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Righting Environmental Wrongs: Assessing the Role of Legal Systems in Redressing Environmental Grievances

During the second half of the twentieth century, many countries fundamentally altered the way in which their legal systems addressed

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environmental issues. In particular, legal innovations were developed to offer citizens a means of redressing grievances against the state or private entities for violating environmental regulations. The United States began expanding access to its courts for environmental litigation through a landmark decision that broadened the concept of standing;[1] India enlarged the field of potential claimants in environmental litigation through a landmark decision and innovative constitutional interpretation; Japan sought to provide avenues for obtaining remedies through national environmental legislation, but grievances have been more successfully redressed through major decisions that have expanded the scope of constitutionally guaranteed rights. Despite differences in governmental structure, legal doctrine, and legislation, states have undergone dramatic transformations in the way that the public interfaces with the legal system in order to right environmental wrongs.

How might social scientists explain this convergence around the notion of public empowerment and enhanced access to courts in order to redress environmental grievances? This Article seeks to develop a response to this line of inquiry by tracing the evolution of judicial innovations in environmental litigation in the United States, India, and Japan.

In this Article, I evaluate the explanatory capabilities of two groups of theories—law and globalization, and policy diffusion and transfer. Then I provide in depth analysis of the development of environmental law in three countries—the United States, India, and Japan—in order to decipher the main causal factors contributing to changes in the way each country approaches access to courts for the purpose of redressing environmental grievances. I find that neither theories of law and globalization nor theories of policy transfer and diffusion offer much value in explaining the changes that occurred. In addition, I find that while the mechanisms countries utilize to expand access to courts for individuals to engage in environmental litigation are context-specific, countries have similarly endeavored to challenge the conventional interpretations of legal doctrine in order to have environmental wrongs addressed by the courts. Finally, I conclude by arguing that this trend may be indicative of an emerging international norm

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1 Also referred to as *locus standi*, standing refers to "the personal stake that a party has in the matter before the court." Hudson P. Henry, Constitutional Law Standing, *A Shift in Citizen Suit Standing Doctrine: Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 28 ECOLOGY L.Q. 233, 234–35 (2001).

whereby individuals may have legitimate legal claims when they suffer (or may potentially suffer) from man-made environmental damage, and that individuals possess certain environmental rights which, when infringed upon, give rise to legal claims that require adjudication by courts.

I
OVERVIEW OF RELEVANT THEORIES

Two potential theoretical explanations concerning the approximate convergence of legal systems over the issue of environmental rights will be discussed here—theories of law and globalization and theories of policy transfer and diffusion.

A. Theories of Law and Globalization

Theories relating to law and globalization offer one perspective that may be useful in understanding the changes in legal norms documented here. Legal scholars, political scientists, and sociologists alike have attempted to locate the sources of legal norm change within a state by examining how international norms, or norms external to the state, facilitate shifts in domestic judicial practices. These mechanisms have been characterized in various ways: transnational legal process,[2] judicial globalization,[3] globalization of law,[4] recursivity of law,[5] and norm life cycle.[6] These theories are described in greater detail below.

Transnational legal process offers one way to explain dynamic global conversations pertaining to law: "Transnational legal process describes the theory and practice of how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."[7] Four attributes define this theory: (1) transnational legal process is nontraditional in that it diverges from

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2 Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

3 Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

4 Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993).

5 Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135 (2007).

6 Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

7 Koh, *supra* note 2, at 183–84.

traditional scholarship on international law by breaking down the dichotomy between domestic and international legal spheres; (2) the theory is nonstatist because agency is afforded to nonstate actors in addition to states; (3) transnational legal process is a theory marked by dynamic interactions among nonstate actors and states, between states, and between public life and the private sphere;[8] and, (4) transnational legal process is normative.[9] That is, norms are created, "interpreted, internalized, and enforced, thus beginning the process all over again."[10]

In a second theoretical approach, the mechanisms through which legal norms are internationalized function as a process referred to as "judicial globalization."[11] This process is conducted primarily by judges who communicate, exchange ideas, and cooperate on various legal issues. Transjudicial communication can take several forms: vertical communication (i.e., relations between federal and supranational courts), horizontal communication[12] (i.e., relations between national judicial systems at the interstate level), and mixed vertical-horizontal communication (i.e., supranational courts functioning as channels for exchange among states or clarifying common legal principles shared among states).[13] Transjudicial communication may be further categorized according to the degree of reciprocal engagement offered by one legal system to another. In direct dialogue, one court initiates communication and another court responds.[14] This form of transjudicial dialogue indicates a situation in which both parties to the conversation are cognizant of the communication and willing to participate in a reciprocal fashion. In monologue, one court conducts its business without considering itself part of a continuous conversation among courts.[15] In intermediated dialogue, a supranational court mediates between the courts of individual states.

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8 For example, norms can originate at any level of governance and impact the functioning of any level in the international system.

9 Koh, *supra* note 2, at 184.

10 *Id.*

11 Slaughter, *supra* note 3, at 1104.

12 Horizontal judicial globalization is further broken down into two types: (1) "judicial cooperation in resolving transnational disputes" and (2) "cross-fertilization of national judicial decisions." *Id*. at 1112.

13 Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 103–12 (1994).

14 *Id.* at 112.

15 *Id.* at 113.

A third theory that may prove informative is the theory of the globalization of law, which cautions scholars to recognize the limited extent to which certain areas of law have penetrated globally. This theory advances the idea that when speaking of the globalization of law, the effects and influences recognized are actually restricted to only a small number of countries.[16] Further, "globalization of law" may be an exaggeration of reality; a more appropriate description of the phenomenon observed may be that while globalization will place new but similar demands on certain states, state responses will be based on domestic concerns as opposed to exclusively international legal norms.[17] In the case of the United States, the influence of legal changes will flow out to willing recipient countries, but the United States will remain fairly insulated from the incorporation of foreign legal innovations. Shapiro asserts that the globalization of law is in essence a reified globalized *Americanism*.[18]

A fourth theoretical orientation presents a sociological treatment of the globalization of law termed the "recursivity of law."[19] Advocates of this theory claim to fill a critical gap in the literature on globalization and its effects on law by emphasizing the dynamic and inclusive aspects of legal globalization. The recursivity of law features four factors that distinguish it from other sociological approaches to the study of law.

First, the recursivity of law perspective highlights the role played by legal actors such as lawyers, judges, and legal scholars.[20] Second, the theory "pays close attention to the constitutive power of legal concepts."[21] More precisely, recursivity adopts a constructivist approach to law whereby codified rules shape the legal environment in which actors exist, while the actors themselves internalize the rules and adapt them to their current circumstances. Third, the recursivity of law recognizes the independent capacity of legal institutions to constrain actors and shape legal rules.[22] Finally, the theory examines how the form that law takes (i.e., case law, codes, regulatory

16 More specifically, the phenomenon of the globalization of law is in reality confined largely to the United States and "Western Europe with shadowy addenda." Shapiro, *supra* note 4, at 38.

17 *Id.* at 63.

18 *Id.* at 39.

19 Halliday & Carruthers, *supra* note 5, at 1138.

20 *Id.* at 1142.

