Greening the *Rechtsstaat*: Constitutional Rights and Environmental Litigation in West Germany, 1969-1980

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On June 11, 1974, the Hamburg Administrative Court issued a temporary injunction to Reynolds Corporation, ordering that its recently constructed aluminum factory in Hamburg be shut down pending the court's decision on a lawsuit. The plaintiff, a Hamburg horticulturalist, claimed that fluorine emissions from the plant would destroy his gardens. An editor of *Die Zeit* presented the "Reynolds case" as a model of "sharpened environmental consciousness," a sign that "the affected citizen is not powerlessly subservient to administrators and corporations." But the editor also denounced the court's demand that Reynolds cease to produce air pollution and questioned whether the plant's emissions were really excessive. If the court's decision "were to become general law, then all factories, all home furnaces, all automobiles would have to be shut down."[1] In its October 1974 ruling, the Hamburg Higher Administrative Court ruled that the emissions did not intolerably harm the plaintiff, overturning the lower court's temporary injunction on the grounds that the plaintiff was unlikely to win his petition.[2]

The Reynolds case highlights the competing demands of corporations and local property owners, of economic growth and environmental protection, which confronted West German courts in the manifold environmental litigation of the 1970s. The case further reveals the role of the courts as autonomous and powerful actors in determining standards of environmental protection, in the period when the environment first emerged as an issue of national political contention. This role has remained largely overlooked in the growing literature on West German

[1] Horst Bieber, "Gladiolen oder Arbeitsplätze," *Die Zeit*, September 6, 1974, accessed November 27, 2013, http://www.zeit.de/1974/37/gladiolen-oder-arbeitsplaetze.
[2] *OVG Hamburg, Beschluß vom 23.10.1974, OVG Bs. II 51/74, Deutsches Verwaltungsblatt* 90 (1975): 208.

environmental history. The extant historiography focuses on local environmentalist initiatives; the courts appear, if at all, as mouthpieces for state power, obstacles to the aims of the environmental movement.[3] Reassessing West German environmental history from the standpoint of the judiciary, however, challenges the critique of a technocratic state crushing nascent environmentalisms.[4] Rather, I argue, West German courts sought to assimilate environmental cases into established tenets of constitutional and statute interpretation. If courts most often ruled on the side of industry, this reflects less an adamant anti-environmental stance than apprehension toward overturning principles that had informed West German jurisprudence since the 1950s, to which environmental litigation posed an incisive challenge.

The conflict between established jurisprudence and environmentalist demands becomes clearest with respect to the major debate over environmental law of this period. In the early 1970s, sparked by the Brandt government's ambitious environmental program, a dispute emerged among West German jurists and politicians over whether a right to a healthy environment could be granted constitutional status. Such a provision would raise fundamental challenges to core tenets of Basic Law jurisprudence. Whereas the fundamental rights of the Basic Law's first nineteen articles had traditionally been conceived as extensions of individual subjecthood, environmental space exceeded the ownership of any individual. The courts had traditionally called on the state to protect the rights of individuals, yet a right to environmental

[3] This historiography has offered a detailed picture of the formative phase of the contemporary environmental movement in West Germany between the mid-1960s and early 1980s. See in particular: Sandra Chaney, *Nature of the Miracle Years: Conservation in West Germany, 1945-1975* (New York: Berghahn Books, 2008), 176-204; Jens Ivo Engels, *Naturpolitik in der Bundesrepublik. Ideenwelt und politische Verhaltensstile in Naturschutz und Umweltbewegung 1950-1980* (Paderborn: Ferdinand Schöningh, 2006); William Markham, *Environmental Organizations in Modern Germany: Hardy Survivors in the Twentieth Century and Beyond* (New York: Berghahn Books, 2008), 94-127; Dieter Rucht, *Von Wyhl nach Gorleben. Bürger gegen Atomprogramm und nukleare Entsorgung* (München: C. H. Beck, 1980); Dieter Rucht and Jochen Roose, "Germany," in *Environmental Protest in Western Europe*, ed. Christopher Rootes (Oxford: Oxford University Press, 2003), 80-108.

[4] Rainer Geulen, "Die langsame Beseitigung des Rechtsschutzes im Umweltrecht," *Kritische Justiz* 2 (1980): 170-182.

protection would allow individuals a claim against actions whose effects could not be limited to themselves. Judicial rulings in the environmental litigation of the 1970s reflect a concern to uphold the foundations of the postwar constitutional order against the potentially disruptive effects of a comprehensive environmental right.

This paper tracks the debate over environmental rights at the levels of constitutional theory and legal practice in 1970s West Germany, seeking to capture the often overlooked juristic dimension of environmental history. The connections between legal theory and practice are particularly salient in Germany, where, as a civil law country, scholarship published in major law journals is as least as important as judicial precedent in shaping constitutional interpretation.[5] The first section analyzes disputes among legal scholars in the early 1970s, alongside proposals for a constitutional amendment developed by committees of the FDP and SPD. I argue that such proposals rested on an expansive reading of constitutional provisions for a "social state" (*Sozialstaat*), challenging an established jurisprudence that foregrounded the principle of the "legal state" (*Rechtsstaat*). While no constitutional amendment came to fruition in this period, environmental litigants increasingly couched legal claims against industrial defendants in terms of constitutional rights. The second section explores such litigation, showing that courts were willing to grant only a restrictive right to the enjoyment of nature that was compatible with the traditional privileging of the *Rechtsstaat*. This right rested on an older idea of "nature" (*Natur*) as an aesthetic and recreational realm, rather than the emergent notion of the "environment" (*Umwelt*) as the basis of a community's health. The third section, on the anti-nuclear litigation of the late 1970s, argues that the restricted scope of environmental rights established through previous litigation prevented plaintiffs from successfully appealing to their constitutional rights

[5] Donald Kommers and Russell Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed. (Durham: Duke University Press, 2012), 73.

in contesting the authorization of nuclear reactors. The litigation and juristic disputes of the 1970s are crucial for explaining the intellectual and political challenges attendant on the rise of West German environmentalism and provide the historical background for the post-reunification environmental amendment to the Basic Law.

PROPOSING ENVIRONMENTAL RIGHTS

In a November 1969 address, the West German Interior Minister, Hans-Dietrich Genscher, first employed the concept of "environmental protection" (*Umweltschutz*) to announce a central aim of the recently inaugurated Brandt government. The term *Umweltschutz*, new to the German language in the late 1960s, signaled a bureaucratic program aimed at regulating pollution, in contrast to the older "nature preservation" (*Naturschutz*), which emphasized locally-based efforts to conserve natural beauty.[6] Brandt's creation of a Cabinet Committee on Environmental Questions, along with the government's release of the Immediate Program for Environmental Protection in September 1970, followed a major UNESCO conference on the biosphere and reflected rising concern with environmental damage throughout the industrialized world.[7] For the SPD Brandt government, as well as the FDP Interior Ministry, the promotion of environmental protection was a means to assert West German leadership on a major international issue and concretize the administration's inaugural commitment to a progressive stance on social policy. As a result of the initiative of successive SPD-FDP governments, fifty-four laws and ordinances on the environment were promulgated between 1970 and 1976.[8]

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[6] Chaney, *Nature*, 176-177; Engels, *Naturpolitik*, 275-276.
[7] Engels, *Naturpolitik*, 279-281; Hans Vierhaus, *Umweltbesußtsein von oben. Zum Verfassungsgebot demokratischer Willensbildung* (Berlin: Dunker & Humblot, 1994), 107
[8] Engels, *Naturpolitik*, 275-276. A complete list is provided in Vierhaus, *Umweltbewußtsein*, 110-114.

