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### Subnational Environmental Constitutionalism and Reform in New York State

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## Subnational Environmental Constitutionalism and Reform in New York State

By James R. May\*

The State of New York's constitution was perhaps the first in the world to embody environmental constitutionalism, most directly in what is known as its "Forever Wild" mandate from 1894, which provides:

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. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.<sup>1</sup>

In contrast to many subnational environmental provisions, courts in New York have regularly enforced Forever Wild.<sup>2</sup> New York's Constitution also contains a remarkable mandate that every twenty years voters decide whether to hold elections for delegates to convene a convention to amend the state's charter.<sup>3</sup>

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\* Distinguished Professor of Law, Widener University Delaware Law School. Portions of this article are adapted from JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* (Cambridge University Press, 2015), reprinted with permission of copyright holder and author.

1. N.Y. CONST. art. XIV, § 1 (originally Art. VII, Sec. 7); Nicholas A. Robinson, *"Forever Wild": New York's Constitutional Mandates to Enhance the Forest Preserve* 7-8 (Feb. 15, 2007), <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1283&context=lawfaculty>.

2. See, e.g., *Ass'n for Prot. of Adirondacks v. MacDonald*, 170 N.E. 902, 905 (N.Y. 1930) (holding that timber harvesting is inconsistent with "Forever Wild" portion of New York State Constitution).

3. N.Y. CONST. art. XIX, § 2:

At the general election to be held . . . every twentieth year . . . the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district . . . shall elect three delegates . . . [who] shall

The next such referendum is November 7, 2017, and if it carries, the state will hold its next constitutional convention in 2019.<sup>4</sup>

With the potential for a constitutional convention comes the potential reexamination of the role of environmental constitutionalism, including the Forever Wild provision.<sup>5</sup> Some welcome the opportunity for a convention as an opportunity to advance environmental constitutionalism, including instantiating fundamental environmental rights:

[T]here is a compelling case for amending the New York Constitution to provide for a right to the environment. If not enacted via a convention, the option exists for the legislature to adopt an environmental right to submit to the voters. Either way, New York deserves to recognize the right to the environment.<sup>6</sup>

Others are skeptical, concerned “that a convention would tamper with the “forever wild” guarantees.”<sup>7</sup> If New York amends its constitution to incorporate additional provisions that provide for environmental rights, duties, responsibilities, and remedies, it will hardly be alone. Environmental constitutionalism enjoys global ubiquity. About half of the world’s constitutions guarantee a substantive right to a clean or quality or healthy environment explicitly or implicitly, and about half of those also guarantee procedural rights to

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convene . . . on the first Tuesday of April next ensuing after their election . . . [and] [a]ny proposed constitution . . . shall be submitted to a vote . . . not less than six weeks after the adjournment of such convention.

*Id.* See generally PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK (1996) (discussing the history and significance of New York’s constitution).

4. See N.Y. CONST. art. XIX, § 2. See Peter J. Galie & Gerald Benjamin, *Introduction*, in NEW YORK’S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS 1, 1-33 (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016) [hereinafter NEW YORK’S BROKEN CONSTITUTION], for a discussion on needed reform constitutional reform.

5. See COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS’N, THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV) 1-6 (2016).

6. Nicholas Robinson, *Updating New York’s Constitutional Environmental Rights*, 38 PACE L. REV. 152, 181 (2017).

7. *Id.* at 177.

information, participation or access to justice in environmental matters.<sup>8</sup> Nearly seventy constitutions specify that individuals have responsibilities or duties to protect the environment<sup>9</sup> and others include directive principles of state policy. A few national constitutions address specific environmental endowments including water, flora, and fauna, while others define the environment in certain ways, including as a public trust or in terms of sustainable development.<sup>10</sup>

What is often overlooked is the extent to which some state constitutions in federal systems—including Germany, Brazil, and the United States—include environmental provisions, some of which are even more elaborate than their counterparts at the national level.<sup>11</sup> Indeed, especially in the age of climate change denial and the anthropocene, subnational government—states,

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8. See, e.g., JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2016) [hereinafter GLOBAL ENVIRONMENTAL CONSTITUTIONALISM]; James R. May, *Symposium on Global Environmental Constitutionalism: An Introduction and Overview*, 21 WIDENER L. REV. 139 (2015); Erin Daly & James R. May, *Robinson Township v. Pennsylvania: A Model for Environmental Constitutionalism*, 21 WIDENER L. REV. 151 (2015); Erin Daly & James R. May, *Comparative Environmental Constitutionalism*, 6 JINDAL GLOBAL L. REV. 9 (2015); James R. May, *Constitutional Directions in Procedural Environmental Rights*, 28 J. ENVTL. L. & LITIG. 27 (2013); James R. May & Erin Daly, *Constitutional Environmental Rights and Liabilities*, 3 ENVTL. LIABILITY 75 (2012); James R. May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, 1 IUCN ACAD. ENVTL. L. E-J. (2011); see also LOUIS KOTZE, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM AND THE ANTHROPOCENE (2017), DAVID R. BOYD, THE RIGHT TO A HEALTHY ENVIRONMENT: REVITALIZING CANADA'S CONSTITUTION 65 (2012); RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE (2009); TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS (2005).

9. See, e.g., BENIN CONST. art. 27 (“Every person has the right to a healthy, satisfying, and lasting environment and has the duty to defend it. The state shall watch over the protection of the environment.”); CHECHNYA CONST. art. 55 (“Everyone is obliged to preserve nature and prevent damages, as well as to be careful with removing natural riches.”); INDIA CONST. art. 51A (“It shall be the duty of every citizen of India . . . to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures . . .”).

10. See GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 8, at 260-269, for a more in-depth discussion.

11. See *id.* at 236-254; see also James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305, 306-307 (James R. May, ed., 2011).

provinces, Länder, cantons, or what is sometimes referred to as the meso-level, which exists between the national government and local governments—are the final frontier in constitutional environmental rights.<sup>12</sup> Subnational constitutionalism is worldwide, advancing myriad civil, political and socio-economic rights, and often filling gaps in federal systems.<sup>13</sup> Many subnational governments have their own constitutions, which can provide the most direct mechanism for advancing local interests, including environmental constitutionalism.<sup>14</sup> Led by states in the Americas in general, and Brazil in particular, subnational governments around the globe have seen fit to constitutionalize substantive and procedural environmental rights, environmental duties, and sustainable development for present and future generations, often with much more specificity and enforceability than provided in national constitutions. Subnational instantiation of constitutional environmental rights can have special salience in countries that have yet to recognize environmental rights at the federal level, including the United States, Canada, and Australia. New York has much to learn from subnational experiences in environmental constitutionalism elsewhere.

This article has three parts. Part I provides a primer to the field of subnational environmental constitutionalism. Part II explores the opportunities and challenges in enforcing existing subnational environmental provisions. Part III then examines a case study involving language to consider at a constitutional convention for the State of New York.

