

C O M M E N T

What Is the Primary Right?

by Carter Dillard

Carter Dillard is a Visiting Scholar at Emory University School of Law.

Humans have presumed that our evolution would take place in a world dominated by human influence. That tendency has led even prominent thinkers to give up on trying to articulate an “environmental” right that protects nature, a right that would be popular enough to go on our most important lists of human rights. The irony is that we already recognize two rights that do tell us what the physical world around us should look like. The first right begins with the absolute form of “the right to be let alone.” The second right begins from the simple truth that because we have a right to leave or exit any political association, like the city we live in, we have a right to leave all political associations—which taken to its logical conclusion means we have a right to places free of any human power or influence. Together, these rights promise us the freedom from others that only a world of limited human societies in a sea of complete nonhuman biodiversity—the nonhuman world—can deliver.

This Comment addresses a problem with today’s efforts to protect the environment, especially with regard to climate change, and offers a solution by suggesting we change how we think about the notion of freedom. This is the problem: how we do justify, based upon principles most people can accept, the government’s limiting our freedom in order to protect the environment? This is the solution: such “limits” on our freedom can be justified based upon the widely accepted principle that every person has the right¹ to be let alone by others, that being free also means having the choice to be independent of or away from other persons and their influence. The right to be let alone by others and be free of them, taken literally and to its logical conclusion, means persons have a right to leave others and thus society in general and enter places free from *all* human influence, or what we often call wilderness.

It follows that to protect the right to be truly let alone, to be free and independent of others, wilderness must be restored around us and be reasonably accessible. Wilderness represents an alternative to society and human political association, and thereby makes it possible for us to

voluntarily participate in them, rather than to be forced to do so because no reasonable alternative exists. Calling for a right to places where we can be free of others, where we can truly be let alone, follows the tradition of the Founders of the United States and of civil rights activists, because such a right is simply part of the widely accepted ideas of liberty and freedom, just a rarely understood and appreciated, but valid, part of what it means to be free. This Comment explains that right, how it radically changes our current efforts to protect “the environment” by reconstituting environmentalism as a “first-generation”² human political right to the nonhuman world, and how that right works to further our freedom, rather than limit it.

I. More Freedom

The key to understanding the right to have wilderness nearby, to have places where you can truly be let alone relatively accessible, lies in understanding that the idea of freedom, or a right to be free, is more complex than we usually think it is.

The right to freedom is more complex because it encompasses not only the right to act, but also the right not to be acted upon, the right to be free of others, or the right to be let alone.³ Supreme Court Justice Louis Brandeis famously referred to something like this aspect of freedom, what he called privacy, as “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”⁴ It is the right to be free of others, fully free of their presence, power, and influence—whether that presence harms or even benefits you.

Consider the familiar idea, regarding rights, that the right to move one’s hand stops at other persons’ noses. We say that because, while we are free to act, that freedom is

1. Why speak in terms of rights at all? Though the point is often brushed over today, rights (or more accurately duties, the elemental concept rights derive from) are the fundamental conceptions law is generally based upon. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), reprinted in FUNDAMENTAL LEGAL CONCEPTIONS 65 (1923).

2. See generally Louis Henkin, *Economic Rights Under the U.S. Constitution*, 32 COLUM. J. TRANSNAT’L L. 97 (1994-1995).

3. See Carter Dillard, *The Primary Right*, 29 PACE ENVTL. L. REV. 860, 867-72 (2012). A competing conception of freedom or autonomy, and the one usually invoked against environmental regulations, is the right to do whatever one wishes. Arguments in favor of this right or conception of freedom or autonomy are a failure. *Id.* at 868; see also Richard Dagger, *Political Obligation*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY §3.2 (Edward N. Zalta ed., 2010); Philip Montague, *Is There a Right to Freedom?*, 49 PHIL. STUD. 71 (1986).

4. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

limited by the duty to let others alone. It is not enough to simply not harm others (touching another person's nose does not harm them), rather, that person ought to be totally free of our influence if he or she so chooses, and has the right to simply be let alone.

Does this way of thinking about freedom sound familiar? It should, because it is something very much like the right asserted by the Founders of the United States, who left England and declared independence in a place they obviously thought, based on what they said at the time, was an empty wilderness ripe to be occupied. Leaving others and being let alone is thus arguably the fundamental American freedom, and right. But what would a right to *literally* be let alone, taken to its logical conclusion, look like?