21 *Id.*

22 *Id.* at 1142–43.

standards) "affects its implementation, its comprehension, its agents, and its function."[23] The recursivity of law approach also presents four mechanisms that describe the intrinsic tensions experienced by states acting within the global legal arena: the indeterminacy of law, contradictions, diagnostic struggles, and actor mismatch.[24]

Finally, a "norm life cycle" approach provides an international relations theory-based alternative to the legalistic approaches detailed earlier in this part.[25] This alternative perspective offers an explanation of how norms influence state behavior through a three-stage process: (1) norm emergence, (2) norm cascade, and (3) norm internalization.[26] In the first stage, proponents of a specific norm, or norm entrepreneurs, seek to persuade relevant actors to adopt the norm. Between the first stage and the second stage a tipping point is reached when a "critical mass of relevant state actors adopt the norm."[27] This in turn leads to the second stage, when other actors imitate the norm and the norm achieves broad acceptance. Finally, during the third stage of the life cycle, debate over the norm ceases and the norm becomes embedded in practice.

Each of the approaches enumerated above seeks to develop a theoretical explanation for changes in domestic legal structures that can be understood in terms of the larger global legal environment in which states exist. Some theories purport a great deal of fluidity between the active agency of domestic and international actors (i.e., transnational legal process, judicial globalization, recursivity of law, and norm life cycle), while other theories restrict the phenomenon to relatively static geographic parameters (i.e., globalization of law). The theories summarized above also vary in terms of the agency afforded to various actors. On one side of the spectrum lie those theories that focus primarily on the role of states (i.e., globalization of law and transnational legal process). On the other side of the spectrum reside theories that recognize a variety of actors that can impact the international legal environment (i.e., recursivity of law, judicial globalization, and norm life cycle). Finally, each of the theories recognizes the significant interplay that occurs between actors at all levels of international society. This dynamism runs along a continuum

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23 *Id.* at 1143.

24 *Id.* at 1149–52.

25 Finnemore & Sikkink, *supra* note 6, at 895–96.

26 *Id.* at 895.

27 *Id.*

with conceptions of interactivity among relevant actors (i.e., states, judges, courts, legal scholars, nonstate actors, etc.) ranging from the inegalitarian, nonreciprocal influence suggested by the globalization of law (i.e., the role of the U.S. Supreme Court within the larger community of courts) to the complete reciprocal engagement and co-constitution explicated in the recursivity of law and norm life cycle (i.e., courts engaged in direct dialogue with one another). These theories have been articulated in various forms, but essentially all of the permutations seek to explain legal norm change in terms of the process by which legal decisions and scholarship from one state influence the actions and outcomes of another state's legal system.

B. Theories of Policy Transfer and Diffusion

Theories regarding policy transfer and diffusion present another possible source of explanatory value for the phenomenon observed. Policy transfer refers to "the process by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions, and ideas in another political system."[28] Policy transfer in particular is concerned with understanding who is responsible (i.e., policymakers) for transferring what forms of information to what ends and deciphering whether the transfer is successful or not.[29] Within the context of this paper, policy transfer may be useful in attempting to explain a certain outcome—such as increased access to courts in order to redress environmental grievances—because it seeks to answer "the very basic questions of who, what, why, where and how policy transfer takes place."[30]

Related to policy transfer is the concept of policy diffusion. Policy diffusion refers to understanding the mechanisms by which "innovations, policies, or programs spread from one governmental

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28 David P. Dolowitz & David Marsh, *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making*, 13 GOVERNANCE 5, 5 (2000).

29 For the purposes of this Article, law may be considered a form of policy (i.e., as a policy instrument) and judges act as policymakers despite their omission from the list of common actors in the policy transfer process. *Id.* at 10.

30 Edward C. Page, *Future Governance and the Literature on Policy Transfer and Lesson Drawing*, ESRC FUTURE GOVERNANCE PROGRAMME WORKSHOP PAPER, London, Jan. 28, 2000, at 3.

entity to another."[31] Unlike policy transfer, however, policy diffusion casts a broader conceptual net: "policy diffusion is not restricted to the operation of specific mediation mechanisms, but includes all conceivable channels of influence between countries."[32] Perhaps more importantly, policy diffusion differs from policy transfer in that it is often used to describe structural reasons for patterns of policy adoption as opposed to explaining the adoption of policy in a particularized circumstance.[33] Yet when considered in tandem, policy transfer and policy diffusion offer a pair of theoretical concepts that may prove useful in the present study as they both "reflect processes which under certain circumstances might result in policy convergence."[34]

Whereas theories of law and globalization function explicitly to explain changes occurring in the legal domain, theories of policy transfer and diffusion seek to describe the process by which changes happen in a substantive policy area. Yet both sets of theories emphasize the role of globalization in facilitating the movement and subsequent utilization of ideas that originated elsewhere.[35] Also, while distinct differences between the groups of theories exist, there are also important overlaps in conceptual orientation. For instance, Slaughter's typology of transjudicial communication could easily be subsumed by the theory of policy diffusion due to its concentration on a subset of actors (i.e., judges) that fall under the purview of organizational studies, an antecedent of diffusion studies. Both theories involving law and globalization and theories of policy transfer and diffusion present useful ways of thinking about the processes by which similar changes occur across legal systems.

The next three parts provide detailed descriptions and analyses of the paths taken by the United States, India, and Japan to expand access to courts in order for individuals and groups to have their grievances for environmental wrongs redressed. Due to the vast differences between the cases in terms of geography, stage of

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31 Adam J. Newmark, *An Integrated Approach to Policy Transfer and Diffusion*, 19 REV. POL'Y RES. 151, 152 (2002).

32 Christoph Knill, *Introduction: Cross-National Policy Convergence: Concepts, Approaches and Explanatory Factors*, 12 J. EUR. PUB. POL'Y 764, 766 (2005).

33 *See, e.g.*, Jacint Jordana & David Levi-Faur, *The Diffusion of Regulatory Capitalism in Latin America: Sectoral and National Channels in the Making of a New Order*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 102 (2005).

34 Knill, *supra* note 32, at 767.

35 *See* Dolowitz & Marsh, *supra* note 28; Slaughter, *supra* note 3.

economic development, political history, and effectiveness of institutions, it stands to reason that the United States will prove to have served as a policy entrepreneur, informing the later policy and legal decisions made in India and Japan. Yet the mechanisms by which such influence is conveyed remain to be seen. Duly recognized is the fact that the preceding statement presumes some modicum of information sharing and conscious adoption of innovative policy. It may, in fact, be the case that the influence of the United States in this domain of policy was marginal at best. Such a finding would indeed require subsequent iterations of theorizing and hypothesis testing.

II
THE DEVELOPMENT OF STANDING DOCTRINE IN THE UNITED STATES

The conception of legal standing as it is used in modern American jurisprudence has departed significantly from its colonial roots. Indeed, "'standing' was neither a term of art nor a familiar doctrine at the time the Constitution was adopted."[36] During the founding of the United States, the Framers drew insight from English law. English law articulated, at least as early as 1724,[37] the idea that a stranger possesses the ability to bring a cause of action where abuses of judicial authority are concerned without being required to show that such abuses resulted in specific injury. Colonial courts, which often deferred in the nascent stages of the American legal system to English doctrine and precedent, similarly permitted third parties who did not demonstrate a concrete injury-in-fact to resolve disputes in court.[38] In fact, "[n]either English nor colonial courts applied any jurisdictional limit that bore any resemblance to the modern law of standing."[39] Therefore, American judicial records dating back to the judiciary's founding exhibit a liberal interpretation of standing doctrine, a construal that reflects the influence of English practice on early colonial jurisprudence.