### I. A Primer on Subnational Environmental Constitutionalism

Subnational provisions stand apart from their national counterparts, if any, and warrant independent examination. Subnational developments at the constitutional and judicial

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12. James A. Gardner, *In Search of Subnational Constitutionalism* 1-2 (Buff. Legal Stud. Res. Paper Series, Paper No. 2007-016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1017239](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017239).

13. See 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, 414-417 (2011).

14. See JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005).

levels can be instructive and illustrative. For example, some environmental constitutional provisions are much more elaborate and intricate than national analogs. Developments at the state level can be thought of as “happy incidents” to advance innovations in law, including in constitutional law and environmental constitutionalism. Brown for one contends that experiences in U.S. states with environmental constitutionalism could provide Eastern Europeans with models for making such environmental provisions self-executing and enforceable.<sup>15</sup>

Unfortunately, judicial developments at the state level in the United States have not been terribly encouraging, as Thompson has observed: “[s]tate courts also have helped ease most of the constitutional provisions into relative obscurity by holding that the provisions are not self-executing, by denying standing to private citizens and groups trying to enforce the provisions, or by establishing relatively easy standards for meeting the constitutional requirements.”<sup>16</sup> Nonetheless, subnational constitutions can provide the additional proving ground for environmental constitutionalism around the globe because such provisions (if they exist) tend to supply a vital link to the dual objectives of protecting the environment and promoting environmental human rights.

#### A. *The Extent of Subnational Environmental Constitutionalism*

Subnational environmental constitutionalism enjoys—or suffers—from many of the same attributes as does its national counterpart. Yet it offers largely untapped opportunities to embed substantive, procedural and other environmental rights in ways most likely to have the greatest effect at the local level, where environmental degradation is most likely to be sustained and where its effects are most likely to be experienced by people

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15. See Elizabeth F. Brown, Comment, *In Defense of Environmental Rights in East European Constitutions*, 1993 U. CHI. L. SCH. ROUNDTABLE 191, 191-192.

16. See generally Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003) [hereinafter Thompson, *Montana’s Environmental Provisions*].

in their communities.

Subnational environmental constitutionalism offers several advantages over national treatment. First, subnational constitutions can reflect local environmental concerns that can be ignored or underserved by the national constitution, even when those concerns may address global challenges. For example, the Dutch provinces of Zeeland, North Holland, Friesland, and Groningen address climate change and sustainable development, problems that the national constitution does not reach.<sup>17</sup>

Second, subnational constitutions can pay attention to minutiae often lacking in national constitutions. Remarkable examples of this are found in Brazil, whose state constitutions delineate extensive governmental functions in the service of substantive environmental rights, including promoting biodiversity and sustainability, protecting species and water quality, advancing conservation and environmental education, and enforcing environmental requirements. The constitution of the Brazilian state of Mato Grosso—which contains agricultural land, part of the Amazon forest, and part of the Pantanal, one of the world’s largest wetlands—is typical in this regard. To “ensure the effectiveness” of substantive environmental rights there, it impels the subnational government to:

- ▶ Safeguard the rational and sustainable use of natural resources to ensure its perpetuation and minimize environmental impact;
- ▶ Preserve the diversity and integrity of the genetic heritage;
- ▶ Establish the state policy of sanitation and water resources;
- ▶ Require, for the installation of work or activity that may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public, guaranteed the community participation through public hearings and their

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17. See GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 8, at 211.

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representatives at all stages;

- ▶ Fight pollution and erosion;
- ▶ Inform, systematic and broadly, the population about pollution levels, the quality of the environment, situations that risk accidents, the presence of substances potentially harmful to health in drinking water and food, as well as the results of audits and monitoring;
- ▶ Promote environmental education at all school levels and public awareness for the preservation of the environment;
- ▶ Stimulate and promote the restoration of native vegetation coverage in degraded areas, aiming at the achievement of minimum standards necessary to maintain the ecological balance;
- ▶ Protect the fauna and flora, ensuring the diversity of species and ecosystems, with prohibition, in the manner prescribed by law, to practices that endanger their ecological function and cause the extinction of species or subject animals to cruelty;
- ▶ Create, deploy and manage state and local conservation units representative of existing ecosystems in the State, restoring its essential ecological processes, and the alteration and suppression may only be allowed by law, with prohibition to any use that compromises the integrity of the attributes that justify its protection;
- ▶ Control and regulate, where applicable, the production, sale, and use of techniques, methods, and substances that represent a risk to life, quality of life and the environment;
- ▶ Relate the participation in biddings, access to tax benefits, and official credit lines to environmental compliance, certified by the competent agency;
- ▶ Define, create and maintain, in the manner required by law, vital areas for the protection of natural caves, archaeological sites, remarkable natural landscapes,



other assets of historical, touristic, scientific and cultural value;

- ▶ Define territorial spaces and their components to be specially designed for the creation of protected environmental areas and preserved goods of cultural value as a historic site;
- ▶ Promote anthropogenic and environmental zoning of its territory, establishing consistent and differentiated policies for the preservation of natural environments, striking landscapes, water sources, areas of ecological interest within the State, from a physiographic, ecological, water and biological standpoint;
- ▶ Promote technical and scientific studies aiming to recycle discarded raw materials, as well as encourage its application in economic activities;
- ▶ Stimulate research, development and use of alternative energy sources, clean and energy saving technologies; and
- ▶ Ensure, in the manner prescribed by law, free access to basic information about the environment.<sup>18</sup>

Most Brazilian states similarly dictate governmental means for implementing substantive environmental rights, including the States of Amazonas, Bahia, Espírito Santo, Goiás, Maranhão, Mato Grosso do Sul, Minas Gerais, Paraíba, Paraná, Piauí, Rio de Janeiro, Rio Grande do Sul, Rio Grande do Norte, Santa Catarina, Sergipe, and Tocantins, and in the Federal District.

Third, subnational constitutions can combine multiple facets of environmental constitutionalism in a single swath, which can be more challenging at the national level due to the challenges outlined in Part I. For example, Article 57 of the proposed Kurdish Regional Constitution of Iraq contains a cavalcade of environmental rights, including individual rights and responsibilities, governmental policies, and sustainability, in a sort of environmental omnibus provision, which provides:

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18. *See id.* at 219-21.

First: Environmental protection (land, water, air, plants and animals) is a responsibility of all and if anyone causes damage to them, they are responsible to fix it and to be punished by law.

Second: All citizens have a legitimate right for freedom and equality in an appropriate living status, in a social and economical environment which will provide a prosperous and happy life and has a responsibility for protecting the environment and improving it for the present and future generations.

