed and bewildered."⁷⁴ One of their most powerful tools in advancing and facilitating the rights of the oppressed has been their display of activism through their liberal interpretation of *locus standi*—the Indian version of standing.⁷⁵ Possibly the most important and significant difference between the Indian doctrine and that of the U.S. is that India's is not grounded in the Constitution.⁷⁶ Still, to warrant *locus standi*, Indian litigants must show both that their rights were violated and that the issue is capable of resolution through the judicial process.⁷⁷ Because of this lack of constitutional grounding,

⁷³ Thomas M. Merrill, *Foreword: Two Social Movements*, 21 *ECOLOGY L.Q.* 331, 332 (1994).

⁷⁴ Rozencranz & Jackson, *supra* note 59, at 229-30.

⁷⁵ *See id.*

⁷⁶ Gellers, *supra* note 30, at 476.

⁷⁷ S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 *WASH. U. J.L. & POL'Y* 29, 70 (2001).

Indian courts have been able to mold *locus standi* to more effectively achieve their goals.

The first real activist role that the courts played was in restoring the judges who had been transferred from their positions during, and as a result of, Ghandi's state of emergency.⁷⁸ Rather than waiting for the judges themselves to bring suit, the Supreme Court, for the first time, allowed legal bar associations to bring suit on their behalf.⁷⁹ Bystanders could now file suit on behalf of the injured without suffering personal harm themselves.⁸⁰ These decisions ushered in the beginning of a massive expansion not only of *locus standi* law, but also of judicial activism.⁸¹

The so-called Judges' Transfer Case opened the door for a whole new type of standing jurisprudence best described as representative standing and citizen standing.⁸² Representative standing allows for an individual to file suit on behalf of someone who cannot approach the court themselves for reasons of poverty, disability, inability, or social or economic disadvantage.⁸³ The Court has extended this principle even further to allow an individual with sufficient interest to sue "in his own rights as a member of the citizenry to whom a public duty is owed."⁸⁴ Citizen

⁷⁸ Gellers, *supra* note 30, at 476-77.

⁷⁹ Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L.J. 57, 58 (1994).

⁸⁰ Michael G. Faure & A.V. Raja, *Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables*, 21 FORDHAM ENVTL. L. REV. 239, 249 (2010).

⁸¹ See Gellers, *supra* note 30, at 476.

⁸² Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. OF THE INDIAN L. INST. 494, 498-500 (1987).

⁸³ *Id.* at 499.

⁸⁴ *Id.* at 501.

standing allows individuals to bring claims that are so diffuse and commonly shared that no individual legal rights would otherwise be sufficiently infringed upon.⁸⁵ Citizens no longer have to suffer a personal injury to bring a claim for something they feel aggrieved by. With the advent of these remarkably relaxed standing laws, citizens were able to challenge governmental actions in the “public interest,” and thus public interest litigation was born.⁸⁶

The Court’s enabling of public interest litigation was no accident. As a way of redressing issues unsolved by the other two branches, the Court displayed patent judicial activism and sought to foster a trend. Reduced standing requirements, and the subsequent rapid growth of public interest litigation, had an especially strong impact on environmental protection. When governmental action or inaction threatened the environment, ordinary citizens could now bring suit on behalf of the general public, and the court pledged to be exceptionally receptive to the challenges. The environmental jurisprudence that has followed has continued to further expand the judicial activism that was first displayed by the Court in the Judges’ Transfer Cases.

Along with considerable weakening of *locus standi* requirements, the Supreme Court of India also virtually eliminated the formalities and requirements involved in filing writs of certiorari.⁸⁷ In 1987, it communicated this directive clearly in *M. C. Mehta v. Union of India*.⁸⁸ The case

⁸⁵ *Id.* at 501.

⁸⁶ Faure & Raja, *supra* note 80, at 249.

⁸⁷ Bharat H. Desai, *Enforcement of the Right to Environment Protection Through Public Interest Litigation in India*, 33 INDIAN J. OF INT’L L. 27 (1993).

