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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

**KELSEY CASCADIA ROSE JULIANA;
XIUHTEZCATL TONATIUH M.**, through
his Guardian Tamara Roske-Martinez; et al.

Plaintiffs,

v.

**The UNITED STATES OF AMERICA;
BARACK OBAMA**, in his official capacity as
President of the United States; et al.,

Federal Defendants.

Case No.: 6:15-cv-01517-TC

DECLARATION OF JOHN E. DAVIDSON
in Support of Plaintiffs' Opposition to
Defendants' Motion to Dismiss;

Oral Argument: February 17, 2016, 2:00 p.m.

I, John Edward Davidson, hereby declare as follows:

My Background

1. I have personal knowledge of the facts and information stated herein. I have reviewed Plaintiffs' First Amended Complaint in this case, as well as the Motion to Dismiss filed by the Federal Defendants, and accompanying documents to both.

2. For the past 14 years, I have served as Professor and Instructor in the University of Oregon Department of Political Science, where I teach courses on Constitutional Law, Intergenerational Justice, and related subjects. In 1992, I received my J.D. from the University of Oregon School of Law. After graduation from Law School, I operated a small private practice and clerked for the Oregon Court of Appeals. I am currently retired from the Oregon State Bar.¹

3. The principle of intergenerational justice (the ethical and legal rights and responsibilities that exist between earlier and later generations within a political society) has been a continuing area of research for me over the past 25 years, and my primary field of study for the past 15 years. I have published on the subject and regularly speak about various aspects of intergenerational justice at academic conferences. My primary area of study has involved questions as to whether and how principles of intergenerational obligation are expressly and implicitly imbedded in the United States Constitution, and whether and how those principles should affect constitutional interpretation, government action, and the exercise of judicial review. In researching these questions, I have thoroughly examined historical records expressive of the intergenerational philosophies and principles prevalent among the framers, as well as the text of the Constitution itself, and other foundational documents.

¹ See my *curriculum vitae*, a copy of which is attached hereto as Exhibit 1.
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4. Because the areas of my research are relevant to the instant case, involving constitutional claims brought on behalf of minor children and posterity to prevent government action and inaction allegedly causing and exacerbating irreversible harms to critical public interests, I offer the following summary of this research to the Court, based on materials available in the public record.

Reserved Powers Doctrine: Rights of Future Legislatures and the Rule Against Legislative Entrenchment

5. The ancient principle known as the “reserved powers” doctrine ordains that one legislature may not legitimately infringe upon the equal sovereignty of later legislatures. One of the most basic and longest recognized applications of this principle is the rule against legislative entrenchment: one legislature cannot bind a later legislature by enacting an irrevocable law. This rule is as close to an axiomatic principle of government as is known to jurisprudence,² having been endorsed by (among others) Cicero,³ Bacon,⁴ and Blackstone⁵ before its adoption within American law and jurisprudence.

6. Although the principle is often expressed in terms of the inherent powers of a legislature or a parliament, the rule also vindicates a more general notion of generational sovereignty. Each sitting legislature derives its legitimate authority from the particular public

² For an extensive discussion of this traditional rule, see John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Calif. L. Rev. 1773 (2003). For a rare dissenting position, see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1666 (2002).

³ Cicero, *Letters to Atticus* (“When you repeal the law itself, you at the same time repeal the prohibitory clause which guards against such repeal.”).

⁴ Francis Bacon, *The History of the Reign of King Henry VII* (1622) (“One Parliament may not by a precedent act . . . bind or frustrate a future [Parliament].”).

⁵ William Blackstone, *Commentaries on the Laws of England* (1769) (“The legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been if its ordinances could bind a subsequent parliament.”).

that elects it. Recognizing the rights and powers of later legislatures is a way of recognizing the rights and powers of Posterity—the later incarnations of the citizenry who elect those later legislatures.⁶ As Thomas Jefferson once famously reminded James Madison, “between society and society, or generation and generation, there is . . . no umpire but the law of nature. . . . one generation is to another as one independent nation to another.”⁷

7. Reserved powers principles have been recognized in the United States since the nation’s inception. A typical example is Virginia’s 1786 Statute for Religious Freedom, authored by Thomas Jefferson, which provides: “This assembly elected by the people for the purposes of normal legislation only, [has] no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own Therefore to declare this act to be irrevocable would be of no effect in law.”

8. As early as 1810, in *Fletcher v. Peck*, the Supreme Court recognized “[t]he principle . . . that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted.” 10 U.S. 87, 135 (1810).

9. Subsequently, the Supreme Court reiterated that contracts dealing with core governmental powers would be treated as voidable and repealable under traditional reserved

⁶ See Julian Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12(2/3) Am. B. Found. Res. J. 379 (1987) (the rule is an instance of the principle that an agent’s powers may not exceed the legitimate powers of the principal); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L. J. 491, 491-92 (1997) (today’s majority can control the present, but not the future); David Dana & Susan Koniak, *Bargaining in the Shadow of Democracy*, 148 U. Pa. L. Rev. 473, 533 (1999) (“If majority rule means anything, it means rule by the current majority and not by a majority of the past. That is the point of elections.”).

⁷ Thomas Jefferson to James Madison (Sept. 6, 1789).

powers principles. In *Stone v. Mississippi*, for instance, the Supreme Court upheld a state legislature’s criminalization of lotteries in the face of an earlier legislature’s grant of private lottery franchises:

[T]he legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. . . . No legislature can bargain away the public health or the public morals. . . . The supervision of both these subjects of governmental power is continuing in its nature. . . . [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.

101 U.S. 814, 817-20 (1879) (quotations omitted).

10. In *Newton v. Commissioners of Mahoning County*, the Court limited the contracts exception even further. 100 U.S. 548 (1879). The Court sustained the Ohio legislature’s statutory relocation of a county seat over objections that the prior statutory assignment of the seat to a different town was perpetual. *Id.* The Court noted the contracts exception to the reserved powers doctrine (articulated in *Fletcher*) was inapplicable when “the statute in question is a *public law* relating to a *public subject* within the domain of the general legislative power of the State, and involving the *public rights* and *public welfare* of the entire community affected by it.” *Id.* at 557.

In all these cases, there can be no contract and no irrevocable law, because they are ‘governmental subjects,’ and hence within the category before stated. They involve *public interests*, and legislative acts concerning them are necessarily *public laws*. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

Id. at 559.

11. In *Illinois Central Railroad Co. v. Illinois*, the Supreme Court indicated the management of critical natural resources was sufficiently governmental that, pursuant to the reserved powers doctrine, control of such resources could not be wholly privatized. 146 U.S. 387 (1892). At issue were submerged lands beneath the Chicago harbor, which the Illinois legislature had purportedly granted to the Illinois Central Railroad. The first portion of the Court's opinion outlined the history of the Public Trust Doctrine as it had historically been applied to government interests in water and submerged lands, while outlining a theory of sovereign resources that extended beyond a narrow concern with such lands.

The state can no more abdicate its trust over property in which the whole people are interested, *like* navigable waters and soils under them, so as to leave them entirely under the use and control of private parties. . . than it can abdicate its police powers in the administration of government and the preservation of the peace. . . Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time. . . The trust with which they are held, therefore, is *governmental*, and cannot be alienated

Ill. Cent. R.R., 146 U.S. at 453-55 (emphases added).

12. The Supreme Court grounded the latter portion of its *Illinois Central* opinion directly in the reserved powers analysis of *Newton v. Commissioners*:

In *Newton v. Commissioners*, . . . [the Court held] that there could be no contract and no irrevocable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment,-neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil. . . . As counsel observe, if this is true doctrine as to the location of a county seat, it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right, as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government

of which, from the very nature of things, must vary with varying circumstances. . . . Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it.

Id. at 459-60.

13. It is significant that *Illinois Central* did not just reject formal, *de jure* legislative entrenchment. The earlier Illinois legislature had not expressly forbidden later legislatures from acting in the areas of land use or water management. But the legislative act had the practical effect of restricting later legislatures' equal freedom to provide equivalent opportunities and protections to the public that they would represent, by materially foreclosing certain options. These cases reflect the principle that the *de facto* destruction of a resource or opportunity offends reserved powers principles as much as, or more than, the formal legislative entrenchment of a policy provision.

14. Logic and precedent suggest the reserved powers doctrine applies to the federal government as much as to state governments.⁸ Each iteration of Congress, just like each iteration of a state legislature, is entitled to exercise the same powers as its predecessors, and to be protected from having those powers encroached upon by an earlier legislature's enactments and policies. The Supreme Court recognized as much in *Reichelderfer v. Quinn*: "The will of a particular Congress ... does not impose itself upon those to follow in succeeding years." 287 U.S. 315, 318 (1932). More recently, in its briefs for *United States v. Winstar Corp.*, the federal government acknowledged: "[t]he logic of the [reserved powers] doctrine ... applies equally to contracts alleged to have been made by the federal government." 518 U.S. 839, 888 (1996).

⁸ See Douglas Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 Ariz. St. L.J. 849, 877 (2001) ("[T]here is no reason why the reserved powers doctrine, with its inalienability principle, should not apply at the federal level as well as the state level."); Roberts & Chemerinsky, *supra* note 1, at 1795-1801.

15. The environmental aspect of the reserved powers doctrine—the requirement that government respect the equal rights of future legislatures and generations to manage and benefit from sovereign resources over time—would, in my opinion, apply to the federal government. While some resources are of primarily local significance, and therefore primarily matters of state trust responsibility, other resources have interstate or international significance and would therefore seem to entail corollary federal rights and responsibilities.

