Florida Law Review

Volume 52 | Issue 2 Article 4

April 2000

Consitutional Codification of an Environmental Ethic

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CONSTITUTIONAL CODIFICATION OF AN ENVIRONMENTAL ETHIC

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I. INTRODUCTION

In Florida, as in many other jurisdictions with attractive and unique natural attributes, the rich environment is both a blessing and a curse. It is a blessing because Florida's mild climate, unique hydrology, and unusual geographic location yield high ecological value—thus supporting a unique

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and diverse array of ecosystems and species.[1] It is a curse because these same attributes attract increasing numbers of visitors and residents who invariably, often unwittingly, degrade and destroy the very natural and aesthetic attributes that attracted them to Florida.[2] It is ironic that Florida, with its shameless penchant for simultaneously promoting and exploiting the state's natural resources, should be near the forefront of a worldwide movement to constitutionalize an environmental ethic.

Society has developed an environmental ethic during the course of the past several centuries. An environmental ethic defies precise definition because it reflects human values that vary among individuals.[3] There is enough evidence, however, to suggest that there is widespread societal consensus that the environment matters and must be conserved.[4]

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1. *See* John J. Ewel, *Introduction*, *in* ECOSYSTEMS OF FLORIDA 4 (Ronald L. Myers & John J. Ewel eds. 1990).

2. *See* FLA. STAT. § 259.105(2)(a)2 (1999). The population of Florida is currently about 15 million, and is projected by the United States Census Bureau to be over 20 million by 2025. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 35 (1998). During the last 20 years, the average population density in Florida has increased from about 180 to 271 persons per square mile of land area. *See id.* at 29. Despite its unique and abundant biodiversity, the state's ecosystems are on the brink of collapse, due to decades of unsustainable agricultural, residential, and commercial development. *See* FLA. STAT. § 259.105(2)(a)6 (1999); JAMES COX ET AL., FLORIDA GAME AND FRESHWATER FISH COMM'N, CLOSING THE GAPS IN FLORIDA'S WILDLIFE HABITAT CONSERVATION SYSTEM 4-5 (1994). For example, during the past 50 years human activities have destroyed about 90% of Florida's old-growth longleaf pine forests, which historically covered more than half of the state. *See* Ronald L. Myers & John J. Ewel, *Problems, Prospects, and Strategies for Conservation*, *in* ECOSYSTEMS OF FLORIDA 622 (Ronald L. Myers & Jack J. Ewel, eds., 1990). The state has also lost over 50% of its wetlands. *See* FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, 2 ECOSYSTEM MANAGEMENT COMMITTEE REPORTS 17 (Nov. 1994). As a result of these and other disruptions of natural systems, Florida has more federally listed species than any other state in the nation except California. *See* Joseph M. Schaefer, *An Overview of Florida's Endangered and Threatened Species and Their Habitats*, *in* WILDLIFE, HABITAT AND LAND USE LAW: FLORIDA'S DEVELOPING ZOO 1.3 (Florida Bar Seminar, Feb. 8-9, 1991).

3. *See* Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 388 (1998). Aldo Leopold stated that "[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise." *Id.* at 390 (quoting ALDO LEOPOLD, A SAND COUNTY ALMANAC 224-25 (1949)). Robert Goldstein offers this definition:

> It is an understanding that in an ecosystem every action taken has consequences; those consequences may be adjudged as positive or negative values based on the needs of society; and that persons must act as stewards of their domain, whether that domain be their 'owned' real property or some lesser interest, to prevent actions that cause negative consequences.

Id. at 391.

4. *See infra* note 44 (citing environmental provisions in state constitutions); *see also infra* notes 29-35 and accompanying text (citing principles of international environmental law); *infra* note 73 (citing environmental provisions in national constitutions). *See generally* DONALD VAN

An environmental ethic is in large part a societal survival response to a burgeoning human population and the demands it places upon the environment. On October 12, 1999, the earth's population reached 6 billion people,[5] up from about 1.6 billion in 1900.[6] Although global population growth rates are slowing, the population will probably reach about 9 billion by 2054.[7] During this period of rapid population growth, humans have developed the technological capability to alter and pollute the environment on a grand scale. This unprecedented population increase, coupled with the technological revolution, has caused substantial harm to the environment and human health.[8]

Society has responded to environmental degradation by adopting laws to conserve natural resources and control pollution. In the United States, the federal government and individual states adopted a plethora of statutes and regulations during the 1970s and 1980s.[9] Much of this law was

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DEVEER & CHRISTINE PIERCE, THE ENVIRONMENT ETHICS AND POLICY BOOK: PHILOSOPHY, ECOLOGY, ECONOMICS (1998) (containing writings on environmental ethics from a diverse array of authors); Goldstein, *supra* note 3, at 386-401 (discussing environmental ethics).

5. *See The World at Six Billion*, U.N. Dep't of Econ. and Soc. Affairs, Population Div., at Box 1 ESA/P/WP.154 (1999) (available at <http://www.popin.org/6billion/>). It took only 12 years to add the most recent billion. *See id.*

6. *See id.* at table 2.

7. *See id.* at box 1.

8. The general deleterious effects of human population growth and development on the natural environment are well established, despite substantial debate as to site-specific effects. *See, e.g.*, 42 U.S.C. § 4331(a) (stating "[t]he Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. . . ."); 16 U.S.C. § 1531(a) (stating "[t]he Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation"); 42 U.S.C. § 7401(a)(2) (stating that "[t]he Congress finds . . . that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation"); FLA. STAT. § 259.105(2)(a)2 (1999) (stating "[t]he Legislature finds and declares that . . . [t]he continued alteration and development of Florida's natural areas to accommodate the state's rapidly growing population have contributed to the degradation of water resources, the fragmentation and destruction of wildlife habitats, the loss of outdoor recreation space, and the diminishment of wetlands, forests, and public beaches").