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36 Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 818 (1969).

37 Arthur v. Comm'rs of Sewers in Yorkshire, 88 Eng. Rep. 237 (1725).

38 Berger, *supra* note 36; *see also* Matt Handley, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 REV. LITIG. 97, 103 (2002).

39 Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1764 (1998).

The practice of awarding standing even where a claimant does not possess a direct interest in the matter or has not demonstrated specific injury remained unperturbed for decades. However, in the early nineteenth century, challenges to standing doctrine emerged. Yet it would not be until 1897 that the standing of an individual in a case involving a public right would be contested in an American court.[40] Standing would later formally enter the legal system as a critical issue in the 1923 case *Frothingham v. Mellon*.[41] *Frothingham* rendered ambiguous whether courts were to approach standing as a constitutional mandate or common law doctrine.[42] This quandary was first entertained in *Stark v. Wickard* in 1944,[43] which yielded the first federal judicial opinion on the matter. In *Stark*, the Court determined that Article III of the U.S. Constitution, which outlines those "cases" and "controversies"[44] that may fall within the power of the judiciary, should be interpreted in a more restrictive fashion.[45] This decision had the effect of narrowing the criteria used to decipher whether the plaintiff could prove he or she had been injured by the actions of the defendant.[46] In its 1970 decision, *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, the Court clarified its assertion in *Stark* by recognizing injury-in-fact as a necessary condition for the attainment of standing under Article III.[47] The decision in *Data Processing* also required plaintiffs to prove that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[48] Two additional Article III requirements were introduced by the Court in 1973,[49] and standing doctrine formally expanded to a three-prong test in 1976,[50] requiring that a plaintiff demonstrate (1) injury-in-fact; (2) that the injury can be traced to the

40 Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1271–72 (1961).

41 Frothingham v. Mellon, 262 U.S. 447 (1923).

42 *Id.*

43 Stark v. Wickard, 321 U.S. 288 (1944).

44 U.S. CONST. art. III, § 2.

45 *Stark*, 321 U.S. at 310.

46 Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992); *see also* Handley, *supra* note 38, at 104–05; Pierce, *supra* note 39, at 1765.

47 Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970).

48 *Id.* at 153.

49 Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973).

50 Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976).

actions of the defendant; and (3) that a decision in favor of the plaintiff is likely to redress the injury sustained.[51]

Standing doctrine in the United States has had a major impact on the opportunities available for private citizens and environmental organizations to engage in litigation on the basis of representing the public interest in environmental protection. Four watershed cases discussed below serve to illustrate the role played by nonlinear changes in standing in the development of American public interest environmental law. In *Scenic Hudson Preservation Conference v. Federal Power Commission*, a federal court addressed the issue of whether an environmental group could satisfy the requirements to obtain standing.[52] In *Scenic Hudson*, citizens assembled under the group name Scenic Hudson Preservation Conference filed an injunction against the Federal Power Commission to enjoin the agency's plans to build a hydroelectric power plant in Cornwall, New York.[53] The citizens' group alleged that the planned power plant would diminish the area's recreational, aesthetic, and biological quality.[54] Under the Federal Power Act, the Federal Power Commission was required "to promote the most efficient use of water resources, including recreational use."[55] Recognizing the potential harm to the concerned citizens posed by the construction of the power plant and the federal mandate to protect recreational use of water resources, the court ruled that the rights of the group had been infringed upon.[56] Thus, the court determined that the Scenic Hudson Preservation Conference did, in fact, satisfy the standing criteria of "injury-in-fact," and, ultimately, that the Federal Power Commission did not adequately conduct its due diligence with regard to assessing the impacts that the proposed hydroelectric power plant would have on the citizens of Cornwall.[57] The case marked the first time in

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51 Pierce, *supra* note 39, at 1765; *see also* Laveta Casdorph, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 498–99 (1999).

52 354 F.2d 608 (2d Cir. 1965).

53 JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 11 (2d ed. 2007).

54 *Id.*

55 Lucien Chipley, Comment, *Environmental Law—Standing to Sue*, 6 LAND & WATER L. REV. 527, 530 (1970–71).

56 *Id.*

57 SALZMAN & THOMPSON, *supra* note 53, at 11.

American legal history that an environmental group was granted standing in a court of law.[58]

Almost thirty years later, the Supreme Court would be forced to further explicate the injury-in-fact requirement as it applied to public interest environmental law in *Lujan v. Defenders of Wildlife*.[59] In *Lujan*, a group of plaintiffs filed suit against the Fish and Wildlife Service, alleging that the agency's practice of "funding . . . overseas projects that threatened endangered species in Egypt and Sri Lanka" violated the terms of the Endangered Species Act.[60] The plaintiffs' standing argument was based on the notion that two individuals affiliated with Defenders of Wildlife had once visited the foreign natural habitats of endangered animals and intended to return at some point in the unspecified future.[61] The Court did not find this argument persuasive, asserting that the plaintiffs' intentions to return to the habitats abroad were not sufficient to fulfill the injury-in-fact requirement of the three-prong standing test and that the alleged injury-in-fact must be "concrete and particularized" as well as "actual or imminent."[62] In sum, the Court's decision in *Lujan* effectively narrowed the circumstances under which a plaintiff can claim an injury-in-fact, constricting the potential for a claimant to attain standing in the realm of environmental law.

The scope of what constitutes an injury-in-fact would again be tapered in *Steel Co. v. Citizens for a Better Environment*.[63] In *Steel Co.*, "the Court applied a narrow interpretation of the redressability requirement to deny standing to a nonprofit citizens group suing under the Emergency Planning and Community Right-to-Know Act (EPCRA) for a manufacturing company's failure to make available required reports concerning toxic chemical use."[64] In particular, redressability was denied on the grounds that because Steel Co. had begun to comply with the report requests before the trial commenced,

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58 The case was subsequently remanded and in 1971 the Federal Power Commission was deemed to have satisfactorily evaluated the environmental impacts of constructing a hydroelectric power plant along the Hudson River. Scenic Hudson Press Conference v. Fed. Power Comm'n, 453 F.2d 463, 481 (2nd Cir. 1971).

59 *See* 504 U.S. 555 (1992).

60 Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 52–53 (Fall 2001).

61 Sunstein, *supra* note 46, at 198.

62 *Lujan*, 504 U.S. at 560, 564.

63 *See* 523 U.S. 83 (1998).

64 Henry, *supra* note 1, at 238.

civil penalties paid by the company would not have the restorative effect on the alleged grievance mandated by the current standing doctrine.[65] This strict temporal consideration of redressability marked a setback for potential environmental litigants clamoring to enforce compliance with environmental statutes through the judicial system. It allowed companies to "minimize the times they have to report [on the use of toxic chemicals] and always avoid being sued by merely beginning to report after being threatened with a lawsuit."[66] In effect, the decision in *Steel Co.* reduced the incentive for companies to comply initially with environmental regulations and allotted them additional time to violate federal environmental statutes before legal action is instigated by environmental groups.