Third: The Regional Government shall take action to mitigate and treat the sources of pollution in the environment, and in regard to this it, strives to develop forests and protect the fields and protect the green zones inside the cities and their outskirts. The Regional Government shall develop, enlarge and construct public parks, natural parks for protecting animals, plants, and natural resources and prohibit buildings and institutions and the use of machines and instruments in the natural protectorates.<sup>19</sup>

As of 2013, this draft has not yet gone into effect, but as written, it stands as a model of the potential for environmental constitutionalism; this, despite the fact that control over the land and resources remains in dispute between the regional and national governments.

Fourth, subnational environmental constitutionalism can provide enhanced opportunities for coordinated national-state implementation of national environmental policies. For example, as Michael Kelly describes, the Kurdish Regional Constitution within the framework of the Iraqi Federal Constitution allows for shared responsibility for environmental policy.<sup>20</sup> Kirsten Jörgensen notes that “[t]en out of the twenty-

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19. See Michael J. Kelly, *The Kurdish Regional Constitution Within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN ST. L. REV. 707, 784 (2010).

20. *Id.* at 727-28.

eight states of India (Tamil Nadu, Karnataka, Andhra Pradesh, Gujarat, Rajasthan, Maharashtra, Madhya Pradesh, West Bengal, Kerala, and Orissa) are implementing major wind energy programmes,” under the aegis of the federal constitution.<sup>21</sup> At times, the allocation of responsibility for the environment between the local and the national government can give rise to political tensions and even military action when the local and national goals are at odds or when the revenues produced by exploitation of natural resources have to be equitably shared; most often, however, constitutional environmental provisions can promote inter-governmental cooperation.

Such national-subnational coordination is fairly common. For example, states that make up the Ethiopian federation (Afar, Amhara, Benishangul-Gumuz, Gambella, Harari, Oromia, Southern Nations, Nationalities, and Peoples’ Regional State (SNNPRS), Somali, and Tigray), “share the . . . environmental policy objectives” reflected in the national constitution.<sup>22</sup>

Other federal constitutions explicitly delegate environmental protection to subnational entities, including Spain,<sup>23</sup> Germany, and the Netherlands.<sup>24</sup> Hudson notes that the federal Canadian Constitution “contains explicit language

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21. Kirsten Jörgensen, *Climate Initiatives at the Subnational Level of the Indian States and Their Interplay With Federal Policies* (March 2011) (presented at the 2011 ISA Annual Convention), [http://www.diss.fu-berlin.de/docs/servlets/MCRFileNodeServlet/FUODOCS\\_derivate\\_000000002109/isa11\\_joergensen\\_draft.pdf](http://www.diss.fu-berlin.de/docs/servlets/MCRFileNodeServlet/FUODOCS_derivate_000000002109/isa11_joergensen_draft.pdf).

22. Tsegaye Regassa, *Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level*, 3 MIZAN L. REV. 33, 1-2, 51 n.85 (2009).

23. See Kelly, *supra* note 19, at 763-64.

24. See Kirsten Jörgensen, *Governance for Sustainable Development in the German Bundesländer*, in SUSTAINABLE DEVELOPMENT AND SUBNATIONAL GOVERNMENTS: POLICY-MAKING AND MULTI-LEVEL INTERACTIONS 103, 109-15 (Hans Bruyninckx et al., 2012) [hereinafter SUSTAINABLE DEVELOPMENT] (“As a result of the 2006 federalism reform, the distribution of powers has changed slightly to favor the *Bundesländer*. This reform provided the *Bundesländer* the right to deviate from federal law in the areas of nature conservation, landscape planning, and water and flood water management . . . .”); Frans H.J.M. Coenen, *Dutch Provincial Sustainable Development Policies: Ambitions and Differences*, in SUSTAINABLE DEVELOPMENT, *supra* note 24, at 120, 121-25, 132-34.

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granting *exclusive* regulatory authority over subnational forest policy to the provinces . . . . This is a significant state of affairs since the Canadian provinces actually own or otherwise control 84 percent of the nation's forests."<sup>25</sup> Indeed, the Constitution of Canada provides in pertinent part "[i]n each province, the legislature may exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom."<sup>26</sup>

Fifth, even failed attempts to instantiate constitutional environmental rights at the subnational level can contribute to the enactment of legislative measures to achieve the same ends. Boyd, for example, reports that negated efforts to advance environmental constitutionalism at the federal and provincial level in Canada contributed to the enactment of provincial legislation recognizing substantive environmental rights in the Northwest Territories, Nanavut, Ontario, Quebec, and the Yukon.<sup>27</sup> Ontario's legislatively-enacted environmental "Bill of Rights," for instance, advances human and environmental rights at the local level.<sup>28</sup>

Sixth, insofar as most citizens are mostly connected to their state government and state authority is more likely to be responsive to the needs of local communities, subnational constitutionalism affords greater opportunities for both political and legal action to enforce and promote environmental norms. Cusak observes that subnational environmental constitutionalism includes textual provisions "granting citizens the right to a healthful environment; public policy statements

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25. Blake Hudson, *What Kind of Constitutional Design is Optimal for Environmental Governance?*, ENVTL. L. PROFESSOR BLOG (Feb. 6, 2012), [http://lawprofessors.typepad.com/environmental\\_law/2012/02/what-kind-of-constitutional-design-is-optimal-for-environmental-governance.html](http://lawprofessors.typepad.com/environmental_law/2012/02/what-kind-of-constitutional-design-is-optimal-for-environmental-governance.html).

26. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), *reprinted in* R.S.C. 1985, app II, no 92A(1) (Can.).

27. *See* BOYD, *supra* note 8, at 61-66.

28. *Id.* at 63-65. For a discussion of Ontario's approach to environmental constitutionalism, see Sandra Walker, *The Ontario Environmental Bill of Rights*, in ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE 20-32 (Sven Deimann & Bernard Dyssli eds., 1995).

concerning preservation of natural resources; financial provisions for environmental programs; [and] clauses that restrict the environmental prerogatives of state legislatures.”<sup>29</sup>

And finally, subnational environmental constitutionalism can provide experience in a country that can normalize environmental constitutionalism and goad activity at the national level. This has happened in Argentina, where, as Hernandez notes, the Province of Córdoba’s constitutional environmental rights preceded those that followed at the national level.<sup>30</sup>

### *B. Textual Subnational Environmental Constitutionalism*

Subnational environmental constitutionalism has gained a foothold throughout the globe, including in Austria, Argentina, Brazil, Ethiopia, Germany, India, Iraq, Netherlands, the Philippines, and the United States.<sup>31</sup>

The Brazilian brand of subnational environmental constitutionalism is especially striking. Spurred on initially by the Rio Declaration in 1992 (and buffeted by the Rio+20 Conference in 2012), the most ardent examples of subnational environmental constitutionalism occur at the state level in Brazil.<sup>32</sup> The constitutions for all of Brazil’s twenty-six states—

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29. Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 181 (1993); Barry E. Hill, Steve Wolfson & Nicholas Targ, *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT’L ENVTL. L. REV. 359, 390 (2004) (“Environmental constitutional provisions at the state level, however, have fared better than at the federal level. Every state constitution drafted after 1959 explicitly addresses ‘modern concerns’ regarding pollution control and preservation. Indeed, fully one-third of all state constitutions include: (1) policy statements regarding the importance of environmental quality; (2) environmental enabling language; and/or (3) language creating an individual right to a clean and healthy environment.”) (footnotes omitted).

