The Constitution of the Environmental Emergency

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Introduction

ENVIRONMENTAL LAW IS a vibrant, challenging and burgeoning field. It develops alongside rapidly evolving environmental science, spirited environmentalism and in response to the many pressing environmental problems we face today. Flip through the pages of any journal of environmental law and you will find countless ideas of how environmental law can be reformed to better secure environmental protection and myriad accounts of the ways in which past and current environmental laws have fallen and continue to fall short. What you are less likely to find, however, is sustained attention to the ways in which environmental issues strain some of our most basic assumptions about law.

This book distinguishes itself from most environmental law scholarship in that it does not attempt to solve any particular environmental problem. Rather, it articulates a theory of how the exercise of public authority can be governed by a democratic conception of the rule of law, elaborated, as it needs to be, for the special challenges posed by environmental issues. Environmental issues are in many ways an ideal perspective from which to revisit our assumptions about democracy, law, and the rule of law. One scholar has described environmental law as 'hot law' because 'the agreed frames, legal and otherwise, for how we understand and act in the world are in a constant state of flux and contestation'.[1] Environmental issues are complex in almost every way—scientifically, politically and disciplinarily. They challenge fundamental assumptions about what it means to be governed by law, which typically transpires through general, relatively stable rules enacted in advance by the legislature and interpreted by the courts. In other words, the complexity of environmental issues presents a fundamental problem for understanding how law can both constitute and constrain the state's regulative authority over the environment.

This book argues that the best way to understand the challenge that environmental issues pose for law is through the lens of an ongoing emergency. Like emergencies, environmental issues require decisions to be taken under conditions of deep uncertainty where the possibility of a catastrophe cannot be reliably eliminated in advance. We can thus glean important theoretical insights from legal theory on conventional emergencies to develop a better

[1] E Fisher, 'Environmental Law as "Hot" Law' (2013) 25 *Journal of Environmental Law* 347, 347–48. See also A Philippopoulos-Mihalopoulos, 'Looking for the Space between Law and Ecology' in A Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (London, Routledge, 2011) 1 (on the radical potential of environmental law).

understanding of the relationship between law and environmental issues. The central challenge of emergencies is succinctly captured in the work of controversial Nazi legal theorist, Carl Schmitt. Schmitt argued that the unforeseeable, existential threat—the exception or emergency—necessitates unconstrained executive discretion. He argued, in other words, that the emergency cannot be governed by law. We will see that Schmitt's challenge and its potential responses provide the framework for understanding and responding to the challenge that environmental issues pose for law.

The book elaborates a concept of the 'environmental emergency': the idea that all environmental issues contain the constitutive features of an emergency. We will see these features arise from the complex, adaptive nature of ecological systems, which makes it impossible to reliably eliminate in advance the possibility of an environmental catastrophe. Conceiving of environmental issues as an emergency has several rationales. First, it reflects the internal orientation of the field of environmental law. Much of environmental law is aimed at curbing our worst excesses and abuses of the environment, staving off a true disaster. Environmentalism, a driving force of environmental law reform, is also preoccupied with forecasts of the next imminent environmental disaster. This book taps into this deep sense that environmental issues present a distinctive, potentially existential challenge, and it inquires into the implications of this challenge for law. Second, focusing on the possibility of the worst-case scenario—the unforeseen, existential threat—allows us to develop a comprehensive theory of the rule of law. The concept of the environmental emergency reveals how law can both constitute and constrain the exercise of public authority at all times and for all issues, even in the event of an environmental catastrophe. The environmental catastrophe (eg, extreme weather, crop failure, epidemic) is a necessary feature of the concept of the environmental emergency. But this is distinct from the argument that all environmental issues confront us as an ongoing emergency, which justifies the theory of the rule of law elaborated and defended within this book. Finally, we will see that the concept of the environmental emergency provides a useful framework or outline for the book, by building on existing theoretical work on national security emergencies. The emergency framework allows us to dip into a variety of ongoing conversations in environmental law for the purpose of showing how a self-consciously theoretical approach to environmental law has the potential to reorient these conversations toward why environmental law (as opposed to governance, politics, economics, etc) is something worth having in the first place.