More recently, the Supreme Court revisited the requirements for standing in environmental law in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc*.[67] The case involved a group of environmentalists who filed suit against Laidlaw under the citizen suit provision of the Clean Water Act for allegedly violating the conditions of the National Pollutant Discharge Elimination System (NPDES) permit the company had successfully obtained from the South Carolina Department of Health and the Environment (DHEC).[68] After a series of appeals from both sides, the Supreme Court granted certiorari and considered whether the plaintiffs, Friends of the Earth (FOE), satisfied the requirements necessary to attain standing and bring suit against Laidlaw.[69] In particular, the Court examined whether the plaintiffs were able to demonstrate injury-in-fact in light of the dearth of evidence indicating that Laidlaw's actions had diminished the water quality of the North Tyger River.[70] The Court ultimately decided in favor of FOE by a seven to two margin, holding "that the lessening of aesthetic and recreational values of an area can constitute a valid injury-in-fact for Article III purposes and . . . that FOE's members had suffered a sufficiently concrete injury-in-fact."[71]

The decision rendered in the *Laidlaw* case offers two important implications for standing doctrine in American environmental law. First, unlike *Steel Co.* where the alleged violations all occurred in the

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65 *Id.*

66 Handley, *supra* note 38, at 113.

67 528 U.S. 167 (2000).

68 Henry, *supra* note 1, at 242–43.

69 *Id.*

70 *Id.* at 243–44.

71 *Id.*

past, *Laidlaw* dealt with violations that were alleged to continue up until the time that the case was heard in the appellate court. The ruling in *Laidlaw* signaled the Court's relaxation of the redressability prong as conceived in *Steel Co.*, asserting that civil penalties could perform a restorative function as a deterrent against continued harmful activities. Second, *Laidlaw* expanded injury-in-fact to include affronts to a plaintiff's aesthetic and recreational values. As a result, the Court retreated from the requirement set forth in *Lujan* that a plaintiff must demonstrate imminent and particularized injury to satisfy the injury-in-fact prong of standing doctrine. Courts would not require that a claimant pursuing legal action against a party accused of violating environmental regulations prove scientifically or through quantitative analysis the existence of a harm to the environment. Less readily quantified infringements of aesthetic or recreational value would suffice to justify bringing a cause of action.

Since the 1940s, standing doctrine in the United States has gradually evolved to require the fulfillment of more stringent criteria under the auspices of an increasingly broad interpretation of Article III "cases" and "controversies." The development of modern American standing rules can be understood in terms of three periods of judicial innovation—a conservative period (1930s and 1940s) in which the Court sought to "protect New Deal legislation from court-based attacks by businesses seeking to preserve their economic interests"; a liberal period (1960s and 1970s) marked by a relaxation in standing rules in response to the expansion of individual constitutional rights; and a more recent conservative period (1980s onward) in which the appointment of new justices during three Republican administrations has resulted in a narrowed interpretation of standing.[72]

Since the 1940s, standing as applied to environmental law has varied considerably more than standing doctrine overall. As intimated above, the incongruous trajectories of standing doctrine and standing rules in public interest environmental law may be due to the interaction of two factors—the ideological dispositions of judges and periods of fundamental social, economic, and political change in the United States. Isolating the individual impact of either variable represents a Herculean task. On the one hand, judges' ideological stances are consistent and transparent enough to predict the rate at

72 Casdorph, *supra* note 51, at 473–74.

which a judge will grant standing to certain types of plaintiffs.[73] On the other hand, a shift in social attitudes toward the environment may have spurred judicial activism, which permitted the public greater access to the courts to redress environmental grievances.[74] However, it may also be that an individual judge's ideology and the changing context in which judicial decisions were made were simply two elements of a co-constitutive relationship.[75]

The remainder of this paper focuses on two additional cases—India and Japan. The case in India centers on the development of *locus standi* in public interest litigation. The case in Japan concerns the role of government and the legal system in addressing pollution and its impacts on human health. The goal of the following historical analyses is to assess how, in each case, the legal system evolved to serve the interests of the citizens who sought to obtain remedies for environmental harms that were committed by public or private entities.

III
THE REVOLUTION OF *LOCUS STANDI* IN INDIAN PUBLIC INTEREST LITIGATION

Unlike other developing countries with underdeveloped judicial systems, India possesses a progressive history of expanding public interest litigation and incorporating facets of international environmental law into its legal doctrine.[76] However, India's path to adopting a liberal perspective on judicial standing has been a tumultuous one. The end of World War I launched national and social revolutions in India. Following the conclusion of World War II, India's concurrent revolutions provided the political will necessary to demand freedom from British colonialism. After years of colonial subjugation, India gained its independence on August 15, 1947. In an effort to realize the dream of social equality, which was stifled under British rule, the Constitution of India (1949) was designed to address

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73 Pierce, *supra* note 39, at 1754–55.

74 Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209, 213–18 (1987).

75 David Sive, *The Litigation Process in the Development of Environmental Law*, 19 PACE ENVTL. L. REV. 727, 738–39 (2001–2002).

76 Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENVTL. L. 293, 293–96 (2007).

issues of social justice and promote equal treatment under the law. Such desires required a strong judicial branch to enforce the laws.

The judiciary's role as guarantor of social justice would not be developed swiftly, however. The judiciary's emergence as a reliable protector of individual rights would be contingent upon its ability to cast off the oppressive shackles of its colonial history. For some scholars, optimism about the role of the courts in India abounds: "The judiciary has a colonial past and the democratic destiny."[77] Such optimism is not rooted in unqualified idealism; indeed, the gradual relaxation of standing rules in India speaks to the country's proactive stance on extending the concept of social justice to all Indians.

Prior to the 1970s, and absent any formal rules for establishing standing provided by the Constitution, Indian courts relied on a "person aggrieved" standard for deciding who is fit to bring a case to trial.[78] But beginning in the [1970s], standing rules in India were greatly expanded. Indian courts began to adopt a more flexible standard whereby those seeking access to the judicial system needed only to prove that they possessed "sufficient interest."[79] The expansion of judicial standing was fostered by two factors: (1) an increasing demand within India to address issues of social justice and (2) the insertion of a provision within the 42nd Amendment to the Indian Constitution that provided free legal aid to the poor.[80] Both of these legal innovations were strongly advocated for by two activist judges sitting on the Supreme Court of India at the time, Justice Bhagwati and Justice Iyer.[81]

A pivotal moment for the evolution of *locus standi* in Indian jurisprudence came in 1982 when the Supreme Court of India decided *Judges' Transfer Case*, A.I.R. 1982 S.C. 149. In *Judges' Transfer Case*, "[t]he Supreme Court ruled that bar associations of lawyers had

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77 Gulab Gupta, *Public Interest Litigation as an Instrument of Social Justice*, 5 CENT. INDIA L.Q. 1, 2 (1992).

78 SHYAM DIVAN & ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 134 (2d ed. 2001).

79 *See id.* at 134, 136.

