The Philippine Children's Case: Recognizing Legal Standing for Future Generations

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> "Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony [of nature] for the full enjoyment of a balanced and healthful ecology."
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> Supreme Court of the Philippines, *Oposa v. Factoran*,[1] July 30, 1993.

On July 30, 1993, the Supreme Court of the Philippines, granted standing to a group of children who had sued to uphold their environmental rights and those of future generations. The children, represented by the Philippine Ecological Network, a Manila environmental group, sought to stop the logging of the nation's dwindling old-growth rainforests. The children argued that continued deforestation would cause irreparable injury to their generation and succeeding ones, and would violate their constitutional right to a balanced and healthful ecology. The Court held that the children had standing to defend their generation's right to a sound environment and to perform their obligation to preserve that right for future generations.

The case was noteworthy because it most likely was the first time that a nation's highest court has explicitly granted legal standing to representatives of future generations. The "Children's Case" reflects an emerging principle of international environmental law that present generations have a duty to pass on a sustainable environment to their successors. Vital to this principle of intergenerational equity are legal mechanisms to ensure the expression and consideration of the interests of future generations.

This case comment will discuss how the reasoning and arguments in *Oposa* could be used to advocate the environmental rights of future generations in the United States. This paper will focus on the United States;

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1. Judgment of June 30, 1993 (Juan Antonio Oposa, et al. v. the Honorable Fulgencio Factoran, Jr., Secretary of the Department of the Environment and Natural Resources et al.), Supreme Court of the Philippines, G.R. No. 101083 (Phil.) [hereinafter Oposa]. The case has become known as the "Children's Case" in Philippine newspaper accounts.

with its long tradition of environmental citizen suits and innovative expansion of traditional common law rights, this nation likely would be more hospitable to the representation of future generations than other countries.[2] If recognized by Congress and the U.S. Supreme Court, standing for representatives of future generations could be used by environmental groups as a means to bring suits, aimed at preventing long-term damage, that otherwise would be blocked by the injury requirements of current standing doctrine.

Part I of this case comment will discuss the facts and arguments in the plaintiffs' case and the reasoning of the court. Part II will recount the growing international support for intergenerational equity found in international agreements, foreign constitutions and legislation, cultural traditions, and American law. Part III will note the general objections raised to legal standing for representatives of future generations and discuss the hurdles erected by the U.S. Supreme Court's standing decisions. Finally, Part IV will explore possible mechanisms to promote the environmental interests of future generations in the United States.

I. THE CHILDREN'S CASE

A. THE HISTORY

Twenty-five years ago, the Philippine archipelago was covered with rainforests which were home to indigenous cultures and a multitude of species. The island nation had an estimated 16 million hectares of rainforest, covering 53 percent of its territory.[3] Today, less than 850,000 hectares of old-growth rainforest remain, about 2.8 percent of the country's land mass, plus another 3 million hectares of unusable secondary growth forest.[4] The Philippine Ecological Network (PEN) sued in 1990 after learning that the Philippine Department of the Environment and Natural Resources (DENR) had granted timber leases totalling 3.89 million hectares. This development alarmed PEN, which calculated that at the current rate of deforestation of 200,000 hectares a year, the nation would lose its forests within a decade.

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2. Another reason to focus on the United States is that the Oposa plaintiffs cited U.S. environmental case law in their arguments for standing. *See infra* notes 13-17 and accompanying text. The United States is truly an exporter of environmental law; Mexico and other nations have used American statutes, structures and procedures as models for their environmental laws.

3. Plaintiffs' Petition for Certiorari at 5, Judgment of June 30, 1993 (Oposa v. Factoran), Supreme Court of the Philippines, G.R. No. 101083 (Phil.).

4. According to the plaintiffs, the rapid deforestation has led to an array of environmental consequences: massive soil erosion and loss of soil fertility; water shortages resulting from the depletion of streams, rivers and aquifers; displacement of indigenous cultures; the extinction of species of flora and fauna; increased siltation of river beds which has shortened the lifespan of hydroelectric projects; destruction of corals and marine life; increased velocity of typhoon winds stemming from the removal of natural windbreaks; increased flooding of lowlands; and reduction of the earth's capacity to process carbon dioxide. Oposa, *supra* note 1, at 4-5.

PEN, led by its president, Antonio Oposa, filed suit in March 1990 on behalf of 41 children against the Secretary of DENR. The complaint, filed as a taxpayers' class action in the Regional Trial Court of Makati, asked the court to order DENR to cancel its existing timber leases and issue no additional leases. In July 1991, the trial judge granted DENR's motion to dismiss, ruling that the plaintiffs had failed to state a cause of action.[5] The children appealed to the Supreme Court of the Philippines, arguing that the trial judge had abused his discretion in dismissing the case. The high court granted certiorari in May 1992.

B. PEN'S ARGUMENT

The plaintiffs first argued that they and future generations have a right to a healthy environment.[6] That right would be rendered null, they argued, if the current generation was allowed to completely denude the nation's forests. Noting that every generation holds the environment in trust for succeeding generations, they argued that they could bring suit as real parties in interest. To support their claim of an environmental right, the children cited policy statements in Philippine environmental[7] and administrative law,[8] the national constitution,[9] and natural law.[10] The plaintiffs

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5. The trial judge, Eriberto U. Rosario, Jr., wrote: "For although we believe that the plaintiffs have the noblest of all intentions, [the complaint] fell short of alleging, with sufficient definiteness, a specific legal right they are seeking to enforce and protect, or a specific legal wrong they are seeking to prevent and redress."

The court also concluded that the complaint had raised a political question, which the court could not consider without violating the "sacred principle of separation of powers." Finally, the judge noted that he could not grant the requested relief, the cancellation of existing timber leases, without violating the non-impairment of contracts clause of the Philippine Constitution. *Reprinted in* Plaintiffs' Petition for Certiorari, *supra* note 3, at 8.

6. Plaintiffs' Petition for Certiorari, *supra* note 3, at 10-11.

7. The nation's 1977 landmark environmental law stated: "In furtherance of these goals and policies, the government recognizes the right of the people to a healthful environment." Presidential Decree 1151 (Phil.).

8. The law creating the DENR makes the following statement of policy:

> "It is hereby declared the policy of the State to ensure the sustainable use, development, management, renewal and conservation of the country's forest, mineral, land, off-shore areas and other natural resources, including the protection and enhancement of the quality of the environment, and equitable access of the different segments of the population to the development and use of natural resources, not only for the present generation but for *future generations* as well. . ." (emphasis added)

The law also states that DENR is to conserve and manage forest lands in "order to ensure equitable sharing of the benefits derived therefrom for the welfare of present and *future generations* of Filipinos." Executive Order 192, §§ 3, 4, June 10, 1987 (Phil.), *reprinted in* Oposa, *supra* note 1, at 16-17.

9. "The State shall protect and advance the right of the people to a healthful and balanced ecology, in accord with the rhythm and harmony of nature." PHIL. CONST. art. II, § 16.

10. The children argued that as a species of the animal kingdom, they are vested with a right of self-preservation and self-perpetuation. Plaintiffs' Petition for Certiorari, *supra* note 3, at 12.

argued that DENR had an obligation to protect that right, citing the agency's enabling legislation, which included a duty to conserve terrestrial and marine areas "for present and future generations of Filipinos."[11] By allowing timber firms to cut 3.89 million hectares when only 850,000 hectares of harvestable old growth forest remained, the agency would violate that duty, destroy the life support system of future generations, and commit "generational genocide."[12]

In arguing for standing, PEN cited the U. S. Supreme Court's decisions in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*[13] and *Sierra Club v. Morton*.[14] The issue of standing in the environmental context had not been addressed previously by the Supreme Court of the Philippines. PEN cited the cases because Philippine courts, though part of a civil law system, have traditionally relied on Anglo-American theories and precedents in cases not covered by written law.[15] In *SCRAP* and *Sierra Club*, the U.S. Supreme Court held that standing is not confined to those who incur economic harm,[16] but can be granted to those who would suffer

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11. Executive Order 192, *supra* note 8, § 4(e).

12. Plaintiffs' Petition for Certiorari, *supra* note 3, at 13-14.

13. 412 U.S. 669 (1973). In SCRAP, considered the high water mark of liberalized environmental standing, plaintiffs sued to challenge a new Interstate Commerce Commission railroad rate structure, arguing that the rates would discourage recycling and lead to increased litter in the parks they used. The Supreme Court upheld the trial court's determination that the plaintiffs had sufficiently alleged that they would be adversely affected by the agency action to withstand a motion to dismiss for lack of standing.

However, the Supreme Court raised doubts about the viability of SCRAP's permissive approach in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). The Court noted, "The SCRAP opinion, whose expansive expression of what would suffice for . . . review under its particular facts has never since been emulated by this Court. . ." *Id.* at 889.