Outside the social-liberal coalition, environmentalism continued to appeal to conservative critics of industrial society who had formed the movement's mainstay in earlier decades.[9] The idea of a constitutional environmental right, though later associated with jurists and politicians of the Left, was first proposed by the CSU President of the Bavarian Parliament, Rudolf Hanauer, in a September 1970 address. Employing a suggestive language of salvation, Hanauer called for the incorporation of a "fundamental right to a sound environment (*Grundrecht auf eine heile Umwelt*)" into the Basic Law. Hanauer recognized that constitutional lawyers would face difficulties in explicating such a right, given that the environment could not be the property of any single person.[10] Nevertheless, Hanauer insisted that due to the widespread environmental degradation in contemporary West Germany, an individual's natural right to a healthy environment required juristic foundations. Hanauer's proposal was soon adopted by center and Left parties. The Environmental Program submitted by the Brandt government to the Bundestag in October 1971 noted the lack of an environmental right in the Basic Law and called for the examination of foreign models to determine how to concretize an individual right against environmental pollution.[11] The government program was followed by a November 1971 SPD document on "The Criminality of Environmental Destruction" and the March 1972 Freiburg

[9] On conservative environmentalism in 1970s West Germany, see: Rüdiger Grad, "Die Grenzen des Wachstums und die Grenzen des Staates. Konservative und die ökologische Bedrohungsszenarien der frühen 1970er Jahre," in *Streit um den Staat. Intellektuelle Debatten in der Bundesrepublik 1960-1980*, ed. Dominik Geppert and Jens Hacke, 207-228 (Göttingen: Vandenhoeck & Ruprecht, 2008). On earlier traditions of German environmentalism, see: Thomas Lekan, *Imagining the Nation in Nature: Landscape Preservation and German Identity, 1885-1945* (Cambridge, MA: Harvard University Press, 2004).

[10] Rudolf Hanauer, "Zum Grundrecht auf eine heile Umwelt," *Natur und Landschaft* 12 (1970): 427-428. On Hanauer's address, see also: Chaney, *Nature*, 191.

[11] Deutscher Bundestag, "Umweltprogramm der Bundesregierung," 9-10, http://dip21.bundestag.de/dip21/btd/06/027/0602710.pdf, accessed December 11, 2013.

Program adopted by the FDP parliamentary faction, both of which offered formulations of a constitutional environmental right.[12]

Proponents of a constitutional environmental right sought to raise environmental protection from a political objective to an uncontestable, foundational principle of West German democracy. The gravity of such a proposal can only be grasped in view of the centrality of constitutionalism in West German political culture. In contrast to the Imperial and Weimar German constitutions, which were "easily amended and judicially unenforceable," the Basic Law was legally binding upon all branches of government, making all legislative statutes and administrative ordinances subject to the judicial review of the Federal Constitutional Court.[13] The framers of the Basic Law, mindful of the experience of the Third Reich, conceived of the constitution's first nineteen articles, comprising the fundamental rights (*Grundrechte*), as the bedrock of the postwar legal order.[14] A respect for the permanence and inviolability of these fundamental rights guided the first generation of constitutional jurisprudence. Although the Basic Law was amended thirty-two times between 1949 and 1975, there were no changes to the battery of fundamental rights in the first nineteen articles.[15] The incorporation of a right to environmental protection would have signified a major alteration to the Basic Law, and the various proposals for the recognition of such a right generated significant controversy among constitutional lawyers.

Debates over the constitutional basis of environmental protection centered on two sections of the catalogue of the fundamental rights: Articles 1 and 2, which declare the

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[12] Karl-Hermann Flach, Werner Maihofer and Walter Scheel, *Die Freiburger Thesen der Liberalen* (Hamburg: Rowohlt, 1972), 109-110; "Kriminalität der Umweltzerstörung. Ein Diskussionsentwurf der Arbeitsgemeinschaft Sozialdemokratischer Juristen (ASJ)," *Zeitschrift für Rechtspolitik* 5 (1972): 77. See also: Heinhard Steiger, *Mensch und Umwelt. Zur Frage der Einführung eines Umweltgrundrechts* (Berlin: Erich Schmidt, 1975), 9.
[13] Kommers and Miller, *Constitutional Jurisprudence*, 43, 72.
[14] Ibid., 43.
[15] Steiger, *Mensch und Umwelt*, 9.

individuals' rights to "human dignity," "life," "physical integrity," and the "free development of [one's] personality," and Article 14, which both guarantees the right to property ownership and establishes that property "shall also serve the public good."[16] Controversies among jurists over the interpretation of these articles reflected the tension between the dual character of the Federal Republic as a "legal state" (*Rechtsstaat*) and "social state" (*Sozialstaat*). While both principles found expression in Article 28 of the Basic Law, which describes the Federal Republic as a "social state governed by the rule of law," they often conflicted in legal practice.[17] Whereas the *Rechtsstaat* principle in German legal thought entails a conception of the fundamental rights as negative rights guarding individual liberties against state intervention, the *Sozialstaat* principle imposes upon the state an obligation to create the positive conditions for the meaningful exercise of those rights.[18] Proposals to introduce an environmental right rested on an expansive interpretation of the *Sozialstaat*. A healthy environment could be conceived as a prerequisite for "human dignity," "life," "physical integrity," and "personality" and thereby as a state obligation following from these individual rights. Such an obligation would privilege the second paragraph of Article 14 over the first, restraining the freedom of property owners in favor of the public interest in a healthy environment.[19]

In a landmark 1958 decision, the Federal Constitutional Court ruled that the fundamental rights entailed both negative liberties as well as "objective values" that the state was bound to uphold, thus giving substance to the *Sozialstaat* clauses in the Basic Law.[20] Nevertheless, in its first two decades, the Constitutional Court decisively privileged the character of the

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[16] Deutscher Bundestag, "Basic Law for the Federal Republic of Germany," trans. Christian Tomuschat and David Currie, 15, 22, https://www.btg-bestellservice.de/pdf/80201000.pdf, accessed December 11, 2013.
[17] Ibid., 31. The *Sozialstaat* principle is also associated with Article 20, paragraph 1 ("The Federal Republic of Germany is a democratic and social federal state"), and the *Rechtsstaat* principle with Article 20, paragraph 3 ("The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice"). Ibid., 27.
[18] Kommers and Miller, *Constitutional Jurisprudence*, 35-37.
[19] Deutscher Bundestag, "Basic Law," 15, 22.
[20] Kommers and Miller, *Constitutional Jurisprudence*, 61.

constitutional order as a *Rechtsstaat*, especially in its interpretations of Articles 2 and 14. Thus, the court sought to circumscribe the potentially expansive meaning of a right to "personality" by ruling that this right could be invoked only against intrusions into individual liberty and did not impose any positive obligation on the state. The court also privileged the freedom to own property over property's public obligations.[21] For constitutional lawyers in the postwar Federal Republic, a jurisprudence that foregrounded the inviolability of individual, negative rights was intended to form a pillar of West German political identity, in contradistinction to both the Third Reich and the German Democratic Republic.[22] This framework did not allow for the derivation of an environmental right, which would entail both restrictions on property owners and a state obligation to take preemptive measures to protect its citizens from environmental damage.

The writings of legal scholars who favored a constitutional right to a healthy environment reveal how the idea of environmental rights could appeal to both left- and right-wing critics of an interpretation of the Basic Law as establishing a purely liberal *Rechtsstaat*. Eckard Rehbinder (b. 1936), a Bielefeld law professor and member of the Association of Social Democratic Jurists, who would become one of the disciplinary founders of environmental law in West Germany, approached the question of environmental rights from the perspective of expanding the scope of the *Sozialstaat*. For Rehbinder, writing in 1970, the weakness of West German environmental law was a result of the state's privileging economic growth over its social welfare obligations. An interpretation of Article 2 to include "a right to clean air, clean water, noise-free calm, a wholesome landscape, even aesthetically beautiful nature" would obligate the state to ensure the natural foundations for exercising one's rights to life and the free development of personality.

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[21] Ibid., 399, 631.

[22] On the role of liberal-conservative political thought in the formation of the Federal Republic, see: Jens Hacke, *Philosophie der Bürgerlichkeit. Die liberalkonservative Begründung der Bundesrepublik* (Göttingen: Vandenhoeck & Ruprecht, 2006).

Moreover, such a right would activate the Basic Law's assurances of the public "obligations" of property in the second paragraph of Article 14.[23] Rehbinder's derivation of an environmental right from the existing battery of fundamental rights thus rested on a shift in emphasis away from the *Rechtsstaat* principle.