In this book, I defend and elaborate an understanding of the rule of law as a collective requirement on all institutions of government to publicly justify decisions on the basis of core common law principles. I build on the work of Lon Fuller, David Dyzenhaus and others who argue that what makes law law—that is, what gives law its authority—is its compliance with the rule

of law. This authority derives from the fact that the rule of law respects the autonomy of individuals, understood as rational and self-determining agents, who are capable of actively participating in shaping their public institutions. An ongoing requirement of public justification enables individuals to reason with the law; it facilitates and empowers active participation by those subject to the law. The public-justification conception of the rule of law obliges public decision-makers to justify their decisions with reasons that individuals can understand and reasonably accept. Individuals can then choose whether to obey the law or to contest it. Through this reasoning process, they are active participants in the rule-of-law project of ensuring public decisions reflect our best collective understanding of our core constitutional principles and how they can be fulfilled in any given case.

The theory presented here lies at the interface between common law constitutionalism and deliberative democracy. Common law constitutionalism holds that the common law, with its long historical evolution, reflects the deeply rooted values that are constitutive of the community. On this view, public officials must justify their decisions on the basis of core common law constitutional principles, such as reasonableness and fairness. Judges are entitled to intervene when a public decision is successfully contested on the basis that it does not reflect these principles. Theories of deliberative democracy emphasise the reason-giving demands on both citizens and officials. On this view, collective rule is legitimate when public decisions are justified by general, public-regarding reasons that those affected can reasonably accept. Others have noted this continuity between deliberative democracy and common law constitutionalism,[2] but its implications for the administrative state and environmental decision-making in particular remain to be explored. The contribution of this book is to focus squarely on this intersection, which plays out in the depths and details of environmental decision-making that simultaneously and directly engage both democratic and legal aspects of public justification. It provides a theory that explains how these environmental decisions can have both legal and democratic authority.[3]

The rule-of-law requirement of public justification provides a coherent theory from which to understand and, in many instances, reorient existing practices in environmental law. In particular, it allows us to appreciate the role of creative institutional design—even unconventional, non-adjudicative

[2] D Dyzenhaus, 'The Legitimacy of Legality' (1996) 46 *University of Toronto Law Journal* 129; H Kong, 'Election Law and Deliberative Democracy: Against Deflation' (2015) 9 *Journal of Parliamentary and Political Law* 35.

[3] The book theorises how legality can constitute 'the green state': R Eckersley, *The Green State: Rethinking Democracy and Sovereignty* (Cambridge, MA, MIT Press, 2004). It can also be understood as an exercise of administrative constitutionalism, or elaborating the norms that constitute public administration: E Fisher, *Risk Regulation and Administrative Constitutionalism* (Oxford, Hart Publishing, 2007).

institutions—in maintaining the rule of law under the conditions presented by the environmental emergency. The rule-of-law requirement of public justification allows us to refine the contours of well-known but somewhat controversial (or at least confounded) environmental principles, such as the precautionary principle and sustainable development. Moreover, we will see that these principles have an essential but unrealised role in maintaining the rule of law by modifying the requirements of the common law principles of fairness and reasonableness. Furthermore, the requirement of public justification provides guidance on how public institutions can reason adequately in light of conflicting environmental values and half-hearted legislative commitments to public justification. Finally, we will see that the public-justification conception of the rule of law provides a promising foundation for developing a meaningful constitutional environmental rights jurisprudence. While immediate law reform is not the primary objective of the book, we will see that in each of these contexts, important normative implications follow from this conception of the rule of law.