⁸⁸ See *M.C. Mehta v. Union of India*, ENVIRONMENTAL LAW ALLIANCE WORLDWIDE (Dec. 20, 1986), <http://www.elaw.org/node/1322> (last visited Feb. 8 2015).

involved the aftermath of a gas leak at a food and fertilizer facility.⁸⁹ Defendants objected to the suit on the grounds that the plaintiffs improper writ amendment should preclude their filing of a claim.⁹⁰ The Court, however, stated that procedure was “merely a hand-maiden of justice” and should not stand in the way of the ordinary citizen’s access to the courts.⁹¹

[W]here the poor and the disadvantaged are concerned who are barely eking out a miserable existence with their sweat and toil and who are victims of an exploited society without any access to justice, this Court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action group acting pro bono publico would suffice to ignite the jurisdiction of this Court.⁹²

The Court went on to hold that the letter requesting writ does not even need to be addressed to the Chief Justice or the Court in general, but can be addressed to any individual justice.⁹³ The Court reasoned that “poor and disadvantaged person[s] or social action group[s]” may not be aware of the proper procedure or form of address.⁹⁴ They may simply be aware of a judge from their state and a letter

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ ENVIRONMENTAL LAW ALLIANCE WORLDWIDE, *supra* note 88.

⁹⁴ *Id.*

to that judge would be wholly acceptable.⁹⁵ Insisting otherwise would “deny access to justice to the deprived and vulnerable sections of the community.”⁹⁶ Once again, the Court took a purely human rights based approach in their decision and in doing so, radically altered the law.

In 1985, the Indian Supreme Court opined on what it proclaimed was the “first case of its kind in the country involving issues relating to environmental and ecological balance.”⁹⁷ *Entitlement Kendra v. State of Uttar Pradesh* was brought to stop the continued operation of limestone quarries in the Himalayan Mountains, which had been the source of considerable environmental degradation for a substantial amount of time.⁹⁸ In ruling in favor of the plaintiffs, the Court relied heavily on the information it obtained from a self-appointed committee established to report on the quality of the quarries.⁹⁹

By appointing a committee at all, the Court proactively played an activist role before even deciding the case. In the opinion, the Court discusses the findings of its own committee before immediately discussing the findings of the Committee that “it seems the Government of India also appointed.”¹⁰⁰ The Water Act gives the power to appoint committees not to the judiciary, but to the Central

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Rural Litigation and Entitlement Kendra v. State of U.P.*, ENVIRONMENTAL LAW ALLIANCE WORLDWIDE (Mar. 12, 1985), available at <http://www.elaw.org/resources/text.asp?ID=1095> (last visited Feb. 8, 2015) [hereinafter “*Rural Litigation and Entitlement Kendra*”].

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

and State Boards of the Department of Environment.¹⁰¹ To further emphasize this new sense of power, the Court went on to specifically direct the Department of Environment to form an additional committee and to “nominate,” within four weeks, specific individuals that the Court identified for continued evaluation of the ongoing mining operations.¹⁰²

The Court’s ruling proved to be a positive step for the Indian environmental movement, but was also a substantial overstepping of their established judicial boundaries.¹⁰³ By acting on their own to appoint and prescribe committees, the Court cloaked itself in legislative power and, in doing so, began to foster animosity with the other branches of government.¹⁰⁴ As the first real environmental case to reach the Indian Supreme Court, the judiciary set a precedent of environmental activism that would continue to expand in the coming years.

In 1991, in *Subhashkumar v. State of Bihar*, the Indian Supreme Court reiterated another radical change in the area of environmental law.¹⁰⁵ The case dealt with the discharge of waste sludge into the Bokaro River.¹⁰⁶ While discussing the environmental harm, the Court referred to Article 21 of the Indian Constitution, which states, “no person shall be deprived of his life or personal liberty except according to

¹⁰¹ The Delhi Jal Board Act, No. 4, Acts of Parliament, 1998 (India).

¹⁰² *Rural Litigation and Entitlement Kendra*, *supra* note 97.

¹⁰³ See J. Mijin Cha, *A Critical Examination of the Environment Jurisprudence of the Courts of India*, 10 ALB. L. ENVTL. OUTLOOK J. 197, 213 (2005).

¹⁰⁴ *Id.*

¹⁰⁵ *Subhashkumar v. State of Bihar and Others*, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE, <http://www.ielrc.org/content/e9108.pdf> (last visited Feb. 8, 2015) [hereinafter “*Subhashkumar*”].