If we literally mean an absolute right to be let alone, not only would no one be permitted to touch me without my consent, but no one would be permitted to make sounds that I had to hear, or put up boundaries I could not cross, or alter the physical world in any way, thereby remaking it in some regard *their* world. No person would be able to subject me to their presence, power, and influence at all.

And this is how we begin to move toward a right to wilderness, or what is better thought of as the nonhuman world that by definition is the world, or more specifically the collective natural habitats, occupied by all *nonhumans* or species other than humans. This is how we begin toward a solution to the problem in environmentalism of needing to be justified by widely accepted principles: we associate the freedom-enhancing right to be let alone with actual places where we are let alone, where we do not have to be subject to others.

The alternative to *human* political association, to human worlds, is logically and by definition the *nonhuman* world, or complete nonhuman biodiversity—the complete list of other species located and living in their primal habitats. The term nonhuman is no doubt foreign to most readers because places dominated by any influence other than human have in the past several centuries become virtually inaccessible and erased from our “environment,” so that the concept of “environment” is itself synonymous with human influence. We need to step out of that trap and imagine the world otherwise.

Conceptually, freedom from other humans is the nonhuman.

We can term the right to have reasonable access to these places and to get away from it all and truly be let alone the primary right. The primary right is more than the mere limitation or regulation of others' influence; it is the absence of others' presence and influence. It regards not simply how others relate to you, but *whether* they relate to you—at all.

How is the right to get away from others primary? Consider that when we talk about rights and their flip side,

duties, we are really talking about a collection of dos and don'ts among a particular society or collection of people.

Of course, this presupposes that people are a part of a system of dos and don'ts, of mutual relations, of collective influence. What if they do not wish to be in such a system? For any given system, the primary, the foundational, issue that circumscribes the meaning of freedom within that system is whether one can choose not to be a part of the system. That is, if any group of people is trying to figure out how to treat or influence one another, and what their rights should be, the first decision is inevitably whether members will treat or influence each other *at all*, or whether they can be free of one another. The primary right is the right to be entirely outside of any particular system of dos and don'ts, mutual relations, and collective influence. The right is primary because, while political entities can offer the freedom that comes with order, one is not free if one does not consent to—which means having an alternative to—that order.

Sometimes, it is easy to forget that we are even inside of other persons' systems, made subject to their ideas, decisions, ways of living, and of their influence. We should know when we are, when we don't want to be, and that we are free to go. For the right to opt out and be let alone to be meaningful, a real, physical alternative to human influence must exist and be accessible. The alternative to the world of other humans is, by definition, the nonhuman world, or what we generally call wilderness. It is the part or parts of the world occupied by species other than humans; it is the world made up of those species' habitats, and their influences. Without that, or with it virtually inaccessible, we are all subject to the will of others, to colonization by them, to *forced enculturation*.

How do these places promote freedom, other than being places where we can be let alone? If no place devoid of other persons and their influence exists, participation in some political system or social order becomes literally forced upon us—we simply have no alternative. You may be able to leave one system for another, but you have no right or ability to exist completely outside such systems. You are simply stuck with the least objectionable system, imprisoned in a sense. You are also then made ignorant, in that you are unable to truly evaluate those systems because the pure alternative, the absence of human association, no longer exists. There is no control left to test those systems. Note also, as an aside, that those political systems—taken as a collective—have less of an incentive to improve because, at some point, their constituents cannot “vote with their feet” by simply leaving. The collection of systems is the only alternative. Such a state of affairs diminishes true freedom; to keep human interaction consensual, there must be an alternative.

For example, when I was growing up in Florida, there was a special place near our neighborhood where the chil-

dren went, several acres of totally undeveloped land that was overgrown with native plants and inhabited by wild animals. We called it “the jungle.” Even as children, we understood it was a special place—wild, a true alternative, and in a very special way, free. It was, of course, not a true wilderness devoid of human power and influence, but it was tending toward that ideal and valuable as such.

So, to recap, one way to try to justify government limiting what we do in order to protect the environment, and in a way that can make us more free by giving us an alternative to systems of dos, don'ts, mutual relations, and collective influence, is to take the right to be let alone—the primary right—literally and to its logical conclusion. To demand your primary right, to take being let alone seriously, means demanding that places exist where you are not obligated to live under any other person's power and influence.