9. *See, e.g.*, 42 U.S.C. §§ 4231-4270d (establishing national environmental policy and the environmental assessment process); 33 U.S.C. §§ 1251-1287 (providing for regulation of water pollution and dredge and fill activities); 42 U.S.C. §§ 7401-7671q (providing for regulation of air pollution); 16 U.S.C. §§ 1531-1534 (providing for the listing and protection of endangered and threatened species); 42 U.S.C. §§ 9601-9679 (providing for cleanup and liability for hazardous waste sites); 42 U.S.C. §§ 6901-6992K (providing for regulation of hazardous and solid wastes); FLA. STAT. ch. 403 (1999) (providing for the air and water pollution control); FLA. STAT. ch. 373

developed without any specific constitutional authority relating to the environment.[10] This abundance of law has substantially reduced air and water pollution, but has largely failed to conserve ecosystems and biodiversity.[11] Emerging paradigms such as ecosystem management and sustainable development attempt to redefine human interaction with the environment, and to overcome this historically destructive relationship.[12] To a large extent, however, these approaches remain nebulous and have not yet resolved many intractable controversies concerning the environment and economic development.

Today, societies throughout the world are elevating environmental protection to constitutional status. This is because an increasing majority of citizens understand the critical role the environment plays for life on earth, and are insisting that it be provided greater consideration than in the past. The evidence of this societal phenomenon is that environmental provisions are now being integrated into constitutions throughout the world.[13]

This Article examines the legal, political, and societal significance of environmental constitutional provisions. Part II of this Article briefly traces

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(1999) (providing for regulation of water resources); FLA. STAT. ch. 380 (1999) (providing for regulation of areas of critical state concern and developments of regional impact); FLA. STAT. ch. 163, pt. II (1999) (providing for comprehensive planning and land development regulation).

10. *But see* CELIA CAMPBELL-MOHN ET AL., ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY 10-11 (1993) (noting that the federal government's authority for environmental regulation is derived from the commerce clause, while state authority is derived from the public interest and the police power). Local government authority to regulate the environment is derived from broad delegations of state police powers. *See* A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 568, 574-76 (1993).

11. *See, e.g.*, Edward O. Wilson, *The Current State of Biodiversity*, *in* BIODIVERSITY 12-13 (Edward O. Wilson ed., 1988) (stating that scientists estimate that current rates of species loss are extraordinarily high, perhaps as much as 1,000 to 10,000 times greater than natural extinction rates). Biodiversity is the genetic, species, and ecological diversity of plants, animals, and microorganisms. *See* Jeffrey A. McNeely et al., *Biological Diversity: What It Is and Why It Is Important*, *in* CONSERVING THE WORLD'S BIOLOGICAL DIVERSITY 17 (1990). Many scientists agree that conserving ecosystems and ecosystem functions is the key to maintaining overall biological diversity. *See, e.g.*, Nyle C. Brady, *International Development and the Protection of Biological Diversity*, *in* BIODIVERSITY 410-11 (Edward O. Wilson & Frances M. Peter, eds., 1988).

12. *See* R. Edward Grumbine, *What is Ecosystem Management?*, 8 CONSERVATION BIOLOGY No. 1, 27, 29-31 (Mar. 1994). Ecosystem management differs from past strategies because it emphasizes 1) management of entire ecological systems, not individual levels of systems (genes, species, populations, ecosystems, landscapes); 2) management based on ecological boundaries, not political boundaries; 3) protection of total native diversity (species, populations, ecosystems) and ecological patterns and processes that maintain that diversity; 4) recognition that humans influence and are affected by ecological patterns and processes; and 5) recognition that human values play a dominate role in ecosystem management goals. *See id.* at 27.

13. *See, e.g.*, *infra* note 73 (citing to environmental provisions in other national constitutions).

the evolution of a societal environmental ethic. Part III examines environmental provisions in state and national constitutions, and draws comparisons to Florida's constitution. Part IV evaluates the significance of environmental provisions in constitutions. Part V explores future trends. The Article concludes that while in many instances constitutional authority is not legally necessary, it is important because it reflects societal recognition of the importance of the environment. Further, it may be necessary to force political action in certain intractable situations.

II. EVOLUTION OF AN ENVIRONMENTAL ETHIC

Constitutions reflect basic principles and values that are important to society. When the United States Constitution and individual state constitutions were adopted, humans had limited understanding and concern for the environment. Humankind was just beginning to obtain the technological capability to manipulate and pollute the environment on a large scale. Not surprisingly, environmental protection was not part of the general societal consciousness.

The advent of the machine age dramatically changed humankind's relationship to the environment. While technological advances have brought numerous benefits to society, there have also been considerable costs to the environment and human health.[14] In the United States, scholars began expressing concern over exploitation of the nation's forests as early as the late-1800s.[15] By that time much of the eastern forests were being decimated.[16] Eventually, two important precursors to the modern environmental movement emerged, the conservation and preservation movements.[17] These movements eventually led to the establishment of national forests and national parks.[18]

In the late-1940s, Aldo Leopold argued prophetically that the development of human ethics is actually a process in ecological evolution, reflecting the "tendency of interdependent individuals or groups to evolve modes of co-operation."[19] Humans first developed ethics dealing with relations between individuals, and later between individuals and society.[20] These first ethics often concerned land, but land only as an absolute private property right.[21] Leopold argued the next ethic, which he coined the "land

14. *See supra* note 8.
15. *See* CELIA CAMPBELL-MOHN ET AL., *supra* note 10, at 14-15.
16. *See id.* (citation omitted).
17. *See* T. SCHOENBAUM & R. ROSENBERG, ENVIRONMENTAL POLICY LAW 1-3 (2d ed. 1991).
18. *See id.* at 2-3.
19. LEOPOLD, *supra* note 3, at 202.
20. *See id.* at 202-03.
21. ALDO LEOPOLD, A SAND COUNTY ALMANAC 203 (1949). Leopold stated that "[t]he land-relation is still strictly economic, entailing privileges but not obligations." *Id.*

ethic," would reflect a more cooperative and less domineering relationship between man and the land.[22] Leopold considered this extension of ethics to the land, including plants and animals, as an ecological necessity critical to the long-term health of both man and nature.[23]

Today's trend to provide the environment constitutional status is evidence of the truth of Leopold's assertion. As with other ethics, an environmental ethic has developed largely out of necessity. Many of today's citizens understand that their future, and the future of their children and grandchildren,[24] is directly tied to the quality of the environment.