On the opposite end of the political spectrum, Werner Weber (1904-1976), a former student of Carl Schmitt who rose to prominence as a constitutional scholar in the Federal Republic, also emerged as a founder of environmental law and an early defender of a constitutional environmental right. For Weber, writing in 1971, the disorganization of environmental law in the Federal Republic could be ascribed to the lack of substantiation of the *Sozialstaat* clauses in the Basic Law, in contrast to the extensive elaboration of state obligations in the Weimar Constitution. [24] Weber's analysis of extant environmental law was articulated within a critique of liberal individualism: "The careless use of individual freedoms" was responsible for "much environmental damage," and therefore the dominant conception of constitutional rights as negative liberties was an insufficient foundation for environmental protection.[25] Weber concurred with the legal scholar Hans Heinrich Rupp (b. 1926) that environmental degradation had exposed "the illusions of the bourgeois *Rechtsstaat*" and turned to a more expansive conception of the *Sozialstaat* to locate a constitutional basis for environmental protection.[26] Weber, following Rupp, interpreted the right under Article 1 to inviolable "human dignity" as presupposing a state guarantee of an "undamaged environment."

[23] Eckard Rehbinder, "Grundfragen des Umweltrechts," *Zeitschrift für Rechtspolitik* 11 (1970): 252.
[24] Werner Weber, "Umweltschutz im Verfassungs- und Verwaltungsrecht," *Deutsches Verwaltungsblatt* 86 (1971): 806-807.
[25] Ibid., 807.
[26] Hans-Heinrich Rupp, "Die verfassungsrechtliche Seite des Umweltschutzes," *JuristenZeitung* 26 (1971): 401-402.

This guarantee would be grounded in the public obligations of property in accordance with the second paragraph of Article 14.[27]

The constitutional amendments proposed by the SPD Association of Social Democratic Jurists in November 1971 and by the FDP in its Freiburg Program of March 1972 similarly reflected the view that environmental protection could not rest on a conception of rights as purely negative liberties. Both the SPD and FDP committees favored adding a third paragraph to Article 2, rather than deriving environmental rights from the existing clauses, in order to make the constitutional basis for environmental protection absolutely explicit. Like the earlier legal scholarship, their proposals envisioned an expansive *Sozialstaat*. The Association of Social Democratic Jurists proposed to amend Article 2 with the clause, "Everybody has a right to life in a humane environment. The natural foundations [of life] stand under special protection of the social *Rechtsstaat*. The limits of permissible environmental damage will be regulated through law or on the basis of a law…"[28] The FDP Freiburg Program proposed to add to Article 2 a nearly identical provision: "Everybody has a right to a humane environment. The natural foundations [of life] stand under the special protection of state order. The limits of environmental pollution permissible in the public interest will be determined by law."[29] Both proposals diverged from the language of the extant fundamental rights by linking the declaration of an individual right to the creation of a positive obligation for the state. The drafters of the SPD amendment were more explicit in their challenge to the *Rechtsstaat*, declaring their proposal a "*social right (soziales Grundrecht)*" and invoking the "social obligations of property."[30] In its content,

[27] Weber, "Umweltschutz," 806.
[28] Arbeitsgemeinschaft Sozialdemokratischer Juristen, "Kriminalisierung der Umweltzerstörung," 77.
[29] Flach, Maihofer and Scheel, *Freiburger Thesen*, 109-110.
[30] Arbeitsgemeinschaft Sozialdemokratischer Juristen, "Kriminalisierung der Umweltzerstörung," 77. Emphasis in the original.

however, the FDP amendment appealed equally to a framework associated with the *Sozialstaat*, by mandating the state protection of a humane environment.

The positions articulated by the SPD and FDP amendments, as well as by legal scholars favorable to an environmental right, opposed the mainstream framework of West German constitutional interpretation. These proposals were soon challenged by defenders of the primacy of the *Rechtsstaat*. Carl Hermann Ule (1907-1999), a Speyer professor of public law, argued that all of the proposals for an environmental right stretched the meaning of the *Sozialstaat* beyond recognizable limitations. The *Sozialstaat* clauses in Articles 20 and 28 only established "the mitigation of social tensions and a concern for a just social order" as a general aim for the West German state.[31] These clauses did not convert all of the fundamental rights into "social rights"; rather, the constitutional rights to life and personality remained negative, "individualistic fundamental rights."[32] Ule's insistence on an interpretation of the fundamental rights foregrounding the *Rechtsstaat* principle led him to reject the proposals for environmental rights advanced by Rehbinder, Rupp, and the SPD as overburdening the meaning of Articles 1 and 2. He preferred legislative rather than constitutional solutions to environmental protection, arguing that only the former provided for adequate means of enforceability.

Hans Hugo Klein (b. 1936), a CDU Bundestag member and Göttingen law professor, offered a similar critique of the idea of a constitutional environmental right. Though published in the *Festschrift* for Werner Weber, Klein's analysis provided an alternative conservative position to Weber's, viewing the constitution as a guarantor of individual liberties rather than a mechanism of social integration. For Klein, as for Ule, the *Sozialstaat* principle "does not oblige any constitutional organ to *particular* social-political norms," and thus did not create a state

[31] C. H. Ule, "Umweltschutz im Verfassungs- und Verwaltungsrecht," *Deutsches Verwaltungsblatt* 87 (1972): 438.
[32] Ibid.

responsibility for environmental protection.[33] Klein argued further that the extant proposals for an environmental right exaggerated the ability of the constitution to create enforceable state obligations.[34] Klein noted that in the German Democratic Republic, "environmental damage is significantly greater than in the Federal Republic," despite that Article 15 of the East German constitution declared "the protection of nature as the obligation of state and society."[35] The example of the GDR served Klein as a negative model for West Germany, a demonstration that even in an ostensibly socialist state, social guarantees in the constitution did not create adequate mechanisms of enforcement.

Both Ule in 1972 and Klein in 1974 stressed the enforcement of existing administrative law, rather than the derivation or addition of a new constitutional right, as the appropriate legal means for environmental protection. Their arguments rested on an interpretation of the *Sozialstaat* clauses as creating only a general framework for the state's involvement in society, rather than a set of specific state obligations toward its citizens. In contrast, the positions represented by Rehbinder, Weber, and Rupp rested on a more expansive reading of the *Sozialstaat* clauses as requiring the state to create the necessary conditions for the realization of individual rights. Thus, the latter could postulate a healthy natural environment as a correlate to the constitutional rights under Articles 1 and 2 mandating state protection.

The idea of a constitutional environmental right remained anchored in the rhetoric of the federal government through the end of the Brandt administration. In a January 1973 Bundestag address, Brandt called for the incorporation of a "right to a humane environment *(Recht auf menschenwürdige Umwelt*)" into the Basic Law, while in March 1973, Interior Minister

[33] Hans Hugo Klein, "Ein Grundrecht auf saubere Umwelt?" In *Im Dienst an Recht und Staat. Festschrift für Werner Weber*, eds. Hans Schneider and Volkmar Götz (Berlin: Dunker & Humblot, 1974), 645. Emphasis added.
[34] Ibid., 650-652.
[35] Ibid., 660-661.

Genscher, echoing his party's Freiburg Program, called for the introduction of a "social right to a healthy environment" at the constitutional level.[36] As late as March 1974, the Committee on Environmental Law advanced its own proposed amendment to Article 2 and announced that the Interior Ministry was continuing preparations for a draft amendment to the Basic Law.[37] The government's focus on environmental issues, however, had already diminished following the oil crisis of October 1973 and the onset of recession. By mid-1975, despite discussion within the administration of an environmental right earlier in the year, Chancellor Helmut Schmidt resolved to diminish the state's involvement in environmental protection.[38] During this period, the demand for a constitutional environmental right passed from party committees to an increasingly vocal and anti-statist environmental movement. For the judiciary, the collapse of government-backed proposals for a constitutional amendment was only the beginning of a protracted struggle to define the scope of constitutionally mandated environmental protection in legal practice.