While this account of the rule of law is not necessarily tied to any particular jurisdiction, this book develops the public-justification conception in the context of Canadian environmental and administrative law. Canada presents particularly fruitful and largely unexplored terrain on which to construct a theory of environmental law based on common law constitutionalism. Canadian jurisprudence has proven fertile ground for common law constitutionalism,[4] which as we will see, provides a persuasive response to the challenge of emergencies. To date, common law constitutionalism has largely ignored the policy-dominated regulatory domain of public law. In addition, we will see that Canadian law and policy are deeply ambivalent about environmental protection. Canadian environmental law is the product of a wilderness or preservationist national identity and a natural resource exploitation reality.[5] Canada thus presents a hard case for understanding how the rule of law ought to operate in light of these deeply conflicting environmental values. In other words, environmental issues—like emergencies—can force us to re-examine the 'agreed legal frames' in both public and environmental law.

[4] MD Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 *University of Toronto Law Journal* 91; D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, Cambridge University Press, 2006); E Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford, Oxford University Press, 2011).

[5] S Wood, G Tanner and BJ Richardson, 'What Ever Happened to Canadian Environmental Law?' (2011) 37 *Ecology Law Quarter* 981, 981 and 986–87.

I. METHODOLOGY, TERMINOLOGY AND CONTEXT

The book adopts a conceptual methodology to explain what it means to govern the environment by law. It refers to this conceptual framework as the environmental emergency because it is built on the argument that environmental issues contain the constitutive features of an emergency. The environmental emergency allows us to uncover and critique existing rule-of-law assumptions in Canadian environmental law and develop an alternative account of the rule of law that takes seriously the complexity of environmental issues. The rule-of-law theory developed within this book, however, follows a tradition of democratic pragmatism.[6] Understanding the rule of law as a democratic project—ie, as an ongoing commitment to public justification—means that its content is never fixed. Public justification is essential to the process of realising, deliberating upon and re-articulating core constitutional principles. The methodology for developing this conception of the rule of law, as we will see in Part II of the book, is to draw out theoretical insight from existing institutional practices that do especially well or poorly at fostering a commitment to public justification.

The rule of law is often labelled an 'essentially contested concept' because it 'inevitably involves endless disputes about [its] proper use.'[7] Two conceptions of the rule of law are contrasted in this book. The first conception, which I refer to as the formal conception, is developed in the first three chapters. The formal conception of the rule of law emphasises the requirement of a formal allocation of distinct powers between institutions of government. The formal conception, put differently, is largely commensurate with a strong separation of powers. The second conception of the rule of law is the theory developed in the book that, at base, requires public decision-makers to publicly justify their decisions on the basis of common law constitutional principles. I refer to this as the public-justification conception, or the requirement of public justification. After chapter four, however, no such qualifying language should be necessary. The argument here is both normative and comprehensive, that is, the public-justification conception of the rule of law developed and advocated for in Part II can and should operate for all issues at all times.

[6] I borrow this term from JS Dryzek, *The Politics of the Earth: Environmental Discourses*, 3rd edn (Oxford, Oxford University Press, 2013) 99. By pragmatism, I mean the philosophical pragmatism of Charles Peirce and John Dewey.

[7] WB Gallie, 'Essentially Contested Concepts' (1955) 56 *Proceedings of the Aristotelian Society* 167, 169; J Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2004) 21 *Law and Philosophy* 137.

Environmental law also suffers from somewhat of an identity crisis. The environment is all around us. Humans are part of it, and virtually every public decision has some effect on the environment, whether intended or not. Many have therefore advocated an expansive understanding of environmental law that requires rooting out the unsustainable practices 'embedded in every aspect of economic and political life'.[8] The conventional understanding of environmental law, in contrast, tends to focus on regulating specific human activities that have direct effects on environmental and human health: eg, air and water pollution laws, endangered species protection, the regulation of natural resource development. Since the rule-of-law theory developed here is comprehensive, nothing important turns on this distinction. As will become clear, the focus of the book is on conventional environmental law and, in particular, on the conflicts between natural resource exploitation and environmental protection. While the specific case studies are essential for my methodology, the systemic features of all environmental issues are what justify approaching these issues as an ongoing emergency. By this I mean the features of complexity and the ever-present possibility of an environmental catastrophe. After making this argument in chapter one, I will refer to these features simply as complexity as opposed to uncertainty, risk or some other descriptor. As we will see, complexity best captures the kind of uncertainty we face when regulating the environment, and it is this complexity that constitutes the environmental emergency.

