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# Report and Recommendations Concerning Environmental Aspects of the New York State Constitution

New York State Bar Association Environmental and Energy Law Section

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**NEW YORK STATE BAR ASSOCIATION  
ENVIRONMENTAL AND ENERGY LAW  
SECTION**

**REPORT AND RECOMMENDATIONS**

**CONCERNING**

**ENVIRONMENTAL ASPECTS OF THE NEW  
YORK STATE CONSTITUTION**

**ADOPTED BY**

**THE TASK FORCE ON ENVIRONMENTAL  
ASPECTS OF THE NEW YORK STATE  
CONSTITUTION**

**AUGUST 23, 2017**

2017

*TASK FORCE REPORT*

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### Introduction and Executive Summary

The Executive Committee convened the Task Force on Environmental Aspects of the NY State Constitution in January of 2017 with the following purpose:

study and prepare a written report, to submit to the Section's Executive Committee, regarding (1) environmental issues appropriate for consideration in any amendment to the New York Constitution, beyond the issues which the NYSBA House of Delegate has already determined, and (2) constitutional issues relevant to climate change, and (3) appropriate provisions for an environmental right in the State Constitution, and (4) any other environmental issues that the Task Force considers important for submission to the Section Executive Committee<sup>1</sup>

The Task Force has met, consulted, and prepared the Report and Recommendations that follow. As described in greater detail and for the reasons provided, the Task Force recommends:

- (I) That no changes be made to Article XIV; and
- (II) Article I be amended to set forth an environmental right.

The purpose of the Report is to inform and enrich understanding of environmental issues which may be considered at a Constitutional Convention (should one occur) or with respect to proposals to amend the Constitution through the legislative process.

The New York State Bar Association supports a Constitutional Convention. If a convention is held, the Task

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\* The opinions expressed are those of the committee preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

1. Memorandum from Nicholas A. Robinson to Lawrence P. Schnapf, Proposals for a Section Task Force on Environmental Aspects of the NY State Constitution (Jan. 27, 2017).

Force recommends as follows:

### **Recommendation I**

#### ***No changes to Article XIV are needed or advisable.***

Some analyses of Article XIV<sup>2</sup> have suggested tweaks designed to update and simplify the Article's text without altering its substantive content and protections. The Task Force examined two such suggestions for how the text of Article XIV could be improved (deletion of the "as now fixed by law" clause and repeal of Section 2, the Burd Amendment) and concluded in each case that no change is needed or advisable. The Task Force is also aware of proposals to amend Article XIV that might be raised at a Constitutional Convention and could have the effect of weakening the text. The Task Force does not believe that textual amendment is necessary to improve Article XIV and further recognizes that a Constitutional Convention creates the risk that Article XIV could be weakened.

#### **(1) Evaluating the "as now fixed by law" clause**

Article XIV provides in Section 1, "The lands of the state, now owned or hereafter acquired, constituting the forest preserve *as now fixed by law*, shall be forever kept as wild forest lands."<sup>3</sup> The "as now fixed by law" clause is the key to preventing the Legislature from purporting to (re)define the Forest Preserve. The clause anchors the definition in time, in a way serving the "forever" part of the constitutional mandate.

The Constitutional Convention debates of September 7 and 8, 1894 make clear the purpose behind the phrase "as now fixed by law." The delegates knew they were "fixing" the definition of Forest Preserve in a statute not part of the Constitution and that the use of the phrase was intended to prevent the Legislature

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2. Including the New York State Bar Association, Report and Recommendations Concerning the Conservation Article in the State Constitution (Article XIV) (approved by the House of Delegates November 5, 2016).

3. N.Y. CONST. art. XIV, §1 (emphasis added).

from changing the definition by changing the statute. On September 7, delegate David McClure, Chairman of the Special Committee on State Forest Preservation which had proposed the Forever Wild Clause explained that he inserted the words “as now fixed by law” in the original draft, saying he was doing so to prevent the Legislature from ever changing the statutory definition of the phrase in Laws of 1893, chapter 332:

The object of inserting “as now fixed by law” is to prevent the Legislature from at any time limiting the extent of the forest preserves by providing that in a certain county which by the laws of the state is now a part of the forest preserves there should not be included within it, or in any way excepting, any part of the lands within that county. It was thought by the committee desirable to fix it so that as the law now constitutes the forest preserves it shall be understood to be referred to in the Constitution.<sup>4</sup>

The “as now fixed by law” clause thus serves an important function and should be retained.

## **(2) Evaluating Section 2, the Burd Amendment**

Section 2, the Burd Amendment, reserves up to three percent of the Forest Preserve “for the construction and maintenance of reservoirs for municipal water supply, and for the canals of the state.”<sup>5</sup> The Burd Amendment is specifically limited to the construction and maintenance of reservoirs for municipal water supplies and for the supplying water to the canals of the State. It does not authorize the use of Forest Preserve for water wells, nor does it authorize the flooding of Forest Preserve for flood control reservoirs or to address river level fluctuations. It is very unlikely a municipality will propose

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4. See, Robert C. Glennon, “Non-Forest Preserve: Inconsistent Use,” *in* GOVERNOR’S COMMISSION ON THE ADIRONDACK PARK IN THE TWENTY FIRST CENTURY, TECHNICAL REPORT, Vol 1, No. 5, at 76 n. 5.

5. N.Y. CONST., art. XIV, sec. 2.

a new water supply reservoir in the Forest Preserve because today's New York State Health Department is very opposed to surface water reservoirs in the Forest Preserve as a source of drinking water and would be unlikely to issue a permit for same. It is even more unlikely that anyone would ever propose a new dam and reservoir for any canal system. Section 2 thus expressly limits any prospective dam and water impoundment project and does so in a manner that renders it extremely unlikely that such a project would be pursued. For those reasons, the Task Force concludes that Section 2 should not be amended or deleted.

The Task Force also recognizes the value of the Section 4 State Nature and Historical Preserve Trust which has been used by land conservationists to protect tens of thousands of acres of scenic and ecologically "unique" lands as part of the State Nature and Historical Preserve Trust created by Section 4.<sup>6</sup> Section 4 provides for State acquisition of lands for a "state nature and historical preserve" located outside of the Forest Preserve.<sup>7</sup> The statutory authority for Article 45 of the Environmental Conservation Law is expressly predicated on Section 4 of Article XIV<sup>8</sup> and Environmental Conservation Law §§ 45-0117 and 51-0703 give effect to this provision by creating a State Nature and Historical Preserve Trust to protect unique natural resources and features of State forests and wildlife management areas designated as "unique areas" to be included in the Trust.