Today, an environmental ethic is reflected in the constitutions of over half the states of the United States.[25] An environmental ethic is also reflected in constitutions of other nations, particularly those adopted during the 1980s and 1990s.[26] The constitutions of over fifty other countries now contain environmental provisions.[27]

An environmental ethic is also reflected in general principles of international environmental law[28] that have evolved during the last 30 years. Many of these principles are included in major international environmental agreements, declarations, and conventions, as well as in constitutions and laws of individual countries. For example, the precautionary principle states that scientific uncertainty regarding potential environmental damage should not be used as a basis for postponing cost effective measures to prevent environmental degradation.[29] Other general principles of international environmental law emphasize the right to a clean

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22. *Id.*

23. *See id.* at 203.

24. An obligation to future generations is a common feature of national and international environmental law. *See, e.g.*, 42 U.S.C. § 4331(b)(1) (creating an ongoing obligation for the federal government to "use all practicable means . . . [to] fulfill the responsibilities of each generation as trustee of the environment for succeeding generations); CONSTITUIÇÃO FEDERAL ch. VI, art. 225 (Brazil, adopted 1988) [hereinafter BRAZIL CONST.] (imposing a duty on government and the community to protect and preserve an ecologically balanced environment for future generations); *infra* note 31 (citing to international declarations articulating an obligation to future generations).

25. *See infra* note 44.

26. *See infra* note 73.

27. *See infra* note 73.

28. The literature is not entirely clear as to whether these "principles" are properly termed "general principles of international law," "international agreements codifying or contributing to customary law," or "law-making treaties." *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 11-19 (1990).

29. *See United Nations Conference on the Environment and Development, Rio Declaration on Environment and Development*, principle 15, U.N. Doc. A/CONF.151.5/Rev.1 [hereinafter *Rio Declaration*]; *United Nations Conference on Environment and Development, Convention on Biological Diversity*, (1992), 31 I.L.M. 818 [hereinafter *Biological Diversity Convention*]; *World Charter for Nature*, G.A. Res. 7, 36 U.N. GADR Supp. (No. 51) at 17, art. II(b), U.N. Doc. No. 151 (1982), *reprinted in* 12 ECOLOGY L.Q. 977, 992 (1985) [hereinafter *World Charter for Nature*].

environment,[30] obligations to future generations,[31] the right to develop limited by the obligation not to harm other states or nations,[32] rational future planning,[33] environmental impact assessment,[34] and citizen participation.[35] Although difficult to enforce,[36] general principles of international environmental law reflect the global nature of an environmental ethic.

Multilateral environmental agreements and conventions also reflect international concern for the environment. For example, the Convention on Biological Diversity, adopted in Rio de Janeiro in 1992, establishes general obligations for parties to provide for conservation and sustainable use of biological resources.[37] The Convention obligates parties to conserve biological diversity, including protection of habitat and ecosystems, and maintenance of viable populations of species.[38] While the extent to which the Convention's obligations are enforceable is unclear,[39] the convention

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30. *See Declaration of the United Nations Conference on the Human Environment*, principle 1, U.N. Doc. A/CONF. 48/14 (Stockholm 1972), *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter *Stockholm Declaration*].

31. *See id.*; *Rio Declaration*, *supra* note 29, principle 3; *Biological Diversity Convention*, *supra* note 29, pmbl; *World Charter for Nature*, *supra* note 29, pmbl.

32. *See Stockholm Declaration*, *supra* note 30, principle 21; *Rio Declaration*, *supra* note 29, principle 2; *Biological Diversity Convention*, *supra* note 29, pmbl., art. 3; *see also* VEIT KOESTER, THE RAMSAR CONVENTION ON THE CONSERVATION OF WETLANDS—A LEGAL ANALYSIS OF THE ADOPTION AND IMPLEMENTATION OF THE CONVENTION IN DENMARK 9 (1989) (arguing that there now exists a principle of customary international law that nations are under an obligation to protect and conserve ecosystems which, in the international sphere, are rare or endangered or provide important habitat for migratory species of wild animals).

33. *See Stockholm Declaration*, *supra* note 30, principles 13-15.

34. *See Rio Declaration*, *supra* note 29, principle 17; *Biological Diversity Convention*, *supra* note 29, art. 14,1(a); *World Charter for Nature*, *supra* note 29, at II,11(c).

35. *See Rio Declaration*, *supra* note 29, principle 10; *Biological Diversity Convention*, *supra* note 29, art. 14,1(a); *World Charter for Nature*, *supra* note 29, at III,16,23,24.

36. General principles of international environmental law are difficult to enforce primarily because the declarations or agreements in which they are contained are either not legally binding or do not provide for binding dispute resolution. These principles might be enforceable to the extent that they are incorporated into international agreements to which a country is a party, yet provisions for direct enforcement of most international agreements are notoriously weak. An individual nation or a group of nations could impose trade sanctions against a country that was violating one of these general principles, in an attempt to get the country to change its policies, but this would probably conflict with the General Agreement on Tariffs and Trade (GATT). *See United States—Restrictions on Imports of Tuna*, GATT Panel Report No. DS29/R (June, 1994) (holding that trade measures aimed at changing the policies of other countries are inconsistent with the GATT). The use of sanctions as leverage to enforce the principles is unlikely, given the GATT obligations of most countries.

37. *See Biological Diversity Convention*, *supra* note 29, pmbl.

38. *Biological Diversity Convention*, *supra* note 29, art. 8(d).

39. The terms of the convention regarding *in-situ* conservation are mandatory, yet include qualifying language that each party must take certain conservation actions only "as far as possible

does reflect the consensus of signatory parties that biological resources are important and should be conserved.

The Ramsar Convention on Wetlands, which entered into force in 1975, promotes conservation of wetlands throughout the world.[40] Parties must formulate and implement plans to conserve designated wetlands.[41] The Ramsar Convention also creates some general obligations extending beyond designated sites. Parties to the Convention must create a national wetland inventory within their respective countries and promote the conservation and wise use of non-designated wetlands by establishing nature reserves on wetlands.[42] Ramsar obligations also extend to the international arena, where parties must promote international cooperation and conservation of wetlands.[43] The Convention does not place many mandatory substantive requirements on countries regarding wetlands conservation. Rather, the Convention raises awareness of wetlands functions and values and obligates countries to meet certain procedural requirements before taking actions which adversely impact wetlands.

