

Necessities to Life: The Fundamental Rights to Clean

Water and Clean Air

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Americans are guaranteed fundamental rights, including some not enumerated in the Constitution. The Supreme Court has recognized several, such as the right to parent one's children. The right to clean water and clear air are necessary to “promote the general welfare” and so should be recognized as fundamental rights. This paper walks through the importance of both water and air protections, where the United States legal framework could possibly allow for protections, what current protections exist, why further protections are vital.

Introduction

Certain fundamental rights are guaranteed in the U.S. Constitution. While many of these, such as freedom of speech, are expressly named in the document, the Ninth Amendment establishes the existence of “unenumerated rights” which are deemed to be implied by the foundational American texts. These rights are a place where the framers acknowledge the necessity to achieve other goals and enable for these rights to become judicially enforceable through their underlying presence in the preamble. Since the preamble declares that two of the principal goals of the Constitution are to “promote general Welfare” and “liberty,” and since clean air and water are vital to human survival, the right to clean water and clear air should therefore be recognized. Federal protection for these rights stems from the Clean Water Act and Clean Air Act,

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passed by Congress in the 1960s. Several states recognize the right to clean air and water in their State Constitutions or through legislation, but the U.S Supreme Court has yet to consider the question of whether clean air and water ought to be considered as rights guaranteed by the Ninth Amendment. Recognizing these as fundamental rights in the U.S. Constitution, would expand their protections and raise the hurdles that would need to be overcome to deny them to people.

Public health is a fundamental concern, so the resources crucial to maintaining it are as well: clean water and air. Legal mandates for clean water and air have a significant impact on the environment and on our health. For example, during the Flint water crisis, the city's drinking water was contaminated, causing widespread lead poisoning across the city.² Across the state in Chicago, a lack of clean air due to longstanding pervasive industrial pollution and minimal regulation has caused elevated rates of asthma among the city's population.³

Legal Context

The Ninth Amendment of the Constitution notes that the people retain rights not enumerated in the Constitution and there is a long history of court rulings that there are rights implied. In *Meyer v Nebraska*, in which the Court ruled that states cannot forbid the teaching of a foreign language, the Court noted broadly that the "liberty guaranteed under U.S. Const. amend. XIV denotes not merely freedom from bodily restraint but also" several other unenumerated rights including "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to

² Guyadeen, "New York's Constitutional Right to Water," 2021.

³ "Chicago Now Ranked 18th Most Polluted City in the U.S."



marry, establish a home and bring up children.”⁴ The case mentions that this list is not exhaustive and that the Ninth Amendment provides protections “generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁵ Most of the jurisprudence conferring unenumerated rights has focused on “liberty” guaranteed in the 5th and 14th Amendments.

When the Supreme Court has recognized such rights, as well as when states have added rights to clean air or clean water to their constitutions, they have not spelled out precisely what these rights entail or how they will be protected. Those concerns have been left to the legislatures and courts to define. This paper argues that maintaining one’s life and health are clearly essential to enjoying the privileges of liberty. So, the case for guaranteeing clean air and clean water may be grounded in the “general welfare” clause in the preamble as well as “life” and “liberty” guarantees in both the 5th and 14th Amendments. The right to clean air and clean water should be recognized as implicit in the General Welfare clause, as it would be impossible to promote the general welfare without them.⁶ Fundamental rights are protected by the standard of strict scrutiny hence, requiring a high level of justification for any infringement. According to the Legal Information Institute, strict scrutiny is defined as “a form of judicial review that requires a ‘compelling governmental interest,’ and must have narrowly tailored the law to achieve that interest.”⁷ Strict scrutiny serves as “the highest standard of review” requiring a robust defense and evidence to satisfy the high burden.⁸ Recognizing clean air and water as fundamental rights would protect them from government infringement in future.

⁴ Meyer v. Nebraska, 262 U.S. 390, 1923.

⁵ Meyer v. Nebraska, 262 U.S. 390, 1923.

⁶ TheFreeDictionary.com, “Unenumerated Rights.”

⁷ LII / Legal Information Institute, “Strict Scrutiny.”

⁸ LII / Legal Information Institute, “Strict Scrutiny.”