14. 405 U.S. 727 (1972). In Sierra Club, the Supreme Court ruled that the Sierra Club did not have standing under the Administrative Procedure Act, 5 U.S.C. § 702, to stop the U.S. Forest Service from approving construction permits for a proposed ski resort in the Sequoia National Forest. The Court acknowledged that environmental interests shared by many people could meet the standing injury requirement, but held that the Sierra Club had failed to show in its pleadings how its members would be affected by the project.

The Sierra Club submitted an amended complaint, alleging how its members' use of the forest land would be impacted by the resort's construction. A district court judge held that the amended complaint was sufficient to establish standing; the ski resort was never built. Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972) *cited in* Bradley C. Bobertz, Note, *Toward a Better Understanding of Intergenerational Justice*, 36 BUFF. L. REV. 65 (1987).

15. American cases are not dispositive but are persuasive in the Philippines. In limited exceptions, Philippine courts will draw from well-defined civil law theories from written Spanish law. Plaintiffs' Petition for Certiorari, *supra* note 3, at 14.

The Philippines' use of Anglo-American law stems from its past history as an American possession. The Philippines were given to the U.S. by Spain in 1898 at the end of the Spanish-American War. The U.S. granted the islands independence in 1946 and has maintained close diplomatic ties since.

16. The SCRAP Court, quoting Sierra Club, wrote: "Aesthetic and environmental well-being, like economic well-being, are important ingredients in the quality of life in our society, and the fact that

environmental damage as a result of agency action. To have standing, a plaintiff must demonstrate that he would suffer real and perceptible harm.[17] The children argued that they had met the *SCRAP* requirement of real and perceptible harm through their pleadings detailing the adverse consequences and irreparable damage caused by the timber lease program.[18] Having shown they would suffer real and perceptible harm, the children argued that they had standing to challenge the timber lease program.[19]

C. THE COURT'S DECISION

The Court first ruled that the children had filed a valid class suit, stating that the plaintiffs were sufficiently numerous to ensure the full protection of concerned interests. Writing for the Court, Justice Hilario Davide, Jr.,[20] noted that the plaintiffs' claim to represent future generations was "special" and "novel," but agreed that they had standing to do so. Davide wrote: "We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned."[21] By asserting their own right to a sound environment, the children were also fulfilling their responsibility to protect that right for future generations, Davide wrote.[22]

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particular environmental interests are shared by the many rather than by the few does not make them any less deserving of legal protection through the judicial process." 412 U.S. at 687.

17. The SCRAP court wrote: "A plaintiff must allege that he has been or will be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he may be affected by the agency action." 412 U.S. at 689-90.

18. Plaintiffs' Petition for Certiorari, *supra* note 3, at 19-20.

19. In response to the trial court's conclusion (*see supra* note 5) that the suit involved a political question, the plaintiffs argued that the matter was justiciable because the DENR had abused its discretion. PEN further argued that the timber leases were not protected by the non-impairment clause, because they are privileges that may be revoked in the public interest. Plaintiffs' Petition for Certiorari, *supra* note 3, at 20-23.

20. Oposa, *supra* note 1, at 11. Eleven other justices concurred in the result, without writing opinions. A twelfth justice, Justice Florentino Feliciano, wrote a separate concurring opinion. There were no dissents.

21. *Id.* at 11-12. The Court continued: "Such a right as hereinafter expounded, considers the 'rhythm and harmony of nature.' Nature means the created world in its entirety. Such rhythm and nature indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, minerals, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, performance of their obligation to ensure the protection of that right for generations to come." *Id.*

22. *Id.*

The Court agreed with PEN that national statutes, the constitution, and natural law[23] required the government to preserve a balanced and healthful ecology for the children and future generations. After citing in detail many of the statutes and constitutional provisions relied on by the plaintiffs, the Court found additional support in the proceedings of the 1986 Constitutional Commission, during which a constitutional sponsor stated that "the right to a healthful environment necessarily carries with it the correlative duty to refrain from impairing the same."[24] The Court concluded that PEN had made sufficient pleadings to establish a prima facie case that their environmental rights had been violated. The plaintiffs were held to have a cause of action and the trial court's dismissal was reversed.[25]

In a concurring opinion,[26] Justice Florentino Feliciano argued that the children should have to demonstrate before a trial court that a more specific legal right had been violated by the government. To have a cause of action, the PEN plaintiffs should have to show the violation of a specific legal right, such as a provision in the Philippine Environmental Code, instead of citing general constitutional provisions and statutory policy statements. Feliciano warned that allowing causes of action based on such general standards as "the right to a healthful ecology" could "propel courts into the uncharted ocean of social and economic policy-making."[27] If a suit is not based on a specific, operable right, then the defendant will have difficulty making a defense, he wrote. Where there are no specific standards, courts should wait for legislators and the executive to act before intervening. Nevertheless, Feliciano agreed that PEN's complaint should be reinstated, given the "extreme importance" of protecting the country's forest cover.[28]

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23. Oposa, *supra* note 1, at 14. The Court stated that the right to a balanced and healthful ecology is no less important than civil and political rights in the Philippine Constitution. "Such a right belongs in a different category of rights altogether for it concerns nothing less than self-preservation — aptly and fittingly stressed by the petitioners — the advancement of which may be said to predate all governments and constitutions. As a matter of fact, these basic rights need not be even written in the Constitution for they are assumed to exist from the inception of humankind." *Id.*

24. *Id.* at 15, *citing* Record of the Constitutional Convention, vol. 4, 913 (Phil.) (1986).

25. *Id.* at 20, 26. Davide also rejected the trial court's other two arguments for dismissal, ruling that the suit was not barred by the political question doctrine and that the leases could be rescinded without violating the Constitution. *Id.* at 20-26; *see supra* notes 5, 19.

26. Oposa, *supra* note 1, at 4-8 (Feliciano, J., concurring).

27. *Id.* at 6 (Feliciano, J., concurring). Feliciano's argument that plaintiffs should show a more specific legal right is a valid concern, but should not bar future courts from concluding that a government agency violated a general constitutional duty to protect the people's environmental rights. In the U.S, for instance, the U.S. Supreme Court has construed broad constitutional language in the Fourth and Fifth amendments to set specific limits on government conduct.

As this note will argue in Parts III and IV, general policy and constitutional language are not enough. To truly protect the environmental interests of future generations, there should be specific legislation establishing standing and procedures governing representation.

28. *Id.* at 7 (Feliciano, J., concurring). The case is essentially over, with PEN having accomplished its political objective to stop the commercial logging of old-growth rainforests. The Philippine

II. GROWING RECOGNITION OF THE RIGHTS OF FUTURE GENERATIONS

The Philippine Children's Case is part of a trend in international environmental law toward greater legal recognition of the rights of future generations. Since the 1972 Stockholm Declaration,[29] there has been a growing consensus that the present generation has an obligation to bestow a sustainable planet on its successors. However, this concept of intergenerational equity is not new; it has roots in the world's philosophical and legal traditions.[30] In addition, support for the rights of future generations can be found in international legal principles, national constitutions, legislation, and case law around the world.[31]

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government submitted a lengthy motion for reconsideration, but missed the filing deadline. As a result of the case, the government has issued an executive order, rescinding most of the original 92 timber leases; the 27 remaining leases are not in old-growth rainforests. Telephone Interview with Antonio Oposa, president of the Philippine Ecological Network (April 8, 1994).

29. Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14/Rev.1 at 3 (1973), *reprinted in* 11 I.L.M. 1416 (1972).

The Stockholm Declaration, a product of the seminal 1972 U.N. Conference on the Human Environment, contains numerous references to future generations. Though the declaration is not legally binding, several of its provisions, including Principle 21, have been so widely accepted, that today they are considered part of customary international law.

Section 6 of the preamble states, in part: "To defend and improve the environment for present and *future generations* has become an imperative goal for mankind."

Principle 1 provides: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and *future generations*. . ."

Principle 2 states: "The natural resources of this earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and *future generations* through careful planning and management, as appropriate."

Principle 5 provides: "The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind." (emphasis added). *Id.*

30. This concept of intergenerational equity and its roots has been thoroughly explored by Prof. Edith Brown Weiss in a 1989 book and various law review articles. *See* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 119-65 (1989) [hereinafter WEISS, IN FAIRNESS TO FUTURE GENERATIONS]. *See* also Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495 (1984)[hereinafter Weiss, *The Planetary Trust*]; Weiss, *Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198 (1990); Weiss, *Intergenerational Equity: Toward an International Legal Framework, in* GLOBAL ACCORD 333-53 (Nazli Choucri ed., 1993) [hereinafter GLOBAL ACCORD].

As defined by Weiss, "The theory of intergenerational equity proposed argues that we, the human species, hold the natural environment of our planet in common with all members of our species: past generations, the present generation and future generations. As members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it. . .