Therefore, the Task Force concludes that there is no need to update or amend the text of Article XIV. The Task Force is further concerned that the following contemporary Adirondack legal controversies might be addressed by the delegates of a

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6. The Task Force further notes that Section 3 of Article XIV creates the legal basis for some 750,000 acres of state forest land and 250,000 acres of state wildlife management areas outside the blue lines of the Adirondack and Catskill Forest Preserve. While Section 3 notes that the strict limits of section 1 of Article XIV do not apply to these lands, section 3 concludes with this strong legal protection for these valuable lands, declaring "that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private." N.Y. CONST. art. XIV, § 3. Section 3 preserves these valuable lands all across the state from commercial exploitation or sale.

7. N.Y. CONST. art. XIV, § 4.

8. See ECL § 45-0101.

Constitutional Convention to the detriment of the “forever wild” character of the Forest Preserve:

- A possible amendment approving an Adirondack Park network of road-like community connector snowmobile trails should the State lose the currently pending Protect the Adirondacks v. DEC case challenging the creation of such a snowmobile trail system;
- An amendment to allow all-terrain vehicle use of the great network of existing and future snowmobile trails if climate change threatens the practicality of snowmobile use and its contribution to the economy of communities in the Adirondack Park;
- a Closed Cabin Amendment redux, arising from current DEC proposals like the 5-acre “Unclassified” parcel to facilitate a dining and lodging hut-to-hut/yurt facility on the Forest Preserve lands of the Boreas Tract or other Forest Preserve lands on the 15 identified “hut to hut” trail routes in the Adirondack Park.

Article XIV presently provides robust protection to the Forest Preserve. Even small, well-intentioned changes to the text of Article XIV run the risk of occasioning unintended consequences and open the door to efforts to weaken Article XIV. The Task Force thus recommends that Article XIV should not be amended, changed or modified.

## Recommendation II

***Article I should articulate and provide for the protection of a right to clean and healthy environment.***

The Task Force supports the adoption of a constitutional right to a clean and healthful environment. We propose that the right be embodied as a new Section 19 of Article I, which contains other bill of rights provisions such as free speech and equal protection.<sup>9</sup> The beneficial operation of similar provisions

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9. The Task Force recommends incorporation of an environmental right in Article I, as opposed to Article XIV, because such a right is appropriately



in other jurisdictions, the anticipated emergence of climate change-related environmental challenges unprecedented in their severity and complexity, and the limited scope of New York's existing Conservation Bill of Rights augur in favor of the adoption of such a right.

Several states and nations have already adopted constitutional environmental rights<sup>10</sup> and efforts are underway to secure the recognition of environmental rights around the world.<sup>11</sup> In March 2017, the New York State Assembly passed Assembly Bill 6279 which would amend Article I of the Constitution by adding: "Each person shall have a right to clean air and water, and a healthful environment."<sup>12</sup> Most notably in the United States, three states—Pennsylvania, Montana and Hawaii—have enacted constitutional provisions to protect environmental values, which the courts of those states have ruled to be enforceable by citizens. In these jurisdictions, constitutional environmental rights provisions have proven to be

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viewed as on par with the other important rights protected in Article I. Additionally, any effort to amend Section 4 of Article XIV to include an environmental right might invite opponents to attempt to delete or weaken Section 5 of Article XIV, its vitally important citizens suit provision. Section 5 is critical, especially to give citizens and advocacy groups the right to sue to protect the "forever wild" character of the Forest Preserve. Existing Article XIV effectively protects the Forest Preserve in the Adirondack and Catskill State Parks. That provision, part of the State Constitution since 1894, is vital to the future of those areas of our State so important environmentally and for tourism and recreation. It should be maintained in its integrity.

10. See *Environment and Natural Resource Provisions in State Constitutions*, 22 J. LAND RESOURCES AND ENVTL. L. 73 (2002) (surveying state constitutional provisions); James R. May & Erin Daley, *Constitutional Environmental Rights Worldwide*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 329 (2011).

11. Delaware Riverkeeper, for example, has a new initiative, For the Generations, "to pursue and secure constitutional protection of environmental rights in states across the nations." Delaware Riverkeeper, For the Generations, available at <http://www.delawareriverkeeper.org/ongoing-issues/generations> (last visited Aug. 8, 2017). Additionally, the draft Global Pact for the Environment provides in Article I, "Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment." Preliminary Draft Global Pact for the Environment (June 24, 2017), available at <https://www.iucn.org/sites/dev/files/content/documents/draft-project-of-the-global-pact-for-the-environment.pdf> (last visited Aug. 8, 2017).

12. While we also recommend adoption of a constitutional environmental right in Article 1, the text that we propose differs in some respects for the reasons described *infra*.

environmentally protective, a useful means to require consideration of the interests of future generations, and have not unduly displaced legislative prerogative.

Additionally, emerging environmental threats present unprecedented societal challenges. Vexing environmental problems have emerged within the scope of traditional regulation of air and water quality, such as increased recognition of connections between pollution and asthma rates, awareness of local air pollution hot spots, and the detection of widespread contamination of drinking water with a range of pollutants (such as pharmaceuticals, PFOAs and 1,4 dioxane). More importantly, however, climate change presents challenges that have no historical analog in their scope and complexity and will require a long-term, proactive, and thoughtful governmental response.<sup>13</sup>

Finally, as presently interpreted, the existing Conservation Bill of Rights in Article XIV Section 4 does not function as a robust assertion of environmental right that can help New York meet these unprecedented challenges. The existing Conservation Bill of Rights in Article XIV, section 4, provides in relevant part:

The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.

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13. For a discussion of how the public trust doctrine can guide adaptation to climate change in the context of water resources, see Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VERMONT L. REV. 781 (2009) (describing how state public trust doctrines can support adaptive management for water resources in the context of climate change).

The Conservation Bill of Rights was held in *Leland v. Moran* to afford no “constitutionally protected property right” enforceable in the courts and its substantive charge is both limited in scope and generally understood to be fulfilled by existing environmental statutes.<sup>14</sup>

The analysis that follows (1) undertakes a close examination of the most serious concern expressed about the adoption of a self-executing constitutional environmental right, namely that it will displace legislative and executive authority with in environmental policymaking; and (2) evaluates different constructions and orientations of a constitutional environmental right. This analysis concludes that it is unlikely that adoption of a self-executing environmental right in New York would override basic principles of judicial deference to legislative and executive actions. It also recommends that the right be oriented around the concept of a governmental trust duty enforceable directly by citizens in actions against the government and that it expressly reference the interests of future generations and incorporate ecological principles.