¹⁰⁶ *Id.*

procedure established by law.”¹⁰⁷ Building on the longstanding acceptance that Article 21 embodied all fundamental rights, the Court then declared that Article 21 “includes the right of enjoyment of pollution free water and air for full enjoyment of life.”¹⁰⁸ In one short sentence, the Court made access to a clean environment a fundamental right. While the Court had previously touched on this idea, the clear declaration in this case proved crucial to the Court’s continued environmental activism.¹⁰⁹

Though brought to the courts as a public interest case, the suit failed on its merits because the Court determined that it was brought for the petitioner’s personal interest, rather than the public’s.¹¹⁰ The Court’s holding, however, exemplifies the human rights justification behind its new environmental jurisprudence. The Court would allow the extremely lax standing laws to legitimately promote the public interest, but restricted the use of the new lenient system for personal gain.

In *T. Ramakrishna Rao v. Hyderabad Urban Development*, the Court took the environmental rights principle one step further by explicitly stating that, “[t]he slow poisoning of the atmosphere caused by the environmental pollution and spoliation should be regarded as amounting to [a] violation of Article 21 of the Constitution of India.”¹¹¹ It is therefore “the legitimate duty of the Courts as the enforcing organs of

¹⁰⁷ *Id.*; INDIA CONST. art. 21.

¹⁰⁸ *Subhashkumar*, *supra* note 105, at 5.

¹⁰⁹ J. Mijin Cha, *supra* note 103, at 220 (discussing the source of the judiciary’s power).

¹¹⁰ *Subhashkumar*, *supra* note 105, at 5.

¹¹¹ *T. Ramakrishna Rao v. Hyderabad Urban Development*, ENVIRONMENTAL LAW ALLIANCE WORLDWIDE (July 20, 2001), <http://www.elaw.org/node/1843>.

the constitutional objectives to forbid all actions of the State and the citizens from upsetting the ecological and environmental balance."¹¹² To pollute the environment is to violate the Indian Constitution and the fundamental rights of all Indian people. In addition to the existence of representative standing and relaxed *locus standi*, public interest warriors now have a definitive constitutional violation of a public fundamental right to allege as an injury in fact.

After years of blatant judicial activism by the Indian courts, individuals who need to challenge a human rights or environmental violation in the public's interest can now be represented by someone else, file a writ with a simple letter, challenge the degradation of nature as a violation of their constitutional rights, and rely on the courts to make a proactive decision for the betterment of the environment. The line between the law and moral righteousness has been bridged, but the true consequences of these decisions have yet to be seen.

B. THE UNITED STATES

In the U.S., judicial activism played a much subtler role in the development of environmental law. Prior to the environmental and social movements that came in the 1970's, the U.S. Supreme Court had previously acted primarily to slow environmental protections emanating from legislative bodies, and aimed to maintain its historically conservative role in environmental law.¹¹³ However, as the environmental movement grew, environmentalists began to

¹¹² *Id.*

¹¹³ Merrill, *supra* note 73, at 332.

use the court system to enforce the laws passed by Congress, and the judiciary took on a more activist position.¹¹⁴ The courts started to support and help further the social and economic interests that had become an evident part of modern America.¹¹⁵ While legislation was a critical part of the movement, the courts played an important role in effectuating environmental protection through their interpretation of the law.¹¹⁶ Rather than producing opinions that narrowly construed or struck down legislative initiatives, the courts began to liberally construe legislation, and they “became open fora for groups seeking recognition of new rights going beyond what legislatures were prepared to grant.”¹¹⁷ The judiciary itself became an agent of social change.

One of the most significant consequences of this judicial activism was the Supreme Court’s liberal expansion of legal standing requirements—especially as they apply to environmental rights. Environmental law and standing are intrinsically linked in the United States because standing laws often create substantial barriers for environmental litigation. As such, while the Court was sure to temper its displays of environmental activism, its expansions of the environmental standing doctrine was still one of its most prominent displays of that activism.

Article III of the U.S. Constitution has been interpreted to require an individual to demonstrate that they have personally suffered an articulable injury that was caused by a defendant’s actions before the individual can

¹¹⁴ Riegelman, *supra* note 64, at 538.

¹¹⁵ See Merrill, *supra* note 73, at 332.

¹¹⁶ Riegelman, *supra* note 64, at 537.

¹¹⁷ Merrill, *supra* note 73, at 332.

maintain a lawsuit.¹¹⁸ Furthermore, a ruling in that individual's favor must have the potential to redress the specific injury that the person is facing.¹¹⁹ These principles have proven uniquely difficult to apply to environmental claims.

In *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, the Supreme Court explained that "the relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."¹²⁰ The standing doctrine, therefore, precludes any litigation on behalf of direct injury to a specific ecosystem that does not directly injure the individual plaintiff. This judicial interpretation of the standing doctrine "effectively removes ecosystems and other life from any direct claim to justice."¹²¹ This formulation of the standing doctrine requires that an ecosystem be utilized in some way by human beings before it can be protected from those same human beings—a valuation system that is often paradoxical.