To define intergenerational equity, it is useful to view the human community as a partnership among all generations. If one generation degrades the environment severely, it would have violated its intergenerational obligations. . ." GLOBAL ACCORD, *supra*, at 333-53 (Nazli Choucri, ed., 1993).

31. GLOBAL ACCORD, *supra* note 30, at 333-53.

Behind this growing recognition of intergenerational equity remains the question: why should current generations, with all their pressing problems, care about those still unborn? One response is that we should view the earth "not only as an investment opportunity, but as a trust, passed on to us by our ancestors, to be enjoyed and passed to our descendants for their use."[32] Currently, the rights of future generations are not being adequately protected. We have a natural economic preference to choose short-term benefits over long-term costs.[33] When assessing the environmental impact of a proposed action, such as building a hazardous waste facility, we do so from the perspective of our generation, focusing on the externalities that affect us, while disregarding the impacts that may occur in 50 or 100 years.[34] To account for this natural bias, there must be legal mechanisms, such as standing for representatives of future generations, created to ensure that the interests of our successors are considered when they conflict with present needs.[35]

A. INTERNATIONAL SUPPORT FOR INTERGENERATIONAL EQUITY

The concept that humans are stewards of the planet's natural resources is rooted in the world's philosophical and legal traditions.[36] Support can be found within Judeo-Christian[37] traditions, Native American beliefs, Islamic law, African customary law, and Asian religions.[38] Common, civil, and socialist law traditions all hold that humankind has an obligation to protect the environment for posterity.[39]

Concern for intergenerational equity also has been expressed in international agreements. In addition to the Stockholm Declaration,[40] the 1973 Convention on International Trade in Endangered Species (CITES),[41] the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage,[42] and the 1982 United Nations World Charter for

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32. *Id.*
33. *Id.* at 334.
34. *Id.* at 333.
35. *Id.* at 336.
36. *Id.* at 336-338.
37. ". . . And I will give to you, and to your descendants after you, the land of your sojournings, all of the land of Canaan, for an everlasting possession. . ." THE BIBLE, *Genesis* 17:7-8.
38. GLOBAL ACCORD, *supra* note 30, at 336-338.
39. *Id.* at 337.
40. Stockholm Declaration, *supra* note 29.
41. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 6, 1973, 993 U.N.T.S. 243, 27 U.S.T. 1087, T.I.A.S. 8249.
42. United Nations Educational, Scientific & Cultural Organization Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, U.N. Doc. ST/LEG/SER.C./10, 27 U.S.T. 37, T.I.A.S. 8226.

Nature[43] all include language referring to the preservation of the environment for future generations. In addition, international legal experts, such as the World Commission on Environment and Development, have included the protection of the environmental interests of succeeding generations as a general principle of international law.[44]

The 1989 Convention on the Rights of the Child,[45] also can be seen as a possible stepping stone to greater recognition of the rights to future generations. Though the agreement does not mention future generations, its preamble states: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[46] The convention also provides that children should be represented in judicial and legal proceedings that affect them, either directly or through representatives.[47]

Like the Philippines, many nations have enshrined the people's right to a habitable environment in their national constitutions.[48] A few countries,

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43. World Charter for Nature, Oct. 28, 1982, G.A. Res. 37/7, 37 U.N. GAOR Supp. (No. 51) at 17., U.N. Doc. A/37/51 (1983), *reprinted in* 22 I.L.M. 455 (1983).

44. The WCED was established by the United Nations in 1984. The WCED appointed a group of 13 international legal experts, who developed 22 legal principles and 13 recommendations to strengthen the international environmental law framework.

Among the general principles formulated was: art. 2: "States shall ensure that the environment and natural resources are conserved and used for the benefit of present and *future generations*." In a commentary section, the experts group cited Principles 1, 2, and 5 of the Stockholm Declaration as support. U.N. Doc. WCED/86/23/Add.1 (1986), A/42/427, Annex I, *reprinted in* Experts Group on Environmental Law of the World Commission on Environment and Development, Environmental Protection and Sustainable Development: Legal Principles and Recommendations 37-133 (1987) *reprinted in* EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCE, 187-194 (1992).

However, the Rio Declaration, issued at the United Nations Conference on Environment and Development in 1992, did not explicitly include future generations. Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992).

45. Convention on the Rights of the Child, U.N. Doc A/44/736, *reprinted in* 28 I.L.M. 1448 (1989). The convention does not directly address environmental protection, but Article 24(2)(c), does call on nations to take appropriate measures to protect children's health by providing nutritious food and clean drinking water and by considering the dangers of pollution.

46. *Id.*, pmbl.

47. *Id.*, art. 12. International recognition of children's rights to legal representation is significant because children are analytically similar to future generations. As Oposa demonstrates, children can serve as an useful surrogate for future generations. While future generations do not exist in the same way that children do, both have legal rights which they cannot express without assistance. While specific interests of individual children and members of future generations are difficult to ascertain, both share certain group needs, including the need for a habitable environment.

48. *See* WEISS, IN FAIRNESS TO FUTURE GENERATIONS, *supra* note 30, Appendix B, for list of foreign constitutions.

including Guyana,[49] Iran,[50] Papua New Guinea,[51] Namibia,[52] Vanuatu,[53] and the former Yugoslavia,[54] specifically recognize in their constitutions the environmental interests of future generations.

The concept of intergenerational equity has been cited in proceedings before the International Court of Justice. In their challenge against French nuclear testing, Australia and New Zealand included future generations of their own citizens among the interests they were seeking to protect.[55] In a recent ICJ maritime case, *Denmark v. Norway*, Judge Weeramantry wrote a separate opinion discussing the equitable sharing of resources, citing Weiss' writings and the legal traditions supporting intergenerational equity.[56]

Finally, citizens and non-governmental groups have expressed support for intergenerational equity. The Cousteau Society has gathered 1.5 million signatures worldwide in support of a Bill of Rights for Future Generations.[57]

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49. GUY. CONST. act. II of 1980, art. 36: "In the interests of the present and *future generations*, the state will protect and make rational use of its land, mineral, and water resources, as well as its fauna and flora, and will take all appropriate measures to conserve and preserve the environment." (emphasis added)

50. IRAN CONST. ch. IV, art. 50: "Protecting the environment in which the present generation lives and in which *future generations* will develop socially is considered a public responsibility of the Islamic Republic. Therefore, economic activities, and other activities which may pollute the environment or destroy it irrevocably, shall be forbidden." (emphasis added).

51. PAPUA N.G. CONST. ch. IV, §§ 1-3: "We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for collective benefit of us all, and be replenished for the benefit of *future generations*." (emphasis added)

52. NAMIBIA CONST. ch. XI, art. 95: "The state should actively promote and maintain the welfare of the people, by adopting inter alia, policies at the following . . . (1) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit *of all Namibians, both present and future. . .*" (emphasis added)

53. VANUATU CONST. ch. 2, part 2, art. 7: "Every person has the following fundamental duties to himself and his descendants and others: . . .

d) to protect the New Hebrides (Vanuatu) and to safeguard the national wealth, resources and environment in the interests of the present generation and of *future generations*." (emphasis added)

54. YUGO. CONST. introduction, V. "In order to conserve and improve the human environment, working people and citizens, organizations of associated labor, other self-managing organizations and communities, and socialist society shall ensure conditions to preserve and improve natural and other values of the human environment conducive to a healthy, safe, and active life and work for the present and *future generations*." (emphasis added)

55. Nuclear Test Cases (Austl. v. Fr.), 1974 I.C.J. 253.

56. Denmark v. Norway, 1993 I.C.J. 83, 84 (Separate Opinion of Judge Weeramantry).

57. The Cousteau Society's Bill of Rights of Future Generations states:

"Article 1. Future generations have a right to an uncontaminated and undamaged Earth and to its enjoyment as the ground of human history, of culture, and of social bonds that make each generation and individual a member of one human family.

Article 2. Each generation, sharing in the estate and heritage of the Earth, has a duty as trustee for future generations to prevent irreversible and irreparable harm to life on Earth and to human freedom and dignity.

Article 3. It is, therefore, the paramount responsibility of each generation to maintain a

B. SUPPORT FOR INTERGENERATIONAL EQUITY IN THE UNITED STATES

Of all jurisdictions, the United States perhaps would be the most likely to experiment with the legal representation of future generations. Unlike many nations, the United States provides for citizen suits, allowing citizen plaintiffs to sue polluters and to force government agencies to comply with environmental laws. Another American practice, class action suits, provides for representation for a diverse group of citizens with common claims against a single defendant, but who lack the resources and knowledge to combine themselves. American courts and legislators already have recognized that such groups as the mentally incompetent, the indigent, the deceased, the comatose, unborn heirs, and children have a right to legal representation. Given these precedents, it would not be inconceivable to extend that right to future generations. Though American courts have not explicitly recognized the environmental rights of future generations, support for intergenerational equity can be found throughout federal legislation, state constitutions, and case law.