Locke on Intergenerational Ethics

16. The reserved powers doctrine is just one aspect of a much broader set of intergenerational justice principles recognized by the American founders and their ideological predecessors. In the late 16th and the 17th Centuries, English rights theorists such as Algernon Sidney and John Locke elaborated and refined traditions of intergenerational rights and justice inherited from the ancient Greeks and Romans. After their deaths, their theories exerted a profound influence upon America’s founders.⁹

17. The tremendous influence of John Locke’s thought on the early American republic has been amply documented, and I will not reiterate that scholarship here.¹⁰ But at least

⁹See Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (Random House 1942) 75 (noting that among revolutionary leaders “the political writings of Locke, Sidney, and Milton are frequently mentioned with respect and reverence”). Letter from Thomas Jefferson to Richard Henry Lee, May 8, 1825, in *Boyd* 16: 118-19 (Jefferson said of the Declaration of Independence: “All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, in printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.”). See also Alan Craig Houston, *Algernon Sidney and the Republican Heritage in England and America* (Princeton Univ. Press, Princeton, NJ: 1991).

¹⁰See Scott D. Gerber, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation 27-29* (New York University Press, New York & London 1995) (detailing Locke’s influence on Jefferson, James Otis, John and Samuel Adams, James Wilson and Alexander Hamilton); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution ix* (Lawrence, Kansas 1985) (“that the central argument of the Declaration is based mainly upon John Locke’s Second Treatise is indisputable”); *id.* at 7 (noting Locke’s Declaration of John E. Davidson in Support of Plaintiffs’ Opposition to Defendants’ Motion to Dismiss

one aspect of Locke's influence deserves more attention than it has hitherto received. Locke's theories of intergenerational obligation and stewardship, which lie at the heart of his political philosophy, have received far too little attention from academicians and from the legal community.¹¹ By contrast, those same ideas were intimately familiar to America's founders.¹² Locke's views are essential components to a full understanding of the founders' ideas of intergenerational justice, and how those views might apply to modern issues.

18. John Locke's system of intergenerational ethics can be summarized in the form of five primary mandates: 1) We must preserve the human species; 2) We must treat the earth as though we were tenants, rather than owners; 3) We must not waste or destroy creation; 4) We must leave behind "enough and as good" for others; and 5) We must honor and preserve to the extent possible each generation's right to make its own political choices.

19. ***Preservation of the Human Species.*** At the heart of Locke's system of intergenerational ethics is a concern for *preservation of the human species*. That is the primary and fundamental law, which is the standard and measure of all the other natural laws.¹³ Of course, the principle has many more direct applications today than it did in Locke's time. In the 17th century, it would have been difficult to conceive of any action or set of actions which could entirely eliminate humanity. Today we can imagine such scenarios all too easily.

influence in the constitutional convention); Clinton Rossiter, *Seedtime of the Republic* (New York 1952) (esp. ch. 12); Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* 27 (Random House 1942) ("most Americans had absorbed Locke's work as a kind of political gospel").

¹¹But see Clark Wolf, *Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations*, 105 *Ethics* 791-818 (1995).

¹²For a discussion of Locke's influence on Jefferson's generational philosophy, see Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* 383 (New York 1970); Adrienne Koch, *Jefferson and Madison: the Great Collaboration* 65, 76, 78 (New York, Alfred A Knopf 1950).

¹³John Locke, *Two Treatises of Government* ¶¶ 7, 16, 134, 135, 149, 159, 171, 183 (1689) (Peter Laslett ed., 2d ed. 1967).

20. ***Acting as Tenants.*** Locke adhered to the biblical notion that the earth exists for humankind as a sort of intergenerational commons. He cites King David for the proposition that “God gave the world to Adam and his posterity in common.”¹⁴ This notion fixes all real property interests as varying species of tenancy or trust. One of a tenant’s chief obligations is to maintain property in as good and useful a condition as originally received.¹⁵ Accordingly each generation, as tenant, is expected to steward the earth for both the landlord (God) and later tenant-generations. Scott Gerber paraphrases Locke aptly: “Every individual is acting as a trustee of his Creator’s property, with the purpose of the trust being the preservation of mankind.”¹⁶ The use of the landlord-tenant analogy to describe intergenerational relations was anything but new by Locke’s time. The metaphor was destined to become standard fare among the founders and their contemporaries.

21. ***Eschewing Spoilage, Waste, and Destruction.*** A natural corollary to the “world as commons” idea is Locke’s absolute prohibition against waste and destruction. If all our possessions are but temporary gifts from the Creator, then we obviously have an obligation to exercise due care in our custody of those possessions. “Nothing was made by God for man to spoil or destroy.”¹⁷

22. Locke applies this prohibition in various ways. For instance, an individual in the state of nature who claimed a property interest in particular fruits of nature was bound to use or

¹⁴Locke, *Second Treatise*, ¶ 25 (citing *Psalms* 115:16) and ¶ 34. See also Lev. 26:14, 32, 35 (“The land must not be sold permanently, because the land is mine and you are but aliens and my tenants.”).

¹⁵See, e.g., Restatement (2d.) of the Law of Property § 12.1 (1) (1977) (Tenants have the right to reasonable use of property, but must return it in good condition).

¹⁶Gerber, *supra* note 10, at 45.

¹⁷*Id.* at ¶ 31; see also Kathleen M. Squadrito, *Locke’s View of Dominion*, 1 *Envtl. Ethics* 255, 259 (1979) (“The view of dominion that Locke adopts in *Some Thoughts Concerning Education* is one of responsible stewardship, an interpretation of Genesis that stresses man’s duties and obligations towards all creation. . . . To spoil or waste any part of God’s creation is a sin.”).

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consume the claimed fruits before they spoiled, “else he took more than his share and robbed others.”¹⁸ While this prohibition of waste or spoilage could be understood simplistically as no more than a mandate for resource development,¹⁹ there is more to it than that. In paragraph 6 of the *Second Treatise*, Locke identifies *preservation* as an affirmative value to be weighed alongside other values and property interests:

“ . . . [T]hough [the state of nature] be a state of liberty, yet it is not a state of license; though man in that state have an uncontrollable liberty to dispose of his person or possessions, *yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it.* The state of nature has a law of nature to govern it, which obliges every one. . . .”²⁰

23. Locke demands that an appropriate balance be struck between legitimate preservation interests and legitimate development interests. A failure to strike the appropriate balance constituted “destruction, spoilage, and waste.”²¹

24. Locke then makes his famous assertion that “Reason . . . teaches all mankind who will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possession.” This passage is one of the primary sources for the “life, liberty,

¹⁸Locke, *Second Treatise* at ¶ 46.

¹⁹*See id.* at ¶ 34 (“God gave the world to men in common; but . . . it cannot be supposed He meant it should always remain common and uncultivated”) and ¶ 42 (“Land which is wholly left to Nature, that hath no improvement of Pasturage, Tillage, or Planting is called, as indeed it is, *waste.* . . .”)

²⁰*Id.* at ¶ 6 (emphasis supplied). *See also* Locke, *First Treatise* ¶¶ 50-56 (God does not permit us “to destroy those he has given us the Charge and Care of”; God requires us to preserve his creation).

²¹In contemplating which modern practices Locke might condemn as “waste,” it is helpful to consider the legal sense of “waste” which prevailed in pre-revolutionary England and which remains largely unchanged. *Waste* was defined by Blackstone as “a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disheison of him that hath the remainder or reversion.” 2 Blackstone, *Commentaries* at 281. This legal doctrine of waste is addressed more towards the prevention of *over-* or *mis-*utilization of resources than towards prevention of underutilization. In so far as the waste doctrine concerns itself with the protection of successors’ interests, it lends itself readily to the analysis of intergenerational issues.

property” formulation that appears in the Virginia Declaration of Rights, the Declaration of Independence,²² and the Due Process clause of the Fifth Amendment,²³ and therefore warrants special attention. In Locke’s view, these inviolable personal liberties and property rights are, from their inception, subject to restraints against spoilage and destruction. In other words, while no individual ought to be wrongfully deprived of life, liberty, or possessions, those rights *never* extend so far as to include spoilage or destruction of the natural world, especially if that destruction could constitute a threat to preservation of the human species. This principle applies to governments as well as to individuals.²⁴ Any interpretation of Due Process rights based upon the founders’ original intent must take this philosophic background into account.

25. ***Leaving enough behind.*** The above three principles imply a fourth: the “leave enough behind” rule, or “Locke’s Proviso.” According to this Proviso, an individual can legitimately create personal property interests in the bounties of nature only so long as “*there is enough and as good left in common for others.*”²⁵ Locke applied this rule to the appropriation of land, water, animals, and the fruits of the earth.²⁶

²²“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”

²³U.S. Const., Am. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

²⁴Locke, *Second Treatise*, at ¶135 (“it [the legislative power] can be no more than those persons had in a state of nature before they entered into society. . . [and a person has] in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind.”)

²⁵*Id.* at ¶ 27 (emphasis supplied); *see also* 4 Letters and Other Writings of James Madison 478 (property “embraces everything to which a man may attach a value and have a right, and *which leaves to every one else the like advantage*”)(emphasis in original).

²⁶*Id.* at ¶ 32; *see also* ¶ 33 (“Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst; and the case of land and water, where there is enough of both, is perfectly the same.”).