30. ANTONIO MARIA HERNANDEZ, *SUB-NATIONAL CONSTITUTIONAL LAW IN ARGENTINA* 24 (2011).

31. Joseph Marko, *Federalism, Sub-national Constitutionalism, and the Protection of Minorities*, RUTGERS U. CTR. FOR ST. CONST. STUD. (2015), <http://statecon.camden.rutgers.edu/sites/statecon/files/subpapers/marko.pdf> (“Several land constitutions . . . contain provisions for the protection of the environment.”).

32. United Nations Conference on Sustainable Development, Rio+20, June 20-22, 2012, *Rio+20 Outcome Document*, U.N. Doc. A/RES/66/288; United

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and the Federal District—promote environmental protection, often elaborately and identically so.<sup>33</sup> The Mato Grosso constitution is typical, touching all corners of environmental constitutionalism by guaranteeing substantive and procedural rights and imposing duties and responsibilities that apply to all for the benefit of present and future generations.

Notably, the constitutions of most Brazilian states and the federal district embed a substantive right to a quality environment in some form, most commonly to a “balanced” environment. For example, the constitution of the State of Acre provides that “[a]ll have the right to an ecologically balanced environment.”<sup>34</sup> Amapá’s Constitution provides that “[a]ll have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life.”<sup>35</sup> Amazonas’ Constitution says that “[a]ll have the right to a balanced environment, essential to a healthy quality of life.”<sup>36</sup> Ceará’s Constitution refers to a “balanced environment” as an “inalienable right.”<sup>37</sup> Goiás’ Constitution guarantees “an ecologically balanced environment.” Mato Grosso’s Constitution says that: “[a]ll have the right to an ecologically balanced environment.”<sup>38</sup> Maranhão’s Constitution calls a balanced environment “an asset of common use and essential to people’s quality of life, imposing to all, and especially the State and the Municipalities, the duty to ensure their preservation and restoration for the benefit of present generations and future.”<sup>39</sup> Similar provisions recognizing a substantive right to a balanced environment are found in the constitutions of the States of Bahia, Espírito Santo, Goiás, Maranhão, Minas Gerais, Paraíba, Paraná, Piauí, Rio de Janeiro, Rio Grande do Sul, Rio Grande do

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Nations Conference on Sustainable Development, Rio+20, June 20-22, 2012, *Report of the United Nations Conference on Sustainable Development*, U.N. Doc. A/CONF.215/16 (Sept. 28, 2012).

33. See GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 8, at 221-22.

34. *Id.* at 225.

35. *Id.*

36. *Id.*

37. *Id.* at 225-26.

38. See GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 8, at 225-26.

39. *Id.*

Norte, Santa Catarina, Sergipe, and the Tocantins, and in the Federal District.<sup>40</sup> A couple of states vary slightly from the “balanced” formulae, including Mato Grosso Sol, which provides that “[a]ll have the right to enjoy an environment free of physical and social factors harmful to health.”<sup>41</sup>

The constitutions of most Brazilian states express environmental rights in terms of duties and responsibilities that are owed by all for the benefit of present and future generations. For example, Espírito Santo’s constitution reads that: “[a]ll have the right to an ecologically, healthy and balanced environment, and it is incumbent upon them and in particular to the State and the Municipalities, to ensure its preservation, conservation and restoration for the benefit of present and future generations.”<sup>42</sup> Likewise, Mato Grasso’s Constitution imposes a duty on the state, municipalities, and “the community” “to defend and preserve” the environment “for present and future generations,” while Acre’s Constitution says that “both the State and the community shall defend [the environment] and preserve it for present and future generations,” and Amapá’s Constitution stating that “both the Government and the community shall have the duty to defend and preserve it for present and future generations.”<sup>43</sup>

The constitutions of some Brazilian states specifically elevate the interests of nature. For example, Bahia’s says that “[i]t is incumbent upon the State, beyond all powers that are not prohibited by the Federal Constitution, to . . . protect the environment and fight pollution in any of its forms, preserving the forests, fauna and flora.”<sup>44</sup> It remains to be seen whether provisions such as this create a “right” on behalf of nature.

Subnational deployment of environmental rights in the United States is instructive because it underscores both the potential and limitations of environmental constitutionalism.<sup>45</sup>

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40. *Id.*

41. *Id.*

42. *Id.*

43. See GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 8, at 225-26.

44. *Id.*

45. See, e.g., Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063, 1103-05 (1992) (supporting “decentralization” of constitutional provisions that address the environment,

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While all efforts to amend the U.S. Constitution to recognize environmental rights have failed,<sup>46</sup> states in the United States have a long tradition of constitutionalizing environmental protection. Indeed, constitutional recognition of natural resources and the environment at the subnational level in the United States harkens back almost two centuries, beginning in 1842 with Rhode Island's protection of "all the rights of fishery, and the privileges of the shore . . ." <sup>47</sup> Among the more notable provisions is the "Wildlands Forever" provision of the New York State Constitution, which provides that:

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. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.<sup>48</sup>

Presently, there are over two hundred natural resource or environment-related provisions in forty-six state constitutions. These provisions reach nineteen different categories of natural resources or the environment, including water, timber, and minerals.<sup>49</sup> They also take eleven different forms, including

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observing "[s]tate judges [would] . . . be more sensitive in weighing the state's environmental values."); Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 867 (1996) [hereinafter Thompson, *Environmental Policy*]; Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L LEGAL PERSP. 185, 185-87 (1999); Thompson, *Montana's Environmental Provisions*, *supra* note 16, at 174.

46. See generally Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 ENVTL. L. REP. 11013 (2004).

47. R.I. CONST. of 1842, art. I, § 17. For a thorough history of the evolution of Rhode Island's Constitution, see Kevin D. Leitao, *Rhode Island's Forgotten Bill of Rights*, 1 ROGER WILLIAMS U. L. REV. 31, 58 n.68 (1996).

48. N.Y. CONST. art. XIV, § 1. See, e.g., *Ass'n for the Prot. of the Adirondacks v. MacDonald*, 170 N.E. 902, 905 (N.Y. 1930) (timber harvesting inconsistent with "Forever Wild" portion of New York State Constitution).

49. Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73, 74-75 (2002). The categories are:



general policy statements, legislative directives, and individual rights to a quality environment.<sup>50</sup> States recognizing environmental protection as an overarching state policy include Louisiana,<sup>51</sup> Michigan,<sup>52</sup> Ohio,<sup>53</sup> South Carolina,<sup>54</sup> and Virginia.<sup>55</sup> Several more address parochial environmental concerns, such as access to water, preservation, re-development, sustainability, pollution abatement, climate change, energy reform, or environmental rights.<sup>56</sup> Dozens more contain

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(1) public land acquisition/preservation/management, (2) public ownership of land and other resources, (3) sovereignty issues, (4) use/development balance, (5) school trust lands, (6) public trust doctrine, (7) takings/ eminent domain/condemnation power, (8) water access rights, (9) water rights, (10) water development and reclamation, (11) water resource protection, (12) mining and mineral rights, (13) fish and wildlife, (14) fishing access, (15) hunting and fishing restrictions, (16) rights of way, (17) timber and forest management, (18) nuclear power, and (19) agriculture.

*Id.* at 74-75.

50. *Id.* at 75. The other manifestations include provisions respecting (1) legislative protection, (2) agency authority, (3) general financing, (4) taxing authority, (5) bonding authority, (6) funds and trust accounts, (7) educational programs, and (8) private liability. *Id.*

51. LA. CONST. art. IX, § 1 (“The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.”).

52. MICH. CONST. art. IV, § 51 (“The legislature shall pass suitable laws for the protection and promotion of the public health.”).

53. OHIO CONST. art. VIII, §2q (“Environmental and related conservation, preservation, and revitalization purposes. . . are proper public purposes of the state and local governmental entities and are necessary and appropriate means to improve the quality of life and the general and economic well-being of the people of this state . . .”).

54. S.C. CONST. art. XII, § 1 (“The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern.”).

55. VA. CONST. art. XI, § 1 (“To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, [and] its public lands . . . Further it shall be the Commonwealth’s policy to protect the atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.”).

56. Of course, whether to categorize a constitutional provision as addressing the environmental or resources involves some measure of subjectivity. For example, Eurick, *supra* note 45, at 201, puts the number at

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provisions fairly characterized as recognizing that the state holds state resources in “public trust.”<sup>57</sup> Currently, five states instantiate a substantive right to a quality environment:<sup>58</sup> Hawaii,<sup>59</sup> Illinois,<sup>60</sup> Massachusetts,<sup>61</sup> Montana,<sup>62</sup> and Pennsylvania.<sup>63</sup> These provisions are independent of state laws that allow citizens to enforce pollution control statutes.<sup>64</sup>

While most provide a “right” to the “environment,” the adjectival objective – “clean” or “healthful” or “quality” – differs from state to state. For example, Hawaii’s and Montana’s Constitutions aim to afford a “clean and healthful environment,”<sup>65</sup> Illinois’s “a right to a healthful environment,”<sup>66</sup> Massachusetts’s a “right to clean air and water, freedom from

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twenty-one.

57. See Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1 (2007); Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

58. See Cusack *supra* note 29, at 181 (noting amendments to state constitutions include “those granting citizens the right to a healthful environment; public policy statements concerning preservation of natural resources; financial provisions for environmental programs; and clauses that restrict the environmental prerogatives of state legislatures.”); see also EDITH BROWN WEISS ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 416 (1998) (identifying Illinois, Hawaii, California, Florida, Massachusetts, Montana, Pennsylvania, Rhode Island, and Virginia as embedding environmental rights).

59. See HAW. CONST. art. XI, § 9.

60. See ILL. CONST. art. XI, § 2.

61. See MASS. CONST. art. XCVII.

62. See MONT. CONST. art. II, § 3. See generally Bryan P. Wilson, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627 (2004); Thompson, *Montana’s Environmental Provisions*, *supra* note 16, at 158 (discussing Montana’s finding of a fundamental right to a “healthful environment”).

63. See PA. CONST. art. I, § 27.

64. See, e.g., John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I - An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693 (1999) [hereinafter Dernbach I] (explaining purpose of provision).

65. HAW. CONST. art. XI, § 9 (“Each person has the right to a clean and healthful environment.”); MONT. CONST. art. II, § 3 (guaranteeing “right to clean and healthful environment . . .”); see generally Wilson, *supra* note 62.

66. ILL. CONST. art. XI, § 2 (“Each person has the right to a healthful environment.”).

excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment,”<sup>67</sup> and Pennsylvania’s “a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”<sup>68</sup>

These provisions have been interpreted to require harm to humans. For example, in *Glisson v. City of Marion*, the Supreme Court of Illinois explained that: “[t]he primary concern of the drafters . . . was the effect of pollution on the environment and human health. The right to a ‘healthful environment’ was therefore not intended to include the protection of endangered and threatened species.”<sup>69</sup> Yet Montana’s suggests biocentric concerns, choosing both “clean and healthful” over “healthful” out of concern that the latter would permit the environmental degradation of Montana’s most environmentally pristine areas so long as the pollution didn’t harm human health.<sup>70</sup>

Of course, environmental constitutionalism has little traction in subnational governments that either lack a constitution or a bill of rights. Super-subnational environmental constitutionalism by municipal and other local governmental entities is also trending upward, particularly in subnational governmental entities that operate under constitutional mandates to promote environmental interests. Some of these provisions can be even more protective and expansive than what is typically found at the subnational and national levels, such as, for instance, those American cities whose charters protect rights of nature, including Pittsburgh, Pennsylvania. A recent study reports that many cities in the Philippines, including Puerto Princesa, Naga, Quezon, and Makati Cities have adopted local constitutional action plans to address various environmental concerns, including climate change.<sup>71</sup>

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67. MASS. CONST. art. XCVII (“The people shall have the right to clean air and water . . .”).

68. PA. CONST. I, § 27 (“The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment.”).

69. *Glisson v. City of Marion*, 720 N.E.2d 1034, 1042 (Ill. 1999).

70. MONT. LEGISLATURE ET AL., 5 MONTANA CONSTITUTIONAL CONVENTION 1971-1972 VERBATIM TRANSCRIPT 1243-44 (1981).

71. ATENEO SCH. OF GOV’T, STUDY ON CARBON GOVERNANCE AT SUB-NATIONAL LEVEL IN THE PHILIPPINES (2011).

Such super-subnational constitutionalism offers additional and often unexercised potential for achieving environmental objectives. In the United States, for example, as Professor Michelle Bryan Mudd observes:

The local governments in environmental rights states are poised to become leaders in this endeavor by creating and implementing robust environmental land use provisions. Yet that leadership has been lacking to date. Whereas state agencies in Illinois, Pennsylvania, Montana, and Hawaii have integrated environmental review into selected areas of state purview, local governments continue to leave their environmental authority largely unexercised.<sup>72</sup>

## II. Judicial Receptivity to Subnational Constitutional Environmental Rights

Constitutionally enshrined environmental standards at the subnational level are most effective when they are recognized enforced judicially.<sup>73</sup> Yet amid the varied manifestations of constitutionally-embedded environmental provisions at the subnational level, one commonality stands out: they are seldom subject to substantive interpretation,<sup>74</sup> leaving them dormant and awaiting clarity through advocacy.<sup>75</sup> This dearth in applicable jurisprudence is likely due to judicial concerns about recognizing and enforcing emerging constitutional features,<sup>76</sup>

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72. Michelle Bryan Mudd, *A "Constant and Difficult Task": Making Local Land Use Decisions in States With a Constitutional Right to a Healthful Environment*, 38 *ECOLOGY L.Q.* 1, 61 (2011).