### **(1) Assessing the implications of a self-executing right**

The potential to shift policymaking authority from the legislature to the judiciary is often identified as a chief reason not to constitutionalize environmental rights or duties. For a variety of reasons, legislatures may be more institutionally suited to develop environmental policy.<sup>15</sup> Judicial intervention may, however, be warranted when the legislative process proves inadequate to protect core environmental values,<sup>16</sup> which is

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14. *Leland v. Moran*, 235 F.Supp.2d 153, 169 (N.D.N.Y. 2002), *aff'd*, 80 Fed. Appx. 133, 2003 WL 22533185 (2d Cir. 2003).

15. See generally Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 891-899 (1996) (explaining various reasons why legislatures are a preferred venue for developing environmental policy, including that judicial intervention can reduce incentives for legislative action, legislatures are in a better position to decide environmental tradeoffs which present largely political questions, legislatures are better equipped to engage in fact-finding).

16. See generally Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1515-16 (2010) (describing the argument that even the expression of general constitutional principles should warrant

particularly likely to occur when, for example, seeking to protect the interests of future generations<sup>17</sup>; additionally, a shift of authority to the judiciary is arguably less troubling from the perspective of democratic representation at the state, as compared to the federal level.<sup>18</sup> And many lament that it is difficult for public environmental rights and concerns to be redressed in New York's courts because New York State environmental statutes lack the citizen-suit provisions found in the major federal environmental statutes.<sup>19</sup> We note the existence of long-running debate about the optimal role for the judiciary in environmental policy and that it undergirds concern about constitutionalizing environmental rights.

To inform assessment of the advisability of incorporating a more robust (self-executing) environmental right in the New York State Constitution, it is thus useful to consider whether and to what extent adopting such a right would, in fact or potential, shift environmental policymaking to the judiciary. The analysis that follows assesses the impact that robust, self-executing constitutional environmental rights have had on the distribution of judicial and legislative authority in those states where such a right or duty is recognized and seeks to envision how such a right might affect judicial authority in New York.

Ultimately, while a robust, self-executing constitutional environmental right would allow for increased judicial participation in significant environmental disputes, it is unlikely that such participation would unduly encroach on the core role of the legislature. States that recognize a robust, self-

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judicial enforcement in certain circumstances).

17. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 198 (2003) (positing that the "normative argument for constitutional intervention is stronger" with respect to "[e]nvironmental issues that involve future generations, such as the depletion of exhaustible resources, the endangerment of species, global climate change, and the use of long-lived toxics.").

18. State court judges are, for example, more accountable to the electorate and closer to state culture and legal norms and state constitutions can be more easily amended (thereby providing a more feasible means for the citizenry to override judicial constitutional interpretations with which it disagrees). Usman, *supra* note 16, at 1524.

19. See *Friends of the Earth v. Carey*, 535 F2d 165 (2d Cir. 1976) (interpreting federal citizen suit provisions to allow citizens to be "welcomed participants in the vindication of environmental interests.").

executing constitutional environmental right have not experienced a radical or undesirable shift of environmental policymaking authority to the judiciary. In Montana, judicial intervention has been relatively limited and reserved for cases presenting unusual and compelling facts. In Hawai'i, judicial intervention to enforce constitutional environmental rights has been more common and involved, but is perhaps best characterized as requiring dialogue about and attentiveness to environmental values. And in Pennsylvania, while the judiciary has twice invoked constitutional environmental rights to strike down State statutes, both cases involve disputes about the appropriate development of the State's natural gas reserves through fracking, a factual situation that closely parallels the concerns about environmental damage associated with historical exploitation of Pennsylvania's natural resources that motivated the adoption of its Environmental Rights Amendment.

Additionally, in terms of predicting how New York courts might interpret and apply a similar right, it is useful to note that when New York courts have interpreted self-executing positive constitutional rights addressed to other subjects (such as poverty), they have done so in a manner that largely preserves legislative prerogative. Finally, the text of the environmental right that we recommend for New York is oriented and phrased so as to provide the citizens of New York with a judicial backstop—a means to challenge actions affecting integral environmental values while largely preserving existing mechanisms of environmental policymaking and protection.

***Positive constitutional environmental rights and  
judicial authority***

Environmental constitutional rights<sup>20</sup> are typically

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20. Environmental rights can be expressed in a variety of ways in state constitutions and typically involve the assertion of an affirmative, individual right to a clean and healthy environment (or similar). Many state constitutions also impose trust duties. Most notably, the Hawai'i and Pennsylvania constitutions house both affirmative grants of environmental rights provisions and declare public trust duties and in both states it is the public trust duties that have proved particularly important in key decisions.

articulated as positive (second-generation or substantive) rights.<sup>21</sup> The enforcement of positive rights can require courts not only to prevent or stop government action (as would be demanded in the enforcement of negative rights), but further to compel legislative action and thus “immerse[ ] courts more deeply within the affairs of the executive and legislative branches” and raise separation of powers concerns.<sup>22</sup> A review of state judicial interpretation of positive state constitutional rights reveals that courts often deploy doctrines or approaches (political question, finding that an affirmative right is not self-executing, recognizing that the right imposes an affirmative duty on the legislature but giving the legislature broad discretion in defining the scope of the duty, narrowly interpreting the scope of environmental rights provisions, declining to hear cases on procedural grounds (such as standing or ripeness)) that largely preserve the traditional distribution of authority between the judiciary and the legislature and avoid judicial policymaking.<sup>23</sup> These approaches can be seen in New York, where at least one court has held that Section 4, the existing Conservation Bill of Rights, affords no constitutionally-protected property right enforceable by courts (effectively treating it as non-self-executing)<sup>24</sup>; and, in the context of interpreting Article XVIII, Section 1 (imposing an affirmative obligation to help the needy), courts have largely deferred to the

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21. For a discussion of the distinction between positive and negative constitutional rights, see Usman, *supra* note 16, at 1462-1464.

22. *Id.* at 1495.

23. Usman, *supra* note 16, at 1497-1506; Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, *supra* note 17, at 163-65 (2003); Thompson, *Environmental Policy*, *supra* note 15, at 896-97.