Taken together, the integration of the environment into state constitutions, national constitutions, and international law is powerful evidence of a societal environmental ethic. While the ethic is difficult to define, it generally represents enhanced societal awareness of ecological principles and environmental problems. Perhaps most significantly, it indicates that people want to change the status quo by placing the environment on equivalent footing with other societal values. The long-term effect of this phenomenon will likely be greater consideration and protection of the environment.

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and as appropriate." *Id.* art. 8. Accordingly, the Convention provides parties with considerable discretion and "wiggle room" regarding conservation activities. *See id.* Although the Convention places a general duty on nations to conserve, it is unlikely that the provisions could be enforced. Notably, the Convention does not provide a binding dispute resolution option for enforcement. *See id.* art. 27. Article 27 of the Convention establishes a hierarchy of dispute resolution mechanisms, including negotiation, mediation, arbitration, submission to the International Court of Justice, or conciliation. *See id.* art. 27. Arbitration or a decision of the International Court of Justice may be binding, but only if a party agrees in writing before the proceeding. *See id.* annex II, pt. 1, art. 16. Similarly, a party need only consider the findings of a mediation or conciliation proceeding. *See id.* annex II, pt. 2, art. 5.

40. *See Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, 11 I.L.M. 963 (1972) [hereinafter *Ramsar Convention*].

41. *See Biological Diversity Convention, supra* note 29, art. 3. A party must also advise the Ramsar Bureau in Switzerland of any changes in the ecological character of the designated wetland sites. *See id.* arts. 3, 8.

42. *See id.* arts. 2, 4. Parties must train personnel regarding wetland management and research. *See id.* art. 4.

43. *See id.* art. 5.

III. ENVIRONMENTAL PROVISIONS IN STATE AND NATIONAL CONSTITUTIONS

A. *Overview of State Constitutions*

More than half of state constitutions contain at least one environmental provision.[44] Predictably, the content of these provisions varies considerably, from provisions that are only potentially "environmental" to others that are clearly "green." For example, the Kansas Constitution authorizes the state to engage in internal improvements for the conservation of water.[45] Whether this provision includes water conservation for drinking, agriculture, industry, or environmental purposes

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44. At least 30 state constitutions contain provisions relating to the environment. The following list is not meant to be exhaustive, but rather to provide an example of a provision from each state. *See* ALA. CONST. amend. 543 (establishing state land acquisition program); ALASKA CONST. art. XXII, § 2 (abolishing fish traps); CAL. CONST. art. XB (establishing marine resources protection); COLO. CONST. art. XXVII (dedicating lottery funds for environmental purposes); FLA. CONST. art. II, § 7 (establishing pollution abatement and natural resource protection); HAW. CONST. art. XI (providing conservation, control, and development of resources); IDAHO CONST. art. VIII, § 3A (creating pollution control bonds); ILL. CONST. art. II (giving the right to a healthful environment); IOWA CONST. art. VII, § 9 (establishing fish and wildlife protection funds); KAN. CONST. art. II, § 9 (authorizing state to make internal improvements for water conservation); LA. CONST. art. VII, § 10.2 (creating a fund for conservation and restoration of vegetated wetlands); ME. CONST. art. IX, § 22 (preventing reductions in land held for conservation); MASS. CONST. art. XCVII (establishing peoples' rights to clean air and water); MICH. CONST. art. IV, § 52 (providing for the protection of natural resources); MINN. CONST. art. XI, § 14 (creating a fund for natural resource protection); MO. CONST. art. IV, § 43A (allocating revenue from additional sales tax for conservation purposes); MONT. CONST. art. II, § 3 (requiring the state to maintain a clean and healthful environment for present and future generations); N.M. CONST. art. XX, § 21 (providing for the control of pollution); N.Y. CONST. art. XIV, § 1 (requiring that forest preserves currently held and later acquired be held forever wild); N.C. CONST. art. XIV, § 5 (making it the policy of the state to conserve and protect land for the benefit of its citizens); N.D. CONST. art. 10, § 14 (promoting economic growth via the development of natural resources); N.J. CONST. art. VIII, § 2, para. 6. (requiring that a percentage of an existing business tax be spent on hazardous waste site remediation); OHIO CONST. art. VIII, § 2F (authorizing bond issuance to provide for recreation and conservation); OKLA. CONST. art. XXVI, § 4 (appropriating monies for wildlife resource management and conservation); OR. CONST. art. 8, § 5, para. 2 (establishing that lands shall be managed in a fashion consistent with conservation); PA. CONST. art. VIII, § 16 (creating a fund for conservation and reclamation of land and water resources); R.I. CONST. art. I, § 17 (granting all people fishery rights and other shore privileges); S.C. CONST. art. XII, § 1 (asserting that conservation of natural resources are matters of public concern); TENN. CONST. art. XI, § 13 (allowing for the enactment of laws protecting and preserving game and fish); TEX. CONST. art. VIII, § 1-d-(a) (levying a tax on open-space farm and ranch land to promote preservation of these lands); VA. CONST. art. XI, § 3 (preventing lease, rent or sale of oyster beds belonging to the state); W.VA. CONST. art. VI, § 55 (appropriating funds for wildlife conservation and land acquisition); P.R. CONST. art. VI, § 19 (promoting development and use of natural resources).

45. *See* KAN. CONST. art. 11, § 9.

is not clear from the language of the constitution. In contrast, the Illinois Constitution contains a provision that is clearly environmental, stating that each person has a right to a healthful environment.[46] Despite variation in topic and import, a substantial number of provisions in state constitutions are clearly environmental in purpose.

B. *Selected State Environmental Provisions*

Several states establish rights to a clean environment. The Montana Constitution establishes several inalienable rights, including the right to a "clean and healthful environment."[47] The Montana Supreme Court recently held that this right was a fundamental right and was subject to a strict scrutiny standard of judicial review.[48] The Illinois Constitution contains a similar provision, providing a right to a healthful environment and authorizing citizens to enforce this right against private parties or the government.[49] The Illinois Supreme Court, however, has held that this provision does not grant a fundamental right and is subject to a rational basis standard of review rather than strict scrutiny.[50] The Massachusetts Constitution also establishes a right to clean air and water.[51] The New Mexico Constitution declares the state's environment is of "fundamental importance."[52]

Several state constitutions contain highly detailed and specific provisions. The New Jersey Constitution requires that a specified percentage of the state's corporate business tax be directed toward remediation of hazardous waste discharges and water quality monitoring and control.[53] This unusually specific provision requires use of an existing tax to remedy one of the state's most serious pollution problems. The California Constitution forbids the use of gill and trammel nets in a defined geographic area.[54] Florida's constitution, discussed below, includes a provision to limit the use of nets in nearshore coastal waters[55] and establishes a "polluter pays" policy for entities that pollute in portions of

46. *See* ILL. CONST. art. II, § 2.