CONSTITUTIONAL RIGHTS AS A BASIS OF ENVIRONMENTAL LITIGATION

The years 1973-5, during which the West German state reduced its commitment to environmental protection, simultaneously witnessed the growth of a popular environmental movement that defined itself independently of the government's reform program. Whereas the Interior Ministry in the early 1970s viewed moderate environmental organizations as allies, after 1973 the Brandt government distanced itself from the increasingly oppositional grassroots Citizens Initiatives, which now incorporated elements of the New Left and fragmented

[36] Hansjörg Dellmann, "Zur Problematik eines 'Grundrechts auf menschenwürdige Umwelt,'" *Die Öffentliche Verwaltung* 28 (1975): 588; Hans-Dietrich Genscher, "Soziales Grundrecht auf eine gesunde Umwelt," *Zeitschrift für Sozialreform* 19 (1973): 283-286.
[37] Helmut Külz, "Umwelt und Verfassung," *Deutsches Verwaltungsblatt* 90 (1975): 189.
[38] Steiger, *Mensch und Umwelt,* 9; Engels, *Naturpolitik,* 289.

communist K-groups.[39] It was during this period that individual activists, often backed by nature protection associations, began to file lawsuits against state-issued permits for environmentally invasive construction projects, on the basis of their constitutional rights.

These plaintiffs' lack of success should be understood in terms of the tension between the demand for an environmental right and established interpretations of constitutional rights, already exposed in the legal scholarship of the early 1970s. While proponents of an environmental right founded their claims on an expansive understanding of the *Sozialstaat*, West German courts, in rulings on the environmental litigation of the mid-1970s, drew primarily on the arguments of the opponents of an environmental right to restrict the constitutional basis for environmental protection. These decisions were consistent with an emphasis on the individual, negative character of the fundamental rights that had grounded constitutional jurisprudence since the 1950s. Although they rejected a comprehensive right to environmental protection, the courts were willing to recognize a more limited right to the enjoyment of nature, which could be granted without extensive concessions to the *Sozialstaat*. This bounded right served as a justification for the judiciary's rejection of more expansive rights claims and enabled the courts to assimilate the demands of the environmental movement into the established privileging of the *Rechtsstaat*.

Prior to the proposals for a constitutional environmental right in the early 1970s, the limited jurisprudence on environmental issues hewed closely to a conception of the fundamental rights as subjective liberties against the state. Among the first environmental rulings in West Germany, an October 1969 decision of the Lüneburg Higher Administrative Court in Lower Saxony determined that the "protection of nature (*Naturschutz*)" constituted a public interest but

[39] Chaney, *Nature*, 195-204; Christian Joppke, *Mobilizing Against Nuclear Energy: A Comparison of Germany and the United States* (Berkeley: University of California Press, 1993), 45-48.

not an individual right. Rejecting a lawsuit filed by two nature protection associations against construction on privately owned, previously undeveloped land, the court determined that the rights of property owners would trump the demands of third parties for environmental protection.[40] Significantly for subsequent litigation, the Lüneburg decision also held that nature protection associations could not claim legal standing on the basis of the constitutional rights, which inhered only in individuals.[41] Though critics of the Lüneburg ruling, including Eckard Rehbinder, maintained that citizens' groups could legitimately claim standing in environmental cases on the basis of the democratic character of the constitution, such arguments never gained ground in the courts.[42] While rulings of the 1970s consistently rejected the constitutional claims of nature protection associations, the idea of an individual right to environmental protection remained subject to contestation and renegotiation.

The legal challenges to the Lüneburg ruling began in Bavarian courts, before moving to the federal level in the mid-1970s. Uniquely among the West German state constitutions, the Constitution of the Free State of Bavaria contained an explicit reference to environmental protection. Article 141, included among the provisions on "Social Life," established that "Everyone is entitled to enjoy natural beauty and relaxation in the open countryside…The State and Municipalities have the right and duty to provide access to…areas of natural beauty [and] to extend access through the restriction of private ownership."[43] While Article 141 had been present in the Bavarian Constitution since its promulgation in 1946, controversy over its interpretation erupted in the early 1970s as part of the national debate over environmental rights. Plaintiffs

[40] *OVG Lüneburg, Beschluß vom 23.10.1969, I OVG C 1/69, Neue Juristische Wochenschrift* 23 (1970): 774.
[41] Ibid.
[42] Eckard Rehbinder, Hans-Gerwin Burgbacher and Rolf Knieper, *Bürgerklage im Umweltrecht* (Berlin: Erich Schmidt, 1972), 12, 118.
[43] Bayerischer Landtag, "Constitution of the Free State of Bavaria," 18, http://www.bayern.landtag.de/de/196.php, accessed December 11, 2013.

representative of an activist environmental movement, along with sympathetic jurists, believed that Article 141 could serve Bavaria as a constitutional environmental right equivalent to that which the FDP and SPD proposed at the national level.[44] The Bavarian article could be plausibly read as a "social right," containing both a subjective entitlement to the enjoyment of nature alongside a state obligation for environmental protection. While for a brief period judges interpreted Article 141 as entailing such a state obligation, this reading was soon overturned in a series of cases that advanced a more restrictive interpretation consistent with an emphasis on negative rights and property ownership.

The first rulings on Article 141 vindicated the argument of contemporary constitutional scholars who held that the recognition of an environmental right would rest on an expansion of the *Sozialstaat*. In December 1973, the Munich Administrative Court ruled in favor of two Munich residents who petitioned against a recent state permit for the clearance and commercial development of forested land in the Pullach district. The plaintiffs claimed that they were entitled under Article 141 not only to the enjoyment of nature, but by extension, to "the prevention of measures that call this right into question." Therefore, "the right to the enjoyment of nature must logically include a guarantee of nature itself."[45] In overturning the construction authorization, the court accepted not only that Article 141 established a subjective right, but also that such a right would be meaningless without a corresponding state obligation.[46] The Bavarian Higher Administrative Court upheld this interpretation in a February 1974 ruling on a lawsuit filed against a permit for the construction of a warehouse on the territory of the Bavarian Rhön Nature Park. Citing the December 1973 decision, the Higher Administrative Court argued that the right

[44] Christian Sailer, "Das Grundrecht auf Naturschutz," *Bayerische Verwaltungsblätter* 21 (1975): 405-406; Christoph Sening, "Das Grundrecht auf Naturgenuß im Widerstreit der Meinungen," *Bayerische Verwaltungsblätter* 22 (1976): 72-76.
[45] *VG München, Urteil vom 13.12.1973, Nr. M 281 III 73, Bayerische Verwaltungsblätter* 20 (1974): 198.
[46] Ibid., 199-200.

to the enjoyment of natural beauty would require a corresponding restriction of property rights, consistent with the public "obligations" of property established in the Basic Law.[47]

This initial interpretation of Article 141 was contested on the same grounds that jurists such as Carl Hermann Ule and Hans Hugo Klein had rejected the derivation of a right to environmental protection from the Basic Law. The Hamburg legal scholar and judge Karl August Bettermann (1913-2005) penned a commentary on the Röhn Natur Park decision excoriating the court's derivation of a positive right to the state protection of natural beauty. Such an expansive reading of Article 141, Bettermann argued, would provide individuals with a "right to the 'enjoyment'" of any private property, thereby infringing on "the essence of private ownership" in violation of the Basic Law.[48] In contrast, Bettermann interpreted Article 141 as representing a "right of permission (*Darfrecht*)," which could be violated only if an individual were denied *any* access to nature.[49] Along with Ule and Klein, Bettermann emphasized that an interpretation of environmental rights to include a public obligation for the protection of nature would violate the negative liberties guaranteed by the Basic Law.