Clean Water

The right to clean water serves as a “compelling government interest” because human survival depends on the presence of water, maintained as about 75% of the human body.⁹ The Constitution outlines the government’s role in “promot[ing] the general Welfare,” and this general welfare requires public access to clean water. Water is integral to our survival, so whenever this basic resource is not protected that same survival comes under threat.¹⁰

The Flint Water Crisis is a chilling example of what can happen in the absence of clean water. In 2014, the city of Flint attempted to switch the water source of the drinking water to save money.¹¹ The change proved disastrous. “Flint’s nearly 100,000 residents complained their tap water was undrinkable: cloudy, foul smelling and tasting of chemicals or worse” and “*E. coli* outbreaks,” leading to contention between government authorities and citizens over the potability of the water.¹²¹³ The government ultimately admitted its mistake, and switched the water source back from Detroit’s water system to the Flint River.¹⁴ This switch was meant to be temporary, “[u]ntil Flint’s pipeline connecting to the KWA [was] operational.”¹⁵ Initially, the switch seemed promising, as the Flint River was “[Flint’s] main water source until the 1960s.”¹⁶ Bottled water was provided and “[f]ederal and state funds are helping Flint fix its broken water system.”¹⁷ Even though the crisis was eventually

⁹ SITNFlash, “Biological Roles of Water,” 2019.

¹⁰ SITNFlash, “Biological Roles of Water,” 2019.

¹¹ NPR.org, “5 Years After Flint’s Crisis Began, Is The Water Safe?”

¹² NPR.org, “5 Years After Flint’s Crisis Began, Is The Water Safe?”

¹³ NPR.org, “5 Years After Flint’s Crisis Began, Is The Water Safe?”

¹⁴ NPR.org, “5 Years After Flint’s Crisis Began, Is The Water Safe?”

¹⁵ NPR.org, “Lead-Laced Water In Flint.”

¹⁶ NPR.org, “Lead-Laced Water In Flint.”

¹⁷ NPR.org, “5 Years After Flint’s Crisis Began, Is The Water Safe?”



identified and temporarily resolved, including a \$600 million dollar combined settlement going towards the victims, the damage of “drinking Flint’s lead-tainted tap water” is going to have long-lasting effects on the community, due to the likely possibility of lead poisoning.¹⁸ The Flint water crisis shows the horrifying and potentially fatal results that can occur when unclean water is provided to citizens, underscoring how essential clean water is to human life.¹⁹ Clean water is essential to life on earth and a livable environment.²⁰

The right to clean water would provide the necessary baseline of protections allowing for a livable context and environment.²¹ As a fundamental right, clean water would be provided, to the best extent it could given the circumstances, and required, by the highest standards, for healthy lives and a healthy environment. Clean water as a fundamental right may have prevented the Flint water crisis by requiring greater caution and may have protected the citizens of Flint by giving them standing to sue with their concerns of their water quality.

A fundamental right to clean water would require a standard upon which to base judicial decisions of what constitutes clean water and the minimum requirements for the clean water. In the Environmental Protection Agency (EPA)’s “[r]egulatory [d]etermination 3,” “[t]o regulate a contaminant [the Safe Drinking Water Act] requires that EPA determine whether: [first] [t]he contaminant may have an adverse effect on the health of persons,”²² and whether “a substantial level of the contaminant will occur in public water systems with a frequency and at levels of public health concern.”²³ The third requirement is that “regulation of the contaminant presents a

¹⁸ NPR.org, “5 Years After Flint’s Crisis Began, Is The Water Safe?”

¹⁹ SITNFlash, “Biological Roles of Water,” 2019.

²⁰ SITNFlash, “Biological Roles of Water,” 2019.

²¹ SITNFlash, “Biological Roles of Water,” 2019.

²² OW US EPA, “Regulatory Determination 3,” 2014.