73. For a general discussion of enforcement in this context, see John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 *FLA. L. REV.* 299 (2000).

74. See, e.g., *Sierra Club v. Dep't of Transp.*, 167 P.3d 292, 313 n.28 (Haw. 2007) (explaining that, "[a]lthough this court has cited this amendment as support for our approach to standing in environmental cases . . . we have not directly interpreted the text of the amendment.") (citations omitted).

75. Constitutional provisions referred to from hereon may be found in *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM*, *supra* note 8, app. at 281-358.

76. See Robert A. McLaren, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 *U. HAW. L. REV.* 123, 149-150 (1990).

restraining economic development and property rights, entering what are often seen as political thickets,<sup>77</sup> or providing causes of action that may displace other legislative prerogatives granted to affected persons, such as state citizen suits to enforce state pollution control requirements.<sup>78</sup>

Principally, subnational constitutional environmental rights are under-enforced because courts have not found them to be self-executing. A constitutional provision is self-executing if it is “a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.”<sup>79</sup> Thus, a constitutional provision that *is* self-executing requires nothing more from the legislature. A constitutional provision that *is not* self-executing requires implementing legislation to enforce.

In the United States, few state constitutions make clear whether constitutionally-embedded fundamental environmental rights are self-executing. Montana’s, Pennsylvania’s, and Rhode Island’s Constitutions, for example, are silent about whether their environmental rights are self-executing. Constitutions from other states explicitly require subsequent legislative or judicial action. The environmental rights provisions embedded in Hawaii’s and Illinois’s Constitutions, for example, are enforceable by “[a]ny person . . . through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”<sup>80</sup> Massachusetts’s environmental rights

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77. See A. E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 194 (1972); McLaren, *supra* note 76 at 132; Thompson, *Montana’s Environmental Provisions*, *supra* note 16, at 174; see generally James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 OR. REV. INT’L. L. 365 (2009) (finding that obstacles to enforcing state constitutional environmental rights are strikingly similar to those that afflict enforcement of environmental rights provisions in national constitutions worldwide).

78. See James R. May, *The Availability of State Environmental Citizen Suits*, 18 NAT. RESOURCES & ENV’T 53, 53-56 (2004).

79. *Davis v. Burke*, 179 U.S. 399, 403 (1900) (quoting THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 99 (8th ed. 1927)); see Cusack, *supra* note 29.

80. HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; *but cf.* Cusack, *supra*

provision seems to assume judicial action without requiring intervening legislative action.<sup>81</sup>

The constitutions of some states in the U.S. contain a parallel provision that imposes a duty upon the state to enact laws to protect the environment, which suggests to some that corresponding environmental rights provisions are not self-executing.<sup>82</sup> For instance, Rhode Island's Constitution provides that, "it shall be *the duty* of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state,"<sup>83</sup> and Michigan's that "[t]he Legislature *shall provide* for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."<sup>84</sup> Some see the mandatory "*shall*" as requiring legislative action to effectuate constitutional environmental rights.<sup>85</sup> Others see these provisions as merely invoking "moral force"<sup>86</sup> that does not create a separately enforceable environmental right.<sup>87</sup>

Most state court decisions have found constitutionally-embedded provisions in state constitutions *not* to be self-enforcing. For example, in *Enos v. Secretary of Environmental Affairs*,<sup>88</sup> the Supreme Judicial Court of Massachusetts held that the constitutional right to clean air and water does not afford an independent means to challenge an agency's decision to grant a permit to operate a sewage treatment plant under the Massachusetts Environmental Policy Act.<sup>89</sup> In *Commonwealth v. Blair*,<sup>90</sup> a state court held that the same right to clean air and water does not provide a cognizable cause of action to gain access

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note 29, at 182 (opining that Hawaii's provision is self-executing).

81. MASS. CONST. art. XCVII ("The general court shall have the power to enact legislation necessary or expedient to protect such rights.").

82. See Howard, *supra* note 77, at 198; see also McLaren, *supra* note 76, at 133.

83. R.I. CONST. art. I, § 17 (emphasis added).

84. MICH. CONST. art. IV, § 52 (emphasis added).

85. Howard, *supra* note 77, at 199.

86. *Id.* (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 165 (8th ed. 1927)).

87. Howard, *supra* note 77, at 200; see McLaren, *supra* note 76, at 133.

88. *Enos v. Sec'y of Env'tl. Affairs*, 731 N.E.2d 525 (Mass. 2000).

89. *Id.* at 532.

90. *Commonwealth v. Blair*, 805 N.E.2d 1011 (Mass. App. Ct. 2004).

to water supply in violation of the Commonwealth's Watershed Protection Act: "[t]he judge correctly rejected the argument that the Commonwealth is duty-bound to acquire interests related to the protection of drinking water."<sup>91</sup>

Moreover, state courts in the U.S. have held that state attorneys general could not even enforce environmental rights provisions absent implementing legislation.<sup>92</sup> The leading case is *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, in which the Supreme Court of Pennsylvania held that the state's attorney general could not enforce the state's environmental rights provision without further grant of authority from the state legislature.<sup>93</sup> The court reasoned that the provision did not grant the attorney general an unbridled and undefined authority to enforce a vague constitutional mandate to "natural, scenic, historic and esthetic values,"<sup>94</sup> thus exposing individual property owners to enforcement consequences.<sup>95</sup> Likewise, in *State v. General Development Corp.*,<sup>96</sup> a court in Florida held that the state attorney could not enforce Florida's constitutional "policy . . . to conserve and protect its natural resources and scenic beauty,"<sup>97</sup> to prosecute unauthorized canal construction except under the auspices of "the legislature's enactment of over twenty specific general laws that have explicitly given a state attorney the authority to independently initiate civil suits on behalf of the state in other areas concerning the health, safety, and welfare of Florida's

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91. *Id.* at 1018.

92. Some argue that such judicial reluctance is anathema to the core ideas these provisions were designed to promote. *See, e.g., McLaren, supra* note 76, at 135.

93. *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 594-95 (Pa. 1973).

94. *Id.* at 595.

95. *Id.* *See, e.g.,* *Cnty. Coll. of Del. Cty. v. Fox*, 342 A.2d 468, 482 (Pa. Commw. Ct. 1975) (in which the court noted that "while [Pennsylvania's environmental rights clause] may impose an obligation upon the Commonwealth to consider the propriety of preserving land as open space, it cannot legally operate to expand the powers of a statutory agency, nor can it expand the statutory powers of the [state agency] as a practical matter here.").