26. The Proviso was probably articulated with *intragenerational* concerns in mind, more than *intergenerational* ones. Writing in the 17th century, Locke could not foresee how the overutilization of natural resources by one or more generations would prejudice later generations: “there is land enough in the world to suffice double the inhabitants.”²⁷ Over the intervening centuries, however, the world’s population has doubled many times over, and Locke’s basic principles of just resource appropriation have implications today that were not readily apparent when he first formulated them.

27. Extending the Proviso’s coverage to include future generations gives due effect to the underlying principles of equity upon which the Proviso is based.²⁸ To require that a person appropriating property leave “enough and as good” for the earth’s future tenants as well as its present tenants is to honor Locke’s emphasis on the preservation of the species along with his view of the Earth as an intergenerational commons. Read in this way, the Proviso could be interpreted to prohibit a variety of unsustainable practices – practices which result, individually or cumulatively, in the depletion or spoilage of natural resources, and which threaten the wellbeing of the human species. Because such practices do not leave “enough and as good” for later tenants of the intergenerational commons, the right to engage in such practices would be a right which could never be legitimately created or conveyed.

28. It is important to recognize that when Locke discussed the above four intergenerational principles, he did not limit their application to some semi-mythical “state of

²⁷See *id.* at ¶ 36.

²⁸See Clark Wolff, *Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations*, 105 *Ethics* 791, 799 (1995) (“The strongest argument in favor of the proviso is that it is necessary if initial appropriation is to avoid unjustifiably harming others. Since future generations are among those who might be harmed, justified initial appropriation must leave enough and as good for them as well”); John Sanders, *Justice and the Initial Acquisition of Property*, 10 *Harv. J.L. & Pub. Pol’y* 390-91 (1987).

nature.” The rules were held to be applicable to citizens living and working within political societies as well. The laws of a commonwealth, he maintained:

“[are] only so far right as they are founded on the law of nature, by which they are to be regulated and interpreted. . . . The rules that [legislators] make for other mens’ actions must . . . be conformable to the law of nature, i.e., to the will of God, of which that is a declaration . . . [t]he fundamental law of nature being the preservation of mankind . . . The end and measure of the [political] power is the preservation of all . . . society -- that is, all mankind in general.”²⁹

29. Taken together, Locke’s first four intergenerational mandates constitute an early, but remarkably clear articulation of what, today, would be termed a “sustainability” ethic.³⁰

30. **Generational Sovereignty.** What political duties are owed by later generations to earlier generations? Put another way, what limits exist on an existing generation’s authority to make political decisions that are binding upon later generations? Locke’s treatment of these questions constitutes the fifth major facet of his intergenerational philosophy. Because it is the most overtly political aspect of his philosophy, it was of special interest to America’s founders.

31. Locke emphasized the right of each generation to be master of its own political destiny. He rejected the notion that parents or ancestors could oblige their descendants to pay allegiance to a particular government.³¹

²⁹Locke, *Second Treatise* at ¶¶ 12, 135, 171; see also *id.* at ¶ 158 (the power of the legislature or commonwealth “being but the joint power of every member of the society . . . it can be no more than those persons had in a state of nature before they entered into society . . . for nobody can transfer to another more power than he has in himself”); *id.* at ¶ 136, n. 3, (quoting Hooker’s *Ecclesiastical Polity*, III, 9 to the effect that “laws human must be made according to the general laws of Nature . . . otherwise they are ill made.”)

³⁰See e.g. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 *Envtl. L.* 1095, 1122 (1996) (recognizing Locke’s formulation of a “living within limits” ethic); Elliot, *Future Generations, Locke’s Proviso and Libertarian Justice*, 3 *J. Applied Philosophy* 217 (1986); Squadrito, *Locke’s View of Dominion* 262 (“Locke could not foresee the ecological crisis of the twentieth century. . . . However . . . [s]ince ecological balance is essential to the survival of God’s creation, and human beings are commanded by God to preserve their own species, it is clear that Locke would not endorse behavior that tends to disrupt the ecological balance of the Earth”).

“Whenever the owner [of land], who has given nothing but . . . a tacit consent to the government, will by donation, sale, or otherwise, quit [possession of that land], he is at liberty to go and incorporate himself into any other commonwealth, or to agree with others to begin a new one (*in vacuis locis*) in any part of the world they can find free and unpossessed.”³²

32. Locke’s theory of generational sovereignty would later prove attractive to American colonists seeking to justify departure from their ancestors’ allegiance to the English crown.

33. To briefly recapitulate: Locke strongly influenced America’s founders with his intergenerational philosophy. That philosophy concerned the political rights which exist between generations, as well as intergenerational rights and responsibilities related to land and other natural resources.

Pervasive Concern for Future Generations Among the Founders

34. To what extent did the founders embrace these intergenerational philosophies? To what extent did the founders intend these traditions and ideas inform the new government?

35. The founders occupied a unique period in history, a recognizable cusp between one age and the next. Their exceptional circumstances required them on at least two occasions to closely examine their relationship with prior and later generations. First, during the Revolution

³¹Locke, *Second Treatise*, at ¶¶ 73, 116 (“[W]hatever Engagements or Promises any one has made for himself, he is under the Obligation of them, but cannot by any Compact whatsoever, bind his children or Posterity”).

³²*Id.* at ¶ 121. *See also id.* at ¶¶ 114, 115. (“There are no examples so frequent . . . as those of men withdrawing themselves and their obedience from the jurisdiction they were born under, and the family or community they were bred up in, and setting up new government in other places.”) This right of repatriation was integral to Locke’s theories of social contract and tacit consent. It was only because citizens were free to depart and ‘set up shop’ elsewhere, that a government could reasonably construe an individual’s presence within specified borders as tacit consent to governmental jurisdiction. Some indicator of consent was critical under Locke’s theory; without evidence of the consent of the governed, one cannot speak of a voluntary social contract. Without such a voluntary contract, according to Locke, a state had no legitimate authority over its citizens.

and the years leading up to it, they were compelled to explain, both to themselves and to the world as a whole, the circumstances which justified one generation's separation from the government of its ancestors.³³ Next, subsequent to the Revolution, as the founders set out to frame new state constitutions and an even more ambitious "*Novus Ordo Seclorum*,"³⁴ their tasks again demanded that they contemplate the effects of their actions upon posterity.³⁵ What *considerations* must they show to later generations? What *duties* could they reasonably hope to impose upon those same generations? To what extent might such considerations and duties be dependent upon one another? Based on my examination of the records, these themes are explored endlessly in documents of the period. The founders made it perfectly clear – in their speeches and correspondence, and in the language of the Constitution they wrought – that a legitimate government must equitably balance the interests of both earlier and later generations.

36. During the difficult trials of the Revolution, the colonists' concern for future generations strengthened their resolve. George Mason wrote to General Washington in April, 1776, "May God . . . be pleased to inspire us with spirit & resolution, to bear our present & future Sufferings, becoming Men determined to transmit to our Posterity, unimpair'd, the

³³ See The Declaration of Independence, July 4, 1776 ("When . . . it becomes necessary for one people to dissolve the political bands which have connected them with another . . . a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.")

³⁴ "A New Order for the Ages," United States national motto.

³⁵ See Gardner, "Discrimination Against Future Generations . . .," 9 Environmental Law 35 ("A close examination of the debates of the Federal Convention of 1787 reveals that the draftsmen of the Constitution invariably took the view that their generation had an obligation to protect the well-being of future generations"); H. Commager, "America in Its Third Century – What Prospects?" (address before the National Town Meeting at the John F. Kennedy Center for the Performing Arts, Washington, D.C., March 17, 1976) (Transcript on file at the Environmental Law office, The Lewis and Clark Law School) 7-8 ("[W]hat was uppermost in the minds of the founding fathers all the time [was a] sense of fiduciary obligation to posterity. Washington never stopped talking about it. Jefferson spoke of our descendants and thousands and thousands of generations. Tom Paine spoke about it, they all did.")

Blessings we have received from our Ancestors!”³⁶ In the revolutionary pamphlet *Common Sense*, Thomas Paine suggested that, “In order to discover the line of our duty rightly, we should take our children in our hand, and fix our station a few years farther into life; and that eminence will present a prospect which a few present fears and prejudices conceal from our sight.”³⁷

37. Paine’s *Common Sense* also included a cogent, intergenerational challenge to the institution of hereditary monarchy. Because no one generation could rightfully presume to install a leader to rule a later generation, “monarchy is a degradation and lessening of ourselves, and hereditary succession . . . an insult and an imposition on posterity.”³⁸ These concerns were later reflected in the anti-nobility provisions of Article I, sections 9 and 10, of the Constitution.

38. During the Constitutional Convention, intergenerational concerns were reiterated frequently. Roger Sherman noted that, in drafting a constitution, the framers were “providing for our posterity, for our children and our grandchildren . . .”³⁹ Madison stressed that, “In framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce.”⁴⁰ George Mason, writing to his son at commencement of the convention, reflected:

“[T]o view, thro the calm sedate Medium of Reason, the Influence which the Establishments now proposed may have upon the Happiness or Misery of Millions yet unborn, is an Object of such Magnitude, as absorbs, & in a Manner suspends the Operations of human Understanding.”⁴¹

³⁶George Mason to George Washington, April 2, 1776, *The Papers of George Mason* 1:435

³⁷ Thomas Paine, *Common Sense*, January, 1776 (Dover Publications, New York: 1997) 22.

³⁸ *Id.* 18. See Thomas Jefferson, *Notes on Virginia*, query XIII (praising *Common Sense* for introducing the idea of independence and a new form of government to the American colonies.) See also Ellis p. 58 (noting *Common Sense* “swept through the colonies like a firestorm.”)