47. MONT. CONST. art. II, § 3.

48. *See* Montana Envtl. Info. Ctr. v. Department of Envtl. Quality, 988 P.2d 1236, 1249 (Mont. 1999).

49. *See* ILL. CONST. art. II, §§ 1, 2.

50. *See* Illinois Pure Water Comm., Inc. v. Director of Pub. Health, 104 Ill. 2d 243, 251-52 (Ill. 1984).

51. *See* MASS. CONST. art. XCVII.

52. N.M. CONST. art. XX, § 21.

53. *See* N.J. CONST. art. VIII, § 2, para. 6.

54. *See* CAL. CONST. art. XB, § 3(b).

55. *See* FLA. CONST. art. X, § 16 (proposed by initiative petition filed with the Secretary of State, Oct. 2, 1992, adopted 1994).

the Florida Everglades system.[56]

Several states establish pollution control and conservation as state policies but fall short of creating a "right" or "fundamental right." For example, the New York Constitution states the "policy of the state shall be to conserve and protect its natural resources and scenic beauty. . . ."[57] Similarly, North Carolina's constitution declares "[i]t shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry. . . ."[58] Constitutional authorization for land acquisition programs and conservation funds are also common in state constitutions. For example, the Alabama Constitution authorizes the state to create the Alabama Forever Wild Land Trust to acquire and manage natural lands and waters of environmental importance.[59] The Colorado Constitution directs that lottery funds be dedicated for preservation of the state's wildlife, park, river, trail, and open space heritage.[60]

C. *Florida Environmental Provisions*

Not surprisingly, Florida's first constitution contained no references to the environment when it was adopted in 1838. Since that time, Florida has adopted five new constitutions, the most recent in 1968. The 1968 constitution contained the state's first Natural Resource Clause, declaring "the policy of the state to conserve and protect its natural resources and scenic beauty."[61] Today, Florida's Constitution contains sixteen environmental provisions addressing various aspects of the environment. The provisions address five general topics: 1) pollution control and conservation of natural resources, 2) funding for environmental programs, 3) restrictions on alienation of public lands designated for conservation, 4) tax incentives for conservation, and 5) fish and wildlife management. Table 1 identifies environmental provisions in the Florida Constitution.

The backbone of Florida's environmental provisions is the Natural Resource Clause, which establishes state environmental policy and directs the Legislature to implement that policy.[62] The Clause declares "it shall be the policy of the state to conserve and protect its natural resources and scenic beauty."[63] The Legislature's duty is clearly stated: "Adequate provision shall be made by law for the abatement of air and water pollution

56. *See id.* art. II, § 7(b) (proposed by initiative petition filed with the Secretary of State, Mar. 26, 1996, adopted 1996).
57. N.Y. CONST. art. XIV, § 4.
58. N.C. CONST. art. XIV, § 5.
59. *See* ALA. CONST. amend. 543, § 1.
60. *See* COLO. CONST. art. XXVII, § 1.
61. FLA. CONST. art. II, § 7(a).
62. *See id.*
63. *Id.*

and of excessive and unnecessary noise and for the conservation and protection of natural resources."[64] This explicit provision in the Constitution, the supreme law of the state, provides a strong legal basis for the state's principal environmental and land use regulatory programs.[65]

Florida's constitution also provides authority for the state to acquire lands for conservation purposes. Article 12, Section 17 authorizes the state to issue bonds for the purpose of acquiring lands, water areas, and related resources for natural resources conservation.[66] Florida has developed one of the nation's most aggressive land acquisition programs.[67]

Florida's Constitution also includes two unusual provisions initiated by citizens. Both provisions relate to natural resources that the state has allowed to be over-exploited. The first provision was a response to the

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64. *Id.* The 1998 revisions added the phrase "conservation and protection of natural resources" to this directive, thereby broadening its content. *Id.*

65. *See, e.g.*, Turner v. Trust for Pub. Land, 445 So. 2d 1124, 1126 (Fla. 5th DCA 1984) (holding that article II, section seven, of the Constitution provides authority for Florida's principal environmental regulatory programs). An explicit constitutional reference to the environment is not an essential prerequisite to adopting environmental and land use regulations. Environmental regulatory programs may also be justified as legitimate exercises of state police powers to regulate for the purposes of protecting the health, peace, safety, and general welfare of the people of the state, provided the programs are duly authorized by the state legislature. *See* Tarlock, *supra* note 10 (providing a thorough discussion of sources and limits of authority for local regulation of natural resources).

66. *See* FLA. CONST. art. XII, § 17, *incorporated by* FLA. CONST. art. XII, § 9 (1965).

67. *See* FLA. STAT. §§ 259.01-.1051 (1999). Florida has several state land acquisition programs, including the Conservation and Recreational Lands program (CARL) (FLA. STAT. § 259.032 (1999)), the Florida Communities Trust program (*Id.* § 380.511), the Florida Greenways and Trails program (*Id.* § 260.0141), and inholdings and additions programs of the Division of Recreation and Parks (*Id.* §§ 258.007(1), 258.034), the Florida Game and Fresh Water Fish Commission (*Id.* § 372.12), and the Division of Forestry (*Id.* § 589.07). During the 1990s, funding for various land acquisition programs was supplied by several funds, including Preservation 2000, a ten-year state bonding program which raised $300 million annually to supply partial funding for all of the land acquisition programs (*Id.* § 259.101), and the Water Management Lands Trust Fund which is intended to support acquisitions relating to water resources (*Id.* § 373.59). Preservation 2000 ends in 2000 and will be succeeded by a new ten-year, $300 million per year program named Florida Forever. *Id.* §§ 259.105(2)(a), 201.151(1)(a). Money is raised for the land acquisition funds through documentary stamp taxes, issuance of bonds, allocations from federal sources, a phosphate severance tax, state forest operations, leases and sales of state lands, sale of environmental license plates, and sales of management area permits and other special permits. *See Economics of the Green Swamp*, THE GREEN SWAMP SYSTEM, A SCIENTIFIC ANALYSIS 3-27 (1992) (report prepared by the Green Swamp Task Force and the Green Swamp Technical Advisory Committee for the Polk County Board of County Commissioners, Polk County, Florida). The Federal Land and Water Conservation Fund annually allocates funds to Florida for conservation and recreation through the U.S. Fish and Wildlife Service, the U.S. Forest Service, and the National Park Service. Funds allocated to Florida during the 1980s averaged $10 million annually. *See id.* at 3-27. More recently, Congress allocated $300 million for Everglades restoration through the 1996 Farm Bill. *See* Federal Agricultural Improvement and Reform Act of 1996, Public Law No. 104-127, § 390, 110 Stat. 888, 1022-1023 (1996).