If those places do not exist or are relatively inaccessible, then you have no such choice and are obligated to live under other persons' power and influence, in a ubiquitous if subtle tyranny of others, so powerful that one cannot even experience the world without them.

II. Rewriting “Environmental” Law

Accepting the idea of the primary right leads to a way of thinking that is very different from the way we currently approach protecting the undifferentiated “environment” and instead leads us to think in terms of our own proximity to the nonhuman world. There is an argument that a lot of environmental regulation that exists today points in a similar direction, that the regulation of sprawl and demand for “open spaces,” the designation of wilderness areas, the notion of organic food, are all spokes pointing toward something like the primary right. But I will not pursue that here. The primary right itself is novel, in at least five ways.

First, asserting a right to places where one can truly be let alone is very different from simply agreeing to disagree and putting the protection of the environment to a vote. When we assert that something is a right, especially a human right like those asserted by the Founders of the United States, we are saying that it does not matter if a majority refuses to recognize it. Rights override majorities—especially when it is the right to opt out of a society whose ethos you wish to reject, when all you are asking is to be allowed to leave and nothing more. If the primary right is a right, and perhaps fundamental human right, it would not matter if the U.S. Congress voted to pave the entire United States. Congress doing so would not override your primary right to opt out of a paved world, and environmentalists and anyone else that recognized the primary right would be justified and perhaps obligated to fight for their right against the pavers.

Second, almost all attempts to date to articulate human rights to the environment involve rights to a clean, safe, or healthy environment, or a right to sustainable development, or to collective ownership of nature, or to the conservation of certain resources. The primary right is nothing

like any of these things, or properly considered, even an “environmental right” per se.

The primary right is a new and fundamental “first-generation” civil and political human right that alters the legal system more generally, or persons' relation to systems of dos, don'ts, and the collective influence. Persons' influence on the “environment” becomes very much an issue of their exercising power over others, their trampling on the political freedom of others to be let alone. “Development” of the nonhuman world not just destroys it, but is the domination of other humans, like dogs marking their territory until little or no unmarked territory remains.

The primary right converts “environmental” demands to political ones that call for strong action, allowing us to see human domination of the otherwise nonhuman world as a form of gradual but wrongful imprisonment, as free zones devoid of human influence disappear. The primary right converts tepid “environmental” claims that center on protection of that which cannot protect itself, to political claims against those that would force their control upon us by eliminating “free” places absent human control. A desire to protect nature is one thing; a desire to prevent others from controlling you is another. The latter might drive you to real action.

Our current legal system evolved from and is suited to a world before modern technologies made living in the nonhuman world relatively safe, when wilderness was a threat, as opposed to a welcome escape from human civilization. Our legal system was built to conquer such places, and needs now to recognize something like the primary right, rather than weaker “environmental” claims. That will enable our legal system to begin to address the modern threats of our time—overpopulation, industrialization, and the absence of reasonably accessible places where we are not subject to the will of others.

The primary right meets these modern threats by countering them with the distinct and conflicting value, inherited from classical liberalism rather than modern environmentalism, of being let alone by others. Wilderness, conceptually, is the only real example of the absence of human power. Thus, to the extent the general narrative of liberalism involves the removal of humans' power over one another, e.g., the elimination of despots and the expansion of human autonomy, action that restores relatively wild places pegged to the standard of complete biodiversity and natural habitat becomes part of liberalism's story, taking it to its logical conclusion. In this sense “environmentalists” are better thought of as akin to secessionists,⁵ demanding the alternative to human political association that makes consenting to it possible.

5. Readers may see a connection between exit and the familiar notion of secession, especially because there are “primary right” forms of secession that bear only a distant family resemblance to the primary right described herein. Relating the two concepts is beyond the scope of this Comment, but suffice it to say that primary right exit is not secession per se because the former involves getting away from others, even those you would secede with. However, secession would obviously be more feasible in a world where the primary right obtained.

The value of literally being let alone by others can become the new baseline for environmental regulation and a baseline to exact justice from those most responsible for degradation of the nonhuman world.