³⁹ M. Farrand, *The Records of the Federal Convention of 1787*, II:3.

⁴⁰*Id.* at I:422

⁴¹*The Papers of George Mason*, ed. Robert A. Rutland (Chapel Hill, NC: University of North Carolina Press, 1970) 3:892-3.

39. Later, during the ratification debates, similar sentiments would find expression in the arguments of both federalists⁴² and antifederalists.⁴³

40. Such generalized intergenerational concern accorded perfectly with the dominant moral philosophies of the time. David Hume stressed that future ills are “never the less real for being remote.”⁴⁴ Immanuel Kant maintained “human nature is such that it cannot be indifferent even to the most remote epoch which may eventually affect our species, so long as this epoch may be expected with certainty.”⁴⁵

41. One interesting way to gauge the prevalence of the intergenerational outlook during the late 18th century is to study the arguments put forth by commentators of the day on a

⁴²See James Wilson’s opening address to the Pennsylvania ratifying convention (Nov. 24, 1787) (remarking that the effects of the constitution would extend “to innumerable States yet unformed, and to myriads of citizens who in future ages shall inhabit the vast uncultivated regions of the continent”); Alexander Hamilton, New York Convention, June, 1788 (seeking to deflect charges of corruption and self-dealing on the part of the drafters: “What reasonable man, for the precarious enjoyment of rank and power, would establish a system, which would reduce his nearest friends and his posterity to slavery and ruin?”); David Ramsey, *Columbian Herald*, Charleston, South Carolina, June 5, 1788 (“To pull down one form of government without substituting something in its place that would answer the great ends for which men enter into society, would have been to trifle with posterity”).

⁴³See Agrippa [James Winthrop] *X Mass Gazette* (Boston) Jan. 1, 1788 (opposing the proposed constitution due to the absence of a bill of rights, and warning: “By adopting the form proposed by the convention, you will have the derision of foreigners, internal misery, *and the anathemas of posterity*. By amending the present confederation, and granting limited powers to Congress, you secure the admiration of strangers, internal happiness, *and the blessings and prosperity of all succeeding generations.*”) (emphasis supplied). See also Nathaniel Barrell to George Thatcher, Boston (January 15, 1788) (“I see it pregnant with the fate of our liberties and if I should not live to feel its baneful effects, I see it entails wretchedness on my posterity”).

⁴⁴David Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals* 535 (Selby et al. eds. 1777).

⁴⁵Immanuel Kant, *Idea for a Universal History* (1784), 8th Thesis, in Kant’s Political Writings 50 (H Reiss ed., H.B. Nisbet trans. 1970). See Annette Baier, For the Sake of Future Generations in *Earthbound: New Introductory Essays in Environmental Ethics* 216-217 (Tom Regan ed., Philadelphia 1984) (“[T]o discern our duty to anybody, we must in a sense think of everybody, future persons included, according to Kant’s test. . . . Any practice like dumping toxic wastes where they will poison soil, air, or water, seems forbidden by Kant’s test – we cannot conceive of a system of nature in which all humans regularly do this, yet survive as a species.”).

prominent issue such as the French Revolution. Both the proponents and the detractors of that revolution chose to frame their arguments in terms of generational rights. In *Reflections on the Revolution in France*, Edmund Burke decried France's departure from monarchy on generational entitlement grounds.⁴⁶ In an eloquent passage, Burke describes society as a sacred partnership:

a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society.⁴⁷

42. Later in the same piece, Burke phrased his concerns in the language of estate preservation, a language with modern environmental overtones:

[O]ne of the first and most leading principles on which the commonwealth and the laws are consecrated is [that] the temporary possessors and life-renters in it [should be mindful] of what is due to their posterity . . . [and] should not think it among their rights to cut off the entail or commit waste on the inheritance by destroying at their pleasure the whole original fabric of society, hazarding to leave to those who come after them a ruin instead of a habitation . . .⁴⁸

43. Paine penned his highly popular *Rights of Man* as a response to Burke. Paine commended the French revolution for erasing a host of feudal and ecclesiastical privileges which the favored classes and families of past generations had claimed for themselves into perpetuity – at the expense of later generations' majorities.⁴⁹ Responding directly to Burke's arguments, Paine asserted, "I am contending for the rights of the living, and against their being willed away,

⁴⁶Edmund Burke, *Reflections on the Revolution* 28 (Dolphin ed. 1961) ("No experience has taught us that in any other course or method than that of an hereditary crown [can our liberties] be regularly perpetuated and preserved sacred as our hereditary right.") *See id.* at 29 ([The people of England] look upon the legal hereditary succession of their crown as among their rights, not as among their wrongs . . . ; as a security for their liberty, not as a badge of servitude.")

⁴⁷*Id.* at 110.

⁴⁸*Id.* at 108-110.

⁴⁹Thomas Paine, *The Rights of Man* (1791) in *Thomas Paine: Collected Writings* (Eric Foner ed., New York 1995).

and controlled and contracted for, by the manuscript assumed authority of the dead; and Mr. Burke is contending for the authority of the dead over the rights and freedom of the living.”⁵⁰

44. French and American constitution-makers exercised strong influences upon one another.⁵¹ Like their American counterparts, the French were preparing to abandon an ancient feudal system in favor of a republican one, facing similar issues of intergenerational equity. The Marquis de LaFayette submitted a proposed Declaration of Rights to the French National Assembly which would have recognized “*le droit des générations qui se succèdent*.”⁵²

Stewardship Doctrine: The Framers and Natural Resource Preservation

45. The founders and their contemporaries understood and recognized each generation’s fundamental obligation to preserve the value and integrity of natural resources for later generations.⁵³ These stewardship principles, embedded in the Anglo-American legal

⁵⁰Thomas Paine, *The Rights of Man* at 439.

⁵¹The commerce of ideas between Paris and America was brisk. Jefferson was serving as minister to France during 1785 - 1789, communicating regularly with Lafayette and Paine (both in Paris), and Madison, on generational rights. See Smith, *The Republic of Letters*, 631, n. 35.

⁵²Lafayette, Draft of a Declaration of Rights, *Boyd*, 15:230-31. See also Louis-Sébastien Mercier, *Génération nouvelle*, in *Tableau des empires, ou otios sur les gouvernements*, 4 vols. (Amsterdam, 1788) 3:63 (suggesting that every generation -- defined as thirty years -- should be empowered to recreate its government by rewriting the constitution); J.J. Rousseau, *The Social Contract*, ch. 4, 12 (1755) (“Even if each person could alienate himself, he could not alienate his children; they are born free men; their liberty belongs to them, and no one has a right to dispose of it except themselves. . . . In order, then, that an arbitrary government might be legitimate, it would be necessary that the people in each generation should have the option of accepting or rejecting it”); Marquis de Condorcet, *Oeuvres de Condorcet* 10: 39-40 (A Condorcet O’Connor & Francois Arago eds., Paris 1847) (also insisting on periodic constitutional reform as a matter of intergenerational right).

⁵³One might assume that the founders did not have anything to say about intergenerational obligations which would bear upon modern environmental concerns because the founders did not possess modern technology and thus did not have the capability to cause environmental disruption on the scale now possible. An examination of 18th century records predictably reveals very little concern expressed over such issues as pollution, extinction, habitat loss, or the depletion of non-renewable resources. See Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 Tul. Envtl. L.J. 181, 201 (1994) (“It was. . . impossible for the drafters of the Constitution to anticipate that within a mere Declaration of John E. Davidson in Support of Plaintiffs’ Opposition to Defendants’ Motion to Dismiss

constructs of *entail*, *usufruct*, and *waste* were ethical bedrock in the late 1700's. Intergenerational responsibility for land was more familiar, and more widely acknowledged, than intergenerational political rights and economic rights. That is why, when writers of the period sought to describe the proper *political* relations between generations, many of them, including Jefferson, relied upon metaphors and analogies involving *land*.

46. When Burke wished to condemn the revolutionaries of France, he did so by characterizing them as irresponsible life-tenants who would commit waste upon an estate.⁵⁴

47. **Jefferson's Usufruct.** The most systematic treatment of intergenerational principles left to us by the founders was provided by Jefferson in his famous letter of September 6, 1789.⁵⁵ That letter was Jefferson's final installment in a two-year correspondence with James

two centuries an exploding population with incredible nature-devouring technology would fundamentally threaten the future welfare of the nation.”) *Accord*, Jim Gardner, Discrimination Against Future Generations: The Possibility of Constitutional Limitation, 9 *Envtl. L.* 29, 46 (1978). *But see* Worster, Nature's Economy 47-50 (discussing John Bruckner's *A Philosophical Survey of the Animal Creation* (1768) in which Bruckner warns that transformation of the American Wilderness was breaking the “web of life” and “the whole plan of Providence”); Rev Nicholas Collin, *An Essay on Those Inquiries in Natural Philosophy, which are at present Most Beneficial*, 3 *Transaction of the Am. Philosophical Soc'y* 24 (1793) (requesting the American Philosophical Society to support the protection of little-known birds, apparently on the verge of extinction, until naturalists could discover “what part is assigned to them in the oeconomy of nature”). Jefferson was elected into the Society on Benjamin Franklin's motion in 1786. Benjamin Franklin to Jefferson (October 8, 1786) in *Boyd* at X: 437.

⁵⁴Burke, *Bobbs-Merrill*, 108 (“... [O]ne of the first and most leading principles on which the commonwealth and the laws are consecrated is, lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors or of what is due to their posterity, should act as if they were the entire masters, that they should not think it among their rights to cut off the entail or commit waste on the inheritance by destroying at their pleasure the whole original fabric of society, hazarding to leave to those who come after them a ruin instead of a habitation . . .”).