state's failure to conserve fisheries in coastal waters.[68] This provision bans the use of certain nets in near-shore marine waters.[69] The second provision relates to the state's failure to adequately protect the Florida Everglades.[70] This provision, added by voters in 1996, requires that "[t]hose in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution."[71] Voters also amended the Constitution to establish a trust fund to support conservation and protection of natural resources and abatement of water pollution in the Florida Everglades.[72]

Table 1: Florida Constitution Environmental Provisions

1. Pollution Control & Natural Resources Conservation	Art. 2, § 7(a) (conservation policy) Art. 2, § 7(b) (pollution abatement and conservation directive) Art. 2, § 7(b) (Everglades polluter pays) Art. 10, § 16 (net ban)
2. Funding	Art. 3, § 18(b) (appropriations) Art. 7, § 9(b) (water management taxes) Art. 7, § 11(e) (land acquisition bonds) Art. 7, § 14 (pollution control bonds) Art. 10, § 17 (Everglades Trust Fund) Art. 12, § 9(a) (land acquisition bonds) Art. 10, § 11 (ownership and sale of sovereignty lands) Art. 10, § 18 (sale of state conservation lands)
3. Public Lands	Art. 10, § 11 (ownership and sale of sovereignty lands) Art. 10, § 18 (sale of state conservation lands)
4. Tax Incentives	Art. 7, § 3(d); Art. 12, § 19 (renewable energy tax exemption) Art. 7, § 4(a) (tax incentive to protect aquifer recharge)
5. Fish & Wildlife	Art. 3, § 11(a)(19) (hunting and fishing laws) Art. 4, § 9; Art. 12, § 23 (Fish and Wildlife Conservation Commission)

68. *See* Frank Sargeant, *State Voters Reclaim Fish Management*, THE TAMPA TRIBUNE sports, 1 (Nov. 9, 1994); Dave Lear, *The Will of the People*, TIDE (1992) (a publication of the Coastal Conservation Association).

69. *See* FLA. CONST. art. X, § 16 (proposed by initiative petition filed with the Secretary of State, Oct. 2, 1992, adopted 1994).

70. *See, e.g.*, United States v. South Fla. Water Management Dist., 847 F. Supp. 1567, 1569-70, 1582 (S.D. Fla. 1992), *aff'd in part and rev'd in part on other grounds, remanded*, 28 F.3d 1563 (11th Cir. Fla. 1994) (establishing settlement agreement, including nutrient concentration limits, to resolve a suit by the United States against Florida, alleging that Florida had allowed state water quality standards to be exceeded in violation of the Clean Water Act); Miccosukee Tribe v. United States, 1998 U.S. Dist. LEXIS 15838, 53-56 U.S. Dist. Dkt. No. 95-0533-CIV-DAVIS (1998) (holding that the Everglades Forever Act changed Florida's water quality standards and that the EPA must review those changes as part of its duties under the Clean Water Act).

71. FLA. CONST. art. II, § 7(b) (proposed by initiative petition filed with the Secretary of State, Mar. 26, 1996, adopted 1996).

72. *See* FLA. CONST. art. X, § 17 (proposed by initiative petition filed with the Secretary of State, Mar. 26, 1996; adopted 1996).

D. *Selected National Constitutions*

An increasing number of national constitutions contain environmental provisions, several of which are examined more closely below. At least fifty countries' constitutions contain environmental provisions at the time of this writing.[73]

1. Brazil

In 1988, after several decades of military dictatorship, Brazil adopted a democratic constitution. Unlike the U.S. Constitution, which does not directly address the environment, the Brazil Constitution contains explicit authority for environmental protection.[74] The Brazil Constitution provides for protection of the environment generally, and also singles out five major ecosystems in Brazil for environmental preservation.[75]

Chapter VI of the Constitution includes a general declaration that everyone is entitled to an ecologically balanced environment, which is essential to a healthy quality of life.[76] The government must protect and preserve the environment, both for present and future generations, by doing

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73. The author searched numerous national constitutions for environmental provisions using the University of Richmond's Constitution Finder Internet site, available at <http://www.urich.edu/~jpjones/confinder/>. This list of citations is not intended to be exhaustive. *See, e.g.*, ALBANIA CONST. ch. IV, arts. 56, 57; ANGOLA CONST. pt. II, art. 24; ARGENTINA CONST. ch. II, § 41; ARMENIA CONST. ch. 1, art. 10; AZERBAIJAN CONST. ch. 2, § III, art. 39; BELARUS CONST. § II, art. 46; BULGARIA CONST. ch. 2, art. 55; CAMEROON CONST. pmbl.; CAPE VERDE CONST. tit. III, art. 70; CHECHNYA CONST. § 2, art. 34; CHINA CONST. ch. 1, art. 26; CONGO CONST. tit. II, art. 46; CROATIA CONST. pt. III, art. 69; ESTONIA CONST. ch. II, art. 53; ETHIOPIA CONST. ch. 3, art. 44; FINLAND CONST. I, § 14a; GEORGIA CONST. ch. 2, art. 37; GREECE CONST. pt. 2, art. 24; GUYANA CONST. ch. II, 36; HAITI CONST. ch. III, art. 52-1h; HUNGARY CONST. ch. I, art. 18; INDIA CONST. pt. IVA(g); KAZAKSTAN CONST. § II, art. 31; KOREA CONST. ch. II, art. 35 (South Korea); LATVIA CONST. ch. VIII, art. 35; LITHUANIA CONST. ch. 4, art. 53; MACEDONIA CONST. ch. II, pt. 2, art. 43; MADAGASCAR CONST. tit. II, § II, art. 39; MALTA CONST. ch. II, § 9; MOLDOVA CONST. ch. II, art. 37; MONGOLIA CONST. ch. 2, art. 16; MOZAMBIQUE CONST. ch. I, art. 72; NETHERLANDS CONST. ch. 1, art. 21; PARAGUAY CONST. tit. II, ch. I, § II; PERU CONST. tit. III, ch. II, art. 67; PORTUGAL CONST. ch. II, art. 66; RUSSIA CONST. § 1, ch. 2, art. 42; SAUDI ARABIA CONST. ch. 5, art. 32; SLOVAKIA CONST. ch. II, pt. 6, art. 44; SLOVENIA CONST. pt. 3, art. 72, 73; SOUTH AFRICA CONST. ch. 2, § 24; SPAIN CONST. ch. III, art. 45; SWITZERLAND CONST. ch. I, art. 24; THAILAND CONST. ch. III, § 56; TURKEY CONST. ch. 3, VIIIA, art. 56; UGANDA CONST. pmbl. XXVII; UKRAINE CONST. ch. II, art. 50; UZBEKISTAN CONST. § III, ch. XII, art. 55; YUGOSLAVIA CONST. § II, art. 52 (Serbia and Montenegro).