The Supreme Court's decision in *Sierra Club v. Morton*, demonstrated one of the most significant displays of environmental activism when the Court addressed the standing requirement of injury in fact.¹²² In the late 1960's, Walt Disney sought to develop a ski resort in Mineral King Valley, a wilderness and recreation area directly adjacent to

¹¹⁸ Francisco Benzoni, *Environmental Standing: Who Determine the Value of Other Life*, 18 DUKE ENVTL. L. & POL'Y F. 347, 347 (2008) (discussing the standing doctrine).

¹¹⁹ *Id.*

¹²⁰ *Friends of the Earth v. Laidlaw Environmental Service Inc.*, 528 U.S. 167, 181 (2000).

¹²¹ Benzoni, *supra* note 118, at 350.

¹²² *Sierra Club v. Morton*, 405 U.S. 727, 728-29 (1972).

Sequoia National Park.¹²³ The Sierra Club challenged the development as a contravention of federal laws and regulations governing the preservation of national parks, forests, and game refuges.¹²⁴ The Sierra Club claimed standing to challenge the actions as a “corporation with a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country.”¹²⁵ Furthermore, the Sierra Club alleged it would suffer a direct injury as a result of the development of the valley because the development “would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.”¹²⁶ At this point, for the purposes of standing, non-economic injuries to widely shared interests had never been squarely addressed or recognized by the Court.¹²⁷

In addressing this issue, the Court chose to break new ground and articulated two important rules of law. First, it held that the aesthetic and environmental interests that the Sierra Club sought to protect sufficiently rose to the level of “injury in fact” adequate to lay the basis for standing under the Administrative Procedure Act.¹²⁸ The fact that environmental interests are shared by many rather than just a few does not make them any less deserving of legal protection.¹²⁹ Second, the Court held that the party seeking review must be among the class of people personally injured

¹²³ *Id.*

¹²⁴ *Id.* at 730.

¹²⁵ *Id.*

¹²⁶ *Id.* at 734.

¹²⁷ *Sierra Club*, 405 U.S. at 734.

¹²⁸ *Id.* (citing Administrative Procedure Act, 5 U.S.C. § 702 (1946)).

¹²⁹ *Id.*

by the action.¹³⁰ “A mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the [Administrative Procedures Act].”¹³¹ As such, the Court held the Sierra Club lacked standing to challenge the development.¹³² Still, a personal aesthetic environmental interest *alone*—along with a showing that the plaintiff was directly injured in this way—was now considered sufficient injury under Article III of the Constitution. The novel step that the Court took in this case still remains relevant today.

While the majority opined on what would become one of the most important environmental cases to date, the dissenting opinions similarly revealed their activist inclinations and laid important precedent for environmental scholars to come. A shining light in the case was Justice Douglas’ dissent, wherein he voiced a desire so often intoned by environmentalists across the country.

The critical question of ‘standing’ would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature’s ecological

¹³⁰ *Id.* at 736.

¹³¹ *Id.* at 739.

¹³² *Id.*

equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.¹³³

With his now legendary dissent, Justice Douglas took a true activist role and urged the Court to “fashion” a new rule for environmental law. He even ventured so far as to urge the Court to base its decision on “contemporary public concern.”¹³⁴ Despite his urging, the majority failed to find his reasoning compelling. Perhaps the transparent judicial activism that Justice Douglas displayed was too much too soon for the majority, whose opinion had already taken a novel departure from the stricter standing doctrine. Or perhaps the Court simply found Justice Douglas’s level of judicial activism to be unacceptable. Whatever the reason, the Court today has still never given life to Justice Douglas’s pioneering recommendation. However, over forty years later, his dissent continues to play an important role in the scholarly discussions of environmental law.

In the years following *Morton*, the Court reversed course and again began to apply “reinvigorated and more restrictive” standing rules for cases dealing with environmental issues.¹³⁵ As the Court noted in a 1992 case, *Lujan v. Defenders of Wildlife*, “when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.”¹³⁶

¹³³ *Sierra Club*, 405 U.S. at 741-42 (footnote omitted).