24. *Leland v. Moran*, 235 F.Supp.2d 153, 169 (N.D.N.Y. 2002), *aff'd*, 80 Fed. Appx. 133, 2003 WL 22533185 (2d Cir. 2003). Of note, it is also relatively difficult to demonstrate standing in New York in many environmental public interest cases. Albert K. Butzel; Ned Thimmayya, *The Tyranny of Plastics: How Society of Plastics, Inc. v. County of Suffolk Prevents New Yorkers from Protecting Their Environment and How They Could Be Liberated from Its Unreasonable Standing Requirements*, 32 PACE ENVTL. L. REV. 1, 2 (2015) (lamenting the stringency of standing requirements under SEQRA and documenting that “numerous other states have developed standing doctrines that more capably match the purposes of their environmental protection acts and address the ecological complexities of environmental harms yet also prevent frivolous complaints from disrupting judicial efficiency”).

legislature regarding the adequacy of benefits.<sup>25</sup>

In some circumstances, however, courts have applied strict scrutiny to state constitutional affirmative rights (see discussion of application of Montana's environmental right, *supra*) or become deeply enmeshed in defining and overseeing the implementation of policy necessary to satisfy the state constitutional affirmative right (for example, the New Jersey Supreme Court's involvement in school finance litigation).<sup>26</sup> Both of these approaches to interpreting affirmative rights in state constitutions (strict scrutiny and active judicial management) can result in greater judicial policymaking at the expense of legislative prerogative.

To better understand the potential for a constitutional environmental right to give rise to increased policymaking on the environmental by the judiciary, a short review follows of the experience in the three states with positive constitutional environmental rights where those rights have been treated as self-executing and have not been otherwise unduly limited through court interpretation, Hawai'i, Montana and Pennsylvania.<sup>27</sup>

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25. Usman, *supra* note 16, at 1504-05; Sylvia Ewald, Note, *State Court Adjudication of Environmental Rights: Lessons from the Adjudication of the Right to Education and the Right to Welfare*, 36 COLUM. J. ENVTL. L. 413, 445-47 (2011) ("New York courts have taken a relatively conservative approach to welfare rights, and are highly deferential to the legislature in this area.").

26. Usman, *supra* note 16, at 1508-11.

27. Of note, six state constitutions articulate environmental rights, Sylvia Ewald, Note, *State Court Adjudication of Environmental Rights: Lessons from the Adjudication of the Right to Education and the Right to Welfare*, 36 COLUM. J. ENVTL. L. 413, 420 (2011), although many more address environmental matters in some fashion (including through the identification of government trust duties). Of the state constitutions articulating environmental rights, two environmental rights provisions are not self-executing as they textually require legislative action (Massachusetts, Rhode Island). *Id.* at 423. Another state environmental right provision (Illinois) is explicitly self-executing, but has been interpreted primarily as a means to demonstrate standing in claims based upon other state laws. *Id.* at 426-29. See also *People v. Pollution Control Bd.*, 129 Ill. App. 3d 958, 964, 473 N.E.2d 452, 456 (1984) (holding that the intent of the Illinois constitutional environmental rights provision was merely "to remove the special injury requirement for standing" and thus functions only "to ensure standing, not to create substantive causes of action.").

*Hawai'i*

Article XI, Section 1 of the Hawai'i Constitution provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i'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. All public natural resources are held in trust by the State for the benefit of the people.<sup>28</sup>

Article XI, Section 9 of the Hawai'i Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.<sup>29</sup>

The trust duty set forth in Article XI, Section 1 coexists with and is defined with reference to common law public trust principles. While it is difficult to discern precisely what the constitutional expression of the trust duty adds to underlying common law public trust doctrine, Hawai'ian courts have been clear that the constitutional expression strengthens the trust duty, observing that through the "constitutional affirmation of a trust duty the people of this state have elevated the public trust doctrine to the level of a constitutional mandate."<sup>30</sup> Courts

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28. HRS Const. Art. XI, § 1.

29. HRS Const. Art. XI, § 9.

30. *In re Water Use Permit Applications*, 94 Haw. 97, 131, 9 P.3d 409,



invoking Section 1 have further suggested that judicial review is more searching when public trust duties are involved, noting that “while agency decisions affecting public trust resources carry a presumption of validity,” ultimately “[a]s with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai’i rests with the courts of this state.”<sup>31</sup> In the context of water resources (most closely aligned with traditional, common law understandings of the public trust doctrine), Hawai’ian courts have actively defined<sup>32</sup> and policed the scope of public trust duties, making clear that the public trust doctrine has “independent vitality,” to “inform the [State Water] Code’s interpretation, define its permissible ‘outer limits,’ and justify its existence.”<sup>33</sup>

While the Section 1 public trust duty has been developed primarily with regard to water resources, it has also been held to encompass lands in the public domain.<sup>34</sup> In *Mauna Kea*, the Supreme Court of Hawai’i held that the Board of Land and Natural Resources had violated, *inter alia*, Article XI, Section 1 of the Hawai’i Constitution as a matter of law by deciding the merits of an application for a permit for a proposed astronomy observatory on Mauna Kea before conducting a contested case hearing in which the public trust doctrine, and the obligations it imposes on the State, could have been duly considered.<sup>35</sup> The court held that Mauna Kea was within the public trust and that “an agency of the State must perform its statutory function in a manner that fulfills the State’s affirmative constitutional obligations,” namely “fashion procedures that are commensurate to the constitutional stature of the rights involved.”<sup>36</sup> Notably, however, the court’s decision did not rest

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443 (2000).

31. *In re Water Use Permit Applications*, 94 Haw. 97, 143, 9 P.3d 409, 455 (2000).

32. *In re Waiola O Molokai, Inc.*, 103 Haw. 401, 429, 83 P.3d 664, 692 (2004) (exploring the scope of public trust duties relating to water resources).

33. *In re Water Use Permit Applications*, 94 Haw. 97, 133, 9 P.3d 409, 445 (2000).

34. *Morimoto v. Bd. of Land & Natural Res.*, 113 P.3d 172 (Haw. 2005) (suggesting in dicta that the public trust could apply to biodiversity).

35. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 409, 363 P.3d 224, 257 (2015).

36. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 414, 363 P.3d 224, 262 (2015).

solely on the Section 1 trust duty; the court also held that issuance of the permit before a contested case hearing violated the due process rights of parties with standing to assert Native Hawaiian traditional and customary rights.

Hawai'i's constitution also sets forth the right to a clean and healthful environment in Article XI, Section 9. This constitutional right was long referenced by Hawaiian courts primarily to support liberalized standing. However, in *Ala Loop Homeowners*, the Hawaii Supreme Court held that article XI, Section 9 is self-executing and provides an implied private right of action to enforce State laws relating to environmental quality.<sup>37</sup> The court thus held that a neighborhood association had a private right of action to seek to enforce land use statutes against a charter school. In its decision, the court noted the intent of the framers at the 1978 Constitutional Convention to increase public involvement:

Your Committee believes that this important right deserves enforcement and has removed the standing to sue barriers, which often delay or frustrate resolutions on the merits of actions or proposals, and provides that individuals may directly sue public and private violators of statutes, ordinances and administrative rules relating to environmental quality. The proposal adds no new duties but does add potential enforcers.<sup>38</sup>

Notably, although *Ala Loop Homeowners* would seem to invite suits to enforce state environmental laws, few environmental decisions have relied on *Ala Loop Homeowners* in the intervening seven years. Moreover, the court also signaled deference to the legislature in defining the scope of the constitutional environmental right, observing that Article XI, Section 9 “recognizes a substantive right ‘to a clean and

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37. *Cty. of Hawaii v. Ala Loop Homeowners*, 123 Haw. 391, 417, 235 P.3d 1103, 1129, 1134 (2010).