Before moving to the outline of the book, it is worth situating the theoretical argument in its socio-political context. This requires that I identify and respond to two principal objections to the central argument that environmental issues are best understood as an ongoing emergency. The first objection is that, at least in many liberal Western democracies, most environmental issues have not sparked the overzealous state action that characterises many conventional emergency responses. For example, in Canada, Australia and the United States, state action on perceived environmental and national security threats have starkly diverged. Counter-terror measures have proliferated, whereas state action on pressing environmental issues, such as climate change, has stagnated or regressed.[9] This seems to suggest that the problem in the environmental context is not the inability of

[8] M M'Gonigle and P Ramsey, 'Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation' (2004) 14 *Journal of Environmental Law and Practice* 333, 340. See also J Holder, 'New Age: Rediscovering Natural Law' (2000) 53 *Current Legal Problems* 151, 167.

[9] There is a wealth of (largely American) legal research that examines the reasons for widespread lethargy in response to chronic environmental issues: hypothesising and documenting the collective action problem, discounting future harm, cognitive decision-making biases. For one such example specific to this point, see: CR Sunstein, 'On the Divergent American Reactions to Terrorism and Climate Change' (2007) 107 *Columbia Law Review* 503.

law to constrain political power as it is in the national security emergency context. In this respect, many environmentalists and environmental law scholars might long for the kind of preventive state action that has emerged post-9/11.[10]

I agree with this general observation. What this perspective misses, however, is the fact that environmental issues and emergencies present the same core challenge for law. As we will see in chapter one, it is the combination of epistemic features possessed by both emergencies and environmental issues that pose particular challenges for the rule of law. Moreover, it is important to note that while environmental issues are frequently exacerbated by a lack of political will, they do not exist in a complete legal void. In Canada, the provinces, territories and federal Parliament have elected to govern the environment through law. The argument of this book is that this is a meaningful commitment, one that entails much more extensive and nuanced legal obligations than the enactment of a symbolic or perhaps equivocal statute.

The second objection might call into question the value of presenting a unifying theory across either environmental law or public law. As I have just noted, environmental law is potentially all-encompassing, and it contains 'hot problems' that resist unified frameworks.[11] Narrowing the field to public environmental law offers little help. The Canadian administrative state, for example, is comprised of an intricate network of public decision-making bodies including Cabinet, Ministers, appeals tribunals and quasi-judicial regulatory bodies, which issue and review recommendations, regulations, licences, exemptions and approvals covering an enormous range of activities that impact the environment. Perhaps, as prominent public law scholars have argued, we should view our legal system as pluralistic, where statutes are permitted to 'lead a life of their own', independent of the homogenising tendencies of the common law.[12]

The unified theory of public environmental law presented here is both defensible and valuable. It is defensible in that it does not purport to offer a blanket approach to addressing any or all environmental issues. Rather, it focuses on understanding the conditions under which the state can be said to act with legal authority when it regulates the environment. I argue that public environmental decisions will have legal authority when they are

[10] J Stacey, 'Preventive Justice, the Precautionary Principle and the Rule of Law' in T Tulich et al (eds), *Regulating Preventive Justice* (New York, Routledge, 2017) 23.

[11] Fisher, 'Environmental Law' (above n 1) 354–55 (also observing that environmental law scholarship has yet to yield such a framework).