⁵⁵Jefferson to James Madison, September 6, 1789, *Boyd* XV, 392-98. The letter has been extensively studied by Jefferson scholars; I make no attempt to fully recapitulate that scholarship in this article. Some of the better known treatments include: Koch at 62-96 (Ch. 4 – “The Earth Belongs to the Living”); David N. Mayer, *The Constitutional Thought of Thomas Jefferson* 302-308 (University Press of Virginia: Charlottesville, 1994) “The Earth Belongs to the Living”; Merrill Peterson, *Thomas Jefferson's 'Sovereignty of the Living Generation,'* 52 *Virginia Declaration of John E. Davidson in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss*

Madison on the proposed Bill of Rights.⁵⁶ Given the importance of this letter as background material for the Bill of Rights,⁵⁷ and its independent value as a seminal statement of intergenerational equity principles, it serves as the natural starting point for a discussion of the founders' views on generational sovereignty and the land.

48. Jefferson begins his letter by asserting that:

“The question [w]hether one generation of men has a right to bind another. . . is a question of such consequences as not only to merit decision, but place also among the fundamental principles of every government. . . . I set out on this ground, which I suppose to be self-evident, ‘*that the earth belongs in usufruct to the living*’ . . .”⁵⁸

49. Since Jefferson based his philosophy regarding generational political and economic relations upon this “self-evident” principle of usufructary ownership of the earth,⁵⁹ I

Quarterly Review 437-44 (1976); Thomas Jefferson, The Founders, and Constitutional Change, in *The American Founding: Essays on the Formation of the Constitution* 275-93 (J. Jackson Barlow et al., eds., Westport, Conn. 1988); Garry Wills, *Inventing America: Jefferson's Declaration of Independence* 132-48 (Garden City, N.Y. 1978); Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 14 J.L. & Econ. 467-88 (1976); Stanley N. Katz *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 Mich. L. Rev. 1-29(1977); Charles A. Miller, *Jefferson and Nature: An Interpretation*, chap. 5, esp. 161-64. (Baltimore, 1988).

⁵⁶See also Thomas Jefferson to Madison, 20 Dec. 1787, 31 July, 18 Nov. 1788, 15 Mar., 28 Aug. 1789, in *Boyd* at 12:439-43; 13:442-43; 14:188-89, 159-61; 15:367-68. Jefferson's interest in intergenerational equity at this time was inspired in part by a conversation which took place between himself, Thomas Paine and the Marquis de LaFayette in February, 1788 – a conversation prompted by James Wilson's arguments in the Pennsylvania ratification convention disputing the need for a bill of rights.

⁵⁷ Jefferson's letter was written just a few weeks before Congress passed the Bill of Rights. See Ellis p. 123-25 (describing Jefferson's influential role as bill of rights proponent).

⁵⁸Jefferson to James Madison, September 6, 1789, *supra* note 55 (emphasis in original).

⁵⁹The reference to intergenerational rights as “self-evident” recalls the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . .” Jefferson would continue for the remainder of his life to characterize intergenerational obligations in this way. See Jefferson to Thomas Earle, September 24, 1823 (“That our Creator made the earth for the use of the living and not of the dead; . . . that one generation of men cannot foreclose or burden its use to another . . . these are axioms so self-evident that no explanation can make them plainer”).

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will examine the language employed to express the principle. Of most importance is the word: *usufruct*.

50. The legal concept of usufruct can be traced back at least as far as ancient Roman law⁶⁰ and has changed little over the centuries. In Jefferson's time, as now, "usufruct" referred to "the right to make all the use and profit of a thing that can be made without injuring the substance of the thing itself."⁶¹ A usufruct described the rights and responsibilities of tenants, trustees, or other parties temporarily entrusted with the use of an asset – usually land.⁶²

51. Under the common law, the doctrine of *usufruct* was (and remains) closely conjoined with the doctrine prohibiting *waste*, defined by Blackstone as "a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disheison of him that hath the remainder or reversion."⁶³ Taken together, the two doctrines of usufruct and waste provide that a present possessor is entitled to the beneficial use of the natural estate and its fruits, but cannot prejudice future interest holders by destroying or impairing the present estate's essential

⁶⁰See, e.g. W. Hamilton Bryson, *The Use of Roman Law in Virginia Courts*, 28 Am. J. Legal Hist. 135-46 (1984); Sloan, p. 82 ("Like a trusted family counselor, Jefferson drew up a deed of settlement ensuring future generations the right to benefit from the common property, and the means he employed . . . was familiar doctrine to eighteenth-century Anglo-American lawyers.")

⁶¹ Sir Robert Chambers, *A Course of Lectures on the English Law, Delivered at the University of Oxford, 1767-1773*, 2:85, 2 vols. (Thomas M. Curley ed., Madison, Wis., 1986).

⁶² By using the terminology of tenancies to describe the relations between generations, Jefferson endorses a metaphor as old as the Old Testament. Jefferson later explicates and embellishes this landlord-tenant analogy. See, e.g. Thomas Jefferson to John W. Eppes, Monticello, June 24, 1813, *The Writings of Thomas Jefferson* vol. XIII, 269-270 ("Each generation has the usufruct of the earth during the period of its continuance. . . . [T]he case may be likened to the ordinary one of a tenant for life, who may hypothecate the land for his debts, during the continuance of his usufruct; but at his death, the reversioner (who is also for life only) receives it exonerated from all burthen.").

⁶³2 Blackstone, Commentaries at 281.

character or long-term productivity.⁶⁴ Jefferson's philosophy that the earth belongs *in usufruct* to the living partially reiterates the biblical/Lockean paradigm of the earth as intergenerational commons, the benefits of which should be accessible to every member of every generation.⁶⁵

52. Relying on this widely shared value and principle of intergenerational stewardship, Jefferson maintained that each individual, and each generation collectively, had the obligation to pass on the natural estate undiminished and unencumbered to later generations:

[N]o man can by natural right, oblige lands he occupied... to the payment of debts contracted by him. For if he could, he might, during his own life, *eat up the usufruct of the lands for several generations to come*, and then the lands would belong to the dead rather than the living, which would be the reverse of our principal. What is true of every member of the society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of the individuals.⁶⁶

53. For Jefferson, "eating up the usufruct" means extinguishing the next generation's ability to share equitably in the benefits of a natural resource. No individual or society has authority to cause such extinction, whatever personal or collective rights they may allege. The contemporary issue to which Jefferson's arguments most literally apply is the problem of topsoil

⁶⁴The legal doctrines of usufruct and waste resemble Locke's prohibition against spoilage or destruction of "the fruits of nature." See Locke, *Second Treatise*, ¶¶ 31 and 46. It is likely that Locke based his prohibitions, at least in part, upon these accepted legal doctrines.

⁶⁵See my earlier discussion of Locke's views, including the biblical doctrine.

⁶⁶ Jefferson to Madison, September 6, 1789, *supra.*, n. 54 (emphasis added). See also Jefferson to Thomas Earle, September 24, 1823, L and B 15:470-71 ("That our Creator made the earth for the use of the living and not of the dead; . . . that one generation of men cannot foreclose or burden its use to another, [T]hese are axioms so self-evident that no explanation can make them plainer . . ."). Herbert Sloan characterizes Jefferson's convictions accurately: "The earth may belong to the living, but the living enjoy only its usufruct, only its current product. That qualification is critical, for it forbids the living generation to commit waste, and thus each generation becomes a mere tenant for life, empowered only to enjoy the fruits of the estate, not to dispose of it in its entirety. . . . [E]ach generation will serve as a custodian charged with the duty of passing on intact what it receives from its predecessors. The impression such a project creates is decidedly conservative. . . His answer is to . . . husband existing resources." Sloan, *Principles and Interest*, 60.

depletion. As a planter of predominantly agrarian Virginia, Jefferson often phrased his discussions of intergenerational issues -- even economic issues -- in terms of soil:

“Are [later generations] bound to acknowledge [a national debt created to satisfy short-term interests], to consider the preceding generation as having had a right to eat up the whole soil of their country, in the course of a life . . .? Every one will say no; that the soil is the gift of God to the living, as much as it had been to the deceased generation; and that the laws of nature impose no obligation on them to pay this debt.”⁶⁷

54. Jefferson asserts that each generation has the right to inherit, undiminished, the same topsoil capital that its predecessors enjoyed.⁶⁸

55. The same experiences and authorities that shaped Jefferson’s conception of intergenerational obligations—authorities such as Plato, the Old Testament prophets, Aquinas, Locke, and Sidney—also helped to shape the views of his contemporaries. The biblical notion that God granted the world to Adam and his posterity in common was part of mainstream American legal thought.⁶⁹ In his exhaustive examination of Jefferson’s generational theories, Herbert Sloan remarks that, “what makes Jefferson’s views important . . . is not so much that he held them, but that they were widely shared.”⁷⁰ These widely shared principles of usufructary responsibility for natural resources were significant in shaping the early traditions and conscience of America and find voice in state constitutions⁷¹ and federal statutes today.⁷²

⁶⁷Jefferson to Eppes, 269-270

⁶⁸As evidence of Jefferson’s special concern for long-term soil productivity, *see* his *Commonplace Book* pp. 166-67; and Jefferson to Lafayette, April 11, 1787, *The Portable Thomas Jefferson* 421-23.