80 JONA RAZZAQUE, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN, AND BANGLADESH 300 (2004).

81 Rajamani, *supra* note 76, at 294; Gupta, *supra* note 77, at 4. Although the contributions made by Justices Bhagwati and Iyer to the evolution of public interest law in India are well recognized, Divan and Rosencranz argue that American jurisprudence is largely responsible for the internationalization of an expanded perspective on public interest law dating back to the 1955 landmark decision in *Brown v. Board of Education*. *See* DIVAN & ROSENCRANZ, *supra* note 78, at 134 n.86.

the right to sue against transfers of judges during the 'Emergency' that had been declared by Prime Minister Indira Gandhi—even though none of the lawyers would actually suffer economic harm from loss of clients by having different judges hear their cases than those originally assigned to a given court."[82] The result of this decision was a major broadening of *locus standi*, the circumstances under which marginalized groups could gain access to the courts in order to redress their grievances. The ruling established that "the use of law to bring about major changes in society requires that suits should not be limited to those where the rights of a specified individual or identifiable group can be said to have been infringed."[83] With the requirements for obtaining standing relaxed, the Supreme Court experienced a tidal wave of "letters and petitions from poor aggrieved person[s], social workers and media-men complaining of injustice and seeking its interference."[84]

The decision in *Judges' Transfer Case* not only "[expanded] the concept of justiciable public interest and prescrib[ed] an activist role for the judiciary in securing justice for the nation's voiceless,"[85] it also established the doctrinal framework known as representative standing. "Representative standing can be seen as a creative expansion of the well-accepted standing exception which allows a third party to file a *habeas corpus* petition on the ground that the injured party . . . cannot approach the court himself."[86] The doctrine of representative standing constituted a revolutionary legal innovation the likes of which had not been matched in ambition or scale by the courts in the United States or the United Kingdom.[87]

A. The Development of Environmental Rights in India

Environmental rights in India have their origin in ancient religious scriptures. The scriptures ordained "it was the *dharma* of each

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82 John E. Bonine, Professor of Law, Univ. of Oregon, Lecture at Mercer University Law School, Standing to Sue: The First Step in Access to Justice (Jan. 1999) (transcript available at http://www.law.uoregon.edu/faculty/jebonine/docs/boninelecture.pdf).

83 Jill Cottrell, *The Indian Judges' Transfer Case*, 33 INT'L & COMP. L.Q. 1032, 1043 (1984).

84 Gupta, *supra* note 77, at 6.

85 Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L.J. 57, 59 (1994).

86 Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN LAW INST. 494, 499 (1987).

87 Gupta, *supra* note 77, at 6.

individual in society to protect Nature, so much so that people worshipped the objects of Nature."[88] Individual accountability was deemed necessary to ensure the sanctity of the entire community. This perspective is considered a precursor to the notion of "sustainable development."[89]

The modern bases upon which environmental rights in India are founded reside in the "concepts of 'nuisance' under tort law and 'public nuisance' under criminal law."[90] Nuisance provides a legal foundation for environmental law in other common law countries as well, such as the United States.[91] Public nuisance in particular has been utilized by Indian courts to determine that "[p]ublic health cannot be jeopardized by private business."[92] However, during the 1970s, India's environmental law would begin a dramatic shift from the principles of nuisance and public nuisance to human rights. In 1975, Indian Prime Minister Indira Gandhi issued a Proclamation of Emergency due to "'internal disturbance[s]' threatening the security of India."[93] Gandhi's Emergency greatly limited civil and political rights in India. But by early 1977, Prime Minister Gandhi was ousted from office through state election and the Emergency was repealed. As the Indian people were still reeling from a period of civil unrest under Gandhi, the Supreme Court took it upon itself to redress the grievances of its constituents that it had failed to address during the Emergency by strengthening human rights protections. For example, the expansion of *locus standi* occurred in the wake of these events.

Although progress on the environmental rights front had been realized toward the end of the 1970s, the 1980s brought a threshold event that drew attention to the major flaws in Indian environmental

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88 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 Developmnet and Jurisprudence 1 (2006).

89 *Id.* at 2. Although there exist many different definitions for the term "sustainable development," one of the most widely accepted current conceptions was articulated by the Brundtland Commission to refer to development that "meets the needs of the present without compromising the ability of future generations to meet their own needs." U.N. Rep. of World Comm'n on Env't and Dev.: Our Common Future, U.N. Doc. A/42/427 (Dec. 11, 1987).

90 Ayesha Dias, *Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience*, 6 J. ENVTL. L. 243, 245 (1994).

91 In addition to nuisance, American environmental law is also based on the common law doctrine of trespass. *See* SALZMAN & THOMPSON, *supra* note 53, at 44.

92 Dias, *supra* note 90, at 245.

93 DIVAN & ROSENCRANZ, *supra* note 78, at 49 n.40.

law. In 1984, a pesticide factory in Bhopal leaked, killing thousands of Indians and injuring thousands more. This shocking environmental disaster "spurred the Central Government and a few state governments to adopt stronger environmental policies, to enact fresh legislation and to create, reorganize and expand administrative agencies."[94] Later, during the late 1980s and early 1990s, the Indian Supreme Court sought to enhance Article 21 of the Indian Constitution through several landmark court decisions.[95] Article 21 reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law."[96] In particular, the Supreme Court interpreted the fundamental right to life guaranteed in the Constitution to extend to "[t]he right to a 'wholesome environment.'"[97] The Court's judgment in *Subhashkumar v. State of Bihar*, for instance, "held that the right to life includes the right to enjoy unpolluted air and water."[98]

The lessons learned from the Emergency under Gandhi and the Bhopal disaster have thus been addressed by both courts and governments at the federal and state levels. These watershed events have unambiguously shaped the landscape of environmental rights in India.

B. Synthesis

While developments in American or English jurisprudence may have impacted the decision-making processes of Indian jurists, three additional explanations for the unique trajectory of Indian public interest environmental litigation are also plausible. First, activist judges such as Bhagwati served as norm entrepreneurs, at times venturing "far beyond the necessities of the particular case."[99] Second, India's Eastern philosophical roots predisposed the state and its judicial system to advanced legal reasoning regarding issues of human rights and the environment. Third, certain threshold events such as the Gandhi Emergency and the Bhopal disaster pushed the issue of human rights and environmental law to the extent that public

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94 *Id.* at 35.

95 *See, e.g.*, Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh AIR 1988 SC 2187; Attakoya Thangal v. Union of India 1990 KLT 580; Subhashkumar v. State of Bihar AIR 1991 SC 420.

96 INDIA CONST. art. 21 (1950).

97 Dias, *supra* note 90, at 246.

98 DIVAN & ROSENCRANZ, *supra* note 78, at 50.

99 Cottrell, *supra* note 83, at 1043.

pressure mandated some form of judicial action. Indeed, major elements of the legal innovation of *locus standi* were most significantly affected by both the judicial activism of certain judges on the Indian Supreme Court and endogenous shocks to the state that heightened the salience of environmental issues. The evidence presented here suggests that the lowering of standing rules in India was philosophically grounded in American and English legal thought, but more decisively impacted by highly salient events and norm entrepreneurship.

IV
A HISTORY OF ENVIRONMENTAL LAW IN JAPAN

Japan's struggle to address environmental issues can be segmented into four historical periods: (1) the period comprised of all history up until World War II; (2) the period from the start of World War II through 1967; (3) the period from 1967 until 1975; and (4) the post-1975 state of affairs.[100] For the purposes of the current study, only the first three periods will be covered, as they encompass the temporal span in which the most significant legal innovations regarding environmental law occurred. The intention is to provide a detailed analysis of the development of Japanese environmental law. Specific attention will be paid to the cumulative effects of significant domestic events related to the environment and decisions from judges in major environmental law cases.