²³ OW US EPA, “Regulatory Determination 3,” 2014.



meaningful opportunity for health risk reductions for persons served by public water systems” or that regulating the contaminant would meaningfully reduce health risks.²⁴ This was certainly the case in the Flint water crisis where the levels of lead—a well-known toxin linked to health issues like memory loss, high blood pressure, and kidney disease—were subsequently found in the residents blood. In addition to a requirement of water for drinking and other basic needs, the right to clean water also should include protection of natural bodies of water like lakes, especially those in the public domain, as this is also necessary for human and environmental health. The structure for this is already in place with the Clean Water Act, but making clean water a fundamental right would strengthen the EPA’s ability to enforce this law and to protect bodies of water in other ways. Currently, the Environmental Protection Agency regulates clean water through “[t]he Clean Water Act (CWA)” which “establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.”²⁵ Under this regulation, the wastewater management systems and bodies of water are monitored for pollutants.²⁶ Any disposal of oil or other potential pollutants is regulated in order to maintain human and environmental health.²⁷ The Clean Water Act establishes further regulators like permit programs to control pollutant discharges.²⁸ The amount of regulation and protection show the importance of water and its impact on humans and the environment. Supreme Court recognition of clean water as a fundamental right, would support a broader definition and reinforce its legal status. For example, this recognition would

²⁴ OW US EPA, “Regulatory Determination 3,” 2014.

²⁵ OA US EPA, “Summary of the Clean Water Act,” 2013.

²⁶ OA US EPA, “Summary of the Clean Water Act,” 2013.

²⁷ OA US EPA, “Summary of the Clean Water Act,” 2013.

²⁸ OA US EPA, “Summary of the Clean Water Act,” 2013.



allow for water access to be ensured beyond simply regulation of pollutants.

The United Nations provides an example more centrally focused on water access and availability while providing international recognition of the need for clean water. This further supports the case that clean water should be a recognized right. The United Nations Sustainable Development Goals consist of 17 SDGs “adopted by all United Nations Member States in 2015” which outlines an active global partnership effort to recognize international need and strategies to create “peace and prosperity for people and the planet, now and into the future.”²⁹ The United Nations’ Sustainable Development Goal 6 provides another standard definition of clean water and how much is required by the world and individuals.³⁰ Scarcity of clean water is a major issue as “[w]ater scarcity affects more than 40 percent of people, an alarming figure that is projected to rise as temperatures do.”³¹ Guaranteeing a fundamental right to clean water will provide necessary protection in the face of water scarcity.³² Water security and access is necessary to our survival, health, safety, and our environment. The United Nations recognizes this, and the U.S. ought to do the same.

If the right to clean water were fundamental, then a right to clean water would require the government to regulate and undo pollution damage, as well as to establish national regulations aiming to restore contaminated water sources or preserve current water reserves. This responsibility would likely fall to the EPA, and the Army Corps of Engineers would be required to formulate and enforce water regulations in order to ensure that all water within the U.S. is kept clean enough to

²⁹ “THE 17 GOALS | Sustainable Development.”

³⁰ United Nations Western Europe, “Sustainable Development Goals (SDG 6).”

³¹ UNDP, “Goal 6.”

³² UNDP, “Goal 6.”



meet a standard baseline fulfilling this right. This would also protect for future access and water usage which would further achieve United Nations Sustainable Development Goal 6.

Clear Air

Much like clean water, the right to clean air is similarly critical because it is fundamental to all health – global, environmental, and human – which provides the context for the constitutional promotion of “the General Welfare.” Clean air is a “compelling government interest,” as everyone needs to breathe it in order to live.

Air pollution is a result of contaminants, known as pollutants, in the air, which are detrimental to human health and to the environment. The United Nations monitors air quality through the Global Environment Monitoring System for Air (GEMS Air).³³ This program aims to improve air quality through innovation and scientific knowledge.³⁴ Good air quality is necessary for human survival, as “[a]irborne pollutants are responsible for about one third of deaths from stroke, chronic respiratory disease, and lung cancer,” and “one quarter of deaths from heart attack.”³⁵ Air pollution can also cause asthma, “a chronic, or long-term, condition that intermittently inflames and narrows the airways in the lungs.”³⁶ The same airborne pollutants also alter the climate and affect the health of the environment.³⁷ The sources of air pollution vary “from cookstoves and kerosene lamps to coal-fired power plants, vehicle emissions, industrial furnaces, wildfires, and sand and dust storms.”³⁸ A fundamental right to clean air would

³³ U. N. Environment, “Monitoring Air Quality,” 2017.