The primary right has nothing to do with “environmental rights” that refer to owning nature and the nonhuman, or to improving it for the health and benefit of humans (which is arguably part of the simple police powers of the state). These things, like calling all of the nonhuman world a “natural resource,” are anathema to it. It has to do with leaving the nonhuman, and thus others, alone. It has to do with valuing the autonomy of the nonhuman, rather than subsisting as mere pleasure sponges upon the earth. That is not to say that ensuring the primary right would not increase overall human welfare. Nearby wilderness serves as a place and perspective from which we are able to truly appreciate the benefits of society because it is a baseline environment in which those benefits are absent. This place in turn allows us to fully appreciate those benefits, to experience the pleasure that inevitably declines with acclimation to them.⁶ Proximity of the nonhuman, the constant contrast and entry and exit, could thus be invaluable for maximizing human welfare. But solitude, our pure autonomy, rather than general welfare, is the value at the heart of the primary right. BP’s spilling oil into the Gulf of Mexico reduced welfare in many ways, but it was also an affront to freedom, because BP has now forced their influence upon us—expropriated vast portions of the nonhuman world.

Third, the primary right differs from efforts to protect the environment today, in that anyone familiar with environmental regulation knows how hopelessly complex it is. You cannot really understand basic laws and regulations without attorneys specializing in such things, and without scientists ready to assist the attorneys. There is something wrong with that scenario. If the environment is important, most people should understand how it is to be protected. This problem, excessive complexity, flows from the well-known fact that environmental regulation lacks a unifying principle for legislation and regulation, a cornerstone upon which environmental legal systems are built. The primary right provides one, an ideal baseline. It involves the simple demands that all persons be able to reasonably get to places where they can be truly let alone, and that the only place where that can happen, the nonhuman world, be allowed to exist and flourish around us.

Fourth, the complexity of environmental laws, combined with the lack of a unifying principle or cornerstone, also means that it is generally impossible to visualize what the “environment” those laws are designed to protect actually looks like. It is almost as if those who do not care about the environment knew they could win the fight with environmentalists by avoiding rights one can actually picture

in one’s mind (like a right to speak freely), and by instead letting the whole thing devolve into a patchwork muddle of detailed regulations that collectively erase the vision of the thing they are meant to protect. Contrast this with a simple right of reasonable access to wilderness, or places, where we can be let alone. The mental exercise is rather simple, and with it one can picture the environment in their mind: can you, reader, as you read these lines, easily get to places relatively devoid of human influence where you can literally be let alone? Do you have a way out or are you hopelessly surrounded by others, by their land, their buildings, their pollution, their culture, and their influence? How close are you to the relative border of others’ influence? Are you free to go? If you are hopelessly surrounded, know that you are less free than you should be.

Fifth, the very concept of environmental law treats human and nonhuman as a unified whole, as one big “environment.” As will be clearer below, to appreciate the primary right, you have to instead be able to see the world in terms of two worlds that are relatively polar opposites: human, say downtown Manhattan, and nonhuman, the center of Antarctica, for example. You have to see it this way because, by definition, the right to be free of others and their influence means having access to a place where humans and their influence are not, i.e., the nonhuman world. You have to be able to visualize places devoid of humans and their influence—as they were before human influence or as they would be as human influence recedes and nonhuman species dominate. Seeing the world otherwise, as one big “environment,” hides this distinction and, in a world of seven (and soon to be 10) billion, makes the very idea of nonhuman seem impossible. It therefore, conveniently, stops us from demanding access to it. It erases the very idea of opting out.

Such a frame tends to make invisible key factors that degrade the nonhuman world, like human population growth—something most modern “environmentalists” are infamous for totally ignoring⁷ but which would become the central concern in a system designed around the primary right. If we were to change the frame, and name, from “environmental law” to “nonhuman law,” we would preserve in the term itself the very thing to be protected.

Of course, speaking about the primary right in such vague and general terms raises many questions. How do we decide who must leave whom alone, and how do they do it? If I hunt in the wilderness in order to survive, do I violate the primary right of others? Must the residents of a town who enjoy local wilderness areas simply cede them to developers, clear out, and head to Yosemite? If I can move to Antarctica, or buy a boat to live in the middle of the Atlantic Ocean, does that mean my primary right is currently being respected? In other words, even though access to places outside the influence of others was probably a given for the vast majority of human existence, how do we

6. Thus, the relationship between wilderness and the polity goes one level deeper: the proximity of wilderness can bolster its own protection, because persons in the polity would actually experience and thus value it. They might also reduce their consumption by using the experience of existing in wilderness as a baseline for judging material need and want. To the extent wilderness is removed, the opposite occurs.