38. *Cty. of Hawaii v. Ala Loop Homeowners*, 123 Haw. 391, 414, 235 P.3d 1103, 1125-26 (2010) (citing to Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of 1978, at 689–690 (1980)).

healthful environment,’ with the content of that right to be established not by judicial decisions but rather ‘as defined by laws relating to environmental quality.’”<sup>39</sup>

In Hawai’i, then, the constitutional assertion of a public trust duty appears to have resulted in significant judicial oversight, particularly with regard to the development of policy governing water resources (a subject matter with respect to which there is often some judicial involvement even absent a constitutional provision as a result of the “amphibious” scope of the common law public trust doctrine). Judicial oversight is both substantive (requiring, for example, that intergenerational interests be considered) and procedural (compelling procedures sufficient to assure consideration of public trust values). Judicial intervention does not, however, approach the level of judicial management sometimes seen in the context of other state constitutional positive rights, such as education or assistance to the needy. The judiciary appears to be adding its voice to a dialogue with agencies and the legislature about appropriate considerations and processes in environmental policy—a level of judicial involvement with which even many wary of undue judicial aggrandizement are likely comfortable. The constitutional enshrinement of an environmental right, while interpreted to be self-executing and to provide a right of action to enforce environmental laws, has not yet resulted in notable judicial oversight of environmental policy.

### ***Montana***

Montana’s constitution provides in relevant part:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . .<sup>40</sup>

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39. *Cty. of Hawaii v. Ala Loop Homeowners*, 123 Haw. 391, 409, 235 P.3d 1103, 1121 (2010) (citing to *Stand. Comm. Rep. No. 77*, in 1 *Proceedings of the Constitutional Convention of Hawai’i of 1978*, at 689).

40. *Mont. Const. art. II, § 3*.

- (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
- (2) The legislature shall provide for the administration and enforcement of this duty.
- (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.<sup>41</sup>

For many years, the Montana Supreme Court referenced the constitutional environmental provisions to uphold State action, but declined to rely on those provisions to “challenge actions harming the environment.”<sup>42</sup> However, in 1999, the Montana Supreme Court held that an amendment to Montana’s Water Quality Act which excluded certain activities from review under the Act’s nondegradation policy, thereby allowing the discharge of arsenic-containing water without environmental review, implicated the right to a clean and healthful environment, and could survive only after the application of strict scrutiny on remand.<sup>43</sup> The Montana Supreme Court found that the right to a “clean and healthful” environment is a fundamental right and that “any statute or rule which implicates that right must be strictly scrutinized and can only survive strict scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.”<sup>44</sup> Two years later, the Montana Supreme Court applied this holding to private actions, relying on the constitutional provisions to invalidate a private contractual provision that would have required drilling a well through a contaminated aquifer, potentially spreading the contamination.<sup>45</sup>

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41. Mont. Const. art. IX, § 1.

42. Thompson, *Constitutionalizing the Environment*, *supra* note 17, at 167.

43. MEIC v. DEQ, 296 Mont. 207, 231 (1999).

44. MEID v. DEQ, 296 Mont. 207, 225 (1999).

45. Cape-France Enterprises v. Estate of Peed, 305 Mont. 513 (2001).

By invoking strict scrutiny and extending the reach of the constitutional provisions to private actions, these cases would appear to have significant potential to increase judicial policymaking in the environmental realm. The cases, however, have not prompted a flood of litigation or a radical redistribution of policymaking to the judiciary. Few discovered cases have successfully relied on this precedent and, while it is too early to know how case law will evolve, to date the most enduring principle to have emerged is that legislative exemptions to environmental statutes will be subject to close scrutiny. Indeed, the Montana Supreme Court “has begun to demarcate the limits of the MEIC holding” in a manner that “suggests that the court will be deferential to state and local governments” and “will continue to give deference to the interpretations of administrative agencies.”<sup>46</sup> In 2012, for example, the Montana Supreme Court limited the scope of its holding that the environmental right is fundamental, subjecting a statute deferring environmental review for a coal strip mining operation until the permitting stage to only rational basis review. The Court’s reasoning was that

the leases themselves do not allow for any degradation of the environment, conferring only the exclusive right to apply for State permits, and because they specifically require full environmental review and full compliance with applicable State environmental laws, the act of issuing the leases did not impact or implicate the right to a clean and healthful environment in Article II, Section 3 of the Montana Constitution.<sup>47</sup>

Nonetheless, in the words of one scholar, “[t]he Montana

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46. Ewald, Note, *supra* note 27, at 432-33. See generally John D. Echeverria, *State Judicial Elections and Environmental Law: Case Studies of Montana, North Carolina, Washington, and Wisconsin*, 16 VT. J. ENVTL. L. 363, 376 (2015) (observing that “in the last several years, environmental advocates have suffered several important losses in the Supreme Court, suggesting a shift in attitudes on the Court toward environmental cases.”).

47. *N. Plains Res. Council, Inc. v. Montana Bd. of Land Comm’rs*, 2012 MT 234, ¶ 19, 366 Mont. 399, 406, 288 P.3d 169, 174 (2012).

court's powerful interpretation of the constitutional right to a clean and healthful environment . . . affects agency decisions, thwarts legislative efforts to give polluters and developers statutory breaks from environmental laws, and infuses public debate on environmental issues."<sup>48</sup>

### *Pennsylvania*

Article I, Section 27 of Pennsylvania's constitution, the Environmental Rights Amendment, provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>49</sup>

Section 27 is located in Article I, the Pennsylvania's Declaration of Rights, which also provides for religious freedom, freedom of speech, and protection from unreasonable search and seizure.<sup>50</sup> Section 25 declares that rights set forth in Article I are "excepted out of the general powers of government and shall forever remain inviolate."<sup>51</sup>

Early Pennsylvania cases interpreted Section 27 as a grant of power to the government (as opposed to a limitation upon it) and required only that government decisions challenged as violating Section 27 satisfy a three-part balancing test largely divorced from the Section's text (the Payne test).<sup>52</sup> Courts also

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48. Jack R. Tuholske, U.S. State Constitutions and Environmental Protection: Diamonds in the Rough, 21 *Widener L. Rev.* 239, 245 (2015).