¹³⁴ *Id.*

¹³⁵ William W. Buzbee, *The Story of Laidlaw: Standing and Citizen Enforcement*, in ENVIRONMENTAL LAW STORIES 201, 215 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

¹³⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

While the Court's majority opinions continued to avoid liberal interpretations in environmental cases, the debate continued among the Justices over whether or not Congress has the power to confer standing for environmental cases where no cognizable direct injury to the person had occurred. Justice Scalia's plurality opinion in *Lujan* found this type of congressional standing insufficient under Article III of the constitution.¹³⁷

The court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view A plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.¹³⁸

On the other hand, Justice Kennedy, in his concurrence joined by Justice Souter, adopted a much more liberal perspective, opining that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed

¹³⁷ *Id.* at 555.

¹³⁸ *Id.* at 573.

before.”¹³⁹ Justice Kennedy recognized the potential for statutes to define and provide for specific constitutionally cognizable injuries as a result of a statutory violation.¹⁴⁰ While he did not find the statute in this case sufficient, he expressed his willingness to find this type of conferral in other cases and opened the door for further expansion in the future.¹⁴¹ His rationale also provides a potential solution for conservationists seeking to get their environmental cases through the courthouse doors.

While the Court followed *Morton* with almost a decade of stricter environmental standing, the Court in 2000 retreated from these strict standards and embraced a new era of activism. The Supreme Court notably expanded the protections offered by the Court with its adaptive interpretation of both injury and redressability.¹⁴² What has still not changed, however, is that the relevant showing for Article III standing “is not injury to the environment but injury to the plaintiff.”¹⁴³

In 2007, the Court fostered its progressive position in *Massachusetts v. EPA*.¹⁴⁴ In *Massachusetts*, the state challenged the EPA’s denial of a petition for rulemaking under the Clean Air Act to regulate greenhouse gas emissions from motor vehicles.¹⁴⁵ Massachusetts claimed that human-emitted greenhouse gas emissions are a significant

¹³⁹ *Id.* at 580.

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See Friends of the Earth*, 528 U.S. 167.

¹⁴³ *Id.* at 181.

¹⁴⁴ Randall S. Abate, *Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 121, 124 (2008).

¹⁴⁵ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

contribution to global climate change and the resulting rise in sea level would lead to a significant loss in Massachusetts's coastal property.¹⁴⁶

Quoting Justice Kennedy's concurring opinion in *Lujan*, where he asserted that Congress "has the power to define injury and authorize chains of causation," the Court found that the Clean Air Act authorizes this type of challenge to the EPA's actions.¹⁴⁷ It proceeded to address the issue of particularized injury and explicitly held that states are not normal litigants for the purposes of invoking federal jurisdiction. In order for Massachusetts to protect its quasi-sovereign interests, the state is entitled to "special solitude" in the standing analysis.¹⁴⁸ Under the confines of this unique analysis, the Court found that the EPA's failure to regulate greenhouse gas emissions presented an injury to Massachusetts and its coastline that was both actual and imminent.¹⁴⁹

The Court surprisingly accepted a significant causal link in order to find injury in fact: The EPA's failure to regulate a limited amount of greenhouse gases affected the global climate enough that it would result in a tangible rise in sea level that would erode the coastline and thereby injure Massachusetts. Furthermore, this was the first time the Court read a statute to find that Congress had implicitly authorized environmental standing. Despite these displays of activism, the Court softened its pro-environmental decision with the stipulation that states are "special

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 516 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992)) (Kennedy, J., concurring).

¹⁴⁸ *Id.* at 518, 520.

¹⁴⁹ *Id.* at 520.

litigants” for the purpose of this environmental standing.¹⁵⁰

While *Massachusetts v. EPA* was certainly a victory for the environmental movement, it also illustrates the continued restraints—constitutional, political, and perhaps societal—within which the judiciary operates. Nonetheless, the Court’s activist role intermittently broke through these restraints and the Court left a lasting impression on the environmental movement. From its first step of recognizing the aesthetic value of nature, to its most recent steps of finding standing in statutes and validating attenuated environmental injuries, the Court has played an important role in the construction of environmental policy.

V. THE GOOD, THE BAD, AND THE UGLY

A. CONSTITUTIONAL RIGHTS

While both Indian courts and United States courts have taken an activist role in some sense through their environmental rulings, the courts in India have clearly taken their judicial activism far beyond that of U.S. courts. The U.S. Supreme Court certainly pushed the boundaries of established doctrine in cases like *Sierra Club v. Morton*¹⁵¹ and *Massachusetts v. EPA*,¹⁵² but the Indian Supreme Court formed an entirely new set of laws. This significant divergence in activism is partially attributable to the Indian Court’s interpretation of Article 21 as encompassing the fundamental right to a clean environment. By establishing

¹⁵⁰ *Id.*

¹⁵¹ 405 U.S. 727.