A. First Period

The first period began with the Meiji Restoration in 1868. The prevailing thought during this time was that Japan could thwart potential colonizers by conveying strength in the form of industrial prowess.[101] In order to spur the kind of economic growth deemed necessary to augment Japan's status, the country focused on developing the heavy industry sector.[102] As heavy industry grew, Japan began to experience the side effects of rapid development; the "consequences of . . . industrialization could already be seen in the

100 JULIAN GRESSER, KOICHIRO FUJIKURA & AKIO MORISHIMA, ENVIRONMENTAL LAW IN JAPAN 3 (1981).

101 CYNTHIA H. ENLOE, THE POLITICS OF POLLUTION IN A COMPARATIVE PERSPECTIVE: ECOLOGY AND POWER IN FOUR NATIONS 223 (1975).

102 MARGARET A. MCKEAN, *Pollution and Policymaking*, *in* POLICYMAKING IN CONTEMPORARY JAPAN, 201, 202 (T.J. Pempel ed., 1977).

natural scenery."[103] Only twelve years after the Meiji Restoration commenced, Japan would endure its first serious environmental problem. It presented an early test of the competence of the legal system and the Diet, Japan's bicameral legislature, to address the social and environmental impacts resulting from industrialization.

The Ashio case, in which copper mining led to pollution of the Watarase River, demonstrated a concrete instance in which "extensive local environmental pollution and suffering became a social problem."[104] Heavy pollution caused by increased mining production manifested shocking visceral imagery, from dead fish floating along the river, to infant mortality.[105] In 1896, the effects of mining at Ashio garnered national media coverage, which, along with peasant protests, ultimately forced the government to take decisive action.[106] Although the Minister of Agriculture and Commerce articulated strict, unambiguous deadlines for "preventative construction" intended to dramatically reduce the sources of pollution in 1897, the government was only able to force mine managers to capitulate after much damage had already been done to both citizens and the environment.[107] In its totality, the Ashio case offered two important insights regarding the capacity of Japan to effectively handle the environmental crises pervasive throughout the Meiji period: (1) The Diet proved impotent to regulate pollution and (2) "[t]he legal system played only a minor role . . . usually limited to the prosecution and defense of criminal charges."[108] Any hopes for improving the government's ability to address Japan's environmental problems were swiftly supplanted as the country shifted its focus to its military obligations in World War II.

B. Second Period

With the onset of the war, Japan diverted its attention from the pollution problem, ushering in the second period of environmental regulatory activity on uncertain grounds. After the conclusion of World War II, Japan was subject to dramatic reforms to its

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103 Shiro Kawashima, *A Survey of Environmental Law and Policy in Japan*, 20 N.C. J. INT'L L. & COM. REG. 231, 233 (1994).

104 *Id.* at 234.

105 GRESSER, FUJIKURA & MORISHIMA, *supra* note 100, at 4, 6.

106 *Id.* at 7.

107 *Id.*

108 Frank K. Upham, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, 10 LAW & SOC'Y REV. 579, 583 (1976).

governmental and legal infrastructures during the ensuing American occupation.[109] In particular, the Meiji Constitution was replaced by the Constitution of Japan of 1946. The new Constitution included two articles which could be utilized to demonstrate "a constitutional basis for claiming the right to a decent and healthy environment"—Article XIII, which guarantees the right to the pursuit of happiness, and Article XXV, which guarantees the right to maintain the minimum standards for wholesome and cultured living of the people.[110] In theory, these articles could be used to bring a cause of action in cases of environmental harm; however, few endeavored to apply the relevant articles in such a manner. Early on in postwar Japan, it became apparent that the court system as it currently functioned was inadequate to deal with litigation arising from the high volume of people adversely affected by pollution.[111]

Just as Japan was coming to terms with the fallibility of its legal institutions and their capacity for managing environmental litigation, the country fell back on its Meiji era drive for rapid industrialization, reigniting concerns over the impact that industrial growth might have on the environment and human health. Its national pride bruised from the Axis powers' loss in World War II, Japan sought to restore morale through development of its industrial sector; the Japanese would obtain happiness and improve national welfare through material prosperity.[112]

By 1955, the negative effects of the renewed emphasis on industry started to emerge. Three events related to industrialization occurred during the latter half of the 1950s, arousing public concern and magnifying the need for comprehensive environmental regulations. In 1955, Minamata disease, a mysterious illness later found to be caused by mercury poisoning, was discovered.[113] The pervasiveness and salience of the disease raised public consciousness about the potential consequences of the drive for industrialization.[114] Three years later,

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109 Larry C. Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISS. C. L. REV. 11, 11–12 (2007–2008).

110 Kawashima, *supra* note 103, at 237.

111 GRESSER, FUJIKURA & MORISHIMA, *supra* note 100, at 16–17.

112 ENLOE, *supra* note 103, at 223.

113 Despite the prevalence of symptoms linking the disease to industrial waste emanating from the Minamata plant of the Chisso Corporation, direct causation would not be established scientifically until 1959. Upham, *supra* note 108, at 584.

114 *Id.*

when runoff from a pulp factory owned by the Honshu Paper Mill Company began to harm local fisheries along the Edo River, fishermen demanded the company claim responsibility and offer compensation for damages to their livelihood.[115] Upon the company's failure to address the allegations, fishermen stormed the plant, resulting in a melee in which dozens "were injured, and over one thousand policemen had to be summoned to suppress the riot."[116] Due to its proximity to Tokyo, the skirmish attracted national attention, and organized demonstrations calling for effective water pollution laws followed soon after.[117] As a result, two new water pollution laws passed the Diet with little controversy—the Water Quality Conservation Law and the Factory Effluent Regulation Law. However, the legislation furnished at the request of the public proved to be largely ineffective. Later, in 1959, as tensions mounted and patience for concerted governmental action to address the causes of Minamata disease wore thin, members of the Minamata Fisheries Cooperative launched a violent protest, "[breaking] into the Chisso plant and [causing] substantial damage."[118] With public outrage continuing on a persistently volatile path, both the government and Chisso resolved to settle the issue, albeit with only half-hearted conviction.[119] Despite the government's attempt at brokering a peace between business and the citizenry, Minamata disease would remain at the forefront of environmental concerns in Japan well into the 1970s.

In 1962, recognizing the insufficiency of existing legislation to adjudicate administrative cases, Japan augmented its legal system through the passage of the Administrative Case Litigation Law (ACLL).[120] The ACLL provided a definition of standing (*uttae no rieki*) that has remained to this day the guiding source of legal doctrine on the issue. Article 9 of the ACLL requires that in order for an individual to challenge an administrative act in a judicial forum,

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115 GRESSER, FUJIKURA & MORISHIMA, *supra* note 100, at 17.

116 *Id.*

117 *Id.*

118 Upham, *supra* note 108, at 585.

119 *Id.* (As an example of the lackluster effort on behalf of Chisso and the government to compensate the victims of Minamata disease, the 1959 round of negotiations yielded reparations that could only be considered meager at best; the largest sum of money allocated to a family with a disease stricken member was $833).