In a matter of months, the initial interpretation of Article 141 as entailing a limitation on property rights was reversed in favor of the more restricted reading advocated by Bettermann. In a November 1974 decision praised in Bettermann's commentary, the Bavarian Higher Administrative Court ruled against two plaintiffs who petitioned against the construction of tennis courts in an undeveloped nature protection area. While the plaintiffs argued that the construction violated their rights under Article 141, the court, explicitly rejecting its prior interpretation, ruled that Article 141 could not entail a state obligation to preserve any particular

[47] *BayVGH, Urteil vom 15.2.1974, Nr. 239 I 72, Deutsches Verwaltungsblatt* 90 (1975): 546.
[48] K. A. Bettermann, "Anmerkung," *BayVGH, Urteil vom 15.2.1974, Nr. 239 I 72, Deutsches Verwaltungsblatt* 90 (1975): 548-549.
[49] Ibid., 548.

piece of "free nature" from development. Were Article 141 interpreted to contain such a positive right, then any plaintiff's claim to environmental protection could override any building permit, a violation of the essence of property rights as guaranteed by the Basic Law.[50] The court confirmed this reading in a June 1975 decision rejecting a lawsuit filed against the residential and commercial development of a conservation zone in a Bavarian city. To grant under Article 141 a "defensive claim against *any* change of free nature," the court argued, would violate the Basic Law's guarantee of the right to property ownership.[51] The Bavarian court's rejection of a comprehensive right to environmental protection thus proceeded from an interpretation of rights, established at both the Bavarian and federal levels, which emphasized negative liberties, especially the inviolability of property, over positive state obligations.

Despite rejecting the plaintiffs' claim under Article 141, the Bavarian decision of June 1975 provided some ground for the recognition of an environmental right within the framework of the *Rechtsstaat*. Responding to the national debate over a constitutional environmental right, the judges concurred with the dominant view that Article 2 of the Basic Law could not establish a general state obligation for the protection of "free nature," for this would violate the essence of property rights. However, the court continued that Article 2 could provide a right to environmental preservation in cases when the destruction of some portion of nature would "threaten the existential foundations of human personality in their substance."[52] The court cited Hans Heinrich Rupp's 1971 article in support of this claim but executed a subtle twist on his argument. Rupp had sought in the fundamental rights the basis for a comprehensive program of environmental protection, following from the *Sozialstaat* principle. The Bavarian court, however,

[50] *BayVGH, Beschluß vom 21.11.1974, Nr. 19 IX 74, Deutsches Verwaltungsblatt* 90 (1975): 550-551.
[51] *BayVGH, Urteil vom 11.6.1975, Nr. 4 IX 74, Deutsches Verwaltungsblatt* 90 (1975): 668.
[52] Ibid., 671.

interpreted Article 2 as an exclusively negative right: This right would be violated only in cases when the destruction of nature itself represented an assault on human personality.

The Bavarian judge Christoph Sening, in a 1976 article attacking the recent jurisprudence on Article 141, unwittingly gave substance to this limited right. Responding to the national debate over constitutional environmental rights, Sening argued that the opportunity to enjoy natural beauty was a prerequisite for the "physical and mental existence of man," for congenial social relationships among individuals, and even for the stability of democracy.[53] This understanding of human nature, rooted in an older tradition of viewing nature as an essential basis of human personality, led Sening to support an expansive constitutional basis for environmental protection, rooted in Article 2 of the Basic Law. Sening held that the rights to "life" and "personality" under Article 2 entailed a state obligation to protect *all* remaining areas of natural beauty from destruction, citing the *Sozialstaat* clauses in support of his claim. However, Sening's view of human nature could also be employed on behalf of the more limited environmental right proposed by the Bavarian court: the individual right to have only *some* portion of nature available for enjoyment and recreation.

Environmental litigation before federal courts emerged in the wake of the debates over the Bavarian Article 141. Like the Bavarian Higher Administrative Court, federal courts rejected a comprehensive state obligation for the preservation of nature in favor of a traditional emphasis on negative rights. Rulings at the federal level first appeared in mid-1975, precisely at the time that the Schmidt government turned away from proposals for a constitutional amendment. These rulings were consistent with the contemporary scholarship of figures such as Ule and Klein, who had exposed the tensions between an environmental right and the tradition of constitutional interpretation foregrounding the *Rechtsstaat* principle. Given the collapse of all of the proposals

[53] Sening, "Grundrecht auf Naturgenuß," 76.

to introduce an environmental right into the Basic Law, plaintiffs lacked a secure constitutional basis on which to contest environmental damage.

The first federal ruling to engage the debate on constitutional environmental rights, issued by the Federal Administrative Court in June 1975, rejected an expansive right to environmental protection rooted in the *Sozialstaat* principle. The plaintiff, appealing a decision of the Hamburg Higher Administrative Court, petitioned against a government-issued permit that enabled the defendant, a neighboring property owner, to cut down poplars on his property. The plaintiff held that the destruction of the landscape by the neighbor's clearance of poplars would violate his right to live in a "humane environment," thus invoking an environmental right founded on Article 1 of the Basic Law.[54] The plaintiff's argument highlighted the inherent challenge posed to the *Rechtsstaat* by the idea of a constitutional environmental right. A subjective claim to the protection of undeveloped land under private ownership could indefinitely restrict the rights of property owners.

The federal court definitively rejected the plaintiff's interpretation of environmental rights, in accordance with its traditional emphasis on the negative right against state intervention into private property. While remaining agnostic on the larger question of the existence of an "environmental fundamental right," the decision—citing the work of Weber, Rupp, Ule, and Klein—argued that even if such a right were to exist, it could represent only a general state obligation, not a subjective claim to any "specific environmental-protective measures."[55] The court thus assimilated the work of scholars who sought an expansion of the *Sozialstaat* (Weber and Rupp) with those who rejected an environmental right altogether (Ule and Klein) in order to deprive the concept of a right to a healthy environment of any substance. Whereas Weber and

[54] *BVerwG, Beschluß vom 25.6.1975, VII B 84.74, JuristenZeitung* 30 (1975): 666.
[55] Ibid.

Rupp sought in Article 1 a constitutional basis for the expansion of the state's environmental protection activities, the federal court determined that any such obligation could be overruled by the rights of property owners. Without explicitly rejecting a "social right" to a healthy environment, the court established that in practice, a plaintiff could not appeal to the state against environmentally invasive construction. The June 1975 ruling represented a major setback to scholars who favored a constitutional environmental right and was criticized by Christoph Sening and other environmentalist jurists.[56] However, the federal court's decision displayed consistency with a literature that pointed toward the larger difficulties of combining the right to a healthy environment with established frameworks of constitutional interpretation.

A landmark Berlin ruling the following year provided a limited concession to demands for environmental protection within the framework of negative rights. On November 2, 1976, the West Berlin Department of Construction and Housing authorized a special permit for the clearance of 220,000 square meters of West Berlin's Spandau forest and the construction of a heating plant on the territory.[57] Three West Berlin residents filed a lawsuit against the authorizing agency, claiming a violation of their rights under federal building and emissions codes.[58] Acknowledging that no general right to environmental protection had been recognized, the Berlin Higher Administrative Court nevertheless cited the standard established by the Bavarian Higher Administrative Court in June 1975. Article 2 of the Basic Law could become the basis for a subjective right to environmental protection in cases when environmental destruction would undermine "the existential foundations of human personality." Stressing the "social-physical and social-psychic significance" of "recreational space (*Erholungsraum*)," the

[56] Jörg Lücke, "Das Grundrecht des einzelnen gegenüber dem Staat auf Umweltschutz," *Die Öffentliche Verwaltung* 29 (1976): 289; Christian Sailer, "Subjektives Recht und Umweltschutz," *Deutsches Verwaltungsblatt* 91 (1976): 530; Sening, "Grundrecht auf Naturgenuß," 75.
[57] *VG Berlin, Urteil vom 14.12.1976, VG XIII A 419.76, Deutsches Verwaltungsblatt* 92 (1977): 353.
[58] Ibid.