49. Pa. Const. art. I, § 27.

50. Pa. Const. art. I, §§ 3, 7, 8.

51. Pa. Const. art. I, § 25.

52. *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 594 (Pa. 1973); *Payne v. Kassab*, 312 A.2d 86, 97 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). *See also* Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 *ENVTL. L.* 463, 473-78 (2015) (summarizing pre-

came to understand the section to not be self-executing.<sup>53</sup> So construed, Section 27 had little practical effect.

In 2013, in *Robinson Township*, a plurality of the Pennsylvania Supreme Court invoked Section 27, in particular its trust provisions, to strike down as unconstitutional a State statute (Act 13) that amended the 1969 Oil and Gas Act to impose a regulatory structure for unconventional gas development, including *inter alia*, by overriding local ordinances.<sup>54</sup> In deciding that Act 13 violated the Section 27 (primarily its trust clause), the plurality clarified that because Section 27 appears in Article I it imposes a limit on government power and that the right is self-executing.<sup>55</sup>

In *Pennsylvania Environmental Defense Foundation v. Pennsylvania*, the Pennsylvania Supreme Court, this time in a majority decision, expanded on *Robinson Township*, striking down legislation that allowed royalties from oil and gas drilling to be used for non-environmental (general) purposes with consideration of trust duties.<sup>56</sup> *Pennsylvania Environmental Defense Foundation* built on *Robinsons Township* in several important ways, including by expressly overruling the deferential Payne test for assessing violations of the Environmental Rights Amendment and holding that private trust law principles are to be used to interpret the scope of the Commonwealth's trust duty. The majority invoked private trust law and reasoned that the proceeds from the sale of trust assets become part of the corpus of the trust and must be managed consistent with trust purposes; it thus held that the Commonwealth had violated its fiduciary duties in statutes directing the use of trust proceeds for general purposes without consideration of trust purposes.

It is too early to fully appreciate whether and how a reinvigorated Section 27 might shape Pennsylvania law. One expert scholar (writing before *Pennsylvania Environmental*

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*Robinson Township* Pennsylvania cases interpreting Section 27).

53. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, *supra* note 52, at 475 (describing the evolution of Pennsylvania caselaw regarding whether Section 27 is self-executing).

54. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

55. *Id.* at 948, 964-65 & n. 52.

56. 161 A.3d 911 (June 20, 2017).

*Defense Foundation* was decided) concluded that most post-*Robinson Township* cases “are more about filling gaps and repairing inadequacies in the existing environmental regulatory system than they are about overturning that system and replacing it with something else. While public constitutional rights undergird the entire regulatory system, they are likely to be applied directly in only a relatively small percentage of cases.”<sup>57</sup>

While at first blush *Pennsylvania Environmental Defense Foundation* may seem like use of a constitutionalized environmental right for precisely the type of judicial aggrandizement feared by many, two points bear noting that should temper this concern. First, both occasions on which the Pennsylvania Supreme Court has struck down legislation using the Environmental Rights Amendment have involved a factual situation (rapid, economically-motivated exploitation of a natural resource) that closely mirrors the concerns that animated adoption of the Environmental Rights Amendment (such as the environmental harms from timbering and coal mining).<sup>58</sup> Faced with the rapid scale up of fracking to exploit Pennsylvania’s natural gas resources, the Environmental Rights Amendment can thus be viewed as functioning as a judicial backstop, providing the Pennsylvania Supreme Court with a means to strike down State laws that in its view went too far in favoring the short-term economic needs of the present generation over conservation of the underlying natural resource for current and future Pennsylvanians. Additionally, *Pennsylvania Environmental Defense Foundation* turns on the majority’s decision to invoke and apply technical aspects of private trust law.

We are doubtful about the propriety of applying technical aspects of private trust law to a constitutionally-expressed environmental public trust right and recommend that the drafting and legislative history accompanying the adoption of an environmental right in New York should indicate that it is

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57. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, *supra* note 52, at 514.

58. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 960-63 (Pa. 2013); *see also Penn. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (June 20, 2017).



grounded in the traditional public trust doctrine.<sup>59</sup>

### ***Summary and conclusions***

The more specific and detailed the constitutional right, the more readily we can rely upon strong and consistent judicial intervention in its defense without much risk of judicial aggrandizement.<sup>60</sup> The Forever Wild provision in the New York State Constitution presently functions in this fashion, with courts regularly enforcing its clear constitutional command.<sup>61</sup> However, the defining environmental problems and goals of our generation and the next—including most notably climate change and sustainability—are so wide-ranging and complex in their causes, manifestation, and needed policy response (most of which are difficult to anticipate) that they cannot be captured in a neatly defined constitutional command the enforcement of which obviates the need for judicial interpretation and (possibly) more engaged judicial involvement. These issues are nonetheless of central—constitutional—importance.

Scholars identify a number of potential benefits of constitutionalizing public rights. Because constitutional rights “trump inconsistent statutes and regulations” they “create a legal bulwark against incursion by the legislative or executive branches.”<sup>62</sup> From a federalism perspective, some have

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59. *Penn. Evtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 943 (June 20, 2017) (Baer, J., dissenting) (arguing that the Environmental Rights Amendment should be interpreted using the principles of the public trust doctrine as opposed to “precepts of private trust law”).

60. Usman, *supra* note 16, at 1516-17 (describing such provisions as “highly specific detailed affirmative rights provisions” and noting that “[r]igorous [judicial] enforcement of highly specific affirmative rights provisions is warranted.”).

61. As stated *supra*, we do not recommend tinkering with the language of Article XIV. In light of the large body of case law interpreting the Forever Wild provision (and the extent to which it is indexed to the precise language of that provision), the great benefit it provides, and the potential for efforts to weaken to same (or simply cause inadvertent diminution), should a Constitutional Convention occur, we would recommend that delegates not touch or amend Article XIV in any respect.

62. John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, *supra* note 52, at 471-72.

theorized that “the identification and enforcement of state constitutional rights can serve as a mechanism by which state governments can resist and, to a degree, counteract abusive exercises of national power.”<sup>63</sup> Constitutionalized public rights are also more permanent because it is harder to amend a constitution than to alter statutes or regulations.<sup>64</sup> And some posit that “because of their enduring nature and their higher legal status, public rights of the kind embodied in a bill of rights tend to more easily become part of the broader public discourse and public values over the long term than provisions in statutes or regulations,” thereby “foster[ing] the values they embody.”<sup>65</sup>

While conceding that a robust, self-executing environmental right (and/or trust duty) carries with it the possibility of an expansion of judicial authority, experience gleaned from three other States and New York’s application of other affirmative constitutional rights suggests that there is little risk, in particular in New York, that this will unduly displace legislative prerogative. In the words of one scholar, “courts have seldom invoked substantive environmental provisions to constrain or dictate state policy except in ‘transition periods,’ when some or all of the political branches of state government have lagged behind public opinion on an important issue.”<sup>66</sup> And even where, as in Hawai’i, courts have interpreted constitutional environmental rights and duties in a more expansive fashion, the result has been judicial insistence upon consideration of and respect for core, constitutional environmental values, such as a recognition of the interests of future generations.