120 Outline of Civil Litigation In Japan, SUPREME COURT OF JAPAN (2006), *available at* http://www.courts.go.jp/english/proceedings/civil_suit.html (last visited Oct. 30, 2011) (civil cases continued to be governed by the terms of the 1890 Code of Civil Procedure).

the individual must demonstrate the existence of a "legal interest." More precisely, "plaintiffs must demonstrate possession of a right recognized by statute, in addition to proving a causal relation between the contested administrative action and the alleged adverse effect on legal interests."[121]

C. Third Period

The end of the second period and early portion of the third period in Japan's history of modern environmental law saw a shift from an emphasis on restoring national pride through economic development to widespread concern regarding the ramifications of such a pursuit. The failings of the government to address pollution in an adequate and timely fashion prompted the Japanese citizenry to look to the courts for stronger solutions to environmental problems.[122] The courts were receptive to the demands of a worried population, as evidenced by their willingness to take up environmental questions and fill the pollution policy void.[123] The courts had located a newfound courage that would be exercised in the early 1970s.

The third period truly began, however, with the passage of the Basic Law for Environmental Pollution Control in 1967. The Basic Law, while essentially setting up a framework for the adoption of more specific environmental legislation, reflected the government's acknowledgement of pollution as a serious issue, articulated the responsibility of the national government in helping local governments set up local control programs, and centralized the authority and administrative duties pertaining to pollution regulation.[124] On the one hand, the legislation was unprecedented; it represented "the first comprehensive, nation-wide environmental pollution control law in Japan."[125] On the other hand, the government inserted a "harmony clause" that obfuscated the balance sought between human health and economic progress. The harmony clause effectively "meant that pollution controls should in no way harm industrial development."[126]

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121 GRESSER, FUJIKURA & MORISHIMA, *supra* note 100, at 133.

122 *Id.* at 37.

123 MCKEAN, *supra* note 102, at 207.

124 GRESSER, FUJIKURA & MORISHIMA, *supra* note 100, at 24.

125 Kawashima, *supra* note 103, at 242–43.

126 *Id.* at 243 n.71.

One year later, the tension between centralized control and local regulation of pollution would be inflamed with the passage of the Tokyo Metropolitan Environmental Pollution Control Ordinance. The Tokyo Ordinance expanded the definition of pollution beyond the scope of the Basic Law, setting a major local precedent that challenged the narrower purview of the Basic Law. Specifically, the Tokyo Ordinance construed "environmental pollution to mean *any* infringement of the environment" and promulgated the notion that "citizens have the right to a clean and safe environment."[127] Such provisions stood in stark contrast to the relatively benign intentions laid forth in the Basic Law, sending the message to the national government that stronger language and legal obligations were desired.

The year 1970 marked a pivotal moment in the history of Japanese environmental law. Referred to in the literature as Kōgai Gannen (First Year of the Era of Pollution), 1970 involved a confluence of important events that highlighted the ongoing struggle between the quest for industrialization and the preservation of a traditional way of life.[128] Increasing pollution, greater media coverage of environmental harm caused by industrialization, mounting public fear of the health effects from pollution, growing criticism from local governments and the international community, and the potential for electoral losses due to poor handling of the pollution issue further pressed the government to take action. The embattled national government answered the call for reform and took several measures to address the pollution problem. First, the Basic Law was revised with a new purpose in mind—"to protect the health of the nation and to conserve the living environment."[129] Second, the Diet passed a pollution crime law making certain polluting activities subject to classification as criminal offenses. However, preventive measures were ultimately removed from the text "so that [the legislation] could be used only to punish polluters after they had already caused grievous damage to human life."[130] Finally, in 1971 the "Pollution Diet" established a national regulatory entity, the Environment Agency, to oversee administration of environmental issues and enforce environmental regulations.[131] Here, foreign influence played a key role in the development of

127 MCKEAN, *supra* note 102, at 222–23.

128 GRESSER, FUJIKURA & MORISHIMA, *supra* note 100, at 25–27.

129 MCKEAN, *supra* note 102, at 228.

130 *Id.* at 229.

131 GRESSER, FUJIKURA & MORISHIMA, *supra* note 100, at 26–27.

domestic environmental governance; Japan had studied the recent proliferation of independent environmental agencies throughout the West to better inform the creation of their own environmental agency.[132]

Although the Japanese government had made efforts to address the deteriorating quality of the environment, pollution continued to be a serious issue, and environmental conditions did not improve quickly enough to avoid severe health impacts. The inability of the government to sufficiently manage the pollution crisis was seen in the swelling docket of the court system. From 1971 to 1973, the courts decided four important pollution cases that would alter the power dynamic of environmental regulation in Japan. Known collectively as the "big four," each of these cases was decided in favor of the plaintiff who filed suit against a company or companies to seek damages for suffering caused by pollution.[133] All of the cases were decided at the district court level, signifying a growing distance between lower courts and the Supreme Court.

Despite the victories won by the plaintiffs in the big four, the legal process had shown itself to be critically sluggish (Minamata disease was first discovered in the mid-1950s) and the restrictive construal of standing doctrine limited popular access to the courts. This phenomenon could be explained by the fact that standing doctrine in Japan differentiates between "the legal interests of private individuals," which warrant the granting of standing, and the interests "shared by the general public that may incidentally be adversely affected by an official act," referred to as "reflex interests," which are often not recognized as legal interests that merit standing.[134] However, there have been deviations from the orthodox doctrine that have signaled a willingness on the part of judges to engage in the creative expansion of standing rules in environmental cases. In 1972, the Tokyo High Court decided in the Nikko Tarō Cedar Tree case that "preservation of scenic, historical, and cultural sites of value should be given the utmost consideration by administrative agencies because they enhance the people's ability to enjoy a healthy and cultural life."[135]

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132 *Id.* at 26.

133 The four cases were the Kumamoto Minamata Disease case, Niigata Minamata Disease case, Toyama Itai Itai Disease case, and Yokkaichi Asthma case. *See* Upham, *supra* note 108.

134 Kawashima, *supra* note 103, at 263–64.

135 *Id.* at 264.

D. Synthesis

As a civil law country, Japan's judicial decisions are often instructed by or implicitly deferential to legal precedent; however, judges' decisions do not make direct, purposive mention of previous court cases. Therefore, attempting to establish the degree to which standing doctrine in environmental law cases has been explicitly influenced by foreign legal precedent presents an empirical challenge. Further complicating matters, with regards to the decisions made in the big four pollution cases, "the judges who have been involved in these cases have not explained their motivations publicly."[136] In spite of empirical hurdles, one can arrive at a cautious approximation of the influential intensity of various factors through a brief examination of circumstantial evidence.

At first blush, the degree to which Japan's legal structure has been influenced by the United States in the domain of environmental law seems significant. Between the democratic reforms to Japan's Constitution led by the United States during the Occupation, modeling of the Environment Agency after Western government agencies charged with administration of national environmental issues, and rough temporal congruence with the period in which the United States liberalized its standing doctrine, it remains a possibility that Japan was at least marginally influenced by the actions of other countries with progressive legal agendas in the domain of environmental law.

However, the social, political, economic, and environmental context of late twentieth century Japan ultimately offers a more suggestive explanation for the enhanced justiciability of environmental cases. First, the steady stream of pollution related cases in lower and higher courts since the 1960s continues to exert pressure on the Japanese government to address environmental concerns. Second, the intensity of media coverage of the harmful effects of pollution elevated public consciousness about the social costs of industrialization, regularly castigating the government for its inability to combat pollution. Third, violent protests launched to demand greater governmental and industrial accountability tarnished Japan's authority on the domestic front and corroded the image of a recovering industrial power at the international level. Ever image

136 Upham, *supra* note 108, at 606.

conscious in the postwar era, Japan did not want to generate the appearance of a burgeoning legitimacy crisis.