96. *State v. Gen. Dev. Corp.*, 448 So. 2d 1074 (Fla. Dist. Ct. App. 1984), *aff'd*, 469 So. 2d 1381 (Fla. 1985); *see McLaren, supra* note 76, at 134.

97. FLA. CONST. art. II, § 7; *see also McLaren, supra* note 76, at 134.

citizens and environment.”<sup>98</sup>

A few other cases suggest margin for judicial cognizance of subnational environmental constitutionalism. The Supreme Court of Alaska recently read that state’s “public interest” constitutional standard for resource development to require that courts take a hard look at whether state agencies adequately considered the cumulative environmental impacts of oil and gas leases.<sup>99</sup> And the Supreme Court of Montana has subjected that state’s environmental rights provision to strict scrutiny,<sup>100</sup> although it has since been reluctant to enforce it.<sup>101</sup>

### III. Case Study: Pennsylvania’s Environmental Rights Amendment

There are myriad ways to amend the New York State Constitution to advance environmental outcomes. Chief among these is to have it recognize a right to a healthy environment.<sup>102</sup> Other proposals include those to have it limit greenhouse gas emissions, establish land banks, incorporate the public trust doctrine, provide a framework for regionalism and home rule, protect marine life and habitat, conserve aesthetic and cultural landscapes, adopting procedural protections and access to courts, and addressing specific threats, such as toxic substances.<sup>103</sup>

Some suggest that Pennsylvania’s “Environmental Rights Amendment” is the leading example for consideration for environmental amendments to New York’s Constitution.<sup>104</sup> The Supreme Court of Pennsylvania, which recently held that

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98. *Gen. Dev. Corp.*, 448 So. 2d at 1080.

99. *Sullivan v. Resisting Env’t., Destruction*, 311 P.3d 625 (Alaska 2013).

100. *Mont. Env’tl. Info. Ctr. v. Dep’t of Env’tl. Quality*, 988 P.2d 1236 (Mont. 1999).

101. *See, e.g., N. Plains Res. Council v. Mont. Bd. of Land Comm’rs*, 288 P.3d 169 (Mont. 2012).

102. *See generally* Robinson, *supra* note 6, at 179.

103. Paul Bray, “Forever Wild” *The Treatment of Conservation and the Environment by the New York State Constitution*, in *NEW YORK’S BROKEN CONSTITUTION*, *supra* note 4, at 243, 249-56.

104. *See, e.g.,* William R. Ginsberg, *The Environment*, in *THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK* (Gerald Benjamin ed., 1994) 221, 221-29; Robinson *supra* note 6, at 179-80.



*individuals* may enforce article I, section 27 of the Pennsylvania Constitution – which both recognizes an individual right to a quality environment and requires the state to “conserve and maintain” public resources “for the benefit of all the people” — against governmental agencies.<sup>105</sup> In a remarkable decision, the Pennsylvania Supreme Court rejuvenated article I, section 27 of Pennsylvania’s Constitution.<sup>106</sup> In *Robinson Township v. Commonwealth of Pennsylvania*, the Pennsylvania Supreme Court struck as unconstitutional major parts of “Act 13” — a state oil and gas law designed to promote “horizontal hydraulic fracturing,” or “hydro-fracking.”<sup>107</sup> The decision has some important implications for environmental constitutionalism.

Section 27 of the state constitution is no accident. Pennsylvania’s history includes improvident deforestation, significant loss of biodiversity and wildlife, rampant industrialization, and extensive surface and subsurface coal mining. These activities have taken a significant toll on the quality of the environment in the state. Accordingly, in 1971 by constitutional referendum, the people of Pennsylvania adopted the “environmental rights amendment” by a four-one margin. Incorporated as article I, section 27 of the Pennsylvania Constitution, it 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>108</sup>

The environmental rights amendment affords rights and imposes public trust duties that are commensurate with other

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105. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013), *aff’d*, 84 A.3d 1054 (Pa. 2014), *and aff’d in part, rev’d on other grounds*, 147 A.3d 536 (Pa. 2016).

106. *Id.*

107. *Id.* at 1001-02.

108. PA. CONST. art. I, § 27.

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constitutional prerogatives: “It is not a historical accident that the Pennsylvania Constitution now places citizens’ environmental rights on par with their political rights.”<sup>109</sup> Act 27 was enacted based on “the mischief to be remedied and the object to be attained,” namely, to address environmental degradation in the state by promoting individual environmental rights and requiring governmental authorities to hold natural resources in public trust.<sup>110</sup> Horizontal hydro-fracking, on the other hand, is a relatively new engineering technique that can be used to gain access to the natural gas and petroleum embedded in deep shale “plays” a mile or deeper under the surface of the earth.<sup>111</sup> The Pennsylvania legislature enacted Act 13 in 2012 to promote the development of the state’s extensive “Marcellus Shale” play.<sup>112</sup>

Act 13 constituted a major revision to the state’s longstanding Oil and Gas Act in several respects. First, it preempted traditional zoning and planning by local governments to regulate or ban hydrofracking by declaring that state laws “occupy the entire field” of oil and gas regulation, “to the exclusion of all local ordinances,” and thus, “preempt[s] and supersede[s] [the] “local regulation of oil and gas operations.”<sup>113</sup> Thus, local governments were not free to reach their own decisions about whether and to what extent to allow hydrofracking or to impose additional environmental requirements.

Second, Act 13 required local governments to promote hydrofracking, regardless of the wishes of their constituents or concerns about potential adverse environmental effects.<sup>114</sup> It mandated that all local ordinances regulating oil and gas operations “allow . . . for the reasonable development of oil and gas resources,” and established strict time periods for local review of proposals, wherein if not kept, the project was deemed approved.<sup>115</sup> While Act 13 prohibited drilling or disturbing areas

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109. *Robinson Twp.*, 83 A.3d at 960.

110. *Id.* at 959.

111. *Id.* at 914-15.

112. *Id.* at 915.

113. *Id.* at 970.

114. *Robinson Twp.*, 83 A.3d at 971.

115. *Id.* at 970.

within specific distances of underground sources of drinking water, streams, springs, wetlands, and other water bodies, it required state environmental agencies to waive these restrictions provided the developer submits “additional measures, facilities or practices” to protect these waters.<sup>116</sup> Act 13 also established a system to collect and allocate “impact fees” designed to offset some of hydrofracking’s adverse environmental effects.<sup>117</sup> Thus, Act 13 essentially conscripted local governments into the service of promoting state policy prerogatives, which themselves reflected the goals of the oil and gas industry.