⁶⁹*See* Blackstone, *Commentaries*, 2:3 (“The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator.”) *See also* Thomas Paine, *Agrarian Justice*, 396 (“It is wrong to say that God made *Rich* and *Poor*; he made only *Male* and *Female*; and he gave them the earth for their inheritance”).

⁷⁰Sloan, *Principles and Interest* 5. *See also* Sloan at 75 (detailing how the earth-as-commons theme played a significant role in the political theories of Locke, Sidney, and Paine.)

⁷¹*See, e.g.*, Pa. Const. art. I, § 27; Mont. Const. art. IX, § 1; Haw. Const. art. IX, § 1; and Ill. Const. art XI, § 1.

56. The United States' arguments in 1893 in the Tribunal of Arbitration illustrate the deep roots of protecting the vital resources of the Earth for succeeding generations:

The earth was designed as the permanent abode of man through ceaseless generations. Each generation, as it appears upon the scene, is entitled only to use the fair inheritance. It is against the law of nature that any waste should be committed to the disadvantage of the succeeding tenants. . . . That one generation may not only consume or destroy the annual increase of the products of the earth, but the stock also, thus leaving an inadequate provision for the multitude of successors which it brings into life, is a notion so repugnant to reason as scarcely to need formal refutation."⁷³

57. ***The Abolition of Entail.*** Buried within the founders' many discussions of the intergenerational dimensions of land ownership lies a perplexing paradox, the essence of which is as follows:

58. It is clear that the principles of intergenerational ethics were prevalent in late 18th century political discourse. Moreover, metaphors of entail and usufruct were frequently and favorably employed in that discourse to demonstrate through familiar examples the rightness and reasonableness of intergenerational responsibility. This explains the founders' decisions to completely *eradicate* the institutions of entail and primogeniture from American property law? In my opinion, to unravel this paradox is to grasp an important, but forgotten piece of American history, and to understand how, at least in part, our federal government came to lose its sense of intergenerational responsibility and continuity.

⁷² See, e.g., National Environmental Policy Act of 1969, § 101(b)(1), 42 U.S.C. § 4331(b)(1) (1970) (“[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”).

⁷³ Argument of the United States, *Fur Seal Arbitration* (U.S. v. Gr. Brit. 1893), reprinted in 9 *Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration* (Gov't Printing Office 1895); also reprinted in 1 John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been A Party* 755, 813-14 (1898).

59. The institution of entail occupied an ambivalent place in intergenerational philosophy. On the one hand, entail was in some respects *the* quintessentially intergenerational institution; operating in tandem with the doctrine of waste, it compelled present landholders to respect the interests of future interest bearers. The occupant of an entailed estate was expected to consume only the usufruct of the estate and to preserve the corpus intact and undamaged for later owners. She could be sued for waste in the event she failed to comply with this expectation. It is this aspect of entail that Herbert Sloan has in mind when he describes Jefferson's intergenerational philosophy as "proposing a universal and perpetual entail."⁷⁴

60. On the other hand, entail was afflicted with some very pronounced shortcomings. Its intergenerational benefits and protections were reserved to a relatively small group of individuals (kept smaller by the tradition of primogeniture) who held future interests in estates. Entail was therefore rightfully criticized as an instrument of archaic feudalism, imposed by earlier generations in violation of later generations' sovereignty over the land.⁷⁵ Entail and primogeniture were condemned by free market advocates such as Adam Smith for imposing potentially perpetual restraints on the alienation of land and for causing some potentially useful agricultural land to be permanently underutilized.⁷⁶

⁷⁴ Herbert Sloan, *Principles and Interest*, 60.

⁷⁵ It was for this reason that Jefferson identified the 1776 Virginia act to abolish entails as one of his proudest achievements. "A Bill directing the Course of Descents," *Boyd*, 2:391-93; Thomas Jefferson, "Services to My Country" [ca. 1800], *Ford*, 9: 164.

⁷⁶ See Adam Smith, *Wealth of Nations*, I:384 (criticizing entails as "founded on the most absurd of all suppositions, the supposition that every successive generation has not an equal right to the earth, and to all that it possesses: but that the property of the present generation should be restrained and regulated according to the fancy of those who had died perhaps five hundred years ago"). See also Adam Smith, *Lectures on Jurisprudence* 69-70 (R.L. Meek et al. eds., Oxford 1978) ("An eminent lawyer says there can be nothing more absurd than this custom of entails. . . . There is no maxim more generally acknowledged than that the earth is the property of each generation. That the former generation should restrict them in their use of it is altogether absurd; it is theirs together as well as it was their predecessors in their day").

61. Despite these shortcomings of the traditional entail system, it is clear that the founders did not intend to abandon the principle of responsible natural resource stewardship when they abandoned the objectionable system. The principles of stewardship were held in deep respect. While these social pioneers strongly advocated for the right of each new generation to transfer property according to individual choice within a free market, their rationales also affirmed each generation's responsibility to pass on an *undiminished* earth.⁷⁷

62. The founders apparently failed to foresee that the new system of land ownership, with its shifting ephemerality of title, would breed a class of detached, individualist landowners and policy makers with relatively little connection to their predecessors, their successors, and the land itself. They did not foresee the likelihood of widespread, environmentally unsustainable practices, or the full practical significance of eliminating the class of individuals with the clearest legally defensible interests in the land's long-term health.

Unalienable Intergenerational Rights

63. One of the most potent philosophic ideas of the 18th century was the concept of "unalienable" rights,⁷⁸ which denoted a set of rights that one *generation* could not alienate from another *generation*. As my preceding historical analysis confirms, the framers were as concerned with the proper balancing of interests *between* generations as with the proper balancing of

⁷⁷See Adam Smith, *Lectures on Jurisprudence* at 468 ("A power to dispose of estates for ever is manifestly absurd. The earth *and the fulness of it* belongs to every generation, and the preceding one can have no right to bind it up from posterity. Such extension of property is quite unnatural") (emphasis supplied); Jefferson to Eppes, 269-270 ("Are [later generations] bound . . . to consider the preceding generation as having had a right to eat up the whole soil of their country, in the course of a life . . . ? Everyone will say no.") As to Smith's influence on Jefferson and the other founders, see Herbert Sloan, *Principles and Interest*, n. 121-126 and pp 72-73.

⁷⁸Although "inalienable" is the standard modern usage, the Declaration of Independence used the phrase "unalienable rights," and my Declaration follows the Declaration of Independence. Declaration of John E. Davidson in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss

interests *within* generations; both concerns informed their understanding of the named rights in the Constitution.

64. A clear example of this tendency is the set of rights – life, liberty, and property – protected by the Due Process clause of the Fifth Amendment. This particular grouping of rights had a rich political and philosophical background with which the framers were intimately familiar.⁷⁹ In response to British claims that the colonists had lost such rights (recognized by the *Magna Carta* and English Bill of Rights) through waiver or acquiescence on the part of their ancestors, the colonists affirmed that no such waiver was possible, because the rights were “unalienable.” The Virginia Bill of Rights (1776) is illustrative. Its preamble states that it is a “Declaration of Rights made by the good people of Virginia in the exercise of their sovereign powers, *which rights do pertain to them and their posterity*, as the basis and foundation of government.” It goes on in Article one to explain that:

[A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot . . . *deprive or divest their posterity*; namely, the enjoyment of life and liberty with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

(emphasis added)

65. This intergenerational element of “unalienability” had great rhetorical resonance for the American colonials. The earliest articulations of American discontent with England were set forth as criticisms of Parliament’s failure to honor the colonists’ intergenerational rights as

⁷⁹ Grotius taught that there were two types of property interests: interests in “alienable” things (“things which by their nature can belong to one person as well as to another”) and interests in “inalienable things” (“inalienable things are things which belong so essentially to one man that they could not belong to another, as a man’s life, body, freedom, honor”). Grotius, *Jurisprudence of Holland*, Ed. and trans. R. W. Lee (Oxford: 1926-1936) I: 73. This distinction was employed to deny people’s right or power to give up their personal liberty by ‘agreeing’ to any form of bondage. Pipes, *Property and Freedom* at 31.

British subjects.⁸⁰ The Americans claimed that certain “Rights of Englishmen” had been guaranteed to them in perpetuity by both charter and statute,⁸¹ and that these rights had been eroded and infringed upon by Parliament since the first settling of the colonies. Supporters of Parliament’s prerogatives, for their part, argued that the political rights which the colonists’ ancestors had prior to immigrating had been waived by the decision to immigrate, or by colonial acquiescence to Parliamentary overreaching during the subsequent years. To counter these arguments, the colonists espoused the proposition that certain types of rights could *never* be lost to later generations through the action or inaction of earlier generations.⁸² Such rights were

⁸⁰See “Declaration of Rights and Grievances” (1765) (Stamp Act Congress) in Schwartz, *The Roots of the Bill of Rights* at I: 196, 197. (“His Majesty’s liege subjects in these colonies are intitled to all the inherent rights and liberties of his natural born subjects within the kingdom of Great Britain.”); *Journals of the House of Burgesses of Virginia, 1761-1765*, ed. by Kennedy (Richmond, 1907) 302-304 (declaring in response to the Stamp Act that “As our Ancestors brought with them every Right and Privilege they could with Justice claim . . . their Descendants may conclude, they cannot be deprived of those Rights without Injustice”);

⁸¹See *First Charter of Virginia* (1606) in B. P. Poore, *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States* Vol. 2, 1888-93 (1878) (the king declares “for Us, our Heirs, and Successors . . . that all [colonists] . . . and every of their children . . . shall have and enjoy all Liberties, Franchises, and Immunities . . . to all Intents and Purposes, as if they had been . . . within this our Realm of England”). See also similar or identical guarantees in the charters of New England, Massachusetts Bay, Maryland, Connecticut, Rhode Island, Carolina, and Georgia. See also “Maryland Act for the Liberties of the People” (1639) in *Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland, 1637-1664*, I: 41 (W. H. Browne ed. 1883) (“all the Inhabitants of this Province . . . Shall have and enjoy all such rights liberties immunities priviledges and free customs within the Province as any naturall born subject of England . . .”).