74. While Brazil's Constitution provides much more specificity than the U.S. Constitution, both constitutions establish similar tripartite systems of government, including distinct judicial, legislative, and executive branches of government. *See* BRAZIL CONST., *supra* note 24, tit. IV, chs. I, II, III; U.S. CONST. arts. I, II, III.

75. *See* BRAZIL CONST., *supra* note 24, ch. VI.

76. *See id.* ch. VI, art. 225.

the following: 1) Preserve and restore essential ecological processes and manage ecosystems in an ecological manner; 2) Preserve diversity and integrity of Brazil's genetic material; 3) Designate areas for special protection and prohibit uses which threaten the integrity of such areas; 4) Require and make public an environmental impact study prior to any activity that may potentially cause significant harm to the environment; 5) Control production, marketing and use of techniques that threaten life, the quality of life, or the environment; 6) Promote environmental education at all levels; and 7) Protect flora and fauna by prohibiting practices that threaten ecological functions of species, lead to extinction, or treat animals cruelly.[77]

The Constitution also requires restoration of lands damaged through mineral exploitation and provides for the levying of administrative and criminal penalties against persons harming the environment.[78] The Constitution designates five large natural areas in Brazil, including the "Brazilian Amazonian forest, the Atlantic jungle, the Serra do Mar mountain range, the Mato Grosso Pantanal . . . , and the Coastal Zone" as areas of "national patrimony" to be used only in a manner that assures the preservation of the environment and natural resources of these areas.[79]

Clearly, the Constitution provides an abundance of protection for the environment in general, and specifically for the five named areas. In fact, the United Nations considers the Brazil Constitution to be one of the most advanced constitutional texts on environmental issues in the world.[80] The Constitution incorporates basic principles of ecology and conservation biology, including requirements to preserve ecosystems and diversity. The Constitution also prohibits activities that lead to extinction of species. The Constitutional designation of the five natural areas as part of the "national patrimony" provides these areas with the strongest possible legal status.

The Constitutional provision requiring an Environmental Impact Study (EIS)[81] applies to any action, government or private, which may significantly harm the environment, and, thus, is more comprehensive than the United States' EIS requirements under the United States National

77. *See id.* ch. VI, art. 225, para. 1, I-VII.

78. *See id.* ch. VI, art. 225, para. 2, 3.

79. *Id.* ch. VI, art. 225, para. 4.

80. *See* Jeffery S. Wade et al., *Comparative Analysis of the Florida Everglades and the South American Pantanal* 24 (published in the proceedings of the Interamerican Dialogue on Water Management, 54 Miami, Fla., Oct. 27-30, 1993) (citing R. GUIMARÃES, THE ECOPOLITICS OF DEVELOPMENT IN THE THIRD WORLD: POLITICS AND ENVIRONMENT IN BRAZIL (1991)).

81. The acronym EIS, as used in this Article, refers interchangeably to Brazil's "environmental impact study," the United State's National Environmental Policy Act phrase "environmental impact statement," and other laws, conventions, or policy statements concerning assessment of environmental impacts.

Environmental Policy Act.[82] The EIS requirement also coincides with international consensus that the EIS is an essential tool for environmental protection.[83] While EIS requirements are largely procedural, their use in the United States has generally yielded positive results. Much of the value of the EIS process is that it requires decision makers to gather scientific information, consider alternatives, and open the decisionmaking process to public scrutiny. Of course, an EIS process does not guarantee a good decision, but it does facilitate informed democratic decisionmaking.

The enforceability of Brazil's Constitution, arguably one of the most environmentally protective in the world, is largely untested because it is only eleven years old.[84] In the past, Brazil has openly promoted environmentally harmful projects on the basis that abject economic and social conditions justify allocation of scarce public resources to productive development activities, rather than to environmental protection.[85] Yet, despite this history, Brazil has recently made substantial efforts to strengthen its environmental protection, including the environmental provisions in the 1988 constitution, special constitutional and statutory protection for specific geographic areas in Brazil, and programs to strengthen environmental institutions and regulatory programs.[86]

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82. *See* 42 U.S.C. § 4332(C); *see also* 40 C.F.R. § 1508.18 (requiring environmental impact statements for major federal actions, but not for actions in which the federal government is not significantly involved).

83. *See, e.g., Rio Declaration, supra* note 29, principle 17; *Biological Diversity Convention, supra* note 29, art. 14,1(a); *World Charter for Nature, supra* note 29, art. II(c).