¹⁵² 549 U.S. 497.

this principle in *Subhashkumar v. State of Bihar*¹⁵³ and its progeny, the Indian Supreme Court hugely legitimized the power they were already acquiring and using.

By recognizing the existence of such a right, the Indian Supreme Court's environmental and human rights decisions now rely on constitutional interpretation, and the Court is simply enforcing the Constitution's protection of fundamental rights.¹⁵⁴ The Indian Supreme Court took the power to effect both environmental protection and harm definitively out of the hands of the legislature, and placed it soundly into the hands of the judiciary. As a result, the environment in India is now significantly more protected from the whims and changing power of the government, and is shielded from political corruption in the executive and legislative branches. With a stroke of genius, the Indian courts have claimed jurisdiction to decide environmental issues, even in the absence of statutory authority. The Indian courts picked up the ball where the legislature dropped it.

While the strong activism in Indian courts is partially justified by Article 21, the courts still far exceeded the boundaries of their judicial power. For example, in *Entitlement Kendra v. State of Uttar Pradesh*, the Indian Supreme Court not only formed a fact-finding committee itself, but also went as far as to instruct the Department of Environment to form an additional committee and also inform the Department whom it was required to nominate. Even considering the added support of a constitutional provision, the Court largely exceeded its judicial limits by explicitly contradicting a relevant statute.

In assuming this essentially legislative role, the Indian

¹⁵³ *Subhashkumar*, *supra* note 105.

¹⁵⁴ J. Mijin Cha, *supra* note 103, at 220.

courts today continue to protect the environment and its health. However, it is important to keep in mind that their ongoing efforts to increase environmental protections still remain relatively vulnerable to the changing climate of the courts. The judiciary is still a volatile and unelected branch of government. Environmental protections provided by the Court have the potential to be abused by an equally anti-environmental judiciary in the future. Because the courts granted themselves so much discretion over the fate of the environment and because India's environment teeters so close to the edge, an anti-environmental judiciary could have disastrous consequences for the people of India and the resources upon which they so heavily rely. The precarious state of India's environment and the health and survival of its people would likely preclude a radical shift from this stance. However, an unelected judiciary can always change their minds regardless of the political climate.

One reason the U.S. Supreme Court, in contrast, never made such drastic quasi-legislative moves is because it blatantly lacks a constitutional provision or legislative directive granting it that power. Not only does the U.S. Constitution fail to provide a positive right to environmental protection, but also Article III, as interpreted, actively inhibits the courts from significantly altering standing jurisprudence in favor of environmentalism. The mandates of injury, causation, and redressability must always be met. Yet, in order to meet the mandate of injury in fact, "the relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."¹⁵⁵ This is in stark contrast to the Indian court's interpretation of Article 21 of the Indian Constitution, where "[t]he slow

¹⁵⁵ *Friends of the Earth*, 528 U.S. at 181.

poisoning of the atmosphere caused by environmental pollution and spoliation" is regarded as a direct constitutional violation in and of itself, regardless of whether the land is being actively utilized or not.¹⁵⁶ The U.S. Supreme Court has regrettably failed to recognize the scientific fact that continued injury to the connected environment that we all share will inevitably result in injury to the health and wellbeing of all people.

One potential solution to this Article III limitation would be for the Court and Congress to further develop Justice Kennedy's concurrence in *Lujan II*. Theoretically, Congress has the "power to define injury and articulate chains of causation that will give rise to a case or controversy where none existed before."¹⁵⁷ In *Massachusetts v. EPA*, the Court found that the Clean Air Act and Massachusetts' status as a state confer "special solitude" on them for the purposes of standing.¹⁵⁸ Congress could further this trend by defining certain environmental degradation as an injury in itself and thereby confer standing on individual citizens to seek redress for injury to the environment. Subsequently, the courts could expand on Justice Kennedy's concurrence and continue the trend that began in *Massachusetts v. EPA*. Consequently, the solution for environmentalists in the U.S. could lie with the legislature and the Court's continued willingness to expand this notion.

B. ENVIRONMENTAL AND SOCIAL NECESSITY

Another possible explanation for the countries'

¹⁵⁶ ENVIRONMENTAL LAW ALLIANCE WORLDWIDE, *supra* note 111.