7. Ignoring population growth pits human demands, often to simply survive or at the very least for an occupation, against the nonhuman. Paper tiger laws and other hollow victories aside, the result of that fight is obvious.

arrange it today, in a world of seven billion humans whose influence has spread like a wildfire across the earth?

III. Leaving Others

We can answer these questions by elucidating how the primary right is again derived from closely related principles that almost all of us ordinarily accept. There are only four steps involved in deriving the right: First, consider how the right to be let alone—which we seem to accept, value, and act to achieve in our daily lives, actually works. Generally, we are let alone when we simply walk away from another person. The right to be let alone is thus often the same as the right to leave, the right to get away from, the other person or group of persons in question.

The right to exit or leave is important, not just with regard to our country of choice. Imagine if you could never leave an abusive family, dangerous and depressing neighborhood, or particular state you had come to detest. Though contours of the right(s) at stake in each of these instances—rights to privacy, to travel, to freedom of movement, to be let alone—differ, they share a common core: the right to get away from others and their influence. Further, when we leave persons, places, or things, we often wish, and we think we should be allowed, to leave them completely. For example, unless I have done something wrong or have some outstanding debts, I should not have to continue to pay one penny of taxes in Nebraska if I have severed all my ties in that state and left.

Second, if you have a right to leave any person and leave them completely, you have a right to leave all persons in this way. One implies the other. If you leave one person to be with another until you come to the end of the chain of all persons on earth, you have the right to leave that last person as well.

Third, consider what leaving all persons, completely, looks like. This is the step—the most difficult—where we have to explore what the concept of wilderness, or the nonhuman world, really means. What may come to mind, because it is the closest thing to actually leaving all others, is simply going to live at sea, or perhaps in Antarctica. These are extremes of the idea of wilderness, places on earth relatively absent human influence, or nonhuman places.

But having to go all the way to sea or Antarctica is not really leaving others and their influence, or being left alone. If you have to go all the way to sea, you are still very much under the power and influence of others, who have claimed and occupied all other places on the planet so that you have nowhere else to go. You are driven to a place you may not wish to go by the billions and billions of persons that occupy, wall off, and thereby exclude you from all the other places you could have otherwise gone on this planet. Even if all the world decided to designate Greenland as permanent international wilderness, as an empty place where people could go to exercise their primary right to be away from others, then the persons going there—like nomads obligated to live on a designated reservation sim-

ply because all of the land around it had become owned and occupied—would still be subjected to the control and influence of others.

Thinking about a specially designated wilderness is what we might call the “territory trap,” or when thinking about the third step of what it literally means to be let alone, the tendency to forget that creating a territory or state called Wilderness is still very much subjecting those within it to others’ control. It is doing something very human to the nonhuman world, trying to make it human.

Thus, a right to literally be let alone by all others, taken to its logical conclusion, implies *reasonable* access, or that the nonhuman world be relatively nearby. It does so first because being let alone means not being forced by others into specific and perhaps faraway places; the more limited your choices are made by others, the less free you are of them. Secondly, as discussed above, because the nonhuman world is by definition the world occupied by species other than humans living in their natural habitats, ensuring *all* those species continue to exist will, simply because of their sheer number, mean that their world is relatively nearby. Thirdly, reasonable access is implied because for this form of freedom to be meaningful, people must know it exists, really know in their immediate experience these places that represent it exist, and are within reach. Erasing those places, for all intents and purposes, is like a jailer erasing all evidence of the outside—the view, the sounds, the memories, etc. You would never even know an alternative exists.

To really be able to leave others, we would need to reverse the Greenland example discussed above and rather than having a place called wilderness surrounded by the human world, we would have to have human civilizations surrounded by the interconnected nonhuman world, exactly as it was many millennia ago (and perhaps also as it will be again after mass urbanization and the eventual worldwide population decline that many demographers expect). A balance between the two, between the human and nonhuman worlds, would allow each person to actually leave, to reasonably access the unified nonhuman world beyond other persons and their influence.