Berlin court argued that this standard should apply when environmental degradation threatened the availability of "sufficient areas of free nature with recreational value."[59] Given the premium on undisturbed nature for the citizens of walled-in West Berlin, the destruction of a large portion of the Spandau forest would represent an unacceptable violation of the plaintiffs' right to the "free development of [one's] personality" under Article 2.[60]

The Spandau case established a limited basis for a constitutional right to environmental protection consistent with the *Rechtsstaat* conception of rights. Although the court cited Christoph Sening's argument that Article 2 provided a right to protection against environmental damage, the court provided a narrower interpretation of what this right entailed. Whereas Sening held that a plaintiff could claim a violation of his rights upon the destruction of *any* portion of nature—an interpretation rooted in the *Sozialstaat* clauses—the court established only a right to *some* access to undeveloped nature. The court did not uphold a state obligation for environmental protection but only a negative right against the total destruction of one's access to nature. Further, the court's ruling was rooted in a limited conception of the environment as "recreational space," corresponding to an older notion of *Natur* as realm of leisure. An individual's rights under Article 2 were violated not when environmental damage created comprehensive health risks but only when one was deprived of leisure space. Thus, solely under such particular circumstances as those prevailing in West Berlin, where access to nature was severely restricted, could a constitutional environmental right trump the right to property ownership. Outside West Berlin, where individuals still had substantial access to undeveloped landscapes, an environmental right on this interpretation would not conflict with the protection of private property. Recognizing the concern that a general right to environmental preservation would

[59] *OVG Berlin, Urteil vom 2.5.1977, II B 2/77, Neue Juristische Wochenschrift* 30 (1977): 2285.
[60] Ibid.

infringe upon property rights, the judges assured their peers that their decision was not intended to have validity beyond West Berlin.[61]

That the Spandau case established a right against environmental destruction only under the peculiar conditions of West Berlin became clear in a July 1977 ruling of the Federal Administrative Court, which upheld a permit for commercial construction on previously undeveloped land in Munich. A local nature protection association and five individuals living in the area filed a lawsuit on the basis of a violation of their constitutional rights. The federal court, upholding the decision of a Bavarian appeals court, curtly rejected their claim: "There is no environmental fundamental right."[62] The court founded its ruling on the poplar case of June 1975, which determined that individuals had no right to the protection of particular environmental spaces. However, the court further applied the reasoning of the Spandau case to identify a narrower environmental right. In principle, Article 2 could serve as a basis for contesting environmental damage on a neighboring property; in the present case, however, the plaintiffs' rights were not violated because other "recreational spaces (*Erholungsgebiete*)" in Munich were available to them.[63] Thus, the federal ruling confirmed the reduction of environmental rights to a right to the availability of "recreational space." Together, the rulings of 1976-77 determined that the courts would have the final authority to decide whether plaintiffs had access to adequate recreational space, and thus whether they had the right to the preservation of a particular area of nature. Neither a subjective right to a healthy environment nor a general state obligation for environmental protection could be derived from the Basic Law.

Beyond the appeal to Article 2, which after 1977 could not serve as a basis for a right to environmental protection outside West Berlin, one avenue remained for plaintiffs seeking

[61] Ibid.
[62] *BVerwG, Urteil vom 29.7.1977, IV C 51/75, Neue Juristische Wochenschrift* (1978): 555.
[63] Ibid., 556.

recourse against environmentally invasive construction projects.[64] A landmark 1969 ruling of the Federal Administrative Court determined that property owners could claim a violation of their rights under Article 14 if unlawful construction on a nearby property affected their own property in a "severe and intolerable (*schwer und unerträglich*)" manner.[65] Subsequent plaintiffs could argue on the basis of this ruling that their property had been "intolerably" affected due to environmentally damaging construction on a nearby property. Such a claim was successfully advanced by a Lüneburg landlord in a February 1977 suit against a neighboring landowner, who had received a permit to construct a large barn for pigs twenty-five meters from the plaintiff's property. The court revoked the permit on the grounds that the value of the homes constructed on the plaintiff's property would decline unacceptably due to the resultant emissions.[66] However, Article 14 could not serve as a secure basis for a right to environmental protection, because the right to property ownership could be equally invoked by the holders of construction permits. In a widely cited November 1975 ruling, the Federal Administrative Court upheld the permit of a contractor for the exploitation of lava in an undeveloped area, against a lawsuit filed by a District Administration Office that sought to designate the area as a nature protection zone. The court argued that its ruling corresponded to the "tendency" of the first paragraph of Article 14.[67]

The series of court cases at both the Bavarian and federal levels between 1973 and 1977 served to sediment an interpretation of environmental rights that strictly limited the reach of the *Sozialstaat*. Judicial rulings broadly corresponded to the *Rechtsstaat* principle that had traditionally served as the basis of West German constitutional interpretation, upholding the

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[64] The environmental lawyer Michael Kloepfer noted in 1978 that an individual right "to the preservation of nature and landscape" existed only for West Berliners. Michael Kloepfer, *Zur Grundrecht auf Umweltschutz. Vortrag gehalten vor der Berliner Juristischen Gesellschaft am 18. Jan. 1978* (Berlin: De Gruyter, 1978), 7.
[65] *BVerwG, Urteil vom 13.6.1969, IV C 234/65, Neue Juristische Wochenschrift* 22 (1969), 1788-1789.
[66] *BVerwG, Urteil vom 25.2.1977, IV C 22.75, Die Öffentliche Verwaltung* 30 (1977): 752.
[67] *BVerwG, Urteil vom 14.11.1975, IV C 1.74, Die Öffentliche Verwaltung* 29 (1976): 202-204, quoted 204.

property rights of defendants rather than the demands of plaintiffs for environmental protection. Critics of mainstream jurisprudence in the mid-1970s continued to call for a state obligation for environmental protection as a correlate to the constitutional rights to life and human dignity. In a 1976 article, the Mainz law professor Jörg Lücke (1944-2002) supported a "positive right to environmental protection" grounded in the "*Sozialstaat* principle" and argued that individuals had a right against "unreasonable (*unzumutbar*)" environmental conditions.[68] Christoph Sening similarly held that Article 2 could serve as a legitimate basis for contesting environmental destruction.[69] Though published in the mainstream journals of the legal profession, these arguments found no resonance in judicial decisions. With the restriction of environmental rights to a right of access to "recreational space," the courts had by 1977 assimilated environmentalist demands into older frameworks of constitutional interpretation.

FROM *NATUR* TO *UMWELT*? ENVIRONMENTAL RIGHTS AND ANTI-NUCLEAR LITIGATION

The preceding discussion aids in an understanding of the most prominent environmental litigation of 1970s West Germany, the lawsuits filed against the construction of nuclear power reactors. The emergence of a litigious anti-nuclear movement by the mid-1970s was both a product of and a catalyst for the growing rift between the environmental movement and SPD governments. The West German government had pursued an atomic energy program since 1958 and authorized the construction of several nuclear power reactors in the 1960s, without facing opposition.[70] However, the decision of the Brandt government in the wake of the October 1973 oil crisis to rapidly expand the country's reliance on nuclear energy, combined with growing

[68] Lücke, "Grundrecht," 292-293.
[69] Christoph Sening, "Zum Umweltgrundrecht des Bürgers," *Bayerische Verwaltungsblätter* 24 (1978): 205-206.
[70] Rucht, *Von Wyhl nach Gorleben*, 23-27. For a list of all nuclear reactors constructed in Germany, see: International Atomic Energy Agency, Power Reactor Information System, "Germany," http://www.iaea.org/pris/CountryStatistics/CountryDetails.aspx?current=DE, accessed December 11, 2013.

public awareness of environmental issues, generated widespread controversy over the environmental and public health impact of nuclear reactors. Anti-nuclear protests in the Baden-Württemberg town of Wyhl beginning in 1975 sparked a series of protests and occupations at nuclear construction sites throughout West Germany.[71] Litigation filed by the anti-nuclear movement, however, was largely ineffective. By 1980, only in the case of Wyhl were plaintiffs successful in stopping the construction of a nuclear power plant, while elsewhere, temporary injunctions on the construction of nuclear reactors issued in the mid-1970s were overturned by the end of the decade.[72]

The anti-nuclear movement's unsuccessful record in the courts appeared to sympathetic commentators as evidence of a judiciary that had sacrificed its independence to become a pawn of the government's nuclear program.[73] The courts' decisions, however, can be better explained in the context of the debate over environmental rights that had proceeded in the years prior to the major anti-nuclear litigation. The anti-nuclear cases raised in stark relief the question of whether Article 2 created a state obligation for environmental protection, the major area of contention in the environmental litigation of the mid-1970s. The constitutional claims of plaintiffs in anti-nuclear cases rested on the argument that the construction of nuclear reactors in their communities violated their rights to life and physical integrity under Article 2. Given the scientific uncertainties surrounding the health risks of nuclear power, plaintiffs appealed to a state obligation to ensure the conditions for the exercise of their rights, rather than to restitution for an infraction that had already occurred. As in previous environmental cases, however, courts