[12] HW Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1, 22. See also S Coyle and K Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Oxford, Hart Publishing, 2004) 199–200 (arguing that the dominant view of environmental law is as a haphazard collection of legislative responses that does not contain the deeper conception of responsibility that they trace back through the history of common law property rights).

publicly justified on the basis of core constitutional principles. As we will see in chapters six and seven, these principles operate at a high level of generality, but they are not abstract; they are sensitive to particular decision-making contexts. In addition to being defensible, a coherent theory of environmental law is also valuable to the discipline. Despite the interconnectedness of environmental issues in the real world, the field of environmental law is marginalised from other areas of public law and increasingly fragmented.[13] This means that systemic flaws or weaknesses in environmental decision-making may be overlooked. For example, we will see in chapter two that the outcomes of judicial review of a wide range of environmental decisions can be explained by a common set of rule-of-law assumptions held by the courts and environmental advocates. Striving for a unified theory of environmental law allows us to focus on the core challenges of environmental issues to better understand the limits and potential of existing public law theory.

In the tradition of democratic pragmatism, the theory developed in this book is grounded in the institutional practices of environmental law. The book focuses on three detailed environmental contexts: forest law in British Columbia, the assessment of inter-provincial oil pipelines and wind turbine development. The first context spans a number of chapters, beginning with the specific circumstances of an unprecedented mountain pine beetle epidemic and moving through the broader legal and institutional architecture of forest governance in British Columbia. The extended focus on British Columbia forestry may seem technical or parochial for those unfamiliar with Canadian geographical and political landscapes. Canada is home to vast expanses of forest (paralleled only by the equally vast Canadian arctic). This image of expansive and untrammelled forest looms large in the Canadian wilderness psyche. Protecting some of this forest, in particular the old-growth coastal rainforest on Vancouver Island, led to the infamous 'War in the Woods', one of the largest acts of civil disobedience in Canadian history, which saw over 800 protesters arrested in 1993.[14] These iconic protests on Canada's west coast have had an enduring effect on environmental policy in the country to this day.[15] The subsequent examples of pipeline

[13] L Heinzerling, 'The Environment' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 703–4; Coyle and Morrow, *Philosophical Foundations* (above n 12); E Fisher et al, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law* 213, 221 and 231.

[14] DJ Salazar and DK Alper (eds), *Sustaining the Forests of the Pacific Coast: Forging Truces in the War in the Woods* (Vancouver, University of British Columbia Press, 2014) (for nuanced perspectives on the various interests and alliances at play in west coast forest policy).

[15] See ch 3 below on the forestry governance mechanisms that resulted from these protests and ch 6 below on pipeline approvals that are currently poised to instigate acts of civil disobedience of a similar or greater magnitude.

and wind turbine development are each contained in their own chapters. These two examples highlight the contemporary challenge of reshaping the Canadian resource economy to more sustainable energy sources. While the details of these examples are distinctively Canadian, the legal issues and theory embedded within them are not. These examples raise perennial environmental law issues such as the appropriate role of judicial review, regulatory instrument choice, institutional design and the interpretation of the precautionary principle, all of which are examined in the chapters that follow.

II. OUTLINE OF THE BOOK

This book is divided into two parts. In brief, Part I establishes the concept of the environmental emergency and demonstrates its utility in unpacking rule-of-law assumptions implicit within existing approaches to environmental law. Part II turns to the rule-of-law theory of public justification and its elaboration in the environmental context.

Chapter one makes the case for approaching environmental law from the perspective of an emergency. This chapter is grounded in current ecological theory, which posits that ecosystems are complex, adaptive systems, and in risk sociology, which emphasises the inherent limits of predicting the catastrophic potential of human action. Together, these literatures reveal that environmental issues possess the constitutive features of an emergency: an inability to know in advance which issues contain the possibility of a catastrophe and an inability to know in advance what to do in response to such an unforeseen event. Having made the argument that environmental issues are best approached as an ongoing emergency, the chapter then sets out Schmitt's challenge: ie, the challenge to show that emergencies can be governed by law. I canvass two potential responses to this challenge—the extra-legal approach and an accommodation approach—which provide a background framework for understanding the arguments in the two chapters that follow. Chapter one concludes by arguing that both of these responses assume a formal conception of the rule of law that is incapable of answering Schmitt's challenge.