The framers of the U.S. Constitution were deeply concerned about future generations; evidence can be found in the writings of Jefferson, Madison, and Paine.[58] In the Constitution's preamble, framers stated their goal to "secure the blessings of Liberty for ourselves and our Posterity. . ."[59]

American political leaders have continued to concern themselves with future generations. The National Environmental Policy Act, which requires that federal agencies consider environmental impacts before any major federal actions, specifically states that government should act so that "the Nation may fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[60] The law also states that

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constantly vigilant and prudential assessment of technological disturbances and modifications adversely affecting life on Earth, the balance of nature, and the evolution of mankind in order to protect the rights of future generations.

Article 4. All appropriate measures, including education, research and legislation, shall be taken to guarantee these rights and to ensure that they not be sacrificed for present expediencies and conveniences.

Article 5. Governments, non-governmental organizations, and individuals are urged, therefore, imaginatively to implement these principles, as if in the very presence of those future generations whose rights we seek to establish and perpetuate.

58. *See* Bradley C. Bobertz, Note, *Toward a Better Understanding of Intergenerational Justice*, 36 BUFF. L. REV. 165, 170-71 (1987).

59. U.S. CONST. pmbl.

60. The National Environmental Policy Act (NEPA) § 101, 42 U.S.C. § 4331 (1969) states: " a) The Congress recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of *present and future generations* of Americans.

environmental impact assessments must address long-term impacts and the irreversible commitments of resources.[61] The references within NEPA to future generations are significant because the law covers projects that require federal approval or those involving federal funds, regardless of the type of pollution impact or natural resource damage. Environmental groups frequently use this statute to challenge agency decisions not to require a full impact assessment or to challenge the adequacy of the assessment. Though NEPA does not have a specific citizen suit provision, courts have recognized that environmental groups can establish standing to sue government agencies for not complying with the law.[62] Of all existing federal laws, NEPA probably would be the most open to the legal representation of future generations.

In addition to NEPA, many other federal statutes specifically recognize the interests of future generations,[63] typically in their opening policy statement sections. They include the laws creating the U.S. Park Service[64] and those establishing various parks,[65] the Coastal Zone Management

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b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources, so that the Nation may —

1) *fulfill the responsibilities of each generation as trustee of the environment for succeeding generations. . .*" (emphasis added)

61. NEPA § 102, 42 U.S.C. § 4332 states, in part: "The Congress authorizes and directs that, to the fullest extent possible: 1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and 2) all agencies of the Federal Govt. shall — . . .

C) include in every recommendation or report on proposals for legislation and other major Federal action significantly affecting the human environment, a detailed statement by the responsible environmental official on . . .

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long term productivity and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . .

F) recognize the worldwide and long-range character of environmental problems . . ."

62. Most of the Supreme Court's rulings on environmental standing, including Sierra Club v. Morton, have stemmed from cases in which environmental plaintiffs alleged that a government agency violated NEPA.

63. A LEXIS search of the GENFED library, USCS file found 74 references to "future generations" or "succeeding generations." (Jan. 26, 1994)

64. The law creating the U.S. Park Service states: "The service thus established shall promote and regulate the use of the federal areas known as national parks, monuments and reservations hereinafter specified . . . as provided by law, by such means and measures that conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by means as will leave them unimpaired for the enjoyment of *future generations*." 16 U.S.C. § 1 (1993) (emphasis added).

65. For instance, the statute setting up the Red Rock Canyon National Conservation Area includes introductory language that can be found in similar legislation establishing other national parks. "In order to establish, protect, and enhance for the benefit and enjoyment of *future generations. . .*" 16 U.S.C. § 460 ccc-1 (1993) (emphasis added).

Act,[66] the acid rain provisions of the Clean Air Act,[67] and the Nuclear Waste Policy Act.[68]

On the state level, the constitutions of Hawaii,[69] Illinois,[70] Montana,[71] and Pennsylvania[72] specifically mention the duty to preserve the environment for future generations. In Oregon, environmentalists have begun gathering signatures for a ballot initiative that would amend the state's constitution.[73] The initiative would bar the state from "unnecessarily infringing on the right of current and future generations to the benefits of sustainable natural ecosystems. . ."[74] In addition, many U.S. states, including

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66. The Coastal Zone Management Act states: "The Congress finds and declares that it is the national policy — (1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and *succeeding generations* . . ." 16 U.S.C. § 1452 (1993) (emphasis added).

67. Within the acid rain provisions of the 1990 Clean Air Act amendments, the Congressional findings include: ". . . current and *future generations* of Americans will be adversely affected by delaying measures to remedy the problem." 42 U.S.C. § 7651 (a)(5) (1993) (emphasis added).

68. The Congressional findings section of the Nuclear Waste Policy Act states in part: "[H]igh level radioactive waste and spent nuclear fuels have become major objects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or *future generations*." 42 U.S.C. § 10131 (a)(7) (1992) (emphasis added).

69. "For the benefit of present and *future generations*, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self sufficiency of the State." HAW. CONST. art XI, § 1 (emphasis added).

70. "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and *future generations*. The General Assembly shall provide by law for the implementation and enforcement of this public policy." ILL. CONST. art XI, § 1(emphasis added).

"Each person has the right to a healthful environment. Each person may enforce this right against any party, government or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by Law." ILL. CONST. art XI, § 2.

71. MONT. CONST. art XI, § 1(1): "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and *future generations*." (emphasis added).

72. PA. CONST. art 1, § 27: "The people have a right to clean air, pure water, and to the preservation of natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including *generations yet to come*. As a trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." (emphasis added).

73. The ballot initiative is being led by the Oregon Plan for Environmental Rights, based in Portland. According to its letterhead, the group's advisory committee includes state legislators, Portland area officials, and members of Oregon environmental groups.

74. The initiative reads:

The Constitution of the State of Oregon is hereby amended by creating the following new sections 41 and 42 in Article I, to read:

SECTION 41: PROTECTION OF HUMAN HEALTH. No state action shall unnecessarily infringe on the right of the people to a work place and environment protected from pollutants harmful to human health.

SECTION 42: PROTECTION OF NATURAL ECOSYSTEMS. No state action shall unnecessarily

Connecticut, Indiana, Kentucky, North Carolina, Ohio, Tennessee, Washington, and West Virginia have legislation mentioning the state's duty to preserve natural resources for future generations.[75]

Another source of support for legal standing for future generations is federal law, including judicial decisions, arguments, and opinions. In a 1971 NEPA case,[76] an environmental group filed a class action suit, claiming to represent both the born and unborn beneficiaries of the marsh environment near Gravens Island in Cape May County, N.J. The district court held that the group had standing under NEPA, which extended to the class it claimed to represent, including generations unborn.[77]

Federal courts also have cited the interests of future generations in opinions in which standing was not a major issue. In 1977, the Navy was ordered to redo an environmental impact statement for a new atomic submarine facility because it had not assessed the environmental impact of the site far enough into the future.[78] The D.C. Circuit wrote: "[F]orecasting only seven years of the impacts from such a major facility as the Trident Support Site, fails to ensure that the environment will be preserved and

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infringe on the right of current and future generations to the benefits of sustainable natural ecosystems, free from significant impairment.

The language in the proposed Section 42 differs from the constitutional provisions in other states that mention future generations. *See supra* notes 74-77. Rather than simply declare that the state should preserve the environment for the future, the Oregon initiative would impose a duty on the state not to "unnecessarily infringe" upon the environmental rights of future generations. This language, if approved by voters, could provide a legal avenue for an environmental plaintiff to bring a claim on behalf of succeeding generations to challenge state agencies' approval of a development project with long-term consequences. It perhaps would be easier to establish standing under this language than under the language in other state constitutions.

75. CONN. GEN. STAT. ANN. § 22a-1 (West 1985); IND. CODE ANN. § 14-4-5-8 (Burns 1987); KY. REV. STAT. ANN. § 146.220 (Michie 1987); N.C. GEN. STAT. § 113A-3 (1983); OHIO REV. CODE § 1517.06 (Baldwin 1984); TENN. CODE ANN. § 11-13-103 (1993); WASH. REV. CODE ANN. § 79.70,110 (Supp. 1992); W. VA. CODE § 20-5B-1 (1993).

76. Cape May County Chapter, Inc., Izaak Walton League of America v. Macchia, 329 F. Supp. 504 (D.N.J. 1971).

77. *Id.* at 514. The Cape May court wrote: "The plaintiff's standing extends representatively also to the class which it purports to represent, under Rule 23(b)(2), F.R.Civ.P. The members of that class are so numerous, in being and in generations unborn, as to make it not only impracticable but impossible to bring them all before the Court, and with respect to whom there are substantial and common questions of law and fact."