Last, Act 13 prevented physicians from obtaining information about the risks of exposure to certain chemicals used in hydro-fracking unless they agreed to sign a confidentiality agreement.<sup>118</sup> It then subjected physicians who released information about potential chemical exposure to civil and criminal liability.<sup>119</sup>

Seven municipalities, an environmental organization, and a physician challenged the constitutionality of Act 13 on a variety of grounds, including as an affront to both section 27 and federal and state substantive due process.<sup>120</sup>

In response, the state argued that section 27 is unenforceable. It based its theory on an earlier case, *Payne v. Kassab*, which held that section 27 “recognizes or confers no right upon citizens and no right or inherent obligation upon municipalities; rather, the constitutional provision exists only to guide the General Assembly, which alone determines what is best for public natural resources, and the environment generally, in Pennsylvania.”<sup>121</sup>

While agreeing with the state’s interpretation of Act 27, the

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116. *Id.* at 972-73.

117. *Id.* at 933.

118. *Id.* at 924.

119. *Robinson Twp.*, 83 A.3d at 924.

120. *Id.* at 914.

121. *Id.* at 942; see *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976); accord *Klink v. Commonwealth*, 370 A.2d 389 (Pa. Commw. Ct. 1977). For an informative discussion on the question of whether Pennsylvania’s amendment is self-executing, see John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II - Environmental Rights and Public Trust*, 104 DICK L. REV. 97 (1999).

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lower court declared Act 13's statewide zoning provisions to be unconstitutional as a matter of substantive due process and struck the provisions of the law that required state agencies to grant waivers to setback requirements.<sup>122</sup> It also held that the environmental plaintiffs and the physician lacked constitutional standing.<sup>123</sup> Both sides appealed to the seven-member Pennsylvania Supreme Court.

The plurality determined that Act 13 contravenes section 27's remonstrance that the state holds natural resources "in the public trust," the court continued, "we agree with the citizens that, as an exercise of the police power, [Act 13 is] incompatible with the Commonwealth's duty as trustee of Pennsylvania's public natural resources."<sup>124</sup> It observed: "As the citizens illustrate, development of the natural gas industry in the Commonwealth unquestionably has and will have a lasting, and undeniably detrimental, impact on the quality . . . of Pennsylvania's environment, which are part of the public trust."<sup>125</sup>

In particular, the plurality found that preempting local control over hydro-fracking "sanctioned a direct and harmful degradation of the environmental quality of life in these communities and zoning districts."<sup>126</sup> It also concluded that Act 13 unconstitutionally shifted the burden to some citizens to bear "heavier environmental and habitability burdens than others" in violation of section 27's mandate that public trust resources be managed for the benefit of *all* people.<sup>127</sup>

A fourth judge concurred with the outcome, but would have overturned Act 13 as a violation of substantive due process rights of local communities because it would "force municipalities to enact zoning ordinances" despite "Pennsylvania's extreme diversity," noting that Act 13 did not afford adequate "consideration to the character of the

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122. *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012), *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013), and *aff'd in part, rev'd on other grounds*, 147 A.3d 538 (Pa. 2016).

123. *Id.* at 476-78.

124. *Robinson Twp.*, 83 A.3d at 985.

125. *Id.* at 975.

126. *Id.* at 980.

127. *Id.*

municipality,” including geology, topography, environmental quality, water supply, and economics.<sup>128</sup>

Two justices dissented and would have upheld Act 13 and found that the environmental plaintiffs and the physician lacked standing.<sup>129</sup> Another justice did not participate in the decision.

A majority of the court also reversed the lower court’s finding that various environmental plaintiffs lack constitutional standing, ruling that they suffered “a substantial and direct interest in the outcome of the litigation premised upon the serious risk of alteration in the physical nature of their respective political subdivisions and the components of their surrounding environment. This interest is not remote.”<sup>130</sup> Likewise, the majority upheld the standing of an affected physician to challenge Act’s 13’s confidentiality requirement, noting that such interests also were “substantial and direct,” and that “existing jurisprudence permits pre-enforcement review of statutory provisions in cases in which petitioners must choose between equally unappealing options and where the third option, here refusing to provide medical services to a patient, is equally undesirable.”<sup>131</sup> The two justices who dissented would have upheld the lower court’s ruling that the environmental plaintiffs and the physician lacked standing.<sup>132</sup>

The plurality’s opinion in *Robinson Township* reinforces environmental constitutionalism insofar as it represents an authentic attempt to engage the text of the environmental rights amendment. First, it noted that section 27—much like many provisions that provide such rights—vests two rights in the people of the state. The first is a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.<sup>133</sup> The second is “a limitation on the state’s power to act contrary to this right.”<sup>134</sup> Importantly, it held that these rights are equal in status and enforceability to

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128. *Id.* at 1006-08 (Baer, J., concurring).

129. *Robinson Twp.*, 83 A.3d at 1009-14 (Saylor, J., dissenting); *id.* at 1014-16 (Eakin, J., dissenting).

130. *Id.* at 922.

131. *Id.* at 924.

132. *See supra* text accompanying note 16.

133. *Robinson Twp.*, 83 A.3d at 951.

134. *Id.*

any other rights included in the state constitution, including property rights.<sup>135</sup>

Second, it enforced the “public trust” provisions, that is, the obligations of the state to hold resources in the public trust for all people.<sup>136</sup> Because the state is the trustee of these resources, the plurality held, it has a fiduciary duty to “conserve and maintain” them: “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.”<sup>137</sup>

Thus, according to the plurality in *Robinson Township*, a constitutional requirement to hold resources in trust involves two separate obligations. The first is “a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources.”<sup>138</sup> The second takes due regard of present and future generations, and imposes a duty “to act affirmatively to protect the environment, via legislative action.”<sup>139</sup> These duties promote “legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.”<sup>140</sup>

The plurality’s approach also minimized the role of balancing in environmental constitutionalism. Specifically, the plurality rejected the “non-textual” balancing test in *Payne v. Kassab* as “inappropriate to determine matters outside the narrowest category of cases, *i.e.*, those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests.”<sup>141</sup> Accordingly, the Pennsylvania General Assembly will need to revise or scuttle Act 13.

Last, the plurality in *Robinson Township* emphasized that the Environmental Rights Amendment serves both present and future generations. Echoing sentiments from the majority opinion in *Minors Oposa*, it observed: “By any responsible

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135. *Id.* at 953-54.

136. *Id.* at 957.

137. *Id.*

138. *Robinson Twp.*, 83 A.3d at 957.

139. *Id.* at 958.

140. *Id.*

141. *Id.* at 967.

account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.”<sup>142</sup> In so doing, the plurality opinion, in particular, advanced the purpose of the constitutional enshrinement of environmental rights and public trust duties in the first place: to promote environmental protection and advance individual rights to a quality environment.

#### IV. Conclusion

Given the variety of subnational constitutional provisions aimed at protecting all facets of the environment in myriad ways, these textual and jurisprudential developments suggest that subnational environmental constitutionalism is a source of information, inspiration, and innovation at a constitutional convention for the State of New York.

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142. *Id.* at 976; see *Minors Oposa v. Sec’y of the Dep’t of Env’t & Nat. Res.*, G.R. No. 101083, 33 I.L.M. 173 (S.C., July 30, 1993) (Phil.).