[71] Engels, *Naturpolitik*, 365. On anti-nuclear activism, see also: Joppke, *Mobilizing*, 95-116, 168-177; and Rucht, *Von Wyhl nach Gorleben*.
[72] This is based on an analysis of the cases cited in the review article by Klaus Roth-Stielow, "Grundrechtsverständnis des Parlamentarischen Rates und der Grundrechtsschutz beim Betrieb von Kernkraftwerken," *Europäische Grundrechte-Zeitschrift* 7 (1980): 386-391.
[73] Contemporary critiques include Geulen, "Beseitigung"; Roth-Stielow, "Grundrechtsverständnis"; Peter Cornelius Mayer-Tasch, *Umweltrecht im Wandel* (Wiesbaden: Westdeutscher Verlag, 1978), 137-147; Peter Cornelius Mayer-Tasch, *Ökologie und Grundgesetz. Irrwege, Auswege* (Zürich: Fischer Taschenbuch, 1980), 25-37.

proved reluctant to grant this claim, hewing to a reading of Article 2 as a primarily negative right. The only environmental right that West German courts had recognized, the right of access to "recreational space," could not apply in anti-nuclear cases, where the operative concern was not *Natur* as a realm of leisure but *Umwelt* as a prerequisite for life and health.

Anti-nuclear cases turned on the question of the constitutionality of Section 7 of the 1959 Atomic Energy Act, which established that "a license [for the construction of a nuclear power plant] may only be granted if…the necessary precautions have been taken according to the state of the art in science and technology (*nach dem Stand von Wissenschaft und Technik*) to prevent damage resulting from the erection and operation of the installation."[74] The plaintiffs in several prominent lawsuits maintained that this provision violated the Basic Law because it made the realization of the rights to life and physical integrity dependent upon the current "state of…science and technology." However, courts were willing to uphold the "science and technology" clause as a means of reconciling the demands of the anti-nuclear movement for constitutional protection of the environment with private property rights and the dictates of economic growth. This clause enabled judges to appeal rhetorically to a positive environmental right, while in practice limiting the state's obligation for environmental protection based on a flexible standard to be adjudicated by the courts.

Section 7 of the Atomic Energy Act was first upheld in a landmark 1972 case before the Federal Administrative Court on the nuclear reactor in the North Rhine-Westphalia town of Würgassen, the first anti-nuclear lawsuit to reach a federal court. The plaintiff, who lived in the area of the construction site, claimed that the construction of the reactor represented a violation

[74] OECD Nuclear Energy Agency, "Germany: Act on the Peaceful Utilisation of Atomic Energy and the Protection Against its Hazards (Atomic Energy Act)," 16, http://www.oecd-nea.org/law/nlb/nlb-70/supplement.pdf, accessed December, 11 2013.

of his rights given the hazards of the "fission of nuclear fuel."[75] The court's ruling affirmed that the purpose of the Atomic Energy Act was to protect individual rights but went on to argue that the standard of "the state of…science and technology" was sufficient for this purpose. Whereas the plaintiff in the Würgassen case doubted the reliability of the expert opinions solicited by the licensing agency on the safety of the reactor, the court affirmed the validity of the opinions and turned the case back to a lower appeals court.[76] The federal court's interpretation was upheld in a 1974 ruling of the Lüneburg Higher Administrative Court on the nuclear reactor in the Hamburg suburb of Stade. The Lüneburg court rejected a lawsuit filed in protest of the hazards of nuclear radiation, following a consultation with scientific experts who determined that the level of risk to the plaintiffs was sufficiently low.[77] Without denying the state's role in providing the conditions for a healthy environment, the Würgassen and Stade rulings left the authority for determining the extent of the state's obligation to local administrators and the judiciary.

The implications of Section 7 of the Atomic Energy Act emerged further in a series of rulings of the late 1970s, in which plaintiffs active in the anti-nuclear movement contested the construction of nuclear power plants specifically on the basis of their constitutional rights. In the legal battles over the Wyhl nuclear reactor, a group of farmers living in the area of the construction site argued that the reactor would violate their rights under Articles 2.[78] While the Freiburg Administrative Court granted the plaintiffs' claim in its March 1977 ruling, it stopped short of recognizing a comprehensive right to a healthy environment. Rather, citing the Würgassen decision, the court affirmed the constitutionality of Section 7 of the Atomic Energy

[75] *BVerwG, Urteil vom 16.3.1972, I C 49.70, Deutsches Verwaltungsblatt* 87 (1972): 682.
[76] Ibid., 681.
[77] *OVG Lüneburg, Beschluß vom 19/20.6.1974 – VII OVG B 27/73 und VII OVG B 71/73, Deutsches Verwaltungsblatt* 90 (1975): 190-199.
[78] *VG Freiburg, Urteil vom 14.3.1977, VS II 27/75, Neue Juristische Wochenschrift* 30 (1977): 1645. The initial ruling on the Wyhl case is: *VG Freiburg, Beschluß vom 14.3.1975, VS II 26.75, Deutsches Verwaltungsblatt* 90 (1975): 343-347.

Act, which "does not obligate total protection against *any* thinkable danger."[79] The Freiburg court determined that the Wyhl reactor's equipment for preventing an explosion did not match the capabilities of the best available technology, and thus overruled the initial authorization.[80] However, several weeks later, the Würzburg Administrative Court relied on the same principle to uphold the construction of a nuclear reactor in the Bavarian town of Grafenrheinfeld. Whereas local plaintiffs argued that the power plant would damage the town's water supply and agriculture, the court determined, based on consultations with scientific experts, that the reactor's safety features met the current standard of science and technology.[81] The Würzburg court recognized that "radiation exposure can be expected within certain limits" and even that "a catastrophic pressure vessel failure…cannot be completely excluded."[82] In the mold of the Würgassen decision, the Grafenrheinfeld ruling determined that the state's obligation to proactively ensure the conditions of a healthy environment could be circumscribed by law. Both the Wyhl and Grafenrheinfeld decisions were consistent with the broader trend of West German courts in the 1970s to emphasize the negative rather than the positive dimension of the fundamental rights in rulings on environmental lawsuits.

Two seminal decisions of the Federal Constitutional Court demonstrate that the judiciary's rulings in anti-nuclear cases, as in prior environmental litigation, were intended to preserve established institutions against the threat posed by strong claims to environmental rights. In an August 1978 decision, its first ruling on an anti-nuclear lawsuit, the Constitutional Court rejected the petition of local plaintiffs against the construction of a nuclear reactor in the Düsseldorf suburb of Kalkar. Like prior anti-nuclear litigants, the plaintiffs argued that Section 7

[79] Ibid., 1647. Emphasis in original.
[80] *VG Freiburg, Urteil vom 14.3.1977, VS II 27/75 u. A., Deutsches Verwaltungsblatt* 92 (1977): 363.
[81] *VG Würzburg, Urteil vom 25.3.1977, Nr. W 115 II/74, Neue Juristische Wochenschrift* 30 (1977): 1649, 1652.
[82] Ibid., 1652.

of the Atomic Energy Act violated Article 2 of the Basic Law, reducing their fundamental rights to "interests" to be weighed by administrators.[83] In its ruling, the court stressed that the constitutional fundamental rights entailed not only negative liberties but also objective values to guide the state, according with the *Sozialstaat* principle.[84] However, the court went on to agree with the defendants' attorney that to establish a "normative standard" for the protection of individuals against the unforeseeable dangers of new technologies would "proscribe *any* state authorization of the use of technology" and negate the possibility of "technological progress."[85] Therefore, the court determined, the "state of…science and technology" clause provided for a "*dynamic* protection of the fundamental rights," compatible with technological progress.[86] Similar reasoning undergirded the Constitutional Court's December 1979 ruling on the Müllheim-Kärlich nuclear reactor near Koblenz, which a prominent anti-nuclear activist contested on the basis of her rights under Article 2. As in the Kalkar decision, the court affirmed that Article 2 entailed an objective state obligation as well as a negative right, but it proceeded to determine that the public interest in the construction of the reactor overrode the interest of the plaintiff in a temporary injunction.[87]

The Kalkar and Müllheim-Kärlich decisions together established that the state's obligation under the Basic Law to guarantee the prerequisite conditions for "life and physical integrity" could be weighed against what the judiciary determined to be public interests in technological progress and nuclear power. The underlying operative principle in these decisions was the restriction of the scope of the *Sozialstaat* in favor of the property rights of the nuclear

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[83] *BVerfG, Beschluß des Zweiten Senats vom 8.8.1978, 2 BvL 8/77, Europäische Grundrechte-Zeitschrift* 5 (1978): 559.
[84] Ibid., 567.
[85] Ibid., 553, 561. Emphasis added.
[86] Ibid., 553. Emphasis added.
[87] *BVerfG, Beschluß des Ersten Senats vom 20 Dezember 1979 – 1 BvR 385/77, Europäische Grundrechte-Zeitschrift* 7 (1980): 66-67.

corporations and economic growth. The treatment of plaintiffs' rights claims as "interests," to be balanced against the interests of the public, was only possible as a consequence of the court's circumscribed conception of the positive component of the fundamental rights, despite its explicit affirmation of the dual character of rights.