Chapters two and three argue that the emergency framework provides a novel critique of existing approaches to environmental law. In chapter two, I argue that the dominant position in Canadian environmental law scholarship—the environmental reform position—does not face up to the emergency features inherent in environmental issues. It therefore mistakenly advocates for a formal conception of the rule of law. Much like the accommodation approach explored in the emergency literature, the environmental reform position can offer only a façade of legality to environmental decisions, an appearance of legality that does not meaningfully constrain the

exercise of administrative discretion. The chapter argues that this façade can be usefully understood in terms of legal black holes and grey holes. It illustrates how adherence to the formal conception of the rule of law has created these black and grey holes throughout Canadian environmental law.

Chapter three takes up the burgeoning literature on environmental governance. It argues that the literature correctly diagnoses the epistemic challenges of environmental issues. But because it assumes a formal conception of the rule of law, it rejects the rule of law as irrelevant to complex environmental decision-making. Much like the extra-legal approach, environmental governance proponents treat the rule of law as a luxury that we cannot afford. Instead, commentators evaluate environmental governance on the basis of an assortment of criteria: typically effectiveness, transparency, participation and accountability. And while these criteria may be important components of any conception of the rule of law, they are at best only components. This chapter argues that subsuming law within a broader paradigm of governance risks eclipsing what is distinctive about law—the fact that it respects individuals as rational agents capable of actively participating in their own system of governance. Environmental governance risks abandoning the language needed to explain fully the strengths and weaknesses of novel forms of environmental governance.

Part II of the book turns from critique to the elaboration of a democratic theory of the rule of law that responds to the environmental emergency; this is the rule-of-law theory of public justification. Chapter four introduces the contours of the theory, which forms the basis of the remainder of the book. The chapter draws out the public-justification conception of the rule of law from existing Canadian administrative law jurisprudence and argues that it responds to Schmitt's challenge by offering an account of law that both constitutes and constrains public authority. The public-justification conception requires public officials to publicly justify their exercises of authority on the basis of core common law principles, such as fairness and reasonableness. The chapter argues that the requirement of public justification lies at the interface of common law constitutionalism and theories of deliberative democracy. It argues that both theoretical traditions share an understanding of the individual as a responsible agent, capable of actively participating in the ongoing project of democratic governance under the rule of law. The requirement of public justification both protects and enables this agency through the requirement of reason-giving, a requirement informed by the common law and deliberative-democratic requirements explored in subsequent chapters.

Chapter five takes up the first of these specific requirements: creative institutional design. The crux of this chapter is that in emergency contexts (including the environmental emergency), creative institutional design will be necessary to maintain the rule of law. The chapter offers the example of the British Columbia Forest Practices Board, a hybrid institution that

approximates, in unconventional ways, the requirements of public justification across a range of environmental decisions. The chapter then draws on insights from democratic experimentalism, a branch of deliberative democracy, to show how public justification can be maintained even in complex regulatory contexts that cannot fit easily into adjudicative models of review.

The focus of chapter six is then on the specific common law principles of reasonableness and fairness. Relying on Canada's National Energy Board as an example of multifaceted institutional failure, it argues that the conventional articulation of common law principles is inadequate for the environmental context. To respect the status of the legal subject as a responsible agent in the context of environmental decision-making, reasonableness and fairness must be informed by key environmental principles, namely the precautionary principle and sustainable development. It argues that a deliberative-democratic interpretation of precaution and sustainable development has the effect of modifying general common law requirements of fairness and reasonableness in order to preserve the distinctive relationship between legal subject and lawmaker. In doing so, these core environmental principles demand of the National Energy Board a process and decisions that are justified on the basis that they attend to the interests of those affected by its decisions.