¹⁵⁷ *Defenders of Wildlife*, 504 U.S. at 580.

¹⁵⁸ *Massachusetts*, 549 U.S. at 520.

diverging levels of activism is necessity. In India, the Emergency Era and the Bhopal disaster had already devastated the country when the judiciary took up its activist position. In a time of government corruption, massive infringements on civil rights, and heartbreaking environmental disasters and conditions, the people of India were likely looking for the very solution that the Indian courts offered. The courts focused on rectifying the wrongs of the era and implementing civil and human rights, and when a significant legal requirement stood in the way, the courts felt entitled to eliminate it. While there was undoubtedly some opposition, the ineptitude and sordidness of the other branches of government prevented them from either resolving the problems or providing any kind of real opposition to the activist judiciary.

In the U.S. on the other hand, a social movement, rather than ecological or political necessity, spurred the court's limited activism. The American people became more interested in outdoor recreation and developed the means and time to focus on that. While environmental organizations like the Sierra Club brought a multitude of suits to protect the environment, the U.S. still lacked the comparable pressure from the high level of environmental degradation that India continues to experience. As such, a high level of judicial activism was unacceptable from an unelected judiciary. Furthermore, because of the environmental social movement that was blossoming, the stronger legislative and executive branches of the U.S. embraced the movement and played their elected roles of furthering the crusade and developing and enforcing appropriate legislation. The combination of a more supportive government, a less devastated environment, and a contemporaneous movement towards increased civil and environmental rights insulated the judiciary against the

pressures that the Indian courts were forced to confront.

C. LEGISLATION

Another relevant factor for the diverging activism in the United States and India is the stark difference in their applicable environmental legislation. Since the late 1960's, the U.S. has developed strong environmental laws that are, for the most part, enforced by the U.S. Environmental Protection Agency and other entities in the executive branch. In India, however, not only are the environmental statutes weaker, they are inherently self-limiting.¹⁵⁹ Moreover, the applicable agencies fail to effectively enforce them.¹⁶⁰

India only has three environmental laws, and the last of the laws, the Environmental Protection Act, was passed in 1986 to remedy the deficiencies in the first two Acts.¹⁶¹ Each state in India has a designated Pollution Control Board that is charged with the implementation and enforcement of the environmental statutes.¹⁶² However, the jurisdiction of each board is limited to "heavily polluted" areas.¹⁶³ This precludes action by any Board for any degradation less than the "heavily polluted" standard and prohibits the development or implementation of any preventative measures. The Boards do not even have the authority to

¹⁵⁹ J. Mijin Cha, *supra* note 103, at 205.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; A.S. JUMBE, N. NANDINI & S. TANDON, LEGAL ASPECTS OF SURFACE WATER POLLUTION IN INDIA: AN OVERVIEW OF EXISTING STATUTORY FRAMEWORKS IN MANAGEMENT OF LAKE ECOSYSTEMS 1144 (Sengupta M. & Dalwani, R. eds., 2008).

¹⁶² J. Mijin Cha, *supra* note 103, at 205.

¹⁶³ *Id.*

prosecute polluters independently in ordinary courts.¹⁶⁴

This failure by the legislature to promulgate sufficient legislation to protect both India's environment and its people has left a massive gap that needs to be filled. The lack of sufficient legislation coupled with the grave state of human rights and the environment in India may have justifiably spurred the courts to act in the way that they did. These factors may further explain why the Indian courts have continued to embrace and foster public interest litigation while the U.S. has resisted it.¹⁶⁵

D. IMPLICATIONS OF ACTIVISM

The judicial activism in India and the United States has had a number of important implications in each country already and will continue to have far-reaching effects. The significantly weakened *locus standi* and writ requirements in India have led to a barrage of public interest cases entering the courts. In some of the Indian high courts, public interest cases have been known to take up to six years to make it through to completion.¹⁶⁶ In order to deal with this onslaught of cases, the Indian government began requiring a monetary deposit for public interest cases that would be refunded if won, but forfeited if lost.¹⁶⁷ Both the overwhelming time required and the financial obligations bring their own set of access to justice problems in India.

Furthermore, continued flagrant activism by the courts has bred distrust towards the system and the

¹⁶⁴ *Id.*

¹⁶⁵ Cunningham, *supra* note 82, at 495-96.

¹⁶⁶ JUMBE & TANDON, *supra* note 161, at 1145.