The decisions of the Federal Constitutional Court were consistent with the limitations on environmental rights already established by federal- and state-level decisions of the mid-1970s. The demands of anti-nuclear litigants mirrored those of plaintiffs who filed lawsuits against the environmentally damaging construction in their communities. Both appealed to a state obligation for protection from the effects of activities on a neighboring property. The clearance of a neighbor's poplars clearly did not present a threat commensurate with that of nuclear reactors; these cases are analogous, however, in that courts sought to mitigate the potentially disruptive effects to constitutional interpretation and the established political order resulting from expansive claims to environmental rights. While plaintiffs could be granted a right of access to "recreational space" with minimal disturbance to property rights, the more expansive concept of a healthy environment could not be guaranteed with certainty barring what appeared to the judiciary as unacceptable hindrances to the legal order of the *Rechtsstaat*.

Given the parallels with earlier environmental litigation, critics of the anti-nuclear decisions sought to revive the debate of the early 1970s on the introduction of a constitutional right to environmental protection. In a 1979 analysis, the constitutional scholar Alexander Roßnagel drew on the writings of Werner Weber, Hans Heinrich Rupp, Eckard Rehbinder, and Jörg Lücke to argue that the realities of environmental degradation demonstrated the fallacy of interpreting Article 2 as a purely negative right. Rather, an interpretation of Article 2 informed by the *Sozialstaat* clauses would hold that "the fundamental right to life and physical integrity

also contains…social claims to the positive support and help of the state to create conditions under which a humane life is possible in today's environment."[88] Roßnagel argued that such "social claims" would require stricter regulations for the authorization of nuclear reactors, given the threat posed by radioactive emissions to the individual's "physical integrity."[89] Similarly, for the political theorist and environmentalist Peter Cornelius Mayer-Tasch, the state's nuclear program was a threat to the character of the Federal Republic as both a *Rechtsstaat* and *Sozialstaat*, since the construction of nuclear reactors near residential communities represented a direct assault on the "physical integrity" clause.[90]

Such arguments, however, had little impact on judicial rulings of the late 1970s, by which time Section 7 of the Atomic Energy Act had become firmly established as the standard for determining the legality of nuclear reactors. The March 1980 decision of the Schleswig Administrative Court on the nuclear reactor at Brokdorf, which had been the site of an increasingly radical protest movement since 1976, is indicative of the far-reaching impact of the Federal Constitutional Court's judgments.[91] Overturning its decisions of 1976 and 1977, which had temporarily halted the construction of the reactor, the Schleswig court upheld the constitutionality of the "state of…science and technology" clause and determined that the appropriate standard of protection had been met.[92] The resumption of construction at Brokdorf proceeded despite a mass rally in February 1981, and conflict within the anti-nuclear movement in the aftermath of the Brokdorf protests led to its isolation from mainstream

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[88] Alexander Roßnagel, *Grundrechte und Kernkraftwerke* (Heidelberg: Evangelische Studiengemeinschaft, 1979), 52.
[89] Ibid., 55.
[90] Mayer-Tasch, *Ökologie und Grundgesetz*, 14-19.
[91] On the protests and attempted occupation, see: Joppke, *Mobilizing*, 101-104.
[92] *VG Schleswig, Urteil vom 17.3.1980, 10 A 512/76, Neue Juristische Wochenschrift* 33 (1980): 1296-1302. The earlier decisions on the Brokdorf reactor are: *VG Schleswig, Beschluß vom 15.12.1976, 10 D 176/76, Deutsches Verwaltungsblatt* 92 (1977): 219-211; and *VG Schleswig, Beschluß vom 9.2.1977, 10 D 176/76, Deutsches Verwaltungsblatt* 92 (1977): 358-360.

environmentalism.[93] A Stuttgart judge upbraided the Schleswig decision for failing to make reference to Article 2, calling it "the capitulation of the judicial protection of rights before the omnipotence of technology and administration."[94] Viewed in a longer context, however, the Brokdorf case appears as the culmination of a process of curtailing the positive right to a healthy environment in favor of the goals of the *Rechtsstaat*.

CONCLUSION

The proposals for a constitutional environmental right in the early 1970s, and the subsequent litigation over this issue, draw attention to often overlooked aspects of West German environmental history. Even in a period characterized by a burgeoning environmental movement and a rapid expansion of federal environmental legislation, widespread debate persisted over how to integrate the demand for environmental protection into an established legal and constitutional order. Concerns about the holistic health of the environment, rather than simply the enjoyment of natural beauty, proved especially difficult to integrate into a legal order founded above all on the protection of individual liberties against the state. The failure of many litigants to claim environmental rights attests less to technocracy than to the durability of West German constitutionalism, as well as the gravity of the legal challenges posed by new environmental demands. Such challenges were not exhausted by the end of the 1970s but continued into the following decade, which witnessed a realignment of the environmental movement with the formation of the Green Party and the reemergence of anti-nuclear protest.

The debate over the constitutional status of environmental protection inaugurated in the early 1970s was not concluded until after reunification, but its resolution was informed by the

[93] Joppke, *Mobilizing*, 173-174.
[94] Roth-Stielow, "Grundrechtsverständnis," 391.

earlier controversies. Although the former East German states were integrated into the Federal Republic under the existing Basic Law, reunification offered proponents of constitutional reform the opportunity to advocate for the incorporation of certain provisions of the defunct East German constitution. In November 1994, following the approval of Parliament and the Federal Council, a clause was added to Article 20 of the Basic Law, one of several post-reunification amendments: "…the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."[95] The amendment mirrored Article 15 of the East German Constitution, establishing environmental protection as a state goal rather than a fundamental right. The amendment did not bind the state to take any particular measures, and critics who favored an environmental fundamental right argued that it "would have merely a symbolic function" without offering "positive environmental protection effects."[96]

The history of environmental litigation in the 1970s suggests a clear explanation for the legislature's decision in favor of a state goal rather than a fundamental right. The notion of an environmental fundamental right tread too far onto the norms of constitutional law as they had been established in the first decades of the Federal Republic to be accepted by the judiciary. Even with the increased political salience of environmental problems in the 1970s, none of the governing parties, after a brief period in the early 1970s, were willing to advocate for such a right. The history of this debate attests to the difficulties of establishing a framework for environmental regulation within a liberal state committed to the protection of negative rights.

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[95] Helmut Weidner, "Twenty-Five Years of Modern Environmental Policy in Germany: Treading a Well-Worn Path to the Top of the International Field," Veröffentlichungsreihe der Abteilung Normbildung und Umwelt des Forschungsschwerpunkts Technik-Arbeit-Umwelt des Wissenschaftszentrums Berlin für Sozialforschung, No. FS II 95-301, 21, http://www.econstor.eu/bitstream/10419/48980/1/189347120.pdf, accessed December 11, 2013; "Basic Law," 27.
[96] Weidner, "Environmental Policy," 21-22.

That Germany has nevertheless emerged as an international leader in environmental policy also indicates the possibility of building a legislative and administrative apparatus for environmental protection without a constitutional guarantee.