The fourth and final step in deriving the primary right is to recognize that in order to be able to actually and physically leave others and their influence, to truly be let alone, the surrounding wilderness we call the nonhuman world must continue to exist and be allowed to flourish. Without that nonhuman world, truly leaving others becomes impossible. If no place devoid of others and their influence exists, that influence is literally forced upon us. We cannot leave. This scenario in turn poses a serious threat to the legitimacy of any government that is based upon the consent of its governed, as there is no real possibility of consent without a reasonable alternative. Voluntary political association requires places without human power. Thus, the primary right, the right to leave and be let alone, justifies protecting the nonhuman world. It is not an “environmen-

tal” right; it is a first-generation political right not to be forced into being made subject to others.

IV. What the Primary Right Looks Like

Rights, like the right to free speech, are a lot like ideals. With free speech, we have in our mind this ideal that each person ought to be able to speak her mind and express herself without restriction. But that ideal gets balanced in everyday life against competing interests, like the interests neighbors of a particular speaker might have in sleeping at night. While the speaker is able to march about pontificating in the day, he is not allowed to blast his thoughts across the neighborhood via loudspeakers at night. Yet, despite the balancing act, the ideal itself does not go away—we keep the notion of literal and truly “free speech” in our head and use it to do the balancing.

The primary right operates in much the same way. It is based on the ideal of persons being able to go to the nonhuman world with relative ease. We might define the right as: an individual’s general human claim-right to duties of noninterference by others with (1) the rightholders’ reasonable access to local wilderness and (2) his or her access to complete biodiversity and its sufficient natural habitat, (3) paired with the same dual correlative duties on the rightholder not to influence others.

Those duties of noninterference, commonly referred to as wilderness ethics, are best thought of as the unique and uniquely valuable behavior of relative noninterference with others, which simply means leaving wilderness alone, leaving “no trace,” or minimizing your influence on the nonhuman world to keep it so. The behavior of noninterference is comparable to that of observation, the basis of the scientific method and all of the increase in human welfare it has brought. The primary right, like the scientific method, requires persons with certain capacities; those incapable of simply observing without interfering are a bane to both.

The ideal of the nonhuman, or the absence of human presence, power, and influence, is that which makes thinking about how one place is more wild than another even possible. The nonhuman thus refers to both a theoretical ideal and also actual places on earth, which, to one degree or another, are approaching or retreating from that ideal. And just as the ideal of free speech is balanced against competing interests, the ideal of the nonhuman world will be balanced against competing interests. Perhaps the developers’ interest in homes will mean you cannot walk from where you are to the forest but will have to drive, or that you will hear planes above while you are there. And yet, like the free speech example, the ideal does not go away—you use it to juxtapose the planes overhead. And you can use it to orient when acting on your right to leave others.

For example, I am exercising something that looks like the primary right when I hike away from others, alone for the day in Yosemite, among the nonhumans and their habitats and influences. But because I cannot reasonably access Yosemite due to the traffic swelling around it, and

because others in Yosemite constantly cross my path and do not exercise the wilderness ethic of leaving no trace, and because the flora and fauna have been degraded and destroyed, and because the nonhuman wilderness we call Yosemite is bordered and therefore halted by clusters of human influence, I am far from the ideal. Of course, this does not undermine the ideal itself or the primary right that protects it. The ideal and the right continue to orient and justify a call to change the existing policies—to expand Yosemite, limit car access and permits, fund species reintroduction, etc.

Yosemite is not ideal, but it is closer to the ideal than Manhattan. And that ideal and the human right protecting it are useful legally. If Congress attempts to eliminate Yosemite by building strip-malls there, only the claim that access to Yosemite and many other places like it is a fundamental human right, based on something as axiomatic as the freedom to be let alone, is likely—one way or another—to save it.

Rights aside, there is another way of appreciating this ideal of wilderness or the nonhuman world, one sounding more in the realm of equality, that we might consider. Environmental disputes rarely result in any real agreement because humans have differing values and preferences. They want to do different things to the “environment.” Given this, the nonhuman world is the only thing that represents no particular human decision, a place free of human action, and something that is therefore objectively neutral in a very special way. In that sense, it liberates us from others’ subjectivity. The nonhuman world is “objectively valuable” because it has not been reduced to a subjective use. When we alter the nonhuman world, we are not just dominating it, but dominating others. And in a world of competition between various subjective uses of scarce resources, non-use is more equitable than any subjective use. Given the difficulty of justifying our influence on others (and the questions of morality generally), that which influences the least wins out. Wilderness thus becomes an objective and neutral baseline for environmental regulation.