¹⁶⁷ *Id.*

government.¹⁶⁸ Judges are not elected officials, yet they are effectively legislating as if they were. With conflicting laws and procedures, even the most educated of citizens may fail to grasp which precedent is binding. Moreover, the courts are not in the position to balance the need for environmental protection and human rights with the need for economic development and growth.¹⁶⁹

It is lamentably ironic that the Indian Supreme Court, by trying to fix the errors made by the Ghandi administration, is actually breeding more distrust and animosity between the government and its people, and within the different branches of government. The courts are fighting human degradation with a governmental power grab. For the time being, the courts are coming down with decisions in favor of both the environment and human rights, but the long-term consequences of their actions and activism may prove to be less than helpful. Until then, India's judicial activism will hopefully have a profoundly positive effect on India's environment and living conditions.

On the other hand, in the U.S., the much slower change and milder judicial activism has mostly avoided provoking distrust from the other branches of government and the U.S. people. The U.S. courts have taken much less of a pro-environment and pro-human rights position in their opinions, but they have also been lacking the same environmental and human rights pressure to do so. Significantly more proficient legislation has spared the courts from having to take a highly activist role. Stability, a lack of recent political turmoil, and a nearly 250-year-old Constitution have resulted in a more consistent government,

¹⁶⁸ J. Mijin Cha, *supra* note 103, at 218.

¹⁶⁹ *Id.* at 206.

and provided courts the luxury of generally maintaining the status quo. The limited activism that the courts chose to deliver has proven relatively helpful for the environmental movement and was accomplished without causing any major governmental instability. Courts were able to lean on strong legislation and the knowledge that that legislation would be enforced. In the long run, the slower move of U.S. courts to facilitate environmental protection certainly provides the least turmoil. But at the same time, will it ever sufficiently embrace the true value of the environment or acknowledge its interconnectedness? With a rapidly changing climate, and limited time to reverse the trend, this halfhearted attitude towards a life-sustaining resource may prove to be our downfall.

VI. A PROPOSITION

While the Indian system and judicial activism are shadowed by corruption and mass poverty, India's environmental jurisprudence intuitively has its advantages—particularly in the area of standing. The U.S. system has arbitrarily drawn a line to determine when an individual is “injured enough” to be able to assert their right to live in a healthy environment. This is inherently the wrong way of viewing the problem. A working environment is among the most basic and fundamental rights that we possess as living beings. We cannot eat, we cannot breathe, and hence, we cannot survive without an environment functioning well enough to support our basic needs. The U.S. Constitution provides that we shall not be deprived of “life, liberty, or the pursuit of happiness, without due

process of law,"¹⁷⁰ yet smog, dirty water, and a lack of resources have the potential to dramatically shorten the length of lives. Is that not deprivation of life in one of its simplest forms? The Indian Supreme Court seems to think so, and the United States should follow suit.

Furthermore, the line-drawing problem becomes even more complicated in the context of environmental laws because we are dealing with the global climate. Environmental changes all across the world—not just in our backyard—affect the health of our environment at home. Deforestation in Alaska affects the clean air in Florida, just as the rerouting of surface water from the Everglades affects the quality of water in Miami. In an area so inherently adverse to drawing lines, the courts should not turn a blind eye to this interconnectedness when deciding who is injured and who is not. The Court cannot determine how many trees must be cut down across the country before the dirty air we breath, as a result of that, shortens life spans. Proximity to those trees should not be the determinative factor in deciding whether enough injury exists to justify litigation. It is time to give life to Justice Douglas' *Morton* dissent, and "protect[] nature's ecological equilibrium" for the health of all.¹⁷¹

Because the direct injury requirement can preclude a case from ever being decided on legitimate merits—such as the impact on global climate change—the courts should follow the example set by India and relax the standing laws when it comes to environmental rights. Judicial activism does not always have to take as extreme a form as that of India. The U.S. can learn a valuable lesson from India's

¹⁷⁰ U.S. CONST. amend. XIV, § 1.

¹⁷¹ *Morton*, 405 U.S. at 741-42.

constitutional valuation of environmental protection without committing to the same path of extreme activism and political instability. The United States should, and can, simply recognize the right to a clean environment as a fundamental one and help protect all life on earth now and in the future. This change would not require an abandonment of the standing doctrine. It would simply be an acknowledgement by the courts that environmental degradation injures everyone. After all, what could be a more fundamental right than the right to life?