³⁴ U. N. Environment, “Monitoring Air Quality,” 2017.

³⁵ U. N. Environment, “Why Does Air Matter?,” 2017.

³⁶ “Asthma | National Heart, Lung, and Blood Institute (NHLBI).”

³⁷ U. N. Environment, “Why Does Air Matter?,” 2017.

³⁸ U. N. Environment, “Why Does Air Matter?,” 2017.



create the opportunity to sue polluters, to reduce pollution, and to further monitor air quality, giving the general population increased control over the air they breathe.

Like clean water, the right to clean air requires a standard to base judicial decisions and recognition as a fundamental right would strengthen these current standards. The Clean Air Act “authorizes [the] EPA to establish National Ambient Air Quality Standards (NAAQS) to protect public health and public welfare and to regulate emissions of hazardous air pollutants.”³⁹ The EPA sets standards upon which it regulates pollutants and emissions.

Since clean air is not provided by the government the way clean tap water is, it could be argued that it is not the place of courts or the government to provide it. However, this argument fails to understand that air is still maintained and kept clean through government action. Due to the necessity of government action to keep air clean, clean air should be considered a fundamental right.

Current Governmental Protections for Both Clean Air and Water

Several states have added provisions for clean air and water to their constitutions, but these protections are still not adequately extensive, and do not apply to the whole country. For instance, New York State amended its constitution to include protections for clean air and water in November 2021, but the State Legislature is still in the process of appropriately funding this endeavor.⁴⁰⁴¹ Previously, Massachusetts and

³⁹ OA US EPA, “Summary of the Clean Water Act,” 2013.

⁴⁰ Murray and Kominers, “The Human Right to Water in the United States;” Food & Water Watch, “NY Votes to Enshrine Right to Water and Healthful Environment in State Constitution,” Food & Water Watch, 2021.

⁴¹ NY State Senate, “NY State Assembly Bill A6566,” 2021.



Pennsylvania have recognized the human right to clean air and water through their own constitutional amendments.⁴² These states show that it is possible to provide constitutional protection for these rights, but there is still a need for further forward momentum to reach the federal government. The need for clean water has become particularly urgent today in the wake of droughts and other climate disasters. International Law recognizes the right to water in several treaties, and in a United Nations General Assembly (UNGA) resolution in 2010.⁴³ Most recently, on July 28, 2022, “the United Nations General Assembly agree[d] to declare the ability to live in ‘a clean, healthy and sustainable environment’ a human right for all” as an effort to increase urgency and work towards protecting the environment.⁴⁴ The European Court of Justice added the right to clean air as a fundamental right in the European Union in 2014.⁴⁵ In 2021, the World Health Organization published Air Quality guidelines to protect clean air as “a basic human right” and serve as “a global target for national, regional and city governments” in reducing air pollution in a release of guidelines which they regularly update since the first release in 1987.⁴⁶ The most recent update “is in response to the real and continued threat of air pollution to public health.”⁴⁷ The United Nations and its member states recognize the importance of air quality and reducing air pollution to maintain clean air necessary for human and environmental health as illustrated further through the International Day for Clean Air for blue

⁴² Food & Water Watch, “NY Votes to Enshrine Right to Water and Healthful Environment in State Constitution,” Food & Water Watch, 2021.

⁴³ Murray and Kominers, “The Human Right to Water in the United States.”

⁴⁴ World Economic Forum, “The UN Just Declared a New Human Right.”

⁴⁵ UNEP, “The Right to Breathe Clean Air,” 2017.

⁴⁶ “What Are the WHO Air Quality Guidelines?”

⁴⁷ “What Are the WHO Air Quality Guidelines?”



skies with the “Healthy Air, Healthy Planet,”⁴⁸ and it is time for the U.S. to do the same.

The rights to clean water and air should be understood as fundamental rights as both clean water and air are important governmental interests. The standard of fundamental rights provides a robust, but baseline standard which would allow for protection of these resources, access to these resources, and ensure that they will be provided to all. This still leaves open how exactly access would be provided. what this baseline standard would look like exactly, but to some extent that goes beyond the scope of this article and is still left open to debate and discovery.

⁴⁸ United Nations, “International Day of Clean Air for Blue Skies.”



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