⁸² See *Declarations and Resolves of the First Continental Congress* (1774), in Schwartz, I, 215, 216 (“That the inhabitants of the English Colonies in North America . . . have the following Rights: *Resolved* . . . That they are entitled to life, liberty, & property . . . *Resolved*, . . . That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England. *Resolved*, . . . That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them”); *The Rights of the Colonists and a List of Infringements and Violations of Rights* (1772), in *The Writings of Samuel Adams* II: 350-69 (H. A. Cushing, ed. 1906) (“1. *Natural Rights of the Colonists as Men* – “In short it is the greatest absurdity to suppose it in the power of one or any number of men at the entering into Declaration of John E. Davidson in Support of Plaintiffs’ Opposition to Defendants’ Motion to Dismiss

“indefinable” or “unalienable.” As Noah Webster would later explain, “A State can never alienate a natural right – for it cannot legislate for those who are not in existence.”⁸³

66. While some of these unalienable intergenerational rights, such as the right to liberty, were primarily individual in nature, others, such as the unalienable right to “alter or abolish” government, were public rights,⁸⁴ belonging to posterity collectively.

67. Professor A.E. Dick Howard maintains that the committee draft of the Virginia declaration, cited above, is “the most influential constitutional document in American history.”⁸⁵ The Virginia document’s intergenerational focus would eventually find an echo in the Due Process and Posterity clauses of the Constitution – not surprising, given the heavy involvement of George Mason and James Madison, both of whom helped to draft the Virginia Declaration.⁸⁶

68. Before writing the Constitution, the philosophy of the Virginia Declaration found its way into the Declaration of Independence. Joseph Ellis has emphasized the role which the Virginia document played in the shaping of the federal Declaration.⁸⁷ It is a matter of record that

society, to renounce their essential natural rights, or the means of preserving those rights . . . If men through fear, fraud or mistake, should in terms renounce and give up any essential natural right, the eternal law of reason and the great end of society, would absolutely vacate such renunciation . . .”

⁸³ Giles Hickory [Noah Webster] III *American Magazine* (NY) 2/88.

⁸⁴ See *United States Declaration of Independence*, par. 2 (1776) (“[W]hensoever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . .”). See also “South Carolina’s Ratification Proclamation” (May 23, 1788) in Bailyn at 2: 556 (“The [state’s] right to regulate elections to the Federal Legislature, and to direct the manner, times, and places of holding the same is, and ought to remain to all posterity, a fundamental right”).

⁸⁵ Howard, *Commentaries on the Constitution of Virginia* 56 (1974).

⁸⁶ Sutton, *Revolution to Secession: Constitution Making in the Old Dominion* 20-21 (1987) (also on the committee was Patrick Henry).

⁸⁷ Joseph Ellis, *American Sphinx: The Character of Thomas Jefferson* 56-65 (Random House, New York 1998) (“On the eve of writing the Declaration, Jefferson was thinking . . . about Virginia’s new constitution.”).

the Virginia declaration was adopted June 12, 1776. Jefferson received a copy in Philadelphia, and drafted his first version of the Declaration of Independence sometime the following week.⁸⁸

69. The Declaration of Independence proclaims that:

We hold these truths to be self-evident, that all men are created equal, *that they are endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty, and the pursuit of Happiness.⁸⁹

70. Jefferson substituted the phrase “unalienable rights” for “cannot deprive or divest their posterity,” but the meaning was clear to his contemporaries. By employing the “life, liberty . . .” phraseology of the *Second Treatise* and the Virginia Declaration, Jefferson and the other signatories confirmed Locke’s intergenerational philosophy and the rights of later generations.

71. Thus, in my opinion, the intergenerational aspects of the founders “unalienable rights” philosophy must be accorded due weight in any analysis of Posterity’s asserted rights under the Due Process clause of the Fifth Amendment.

Climate Change Discounting: Incongruent with Principle of Intergenerational Justice

72. One recent governmental practice that is markedly inconsistent with the framers’ intergenerational philosophies expressed above is that of “pure time discounting.” The concept of discounting has recently been a part of international and domestic discussions and analyses around how to mitigate against climate change. For example, the International Panel on Climate Change (“IPCC”) estimates that time discount rates are the second most important factor in evaluating the effects of climate change.⁹⁰

⁸⁸*Id.*

⁸⁹ *United States Declaration of Independence*, par. 2 (1776) (emphasis added).

⁹⁰ See David A. Weisbach & Cass R. Sunstein, *Climate Change and Discounting the Future: A Guide for the Perplexed*, Reg-Markets Center Working Paper No. 08-19, Harvard Public Law Working Paper No. 08-20; Harvard Law School Program on Risk Regulation Research Paper No. 08-12, at 11 (Aug. 12, 2008), available at <http://ssrn.com/abstract=1223448> or <http://dx.doi.org/10.2139/ssrn.1223448>.

73. Federal regulations and statutes are regularly promulgated only after the governing agency has concluded a “discounting” cost-benefit analysis. For example, the Environmental Protection Agency has detailed its “need to discount in [its] benefit-cost analysis [sic] of public policies.”⁹¹

74. After reviewing various scholarly publications regarding discounting as it pertains to shaping public policy on climate change, it is my opinion that current analyses and federal laws are not properly accounting for the costs our governmental actions will levy on future generations. Application of a pure discount rate literally treats future harms and future deaths as having only a fraction of the value of present harms and deaths. This is precisely the sort of intergenerational discrimination that the framers enjoined against. Critics of discounting have noted that “discounting ensures that future generations will receive less attention, and perhaps far less attention, than those now living.”⁹² If one believes in intergenerational neutrality and an ethical obligation to take the interests of members of future generations seriously, it is discriminatory to employ a discounting analysis regarding climate change because of potential for terrible harm awaiting future generations.⁹³ Discounting should be seen only as a method of choosing projects, not as a method of determining our ethical and legal obligations to the future.⁹⁴

⁹¹ TTN/Economics & Cost Analysis Support OAQPS Economic Analysis Resource Document, ¶ 8.3 Discounting Benefits and Costs, *available at* <http://www3.epa.gov/ttnecas1/econdata/Rmanual2/8.3.html>; *see also* Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later generations, and the Environment*, 46 *Vanderbilt L. Rev.* 267-304 (1993) (detailing executive orders, case law and EPA actions during the 1980’s and 1990’s mandating review of regulations under cost-benefit analysis and its components, including discounting, thus likely shaping environmental policymaking for the foreseeable future).

⁹² Weisbach & Sunstein, *supra* note 92, at 3.

⁹³ *Id.* at 17.

⁹⁴ *Id.* at 35.

Conclusion

75. Based on the foregoing analysis, it is my opinion that the interests of children and future generations in protecting their vital resources from irreversible damage is deeply rooted in the history and traditions of the Nation, and a central underpinning of the Constitution itself. In the Preamble, the Framers stated their intent to protect the right of the citizens to hold our government accountable to “insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” U.S. Const. pmbl. The Declaration of Independence similarly stated:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator *with certain unalienable Rights*, that among these are Life, Liberty, and the pursuit of Happiness. . . . That whenever any form of Government becomes destructive of these ends, it is the right of the People to alter or to abolish it, and to institute new Government⁹⁵

76. Based on my analysis of the history and traditions of our Nation, and my studies of the Constitution, it is my opinion that an intent to protect Posterity is reflected in the framers’ explicit protection of the class in the Constitution’s Preamble and in the prohibition on attainder of treason working Corruption of Blood, the old British practice by which the descendants of a person convicted of treason was prohibited from inheriting his property. U.S. Const. pmbl., Art. III, § 3, Cl. 2. (standing for the broad proposition that children should not be punished for the actions of their parents).

77. Based on my analysis of the history and traditions of our Nation, and my studies of the Constitution, it is my opinion that the present adult generations, left uncontrolled, are potentially the sort of politically dominant “faction” that the founders sought to guard against.⁹⁶

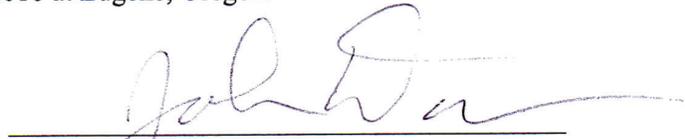
⁹⁵ *United States Declaration of Independence* (1776), par. 2 (emphasis added).

⁹⁶ See The Federalist No. 10 (James Madison) (defining a political faction as “a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, Declaration of John E. Davidson in Support of Plaintiffs’ Opposition to Defendants’ Motion to Dismiss

If Plaintiffs' allegations are correct, then the politically represented present adult generations have accrued disproportionate advantages from unsustainable fossil fuel policies by externalizing most of the costs onto later generations, who will not be politically represented until it is too late to reverse the permanent consequences of climate destabilization and consequent threats to their constitutional rights. Furthermore, the interests of Posterity in the outcome of executive decisions are further marginalized when the specific economic interests of polluters are required to be considered, but Posterity is not. *See* 43 U.S.C. § 1344(a)(2) (Outer Continental Shelf Lands Act requiring consideration of the leasing interests of potential oil and gas producers, but not impacts on future generations). Such generational self-dealing is the type of conduct that the framers condemned repeatedly and at great length, both in their personal writings and in the text of the Constitution.