Earlier in the opinion, the court noted: "We do not share the fear of some earlier courts that liberalized concepts of 'standing to sue' will flood the courts with litigation. However, if that should be the price for the preservation and protection of our natural resources and environment against uncoordinated or irresponsible conduct, so be it. But such seems improbable. Courts can always control the obviously frivolous suitor." *Id.* at 513. However, the applicability of Cape May likely has been undermined by the Supreme Court's decisions since 1971 tightening standing requirements for environmental groups and cutting back on class action claims. *See e.g.* Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992); Zahn v. Int'l Paper Co., 414 U.S. 291 (1973).

78. Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977).

enhanced for the present generation, much less our descendants."[79] In 1987, a district court granted the National Wildlife Federation's request for an injunction to halt the Department of Interior's plan to open public land up for mining,[80] concluding that "denying the motion could ruin some of the country's great environmental resources — and not just for now but for generations to come."[81]

State and federal government attorneys occasionally have cited the interests of "future generations" in their arguments as well. In 1982, Iowa, Nebraska, and Missouri sued federal officials to enjoin the withdrawal of water from the Missouri River; in bringing the case, the Iowa Attorney General declared: "It is high time that we insist on our full legal rights in order to protect the river for future generations."[82] In a 1977 case, the U.S. government argued that a corporate landowner opposing a condemnation action did not have standing under NEPA, because its interest in the case was financial and "not to improve the quality of life for this and future generations."[83]

The Supreme Court has not addressed explicitly the environmental rights of succeeding generations, but several justices have in the past expressed their willingness to liberalize standing requirements for environmental claims. In *Sierra Club*, Justice Blackmun argued in dissent[84] that established conservation groups should have standing to litigate environmental disputes, a view that was in part accepted a year later by the Court in *SCRAP*. In his *Sierra Club* dissent,[85] Justice Douglas proposed that standing should

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79. *Id.* at 830. The Trident court continued: "Although we do not demand that the agency 'foresee the unforeseeable,' make 'crystal ball' inquiries or prophecies instead of predictions, we do find that the Navy here was too short-sighted in setting forth the environmental impacts of the Trident Program. It need not, and indeed, may not be able to forecast the effects of Trident after 1981 in the same detail or with the same degree of accuracy as it has done for the period prior to 1981, but it is imperative that it make a reasonable effort to discern what the effects of Trident's future operations will be."

80. The lower court's injunction was affirmed by the D.C. Circuit. National Wildlife Fed'n v. Burford, 835 F.2d 305, 326 (D.C. Cir. 1987).

81. *Id.*

82. Weiss, ECOLOGY L.Q., *supra* note 30, at 565, n.312.

83. United States v. 18.2 Acres of Land, 442 F. Supp. 800, 806 (E.D. Cal. 1977).

84. Blackmun wrote: "I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization, such as the Sierra Club, possessed as it is, of pertinent, bona fide, and well recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm . . . [I]t need only recognize the interest of one who has a provable, sincere, dedicated and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past." 405 U.S. at 758-9 (Blackmun, J., dissenting).

85. Douglas wrote: "The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies in the name of the inanimate object about to be despoiled, defaced, or invaded by roads

be granted to inanimate environmental objects, such as streams, trees and valleys. A court could appoint a representative to voice the interests of that object, in much the same way, that the judiciary appoints guardians ad litem for children, counsels for the indigent, and executors for the deceased, Douglas noted.[86]

This diverse set of federal legislation, state constitutions, and opinions recognizing the importance of preserving the environment for our posterity indicate that legal representation of succeeding generations would not be as fanciful as it might first appear. In recognizing the *Oposa* plaintiffs' standing, the Supreme Court of the Philippines cited a similar array of general policy statements citing the environmental rights of future generations.

If the United States were to recognize standing for representatives of future generations, it would provide another legal tool for environmental groups to challenge government actions with long-term environmental consequences. Since *SCRAP* and *Sierra Club*, the Supreme Court has tightened the injury and causation requirements that environmental plaintiffs must meet to establish standing.[87] Specifically, plaintiffs must show that they have suffered injury, or will immediately suffer injury, that is fairly traceable to the defendant's conduct. That injury must be "actual and imminent," not "conjectural or hypothetical."[88] For instance, this requirement could be used to deny standing to an environmental group challenging the approval of a waste facility, for which the impacts would be unknown in the near future, but fairly certain in 75 to 100 years. In such a case, a court might conclude that the plaintiffs do not have the requisite injury, given the remote chance that they would suffer immediate harm. However, if a representative of future generations was allowed to seek standing, he could satisfy the injury requirement by showing evidence of the high probability that the people living in the area in 75 years would be injured by the facility. The representative would argue that the harm faced by future residents would be sufficiently "actual" and "imminent" to have standing. Just as appointed attorneys for children and the incompetent do not have to show that they personally would be impacted by the challenged action, the

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and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects for their own preservation. . ."

Douglas argued that people who have frequented a place of natural wonder and know its value should have standing to defend the inanimate objects there. *Id.* at 742-3, 753 (Douglas, J., dissenting).

86. *Id.* at 750 n.8. Similarly, a court could be empowered to appoint guardians ad litem to represent the interests of future generations. *See* discussion *infra* part IV.C.

87. *See* discussion in part III.B. about the difficulties raised by recent Supreme Court standing decisions, including Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) [hereinafter Lujan I] and Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992) [hereinafter Lujan II].

88. Lujan II, 112 S.Ct. at 2136.

representative of future generations should not have to show he would suffer harm, just that future citizens would.

Recognizing such suits would not only help environmental plaintiffs sidestep Supreme Court standing hurdles, it also would help force government and private industry to do more to limit long-term environmental consequences. Provided there are appropriate safeguards,[89] advocates for future environmental rights should be permitted to participate in the American legal system.

III. BARRIERS TO REPRESENTATION OF FUTURE GENERATION

A. OBJECTIONS TO INTERGENERATIONAL STANDING

Many questions and objections can be raised to the legal representation for future generations.[90] These objections include: (1) future generations do not exist, so they cannot be represented in court; (2) an attorney that would represent future generations has no way of knowing what their interests are or what environmental damage they would be concerned about; (3) standing for future generations could be abused by unscrupulous lawyers and open the floodgates for needless litigation; (4) representation of future generations is not appropriate in all environmental cases, and should therefore be limited to litigation against the government to stop long-range environmental damage, or to prevent future damage; and (5) who should represent the interests of future generations — court-appointed attorneys, court-certified lawyers, a federal agency, an independent ombudsman or any plaintiff that claims to represent future interests?[91] These objections can be met by citing the existing legal representation mechanisms for such groups as children, the deceased, and others unable to represent their own interests.

1. Representing Clients Who Do Not Exist

One of the most obvious arguments against representation for future generations is that it would be an exercise in fantasy to sue on behalf of someone who does not exist. This argument ignores the important distinction that a person's legal interests may exist independently of her actual lifetime. For centuries, courts have allowed suits on behalf of parties that are not alive. Executors are permitted to bring suits for the decedent for past injury; the fact that the decedent is no longer suffering injury or did not

89. *See* discussion *infra* part III.A.3.

90. For an extensive discussion of the various questions raised by representation for future generations, *see* E. Joshua Rosenkranz, Note, *A Ghost of Christmas Yet to Come: Standing to Sue For Future Generations*, 1 J.L. & TECH 67, 73-114 (1986).

91. *See discussion infra* part IV.

authorize the suit does not preclude representation.[92] In construing wills, courts consider the intent of the decedent along with the interests of the heirs. Courts have allowed attorneys representing charitable trusts to sue on behalf of unborn beneficiaries and have appointed guardians ad litem to represent unborn remaindermen.[93] Judges have ordered mothers to undergo Caesarian sections[94] and have appointed representatives for fetuses.[95] In a 1977 landmark case, the Illinois Supreme Court held that a child could sue to recover for injuries resulting from a negligent blood transfusion given to her mother more than seven years before the child's conception.[96] These cases indicate that being alive is not a necessary precondition to legal representation. Compared to fetuses, whose potential to be alive may be uncertain, future generations have a greater claim to representation, because it is virtually certain that there will be succeeding generations.[97]

Another argument for representation of future generations is that it would follow logically from the modern Anglo-American trend of expansion of legal rights. Courts have abandoned ancient common law shackles, such as privity of contract, that limited causes of action. Over time, courts and legislators have recognized that women, minorities, and children, once viewed as inconsequential objects, have their own independent legal rights and the right to assert them. Likewise, future generations have these rights as well.[98]

2. Determining the Interests of Future Generations

Another objection is that it would be impossible to represent future generations because we do not know what the generations' interests will be. Given the rapid changes in scientific knowledge, technology, and assessments of environmental problems; the uncertainty about what resources future generations will need; and the inability to predict the composition of future generations, a lawyer would have great difficulty ascertaining future environmental priorities. For instance, twenty years ago, scientists had no idea that chlorofluorocarbons (CFCs) were depleting the atmospheric ozone layer; today, CFCs are considered such a threat to the future that

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92. Rosenkranz, *supra* note 90, at 77-79.