V. Broad Implications

The primary right is a weighty claim that demands strong action primarily because it is a necessary condition for consensual government to be legitimate in that, as discussed above, it is impossible to truly and voluntarily consent to government or human political association if there is no alternative. The weight of the claim means that it has broad implications.

For example, it will force us to examine closely competing interests that have remained virtually unexamined and only presumed to be weighty, like states’ interests in population growth and persons’ right to have large numbers of children, that seem to violate the primary right. What we will find is that those interests, when actually considered, can logically, and consistent with positive law, be narrowed to accommodate the primary right.

It will also lead us to reconsider the concept of law itself. For example, because the primary right posits zones free of human influence and thus free of political authority and obligation, it will require that persons be capable of respecting the right in the absence of sanctions. While some have theorized how legal systems might work in the absence of sanction or coercion, the primary right acts as a strong reason to consider pure legal systems that actually constitute themselves of persons disposed to respect norms *per se*, like the primary right, without sanction.

Finally, the right will force us to reconsider relatively ossified positive law doctrines, like the public trust doctrine, vicarious parental liability, Article III aesthetic injury standing, and modern substantive due process. For example, while modern substantive due process posits zones of privacy or liberty where the state is not present in our lives, such as in the decision to terminate one's pregnancy, it has been attacked as lacking a strong positive and normative foundation. Substantive due process can instead be adapted around the primary right, which requires comparable zones of liberty in order for consensual government—a bedrock principle upon which the U.S. Constitution is founded—to remain legitimate.

VI. The Arguments Against Being Let Alone

Many will reject the primary right. Some will say that humans have to dominate the nonhuman world in order to survive. Of course this is simply wrong. A small number of humans could easily survive and live a higher quality of life than we do now in a world dominated by the nonhuman, thanks to a few modern technologies. In fact, if anything, humans' proliferation and disregard for the world around them, whether through anthropogenic climate change, the development of weapons of mass destruction, or simply the competition for scarce and dwindling resources, poses the greatest threat to the survival of our species.

Others will argue that it is wrong to want to be left alone, that we should embrace all other humans and not want to be free of them. But no one alive today lives his or her life in this way. We all exclude others, many others, from our homes, relationships, work projects, and lives in general. No one wants to be influenced by everyone, and the more persons on the planet, the more persons we exclude.

Some (usually those obsessed with faddish postmodernism) will argue that nature and the nonhuman world is simply a human construct. This argument is really beneath comment, as if the only place truly free of human constructs, and which predated and might postdate our species, was created by humans.

Another argument will be that because we cannot clearly identify violators of the primary right, or because there are too many, the concept of such a "right" is simply too ethereal. Remember that the right asserts duties against all other persons in the world—just the way the right to be free from slavery or genocide does. The fact that rights place a duty on all other persons does not lessen them.

Are we all some way or another constantly responsible for loss of the nonhuman world? Yes, but we can still draw a continuum of relative responsibility for that loss, draw lines regarding permissible behavior, and articulate specific duties on states (which represents "others" generally) and international bodies that protect the primary right.

A better argument against the primary right is that, despite the fact that humans could have exercised the right for almost as long as our species existed, wilderness simply does not exist anymore because humans have in the past two centuries so dominated every corner of the earth, through anthropogenic climate change, for example. But this argument also fails. Even if the damage is already done, the right and ideal still exists, much as universal human rights continue to exist despite their constant violation under oppressive regimes. Rights tell us how things should be, not necessarily how they are. The fact that the Rwandan genocide is irreversible does not mean it did not violate human rights norms, that those responsible should not be punished, or that we should not aim—as close as we can get—for a baseline in the future where genocide does not exist. As discussed above, those rights, those "oughts" and ideals, exist and act as reasons to change the status quo in order to bring actual conditions into closer alignment with the right.

And the same can be said of the primary right. The primary right is an ideal around which to orient our behavior, a reason to change the status quo, collect compensation from those most responsible for the loss of the nonhuman world, and restore that world with those resources as best we can.