## **(2) Orientation and wording of a constitutional environmental right**

There is great variation in the wording of constitutional

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63. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L. J. 1003, 1004 (2003).

64. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, *supra* note 52, at 471-72.

65. *Id.*

66. Thompson, *Environmental Policy and State Constitutions*, *supra* note 15, at 865.

environmental rights provisions, with constitutional texts ranging from relatively bare assertions of a right to a healthy environment to detailed descriptions of the content of the environmental right.<sup>67</sup> Having reviewed many articulations of constitutional environmental rights, examined how they have functioned (in particular in state constitutions), and considered the specific needs of New York, the Task Force believes that the constitutional text that establishes a constitutional right to a healthy environment should explain that a healthy environment requires the conservation and protection of our natural resources, clarify that natural resources necessary to a healthy environment belong to the people in common, and make clear that the State has the duty to protect these natural resources. The constitutional text should provide guidance for understanding the meaning of the right to a healthy environment by (a) describing it with reference to ecosystems and the services that they provide; (b) making clear that the right is held by and associated duties owed to future generations; and (c) explaining that the natural resources that support a healthy environment constitute a public trust. It should also clarify the government's duty to conserve and protect the public natural resources held in trust for the public and provide a mechanism for New Yorkers (citizens, through application to the judiciary) to require that the government meet its duty.

Specifically, the Task Force recommends that a constitutional environmental right for New York should:

- define the right to a healthy environment to include *inter alia* resilient and diverse ecosystems;
- clarify that the public natural resources of New York

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67. *E.g.*, CONSTITUTION OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 413 (“The State shall promote energy efficiency, the development and use of environmentally clean and healthy practices and technologies, as well as diversified and low-impact renewable sources of energy that do not jeopardize food sovereignty, the ecological balance of the ecosystems or the right to water.”); art. 414 (“The State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk.”), available *from* <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

furnish the fundamentals of a healthy environment and are held in trust by the State for the benefit of the people, including future generations;

- assert the State's duty to conserve and protect New York's public natural resources to safeguard the people's right to a healthy environment; and
- provide for any person to enforce the right against the State and its subdivisions through appropriate legal proceedings.

Together, these principles, which are explained in further detail below, can be used to develop a constitutional environmental right that provides meaningful protection to citizens and direction to courts and legislators as New York navigates modern environmental challenges. A right incorporating these principles would invite a judicial oversight role and provide the judiciary with sufficient guidance to enable courts to meaningfully engage while defining and limiting the scope of judicial involvement so as to prevent undue encroachment on the legislature's policymaking role.

### *Ecosystem frame*

Our recommendation to index a healthy environment to resilient and diverse ecosystems reflects a recognition of our embeddedness in and reliance on and impact upon natural systems. This recognition will be important as we seek to achieve sustainability and prepare for and navigate the impacts of climate change. It also reflects an understanding of the relationship between nature and man that accommodates both anthropocentric values (the services that ecosystems provide that advance human well-being) and inherent existence values, including the value of diverse species.

Since the 1970s "growth vs. conservation" has been a recurring dilemma. The goal should be to balance the market's appetite for "resources" within appropriate parameters. We can see that the law we have developed is not preventing the disintegration of many ecosystems. Climate change and low-level chemical exposures are two examples. There is a disjunction between our legal expectations and ecological

reality. The fate of our essential ecological infrastructure is uncertain and the legal response not yet adequate.<sup>68</sup>

Meanwhile, ecology and its constituent sciences and tools are developing rapidly. One suggestion for the law that has emerged from ecological studies is that we supplement use of the term “environmental” with the more concrete term(s), “ecological” or “ecosystem.” While the “environment” is abstract, ecosystems are physical, local, and temporal. An ecosystem can be mapped and studied. Ecological terminology, frameworks and principles can assist the legal system in protecting the actual environment.<sup>69</sup>

Professionals in ecology and related disciplines are considering how best to manage and preserve ecosystems so that their functional integrity is supported and maintained. The literature on ecosystem services, ecological integrity and sustainability presents new possibilities and reveals the sources of risks we are recognizing now. An important step to addressing these risks should be to acknowledge (or strengthen) the connection between ecosystems and those who live in them, to recognize a grounded legal basis for the inhabitants of ecosystems to participate in its protection.

### ***Public trust***

We recommend indexing the constitutional right to a healthy environment to a government trust obligation. The concept of environmental public trust is historical and familiar, but also dynamic and flexible.<sup>70</sup> In New York, the common law

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68. Johan Rockström & Mattias Klum, BIG WORLD, SMALL PLANET: ABUNDANCE WITHIN PLANETARY BOUNDARIES 64-77 (2015) (identifying key planetary boundaries).

69. The term “ecosystem” refers to the manner or process of how nature constitutes itself, creating the infrastructure we rely upon. The Millennium Ecosystem Assessment defined ecosystem services broadly as “the benefits people obtain from ecosystems. These include provisioning services such as food, water, timber, and fiber; regulating services that affect climate, floods, disease, wastes, and water quality; cultural services that provide recreational, aesthetic, and spiritual benefits; and supporting services such as soil formation, photosynthesis, and nutrient cycling.” MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: A FRAMEWORK FOR ASSESSMENT 49, 54-55 (2003).

70. See Mary Christina Wood, NATURE’S TRUST – ENVIRONMENTAL LAW

public trust doctrine protects uses of navigable waters and has been extended to safeguard municipal and State parks from being alienated or converted to nonpublic use, to preserve forests, and to protect historic sites.<sup>71</sup> The concept of treating environmental resources as a public trust is likewise reflected in New York statutes.<sup>72</sup> Grounding a constitutional environmental right in traditional public trust concepts thus provides a grounding for judicial interpretation. We fear that judicial reluctance to elaborate on a bare assertion of a right to a healthy environment would result in such a provision laying fallow. Public trust principles can, moreover, guide government response to emerging environmental challenges, like climate change, that require grappling with aggregated harms, future impacts and questions about long term sustainability. The public trust doctrine articulates the existence of some outer limits on private use of natural resources and it reaffirms the democratic goal of broad access to meet the people's common and long term needs and opportunities.