I certify under penalty of perjury in accordance with the laws of the State of Oregon, and to the best of my knowledge, that the foregoing is true and correct.

Executed this 6th day of January, 2016 at Eugene, Oregon.



JOHN EDWARD DAVIDSON

adverse to the rights of other citizens or to the permanent and aggregate interests of the community.”).

Declaration of John E. Davidson in Support of Plaintiffs' Opposition to
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John Davidson

Education and Licensing

1992
Admitted Oregon State Bar

1992 University of Oregon School of Law
Juris Doctorate
Oregon Honors Scholarship; Certificate: Environment and Natural Resources Law

1984 University of Wisconsin -- Madison
B.A. Anthropology
Honors College

1979 - 1980 Deep Springs College Deep Springs, CA

Professional Experience

Fall 2003 – present University of Oregon Eugene, Oregon
Instructor
Department of Political Science. Courses on public law, legal and political philosophy. Lecturing, course design and administration.

Fall 2010 – present University of Oregon Eugene, Oregon
Departmental Undergraduate Advisor
Academic advising for 800 political science undergraduates. New majors, course planning, graduation and career advising, etc.

Summer 2011 Cornell University / Telluride Assn Ithaca, New York
Co-Facilitator
Telluride Association Summer Program. Design, instruction and facilitation of intensive course on Intergenerational Justice for advanced high school students.

Sep. 2003 – Aug. 2004 Oregon Court of Appeals Salem, Oregon
Judicial Clerk
Legal analysis, research, writing, and editing.

2002 - 2004 Pioneer Pacific College Springfield, Oregon
Associate Professor
Criminal justice and general education courses.

1999 – present Constitutional Law Foundation Eugene, Oregon
Legal Director
Research, writing and public education on the topic of intergenerational justice as a constitutional principle.

1999 M.H.D.D.S.D., Oregon Dept. Human Resources
Legal Consultant
Research and comparative analysis of overlapping client complaint procedures.

Professional Experience (cont.)	1993-1998	Legal Services Office, ASUO	Eugene, Oregon
	Staff Attorney		
	Full legal representation for students and student government on civil law matters.		
	1992-1998	Law Offices of John Davidson	Eugene, Oregon
	Sole Practitioner		
Environmental, civil rights, consumer, and landlord/tenant representation.			
Fall, 1994	Oregon State University	Corvallis, Oregon	
Teaching Assistant			
“Philosophical Perspectives on the Law.”			
1992	Oregon Ballot Measure Six	Eugene, Oregon	
County Campaign Coordinator			
County coordination for state initiative campaign to close unsafe nuclear plant.			
1991	Professor David Schuman	Eugene, Oregon	
Research Assistant			
Assistance in preparation of articles for state constitutional law casebook.			

Courses Taught**Most Recently –****Intergenerational Justice****Matters of Life and Death****Constitutional Law****U.S. Supreme Court****Civil Rights and Liberties****Legal Process****Politics of Religion****Previously –****Introduction to Political Science****United States Politics****Introduction to Comparative Politics****Introduction to International Relations****Introduction to Criminal Justice****Criminal Law****Criminal Procedure****Legal Ethics****Introduction to College Writing**

Selected Publications

Intergenerational Justice Database. (Winter 2009 – present). An online, cross referenced database of concepts, authors and readings relevant to the field of intergenerational justice. An evolving work. (<http://ijdb.auzigog.com/>)

“Generational Sovereignty and the Land,” *The Ecotone* 10 (Spring 2012).

“Taking Turns,” *The Ecotone: Journal of Environmental Studies* 43 (Spring 2012).

“Taking Posterity Seriously: Intergenerational Justice,” Climate Legacy Initiative Research Forum of Vermont Law School (Jan. 2008) (<http://vlscli.wordpress.com/2008/01/28/taking-posterity-seriously-intergenerational-justice/>).

“Tomorrow’s Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing Upon Future Generations,” 28 *Columbia Journal of Environmental Law* 185 (2003).

“The Stewardship Doctrine: Intergenerational Justice in the United States Constitution, available at <http://www.conlaw.org> (website of the Constitutional Law Foundation).

[with Declan O’Donnell] “Reconstitution: A Space Governance Philosophy,” 7 *Space Governance Journal* 19 (2002).

Community and University Service

2013-2015	University of Oregon Senate	
Senator		
Chair, Rules Committee. Member, Free Speech and Academic Freedom Working Group.		
2011-2012	Occupy the Constitution	Eugene, Oregon
Instructor / Facilitator		
Weekly public education class which examined U.S. and Oregon constitutions and historical and contemporary power dynamics in the United States.		
2011-2013	United Academics of the University of Oregon	
Member of:		
Organizing committee, Coordinating committee, Constitution and By-laws work group, Initial contract bargaining team. Elected to Representative Assembly, Fall 2013.		
2007-2009	Climate Legacy Initiative	
Consultants Working Group		
Development of legal doctrines to safeguard future generations from the potential harms of global climate change.		
2003-present	Environmental Law Institute	
Advisor		
Endangered Environmental Laws Program		
1999-2002	Cascade Foothills Library	Dexter, Oregon

**Conferences,
Workshops, and
Events**

Presenter, “Constitutional Grounds of Intergenerational Justice,” University of Oregon, Eugene, Oregon (March, 2015). Public Interest Environmental Law Conference.

Presenter, “Posterity and Climate Change,” *Climate Change Symposium*, University of Oregon, Eugene, Oregon (April 15, 2014).

Presenter, “To Have and to Hold: Property Rights and Wrongs,” *Literature and the Law*, Knight Law School, Eugene, Oregon (April 5, 2013). J. Reuben Clark Law Society.

Panelist, “Public Trust and Atmospheric Trust Litigation,” Eugene, Oregon (March 2012). Public Interest Environmental Law Conference.

Panelist, “Campaign Finance Reform in Oregon: Reducing Special Interest Influence in Elections,” Eugene, Oregon (March 2012). Public Interest Env’tl Law Conference.

Panelist, “Amending the Constitution in Response to *Citizens United: Pitfalls and Possibilities*,” Knight Law School, Eugene, Oregon (January 2012). We the People – Eugene and the Wayne Morse Center for Law and Politics.

Lecturer / Facilitator, “Occupy the Constitution” Eugene, Oregon (December 2011 – April 2012). Hosting of weekly, public classes on the constitutional dimensions of various social and political issues.

Guest Expert, “Intergenerational Justice.” Produced by *Student News* of Amherst, MA. (December 19, 2011). <http://www.youtube.com/watch?v=mbg1ZPD2nqQ>. Amherst Media Twelve.

Moderator, Oregon Democratic primary gubernatorial debate between Gov. John Kitzhaber and Sec. of State Bill Bradbury, Eugene, Oregon (April 2010).

Panelist, “Saving the Planet for Future Generations: Intergenerational Equity and Climate Change,” Eugene, Oregon (March 2010). Wayne Morse Center for Law and Politics Climate Ethics and Climate Equity Series.

Panelist, panel organizer, “The Trust Approach to Environmental Decisionmaking.” Public Interest Environmental Law Conference, Eugene, Oregon (Mar 2009)

Presenter, “The Stewardship Doctrine: Environmental Sovereignty and the Constitutional Duty of Preservation.” John Baldwin Film and Lecture Series, Eugene, OR (Feb 2009)

Panelist, panel organizer, “Measure 37: Working with the Law.” Public Interest Law Conference, Eugene, Oregon (Mar 2007)

Panelist, , “Intergenerational Ecological Responsibility.” Public Interest Law Conference, Eugene, Oregon (Mar 2006)

Panelist, *Promise of Paradise* Conference. “When Planning Goes “POP”: Standing and Appeals.” Oregon Planning Institute, Eugene, Oregon (Sept 2005)

Radio Interview, “The Stewardship Doctrine: Future Generations, the Constitution, and Private Property.” “Jefferson Exchange” (KRVM, 1280 A.M., July 11, 2005)

**Conferences,
Workshops, and
Events**
(continued)

Panelist, “Beyond Measure 37.” LandWatch Annual Meeting, Eugene, Oregon (2005)

Panelist, “Sustainable Land Use in Oregon.” Public Interest Law Conference, Eugene, Oregon (Mar 2005)

Panelist, panel organizer, “The Stewardship Doctrine: Environmental and Related Rights for Posterity under the Constitution.” Public Interest Law Conference, Eugene, Oregon (Mar 2003)

Panelist, panel organizer, “Environmental Protection in the U.S. Constitution.” Public Interest Law Conference, Eugene, Oregon (Mar 2002)

Presenter, “Political and Property Rights in Space: the Public Trust and Intergenerational Rights.” United Societies in Space Conference, Albuquerque, NM (2001)

Panelist, “Constitutional Limits on Environmental Destruction.” Public Interest Law Conference, Eugene, Oregon (Mar 2000)

Panelist, “Environmental Protection and the United States Constitution.” Public Interest Law Conference, Eugene, Oregon (Mar 1999)

Presenter, 2 –3 public workshops annually on landlord-tenant and consumer law issues. Sponsored by ASUO Legal Services office. (1993 – 1998)

**Grants, Fellowships
and Awards**

2007-2008 – Oregon Humanities Teaching Fellowship

2007-2008 – Wulf Professorship in the Humanities.

2002 - 2003, Evergreen Hill Education Fund of the Oregon Community Foundation. (Environmental Heritage Project.)