Chapter seven builds directly on the analysis in chapter six of the principle of reasonableness. Chapter seven allows us to understand how a public decision-maker can reason adequately in a challenging environmental context that engages multiple, competing environmental considerations. The context for the chapter is controversial industrial wind turbine development in Ontario. This controversy has led to a robust body of tribunal jurisprudence that considers the potential harms to human and environmental health that result from wind energy. The chapter argues that the Tribunal reasons adequately about these harms when it offers a cogent justification of its decision on the basis of the relevant statutory considerations, interpreted consistently with a common law backdrop protective of individual agency. We will see that in many instances, the Tribunal reasons adequately even though its public-justification role in protecting individual agency remains implicit. We will also see, however, that by explicitly grounding its reasoning in the public-justification conception, the Tribunal is in a position to resist submitting to the apparent 'plain meaning' of its governing statute, which threatens individual agency by purporting to preclude the operation of the precautionary principle.

Finally, in chapter eight, the emergency framework returns to the fore in order to help develop the relationship between the public-justification conception of the rule of law and a constitutional right to a healthy environment. We will see that prominent academic proposals in Canada for a Charter right to a healthy environment have neglected the need for a theory of law that is facilitative of a robust constitutional environmental rights

jurisprudence. It attends to the method of constitutional rights adjudication in Canada and reveals how the formal conception of the rule of law implicitly operates to undermine environment-related claims under existing provisions of the Charter of Rights and Freedoms. It argues for an understanding of constitutional law as 'administrative law writ large',[16] in which a written bill of environmental rights solidifies and strengthens the common law requirement of public justification.

The concept of the environmental emergency informs the overarching framework of the book's analysis. At the same time, the possibility of an actual environmental catastrophe is omnipresent, stressing our enduring vulnerability to environmental harm. Early chapters canvass a disaster in the forestry context and its legal and regulatory responses. Chapter six, on pipelines, addresses the possibility of a known but as yet unrealised disaster, namely a major marine oil spill. Chapter seven, on wind turbine development, merges both preventive and response dimensions of disaster.

In sum, the book develops a constitution of the environmental emergency. I mean 'constitution' in two senses of the term. First, the chapters of this book construct a concept of the environmental emergency with its own three-part internal constitution. The book's argument is part conceptual, part critical and part theory construction. But the term 'constitution' also signifies the fact that the theory developed in this book posits that the rule of law is constitutive of law itself. In other words, the book explains why having environmental law is something worth having. The assumption underlying most environmental law scholarship to date is that environmental law is the most powerful tool for protecting the environment. The account offered here shows that environmental law is not only that. Environmental law, in the sense defended in this book, makes the agency of individuals—their capacity for reason and self-determination—internal to the project of environmental governance. It empowers individuals to participate actively in the ongoing commitment to ensuring that environmental decisions reflect our best understanding of core constitutional principles. When public officials appeal to the legality of their decisions—eg, 'the statute permits me to convert this pristine lake into a toxic tailings pond'—this comes with its own kind of legitimacy.[17] The challenge, therefore, is to understand the rule of law as something meaningful. A rule-of-law theory of public justification answers this challenge.

[16] This idea originates with South African public law scholar Etienne Mureinik: D Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal on Human Rights* 11, 31–32.

[17] Dyzenhaus, 'The Legitimacy of Legality' (above n 2). This is central to ecofeminist perspectives on environmental law. See, eg, EL Hughes, 'Fishwives and Other Tails: Ecofeminism and Environmental Law' (1995) 8 *Canadian Journal of Women and the Law* 502. Ch 2 below covers numerous examples in which an administrative decision-maker has appealed only to the scope of delegated discretion to justify making an environmentally harmful decision.