On the other hand, a clever comeback argument is that, regardless of reversing the trend of human domination, because of climate change, there will never be truly nonhuman places in the world again. This too fails for the reasons discussed above regarding rights as ideals. Just as we will never be able to reach the ideal of free speech because we have to balance it against other interests, we may never get our nearby forests (or deserts for that matter) to a state of being completely nonhuman. But we still use that ideal as a target when we do the balancing, and any place that is left to primarily nonhuman influences will, eventually, become primarily nonhuman.

But, does balancing destroy the value of the primary right, as persons can simply chip away at the ideal with their competing interests? And if this is true, does the primary right get us anywhere? While balancing does allow for competing interests to be considered, it does not undermine the value of the primary right. Recognizing the primary right *as a human right* is meaningful because not all interests get elevated to the high level of a "right," and rights usually weigh more than interests that are not rights, even when majorities favor those lesser interests. We may think society would be better off without any guns, but that does not defeat the right of even one person to be able to own a gun. When we recognize the primary right, we create a higher bar that developers, loggers, and mining

companies must overcome in order to engage in activities that detract from the nonhuman world.

The final argument against the primary right is that it is not economically or politically feasible, that we simply cannot arrange the world so that nonhuman places are reasonably nearby and accessible. This kind of argument is no more persuasive than trying to defeat a right against warrantless searches by arguing that it is not feasible to require police to get warrants. When we speak of rights, we are not speaking about economic and political feasibility, we are speaking about principles and justice that override the latter.

Unlimited human proliferation and overconsumption are the two behaviors that generally violate the primary right. Neither is physically inevitable, nor unstoppable, and no rights protect either of those behaviors that logically trump the primary right. Instead, the primary right trumps them, and calls us to action. How? Many persons today are behaving in a way that, were others to do the same, the nonhuman world would flourish again and become relatively accessible to all. These persons act in very specific ways: They try to use wilderness, rather than cultural norms, as a baseline for determining their levels of consumption, and as a result they tend to consume fewer goods and services; they prefer second-hand goods when they do consume; they intentionally forgo having children, have fewer children when they do, or adopt; they change their diets, giving up animal products, and convince others to do the same. And they fight to promote freedom against the relatively small group of persons most responsible for the loss of the nonhuman world.

Other persons can and should do the same. The primary right, the right to be let alone by others and free of them, provides a good reason to do so, much the way the right to speak freely is a good reason for people to be tolerant when other people wish to speak. The proximity of the nonhuman world to each of us is, in a way, the litmus test for our succeeding. If we succeed, the nonhuman world won't ever be far away.

If readers have not been convinced by these arguments, there is one more. If it at least might be true, upon further reflection and argument, that we would eventually want to recognize and protect something like the right, then we

are obligated now—as a provisional matter—to preserve the nonhuman world until opponents of the primary right win the debate.

VII. Conclusion

It is one thing for societies to succeed or fail, as they have for millennia, dragging the fortunes of their members up or down. It is another matter, one deeply political rather than merely “environmental,” for modern societies, bloated with billions of people and spanning the globe, to chain everyone in the world to their failings. Climate change, a form of politics without boundaries, is a good example. The nonhuman world, the only place where one is truly let alone, is an ideal stronghold and theoretical baseline against being chained in this way. Its destruction is tyranny because without it we have no choice but to be subject to others, and that is an affront to human autonomy. No one thinks we should be subject to the influence of others against our will. If the nonhuman ceases to exist, we will have no choice.

The Founders of the United States rallied around their particular version of a right to be free against what they saw as the failings of the British monarchy, in a place they saw as a wilderness free from others' control. Environmentalists, faced with losing the battle they started in the last century or giving in to a completely humanized version of the environment unmoored to the historic concept of nature or the nonhuman, need a right they can rally around as well. The primary right will work. It follows the tradition of liberalism, and calls for a right to simply be free from one another, which is a better version of freedom than its opponents will muster.

Of course, for many, what is called for herein will seem impossible, perhaps as impossible as it would have been for humans millennia ago to imagine a world flooded with billions of people surrounding one another so that little of the nonhuman would remain easily accessible. But if we envision relatively complete biodiversity, its local aspects, and reasonable access thereto, and we are as committed as we think we are to consenting to human political association and the alternative it demands, we will have already started down the road to freedom.