93. *Id.* at 78-79.

94. *Id.* at 79, n.48, *citing* Jefferson v. Griffin Spalding County Hosp., 274 S.E.2d 457 (Ga. 1981).

95. In a recent case, the Cook County (Ill.) Public Guardian was appointed to represent a nine-month old fetus. The guardian sought a court order to compel the mother of the fetus to have a Caesarian section because doctors believed that the fetus was being deprived of oxygen and might die during a normal delivery. *See* N.Y. TIMES, Jan. 30, 1994, at E7.

96. Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (1977).

97. *See* Rosenkranz, *supra* note 90, at 79.

98. *Id.* at 80.

many nations have agreed to phase out their use.[99] However, the inability of succeeding generations to express themselves or calculate the value of their interests should not bar their representation. Though some clients of court-appointed attorneys, such as criminal defendants, can express their wishes to their attorney, the vast majority of those represented by appointed guardians, such as infants and the incapacitated, cannot convey their views to their attorneys. Nevertheless, their appointed lawyers are entrusted by the courts to express what is in their clients' interests. Likewise, representatives of future generations will not know the unborn's precise wishes, but can reasonably conclude that all members of succeeding generations will share a common interest in having clean air, potable water, biodiversity, and places of natural beauty.

3. Opening the Floodgates?

Another objection to standing for the future generations is that such a mechanism would be abused by those who would not honestly have future interests at heart and inundate the courts with frivolous litigation.[100] If anyone is allowed to represent future generations, what would bar a clever lawyer representing a developer from intervening in a proceeding by claiming to represent his descendants' interest in access to an ample supply of shopping malls? At the other extreme, an unrelenting plaintiff conceivably might sue on behalf of the fifth generation, lose in court, and then file suit against the same defendant on behalf of the sixth generation.

However, the same potential for abuse is present within existing legal mechanisms, such as class action suits, civil right suits and guardian ad litem actions. The opportunity for mischief is limited by diligent court supervision and detailed ethical rules that ensure that guardians, trustees, and class action attorneys do not represent their own interests or otherwise abuse the process. Similarly, a special set of rules and proper supervision by judges, with the authority to appoint, certify and remove representatives, would be needed to ensure that future generations are appropriately represented.[101]

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99. As of Sept. 22, 1993, 116 nations had ratified the Montreal Protocol, agreeing to reduce their use of CFCs and other ozone-depleting substances. *Montreal Protocol Ratification Status*, 16 INT'L ENVTL. REP (BNA) (Sept. 22, 1993).

100. This was among the concerns raised by members of the public at a mock legal hearing on the question: "Do Future Generations Have the Right to Sue Current and Past Generations for Passing on an Environment That's Diminished?" The forum, which included comments from Weiss and members of an audience of several hundred, was held as part of a symposium, "Inherit the Earth: An Intergenerational Symposium on the Environment," hosted by the University Corporation for Atmospheric Research (UCAR), Boulder, CO, July 1993. Draft transcript of mock legal hearing [hereinafter UCAR forum].

101. Rosenkranz argued that the ideal way to represent future generations would be a court-

Nevertheless, one can argue that representation of future generations would be a waste of time and would not be an appropriate way to handle disputes between present and future generations.[102] But litigation, despite its problems, is sometimes needed to achieve important changes in society.[103] While lawsuits are not the only solution, the present generation, has not, and cannot be expected, to account for the interests of succeeding generations, given people's natural bias toward current needs. Urging government officials to carefully consider the interests of posterity is meaningless unless there are procedural means for challenging the officials when they do not. Allowing future generations legal standing will not flood the courts with litigation if there are sufficient rules and procedures to permit judges to control frivolous litigants.[104] But, as the *Cape May* court noted, ". . . if that should be the price for the preservation and protection of

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certified posterity lawyer. Under such an approach, private attorneys could select a particular future generation to represent in a dispute. A court would then scrutinize the attorney's claim to determine whether the attorney would adequately represent those future interests, using criteria similar to the Federal Rules of Civil Procedure's requirements for certifying class action suits.

Rosenkranz proposed a modified Rule 23 to govern "posterity suits" on behalf of future generations:

> a) Prerequisites to a Posterity Suit. A posterity lawyer may sue as a representative of all or any future generations or class of generations if
>
> (1) the future generations represented are all distant enough that joinder of any of their members is impossible;
>
> (2) there are questions of law or fact common to the class of future generations;
>
> (3) the claims that the posterity lawyer asserts for one future generation are typical of the class of future generations; and
>
> (4) the posterity lawyer will fairly and adequately protect the interests of the class of future generations.
>
> b) Posterity Suits Maintainable. An action may be as a posterity suit if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) For suits on behalf of a class of future generations, the court finds that questions of law or fact common to all the future generations of the class predominate over any questions affecting individual generations, and that a suit on behalf of a class of generations is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (A) the interest of individual generations in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against individual generations or the class of generations;
>
> (C) the desirability or undesirability of concentrating the litigation in this generation; and
>
> (D) the difficulties likely to be encountered in the management of an action on behalf of a class of future generations.

Rosenkranz, *supra* note 90, at 99-102.

102. Public comments, UCAR forum, *supra* note 100.

103. Comments by Weiss, UCAR forum, *supra* note 100.

104. See Cape May, 329 F. Supp. at 513; Sierra Club, 405 U.S. at 758-9 (Blackmun, J. dissenting); and Rosenkranz, *supra* note 90.

our natural resources and environment against uncoordinated or irresponsible conduct, so be it."[105]

4. When is Representation Appropriate?

A strong argument can be made that representation of future interests is not appropriate for all environmental problems. For instance, bringing suit on behalf of future generations to force the reduction of nationwide air pollution would be problematic because every member of society conceivably contributes in some way and thus could be a defendant. Where there is pollution that can readily be remedied in the short term, such as most air and water pollution, that situation should be left to present generations to address.[106] However, in cases such as toxic releases, where there are irreversible and uncertain long-term consequences, the interests of future generations should be heard.[107] Similarly, there should be representation in decisions over the placement of hazardous waste facilities so that cheaper short-term solutions will not be selected over more expensive methods that more effectively limit long-term consequences. Standing for future generations would be particularly appropriate in NEPA litigation, plant-siting proceedings and natural resource allocation controversies because those present an opportunity to prevent future damage before it occurs.

Representatives of future generations should be provided access not only to the courts, but to administrative proceedings. The perspective of future generations would be particularly useful in rule-making. Future generations should not be limited to actions against the government; they should be able to sue private parties. To prevent harassment, there should be procedural limits, such as certification of plaintiffs and a broad res judicata rule, to bar resurrection of unsuccessful suits.[108]

B. OVERCOMING *LUJAN V. DEFENDERS OF WILDLIFE*

Another barrier to representing future generations in the United States is the Supreme Court's move toward stricter standing requirements for environmental group plaintiffs since *SCRAP*. In *Lujan v. National Wildlife Federation (Lujan I)*,[109] the Court held that the National Wildlife Federation

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105. Cape May, 329 F. Supp. at 513.

106. Weiss comments, UCAR forum, *supra* note 100.

107. In such a case, the future generation representative could seek to establish a trust fund to compensate victims and their offspring whose health problems may not become apparent until long after the incident.

108. Rosenkranz, *supra* note 90, at 111-12.

109. Lujan I, 497 U.S. at 871. In this case, there was no specific citizen suit provision. NWF sued under § 702 of the Administrative Procedure Act which allows judicial review for persons who suffer "legal wrong because of agency action" or who are "adversely affected or aggrieved by agency action within the meaning of the relevant statute."

(NWF) lacked standing, because it had not set forth "specific facts" alleging that it would be harmed by a "particular agency action."[110] NWF had sought to challenge the Federal Bureau of Land Management's reclassification of certain public lands under its land withdrawal review program and had submitted affidavits from members stating that they used some of the tracts subject to the program. The Court held that the affidavits were not enough to establish standing to challenge the entire program. This emphasis on specifics could stymie future generation claims, which typically would be based on more general injuries caused by various actions.

In *Lujan v. Defenders of Wildlife (Lujan II)*,[111] a divided Court[112] held that a Congressional statute conferring standing was not sufficient to establish standing unless there was injury in fact. Though many federal environmental laws specifically authorize citizen groups to sue agencies for not enforcing the law, under *Lujan II*, plaintiffs also must demonstrate that they have a legally protected interest that has been injured or would be by the government's conduct.[113]

In his *Lujan II* plurality opinion, Justice Scalia argued that Article III[114] of the Constitution imposes minimum requirements for standing in federal court.[115] He delineated a three-part standing test with different language

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110. *Id.* at 884, 891.