One concern expressed about the creation of a constitutional environmental right is its potential to impact private property rights. We would recommend making an environmental right self-executing only as against the State with respect to satisfaction of its public trust duty. As such, it could not be relied upon to bring suit directly against the owner of private property. Of course, it is possible that in fulfilling its public trust duty to conserve and protect public natural resources to protect the constitutional environmental right the government may adopt laws and regulations that restrict private activity. It is

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FOR A NEW ECOLOGICAL AGE (Cambridge 2014).

71. *Friends of Van Cortlandt Park v. City of N.Y.*, 95 N.Y.2d 623 (2001) (stating that “our courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated. . .for non-park purposes.”); *Town of North Elba v. Grimditch*, 98 A.D.2d 183, 188 (3d Dep’t 2012).

72. See N.Y. Parks Rec. & Hist Preserve Law § 3.0l (protecting State owned parkland throughout the State); N.Y. Parks Rec & Hist Preserve Law § 19.05 (safeguarding historic sites as parks to be protected); N.Y. Evtl. Conservation Law, §15-1601 (McKinney 2011) (declaring that “all the waters of the state are valuable public natural resources held in public trust. . .and this state has a duty as trustee to manage its waters effectively for the use and enjoyment of present and future residents and for the protection of the environment.”).

important to note, however, that these actions can just as well be expected to *enhance* private property rights by promoting environmental conditions that improve the enjoyment and value of property.

Concerns might be raised that constitutional affirmation that public natural resources are held as a public trust might prevent private property owners from obtaining just compensation through a regulatory takings claim. A vested property right is a precondition for a regulatory takings claim and for purposes of the Takings Clause, property is defined with respect to “the restrictions that background principles of the [s]tate’s law of property and nuisance already place upon land ownership.”<sup>73</sup> Thus, a property owner cannot obtain just compensation where background principles of state property or nuisance law (including, possibly, the public trust doctrine) already limit the scope of the property right in the manner of the challenged regulation.<sup>74</sup> Notably, “[g]overnment defendants have successfully raised the public trust doctrine as a defense in a number of takings cases across the country, particularly those involving submerged lands,” although whether and under what circumstances the public trust doctrine qualifies as a background principle that will defeat a takings claim remains unsettled.<sup>75</sup>

We think it unlikely that constitutional assertion that public natural resources constitute a public trust will significantly impact private property owners’ opportunities to obtain just compensation. It is unclear whether a constitutional assertion of public trust would be deemed a relevant background principle. Moreover, in many cases, the public trust will overlap with other recognized background principles that limit the use of property, such as the exercise of police powers or the prerogative to intervene to prevent private property from being used in a manner that unreasonably interferes with the rights of others, which already forestall takings claims. And, as recently reiterated by the U.S. Supreme Court in *Murr v. Wisconsin*, whether a regulatory taking has occurred typically

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73. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

74. *Id.*

75. John D. Echeverria, *The Public Trust Doctrine As A Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 934 (2012).

depends upon the particular facts.<sup>76</sup> We thus do not believe that there is significant risk that articulation of a constitutional public trust and associated duty relating to public natural resources would unduly affect the rights of private property owners.

### *Enforcement*

To be effective, the environmental right should be self-executing by providing for any person to enforce the right against the State and its subdivisions through appropriate legal proceedings. As discussed at length above, absent such an enforcement mechanism, the right may lay fallow and provide little value. Additionally, allowing for citizen enforcement should not occasion undue judicial aggrandizement. One important question raised, however, in structuring a provision to allow for enforcement of the right by citizens against the State is which entities are subject to the duties and responsibilities created by the right and subject to suit. In short, how should the State and its subdivisions be defined and understood?<sup>77</sup>

It would be inadequate to limit suits to actions directly against the New York State Legislature. Actions and decisions with significant impacts on the State's environment and natural resources are commonly undertaken by a multitude of government actors. Having looked to New York statutes which address obligations of government for guidance,<sup>78</sup> the Task Force

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76. *Murr v. Wisconsin*, 137 S.Ct. 1933, (“A central dynamic of the Court’s regulatory takings jurisprudence, then, is its flexibility. . . . In adjudicating regulatory takings cases a proper balancing of these principles requires a careful inquiry informed by the specifics of the case.”).

77. Other states’ environmental right provisions vary as to who is covered and who can initiate enforcement. In Pennsylvania, for example, the constitutional text places the duty on the “Commonwealth,” which courts have interpreted to include “all levels of government in the Commonwealth.” *Franklin Twp. v. Com., Dep’t of Env’tl. Res.*, 500 Pa. 1, 8–9, 452 A.2d 718, 722 (1982). In Hawai’i, public natural resources are held in trust by “the State,” the “State and its political subdivisions shall conserve and protect Hawai’i’s natural beauty and all natural resources,” and the right to a clean and healthful environment is enforceable by “[a]ny person . . . against any party, public or private. . .” HRS Const. Art. XI, §§ 1, 9.

78. Specifically, the State Environmental Quality Review Act (SEQRA) the Freedom of Information Law (FOIL) as well as the State Administrative Procedures Act (SAPA) and some provisions of the criminal laws all in some



recommends that the right extend to and be enforceable against the sovereign State of New York, defined as the State, its counties, and chartered municipalities including with the broadest interpretation possible all administrative and legislative bodies, all municipal instrumentalities including without limitation public authorities chartered by the State together with individuals, boards, cooperatives or organization empowered with any authority through the sovereign power of the State.

### Conclusion

For the reasons described above, the Task Force recommends that (I) no changes be made to Article XIV; and (II) Article I be amended to set forth an environmental right. Article XIV provides a great value to the citizens of New York and should be maintained in its integrity. Article XIV is not, however, adequate in scope to meet today's pressing and unprecedented environmental challenges. Indeed, the ecosystems within the Forest Preserve cannot be protected in the long term without decisive action to respond to climate change.

We also, therefore, recommend that the New York State Constitution clearly articulate and provide a means for citizens to insist upon respect for core environmental principles through the addition of an environmental right. In some respects, these principles are so fundamental that they can understood to be a condition of sovereignty, part of our social compact. All too often, however, the continued existence of resilient ecosystems capable of supporting and enriching life is assumed and the threats to the same are invisible in their proliferation and diffusion. As we confront existential questions of sustainability and the human impact on life systems, there is value in stating a right understood to exist—that New Yorkers have a right to an environment capable of supporting and sustaining life—and

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way mandate that government function in service to citizens. As such the statutes were crafted to encompass various subsets of government actors. None of the statutes is specifically broad or focused enough to provide language that can be co-opted in whole for use in an environmental right but the statutes' definitions are instructive.

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providing a means for citizens and the judiciary to protect it.