Fourth, although no firsthand accounts of judicial decision-making were available at the time of writing, scholarly commentary on the mentality of judges, specifically those judges involved in the big four pollution cases, offers a useful supplementary perspective. In Upham's interpretive analysis of the big four cases, he paints the judges as moderately activist, empathetic, socially conscious interpreters of the law. He surmises that "there is no question that each judge was quite conscious of the difficulties that the traditional theories [of causation] would present to the plaintiffs and were determined to shape standards of proof that would minimize those difficulties to the greatest extent possible."[137] "[I]t is easy to imagine the judges viewing themselves as the last chance for the vindication of substantive justice."[138]

Perhaps similarities in the way in which the United States and Japan have dealt with environmental issues through their respective legal systems "result primarily not from economic competition between governments or from emulation, but from common responses by governments to similar economic, political and social conditions."[139] Particularly in the case of Japan, the development of legal doctrine similar to the United States' legal doctrine at the time can be reasonably understood in terms of two democratic countries generating similar responses to common problems.

V
CONCLUSION

As noted in the introduction, the United States, India, and Japan each experienced significant judicial innovations during the latter half of the twentieth century that profoundly impacted the ability of citizens to redress environmental grievances (see Figure 1 below).

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137 *Id.* at 609.

138 *Id.* at 610.

139 R. Daniel Kelemen & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J. INT'L ECON. L. 269, 271 (2002).

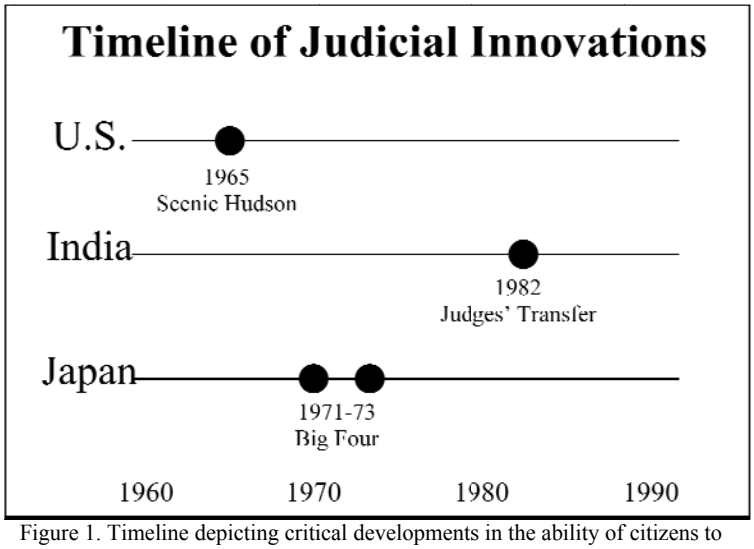

Figure 1. Timeline depicting critical developments in the ability of citizens to obtain environmental justice.

The United States saw the concept of standing expanded in *Scenic Hudson* to permit environmental groups to bring a cause of action. India reduced its standing requirements in *Judges' Transfer Case* to allow the poor a means to access courts through the creation of representative standing doctrine. Finally, Japan expanded its capacity to address environmental problems through judgments in favor of the plaintiffs in the big four pollution cases, which showcased the power of the judiciary to provide environmental justice where national legislation was impotent. In each of these cases, industrialization resulted in potential or actual environmental harms, for which the public sought redress.

In all three countries it is apparent that the judiciary responded to public concern using a combination of legal innovation and remedy; less well understood is the process by which these important decisions were made. Therefore, the preceding case analyses do not allow for decisive tests of the theories of law and globalization and theories of policy transfer and diffusion. However, the cases explored in this study do provide some insights that may prove useful for theory building purposes. Two such lessons will be highlighted below.

First, while industrialization and economic globalization have had serious environmental consequences for states, the manner in which states address the subsequent fallout is particularized to the institutions present. In the case of the United States, a federal court, and later the Supreme Court, adapted to concerns about potential

environmental degradation through innovative interpretation of standing doctrine. Attempts to revise the U.S. Constitution to protect environmental rights would only come after *Scenic Hudson*, and all such efforts have proven unsuccessful thus far.[140] In India, in the wake of the extensive damage and human suffering caused by the Bhopal disaster, the Supreme Court took the lead by interpreting the Constitution's right to life clause to include the right to a safe environment. The Supreme Court of India reacted to public concern, bypassing an ineffective lower court system and a corrupt bureaucracy to offer a more efficient avenue for the pursuit of environmental justice. In Japan, well-intentioned but under-enforced environmental statutes at the federal level left citizens with little recourse to redress environmental grievances until district courts found in favor of the claimants in each of the big four pollution cases. Standing doctrine continued to be construed narrowly, and the Supreme Court proved unwilling to carry the torch of creative judicial interpretation that might assist individuals in bringing their environmental claims to trial. The lower courts, conscious of the plight of Japanese to obtain compensation for environmental wrongs committed in the name of industrialization, served as hospitable venues for the administration of justice. In each of these cases the globalized phenomenon of industrialization caused real or potential environmental harms for which individuals sought redress. Yet the avenue through which justice was obtained was specific to the state in question, depending on the efficacy and efficiency of various domestic institutions. The question of how the right institution is finally selected, perhaps through trial and error or conscious venue shopping, remains yet unresolved but is an area worthy of further exploration.

Second, the empirical evidence in this study suggests that, whatever mechanism of influence may be at play, states have similarly endeavored to challenge the conventional interpretations of legal doctrine in order to have environmental wrongs addressed by the courts. I suggest that this trend may be the result of international environmental norms and principles that have diffused transnationally. In the cases described here, the international environmental norm may be that individuals and groups of affected

140 *See* Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063, 1068–70 (1992) (discussing failed attempts to reform the U.S. Constitution with regards to codifying environmental rights).

individuals have legitimate legal claims when they suffer (or may potentially suffer) from man-made environmental damage. The broader concept entailed here may be that people possess certain environmental rights which, when infringed upon, give rise to legal claims that require adjudication by courts. The cases analyzed in this paper offer some initial support for identifying the presence of an international norm of environmental rights, the existence of which is temporally corroborated by legal scholars who largely consider this regime to have formally emerged with the 1972 United Nations Conference on the Human Environment.[141]

Future research on the development of environmental rights in state legal systems should seek to discern those factors that contributed to judicial decision making in landmark decisions and assess which theoretical framework provides the most purchase in terms of explaining changes in legal norms in the area of environmental rights. The application of compelling theoretical explanations for the phenomenon described in this paper and the explication of potentially valid causal mechanisms require further scholarship, perhaps drawing from resources in cognate disciplines. In the interim, this paper offers a starting point for such scholarship by recognizing that while states have experienced similar problems in managing the environmental consequences of economic development, their respective legal systems have similarly responded to public concern through innovation and leadership.

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141 *See* W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms*, 3 GEO. INT'L ENVTL. L. REV. 85 (1990); James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113 (2005); Neil A.F. Popović, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338 (1996); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. ENVTL. L.J. 103 (1991).