111. Lujan II, 112 S.Ct. 2130 (1992).

112. A six-justice majority denied standing, but Scalia's plurality opinion was joined by only three other justices. Justice Kennedy, joined by Souter, concurred in judgment and in most of Scalia's opinion, but expressed a more liberal view on Congress' power to confer standing by statute. *See* KENNETH C. DAVIS & RICHARD J. PIERCE, 3 ADMINISTRATIVE LAW 84-96 (3rd ed. 1994).

113. The decision, if followed closely, could be used to invalidate citizen suits provisions that exist under major federal environmental laws. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 2, 164-236 (Nov. 1992).

Sunstein argued that Lujan would foreclose "pure" citizen suits brought by citizens, acting with an ideological or enforcement interest, to force a government agency to undertake action required by an environmental law. On the other hand, the decision would not bar standing if the group could show that its members used the resource that was at risk. *Id.* at 224-226.

114. The relevant parts of Article III state that "judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . to controversies to which the United States shall be a party; — to controversies between two or more states; between citizens of different states. . ." U.S. CONST. art. III, § 2 (1). Nowhere in Article III is there any explicit requirement of standing, personal stake, or injury in fact. Sunstein, *supra* note 113, at 168-9.

115. Sunstein criticized Scalia for greatly misinterpreting Article III and ignoring the Anglo-American history of standing, which traditionally allowed qui tam and informers' suits by citizens to vindicate the public interest. *Id.* at 174-5.

Sunstein argued that Article III does not bar Congress from creating new rights and directing the courts to allow standing to defend them. He cited Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), in which the Supreme Court ruled that testers, who posed as prospective buyers to gather evidence of illegal housing discrimination, had standing to sue the defendant, even though they did not suffer any injury in fact. Standing could be granted because Congress had conferred a legal interest on testers to gather information, creating a legally cognizable harm where none had existed. Similarly, Congress could create a new environmental right that could be vindicated in court by a plaintiff without showing injury in fact, Sunstein argued. Sunstein, *supra* note 113, at 175-7, 190-1.

than the Court has traditionally used since the early 1970s.[116] Under *Lujan II*, the plaintiff first must demonstrate injury in fact; that injury must be "concrete and particularized"[117] and "actual and imminent, not conjectural or hypothetical." Second, the plaintiff must show there is a causal connection[118] between the injury and the agency's conduct, and that the injury is not the result of a third party's action. Finally, it must be "likely" that the plaintiff's complaint could be redressed by a favorable ruling.[119]

Lujan II indicates that the Court would not be receptive to claims of future environmental damage. Scalia's language requiring that an injury be "actual and imminent" and "concrete and particularized" could be read strictly by the Court to deny standing for those unborn. While a representative of future generations could prove that a particular agency action would produce some future harm, persuading the Court that the harm is particularized, actual, and imminent and not "conjectural or hypothetical" would be difficult.

However, it is important to remember that *Lujan II*'s holding that Congress cannot confer standing without injury in fact was not supported by a majority. This argument was a marked departure from precedent and may be on shakier ground since the retirement of Justice White, one of Scalia's four votes. Prior to *Lujan II*, the Court had consistently respected Congressional intent to confer standing on persons with particular interests in agency actions.[120] The Court had deferred to Congressional determination of injury and causation, even when Congress has created legally cognizable injuries that the Court might have considered too abstract.[121] In *Havens Realty*, the Court granted standing for discrimination testers based on Congress' recognition that a person is injured when he is denied access to

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116. Under the Court's traditional test, plaintiffs must show they: 1) are within the zone of interest of the statute; 2) have an injury in fact; and 3) have an injury which is redressible by the court. Association of Data Processing Serv. Org. v. Camp, 397 U.S. 350 (1970).

There is debate over how much Scalia's test differs from the traditional formulation. Some argue that Scalia merely clarified the traditional test; others, such as Sunstein, view the decision as a significant shift in the law of standing. *See* Sunstein, *supra* note 113, at 164-5.

117. Lujan's particularized injury requirement is a departure from SCRAP, where the Court stated that the fact that the injury was suffered by many, rather than a few would not preclude standing. Although SCRAP did require that a plaintiff show that he would be perceptibly harmed by agency action, that standard is easier to satisfy than "concrete and particularized" and "actual and imminent" injury. SCRAP, 412 U.S. at 689-90.

118. After Lujan II, courts likely will take a closer look at causation. Courts can be expected to dismiss cases where the "injury" stems from an attenuated line of causation, such as in SCRAP. In that case, the plaintiffs claimed that a new federal railroad rate structure would discourage recycling and thus lead to more litter in the parks that the plaintiffs used. SCRAP, 412 U.S. at 676-9.

119. Lujan II, 112 S.Ct. at 2136.

120. DAVIS & PIERCE, *supra* note 112, at 88.

121. *Id.* at 72.

housing information because of his race.[122] In *Duke Power*, the Court relied on the legislative history of a nuclear liability statute when it granted standing for residents living near a proposed plant to challenge the law.[123] In *Lujan II*, the two concurring justices, Kennedy and Souter, acknowledged that Article III does limit Congress' power to confer standing, but argued that Congress still may do so, provided that it identifies an injury and relates it to a class of persons entitled to bring suit.[124]

After *Lujan II*, it would appear that Congress still could pass a statute recognizing that future generations have environmental rights and conferring standing on those who seek to advocate their interests. To leave no doubt, Congress should clearly express this preference and provide guidance on the degree of causation required, what injuries may be compensated, and the rules for bringing such suits.

Though the Court has retreated from liberalized standing doctrine, Congress should not be deterred from creating new causes of action. Widely available standing has helped limit agency capture and biased decision-making since standing was liberalized in the early 1970s.[125] In *Lujan II*, Scalia expresses his belief that the courts should not interfere with the President's power under the Constitution's "take Care" clause[126] to enforce the law through agencies. Scalia's approach is not judicial restraint, but really an abdication of the Court's responsibility to obey Congressional commands to serve as a check on executive agencies.[127] The Court has a responsibility to defer to the policy decisions of Congress, the most politically accountable branch, rather than insulate the President.[128] If Congress decides to open agency action to greater judicial review and public participation through widely available standing, the Court should not stand in the way.

Even without an explicit Congressional grant of standing, an argument could still be made to persuade a court to recognize standing for representatives of future generations.[129] For instance, an environmental group plaintiff

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122. *Id.* at 53. *See* Sunstein, *supra* note 113.

123. *Id., citing* Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).

124. Lujan II, 112 S.Ct. at 2146-7 (Kennedy, J., concurring). Kennedy wrote: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.*

As Sunstein observed, "Most intriguingly, Justice Kennedy's concurring opinion leaves open the possibility that Congress has the power to create novel property interests, to grant those interests to many people or even to citizens, and to confer standing to enable people to vindicate these interests." Sunstein, *supra* note 113, at 230-236.

125. DAVIS & PIERCE, *supra* note 112, at 67-70.

126. U.S. CONST. art II, § 3.

127. DAVIS & PIERCE, *supra* note 112, at 95.

128. *Id.*

129. Weiss, at the UCAR Forum, argued that future generations could meet the three traditional standing requirements. First, the concerns of future generations are within the zone of interest of

challenging plans for waste disposal facilities could claim that it also represents local succeeding generations' interest in proper waste management to prevent contamination 100 years into the future. Following PEN's example in *Oposa*, the group would cite the policy statements in NEPA and hazardous waste laws to argue that government has a duty to consider the impacts on future generations. Given this duty, the court must provide the future beneficiaries of that duty with a procedural tool to ensure that this obligation is carried out. To satisfy *Lujan II*'s injury test, the group could seek to show "actual" and "particularized" injury by introducing engineering studies detailing that a facility designed to meet short-term needs would contaminate water supplies needed by future generations.

In addition to the *Lujan II* constitutional standing requirements, the Supreme Court has imposed "prudential" limits on standing. The Court has held that a plaintiff "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties."[130] Further, the Court has "refrained from adjudicating 'abstract questions of wide public significance which amount to generalized grievances' pervasively shared and most appropriately addressed in the representative branches."[131] There is an exception to this rule. A party may represent a third party's rights if the third party is unable to assert its own interests and if there is a special relationship between the parties that enables the litigating party to be an effective advocate for the third party.[132] These prudential limits[133] could preclude the interests of future generations, which arguably involve "abstract questions" and "generalized grievances." However, an environmental group could argue that it should be permitted to represent future generations because future individuals are unable to assert their rights. Further, the group could argue that a special relationship exists between group members and their descendants, who will form future generations, that enables the group to effectively advocate those interests.

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many environmental laws. Second, future generations would clearly suffer injury from environment problems, such as toxic contamination and ozone depletion. Third, their injuries could be redressed by stopping the pollution and by setting up trust funds to compensate victims of future consequences. UCAR Forum, *supra* note 100.

130. Valley Forge Christian College v. Americans United for the Separation of Church and State, 454 U.S. 464, 475-76 (1982) *citing* Warth v. Seldin, 422 U.S. 490, 499 (1975).

131. *Id.* at 499-500.

132. Singleton v. Wulff, 428 U.S. 106, 114-116 (1976). In this case, a Supreme Court plurality held that two doctors challenging a Missouri abortion law did have standing to represent their patients' rights to abortions.

133. Because the prudential limits are not constitutionally-based, they could be overridden by Congress.

IV. POSSIBLE WAYS TO REPRESENT FUTURE GENERATIONS

While the Children's Case demonstrated how an environmental group could persuade a court to grant standing for future generations; given *Lujan II,* it is unlikely that such an effort would succeed in the United States without legislation. Perhaps an *Oposa* plaintiff class that includes both living persons and future generations could establish standing, but an attorney solely asserting future generations would have difficulty showing actual and particularized injury. A more fruitful approach would be to amend NEPA or establish new legal mechanisms, such as court-appointed guardians or a national ombudsman, so that future generations are represented.

A. STRENGTHEN NEPA

One way to prod present generations to consider the future consequences would be to strengthen NEPA. For instance, the statute could be amended to mandate explicitly that impacts on future generations be addressed by requiring agencies "to make a reasonable effort to discern what the effects"[134] of the project would be in 100 years. Another way to improve NEPA for both present and future citizens would be to establish a new separate federal entity to prepare environmental impact statements.[135] Under the current law, the agency proposing the action at issue conducts the EIS, reducing the likelihood that all relevant impacts will be fully considered. Finally, Congress also could approve an amendment emphasizing that NEPA should be interpreted not just as a procedural requirement,[136] but as a substantive law requiring a proper balance between present needs and preservation for the future. While such changes to NEPA would force courts and agencies to give greater weight to future interests, these steps likely would not be enough, because present generations still would have a natural preference for their own short-term needs. One method to address this inherent bias would be to provide some form of independent legal representation for future generations in judicial and administrative proceedings.

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134. *See* similar language in Trident, 555 F.2d at 830.

135. Timothy Patrick Brady, Comment, *"But Most Of It Belongs To Those Yet to Be Born:" The Public Trust Doctrine, NEPA and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621, 645 (1990).

136. *See* Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519 (1978). The Supreme Court held that NEPA's mandate to federal agencies is "essentially procedural." *See* Brady's discussion of how NEPA's original purpose of promoting harmony between man and nature was transformed by the Supreme Court into a mere disclosure law. Brady, *supra* note 135, at 635-639.

B. GENERAL RIGHT TO SUE

Another way to advance future concerns would be to create a general right to environmental resources and allow any citizen standing to vindicate that right. Seven U.S. states have laws recognizing such a right.[137] For instance, to sue under Michigan's law, a plaintiff does not have to show injury to himself, just that the defendant caused pollution or is likely to do so. Creating such a federal right would make standing easier to establish, but would not necessarily mean that future generations' interests would be represented.

C. COURT-APPOINTED REPRESENTATIVES

Another approach would be to permit judges to appoint guardians ad litem to represent future generations in pending judicial and administrative matters. When a case arises that involves long-term environmental impacts, the presiding judge would be permitted to select a representative for future interests from among interested non-governmental organizations. The selection would be made by considering the group's knowledge of the subject matter, the breadth of its membership and its capacity to handle the case. Another option would be to allow attorneys to bring future generation claims, subject to court certification.[138]

D. OMBUDSMEN FOR THE FUTURE

Another approach would be to appoint independent ombudsmen to ensure that interests of future generations are considered. The ombudsman[139] would monitor administrative and judicial proceedings; if he determined that future generations would be significantly impacted, he could intervene or file an amicus brief on their behalf. The ombudsman would also entertain requests from the public to intervene in particular cases, respond to citizen complaints about government action, mediate disputes, and serve as watchdogs to alert the international, national, and local communities of environmental threats to posterity.

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137. Those include Michigan, Connecticut, Florida, Indiana, Massachusetts, Minnesota, and South Dakota. Weiss, *The Planetary Trust, supra* note 30, at 568 n. 324.

138. *See* Rosenkranz's discussion of certification, *supra* note 90.

139. The ombudsman concept originated in Sweden in 1809; the term ombudsman is derived from Swedish word for "people's representative." The original ombudsman was appointed to receive complaints about the courts and police; today, Sweden also has ombudsmen to oversee administrative matters and the military. Many other countries have established ombudsmen, including Norway, which established an ombudsman for children in 1981. DAVID R. ANDERSON & DIANE M. STOCKTON, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, OMBUDSMEN IN FEDERAL AGENCIES: THE THEORY AND PRACTICE 61 (1990).

There are international,[140] federal, and state[141] precedents for creating an ombudsmen for future generations. On the federal level, ombudsmen exist within the EPA,[142] the military, the Internal Revenue Service, and the Department of Health and Human Services. At the Department of Energy, there have been public calls for an ombudsman to oversee the management of civilian radioactive waste.[143] The implementing legislation for the North American Free Trade Agreement created an ombudsman to receive public input about the community adjustment program of the new North American Development Bank.[144] These diverse examples indicate that ombudsmen for future generations would not be a great departure from past practice.

Ideally, a single high-profile federal ombudsman for future environmental concerns should be created, with the authority to receive complaints and represent the interests of future generations in courts and before the EPA, the Department of Interior, the Department of Energy, the Nuclear Regulatory Commission, and other agencies whose actions significantly impact the environment. This ombudsman must be more than just an agency troubleshooter, as most current agency ombudsmen are, or a bureaucratic referee, like the Office of Management and Budget or the Council on Environmental Quality. Rather, the ombudsman should be an independent advocate for future interests, with his own staff, funding, and status as an independent agency. The ombudsman, like an independent agency director, should serve a fixed term and not be subject to removal by the president. The ombudsman must have the authority to bring suit and intervene in proceedings to be effective.[145]

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140. The WCED has recommended that countries consider establishing an environmental ombudsmen on the national level. In a 1985 study of the Great Lakes, the U.S. National Research Council and the Royal Society of Canada recommended that the two countries consider establishing an ombudsman for the Great Lakes Basin to identify and warn of adverse impacts on the basin. WEISS, IN FAIRNESS TO FUTURE GENERATIONS, *supra* note 30, at 124 n.16,17. Namibia's constitution, adopted in 1990 when the nation became independent, created an ombudsman, whose duties included investigating environmental complaints. NAMIBIA CONST. ch. 10, art. 91 (c).

141. Wisconsin created the Office of Public Intervenor in 1967 to protect the state's environment. WEISS, IN FAIRNESS TO FUTURE GENERATIONS, *supra* note 30, at 125.

142. The EPA has separate ombudsmen for hazardous waste, small business concerns, and asbestos. Their primary role is to receive complaints and answer questions about particular EPA programs. However, the ombudsmen have limited independence, few resources, and are not easily accessible to the public. Anderson and Stockton recommended that Congress combine these functions into a single agency-wide ombudsman, with broad powers to respond to complaints, who would report directly to the EPA Administrator. ANDERSON & STOCKTON, *supra* note 139, at 60, 66-67.

143. *Workshop Participants Recommend Ombudsman to Help Resolve Waste Management Conflicts*, 24 ENV'T REP.(BNA) 625 (Aug. 13, 1993).

144. NAFTA Implementing Legislation, Pub. L. No. 103-182, § 543(c), 107 Stat, 2057 (1993).

145. As Rosenkranz warned, a future generation advocate with power only to argue before agencies and Congress would likely become nothing more "than a glorified, tax-supported, special interest lobbyist with no political clout." Rosenkranz, *supra* note 90, at 112.

The main advantage of the ombudsman approach is that the ombudsman would be an independent, and respected, voice of future interests. It would be easier to persuade corporate defendants and judges that a government entity should be granted standing to represent the unborn, rather than grant standing to an environmental group. Over time, the ombudsman would develop expertise in assessing long-term impacts and would be better able to voice future interests than a series of court-appointed representatives.

V. CONCLUSION

Oposa has given a substantial boost to the growing legal legitimacy of the environmental rights of future generations. The Philippine Supreme Court's open-minded approach to environmental standing is a refreshing change from the increasingly narrow view of the U.S. Supreme Court.

The Philippine decision is significant because it recognizes that the interests of future generations are not abstract or unascertainable, but can be identified and advocated by a legal representative. The case demonstrates that some effective means, such as standing or an ombudsman, is needed to ensure that future generations' interests are considered in legal and administrative decision-making. The case illuminates a possible way to argue for standing for representatives of future generations in the United States. That argument is that the various statutes proclaiming the government policy of environmental preservation for the future are meaningless unless future generations have a voice to protect their rights. Whether that voice is provided through judicial grants of standing, legislative expansion of standing, court-appointed representatives, or an ombudsman, it is time that the voice of future generations be heard.