84. A proposed waterway "improvement" project (the Hidrovia) could serve as a true test of Brazil's resolve to enforce its constitutional environmental provisions. The Brazilian Pantanal, one of the world's largest wetlands, currently faces potential ecological disaster from this internationally sanctioned economic development project. *See* ENRIQUE H. BUCHER ET AL., HIDROVIA: AN INITIAL ENVIRONMENTAL EXAMINATION OF THE PARAGUAY-PARANÁ WATERWAY 53 (Wetlands for the Americas, Manomet, Mass., 1993). The project is endorsed by several multilateral development banks, several foreign governments, a multilateral trade organization, and countries in the region. *See New Impetus for Paraguay-Paraná Waterway*, Latin America Regional Reports: Brazil, Nov. 25, 1993, *available in* LEXIS, NSAMER Library, LAN File. The European Community committed funding to the project for port infrastructure and administration. *See EC-MERCOSUR Relations*, Reuter Textline, Apr. 7, 1995, *available in* LEXIS, NSAMER Library, BRAZIL File. U.S., French, Italian, Spanish, British, and Polish investors have expressed interest in providing investment capital, equipment, and technical knowledge. *See U.S. Concern About Bolivian Pipeline*, Latin America Regional Reports: Brazil, June 9, 1994, *available in* LEXIS, NSAMER Library, LAN File; *Uruguayan President Calls Walesa "A Hero of Our Times*, Polish Press Agency News Wire, Feb. 23, 1995, *available in* LEXIS, NSAMER Library, ALLNWS File. U.S. Commerce Secretary Ron Brown stated the Hidrovia was one of three projects for which U.S. companies would "compete and win contracts." *Bolivia-Brazil Pipeline*, Latin America Regional Reports: Brazil, Aug. 18, 1994, *available in* LEXIS, NSAMER Library, LAN File.

85. *See* Roger W. Findley, *Pollution Control in Brazil*, 15 ECOLOGY L.Q. 1, 30 (1988).

86. *See, e.g., supra* note 77 and accompanying text.

2. Poland

In 1989, Poland began the transformation from communist to democratic governance. In 1997, Poland adopted its most recent democratic constitution, which includes several environmental provisions.[87] The Polish Constitution embraces the modern concept of sustainable development as the appropriate means to ensure protection of the natural environment.[88] The Constitution also authorizes statutes to protect the natural environment, even if the statutes limit the exercise of constitutional freedoms and rights, provided the limitations do not violate the essence of such freedoms and rights.[89] The Constitution also places several duties on public authorities, including duties to prevent negative health consequences caused by degradation of the environment,[90] to pursue policies "ensuring the ecological safety of current and future generations," to protect the environment, and to support citizens' activities to protect and improve environmental quality.[91] Further, everyone has the "right to be informed of the condition and protection of the environment."[92] The Constitution also places a duty on all citizens to care for environmental quality and specifies that "everyone . . . shall be held responsible for causing its degradation."[93]

IV. THE SIGNIFICANCE OF ENVIRONMENTAL PROVISIONS IN CONSTITUTIONS

A. *Judicial Interpretations—Enforceability*

It is obvious from the abundance of environmental laws that express constitutional authority is not an essential prerequisite for local, state, or federal government to adopt laws to protect the environment and conserve

87. *See* POLAND CONST. (1997) (adopted by National Assembly on Apr. 2, 1997, confirmed by referendum in Oct. 1997, available at <http://www.uni-wuerzburg.de/law/pl00000_.html>).

88. *See id.* ch. I, art. 5. The actual text is "[t]he Republic of Poland . . . ensures the protection of the natural environment based on the principles of sustainable development." *Id.*

89. *See id.* ch. II, § 1, art. 31(3). The provision states: "[a]ny limitation on the exercise of constitutional freedoms and rights may be imposed only by law, and only when necessary in a democratic state . . . to protect the natural environment. . . . [Such] limitations cannot violate the essence of freedom and rights." *Id.*

90. *See id.* ch. II, § IV, art. 68. The provision states "[p]ublic authorities are obligated to combat epidemic illnesses and prevent the negative health consequences of degradation of the environment." *Id.*

91. *Id.* ch. II, § IV, art. 74(1),(2),(4).

92. *Id.* ch. II, § IV, art. 74(3).

93. *Id.* ch. II, § VI, art. 86. The principles of this responsibility must be specified by statute. *See id.*

natural resources.[94] Constitutional authority does, however, provide useful policy guidance for courts, legislators, corporations, and citizens.[95] Constitutional authority may become more important in the future if the emerging societal environmental ethic makes it necessary to reexamine, and perhaps redefine, the relationship and roles of the environment and traditional fundamental rights such as the right to property.[96] In other words, if society insists that the environment be given greater consideration, new constitutional authority may be warranted and required to accomplish that goal.

A key legal issue is whether a constitutional provision is judicially enforceable. Conclusive determination of the legal significance of constitutional environmental provisions can only be made if the provision has been implemented by the state or has been the subject of a judicial decision. Nonetheless, there are some general factors that may help to predict whether a provision is enforceable and whether it is self-executing or requires implementing legislation. One commentator suggests describing provisions as 1) non-mandatory, 2) mandatory/non-prohibitory, 3) mandatory/prohibitory, or 4) mixed provisions.[97]

Non-mandatory provisions often express public sentiment or policy but do not "order a particular result, impose a duty, or create an obligation."[98] For example, a provision stating "the state may adopt land acquisition programs for conservation purposes" is non-mandatory. Non-mandatory provisions are almost never self-executing and are generally not judicially enforceable.[99]

Mandatory/non-prohibitory provisions do "order a particular result, grant a right, or impose a duty or limitation," but "fail to affirmatively prohibit specific acts."[100] For example, a provision requiring that a "state shall control air and water pollution," is mandatory but not prohibitory.

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94. Sources of authority for local, state, and federal environmental laws have been discussed extensively by other commentators. *See generally supra* note 10 and accompanying text.

95. *See, e.g.*, Turner v. Trust for Pub. Land, 445 So. 2d 1124, 1126 (Fla. 5th DCA 1984) (referencing article II, section seven, of the Florida Constitution as providing authority for Florida's principal environmental regulatory programs).

96. *See* Goldstein, *supra* note 3, at 410-12 (arguing that the traditional property "bundle of sticks" should be expanded to include "green sticks" prohibiting harmful use and including a duty of environmental context, thereby reflecting the "current reality of ecology and the societal values comprising environmental ethics"). For example, new constitutional authority may become increasingly important if stronger land use controls are required on private property for the purpose of conserving ecosystems and biodiversity.

97. *See* Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 341-42 (1993) (citing 16 C.J.S. *Constitutional Law* §§ 46-48 (1984)).

98. *Id.* at 342.

99. *See id.*

100. *Id.* at 342-43.

Mandatory/non-prohibitory provisions may be self-executing, depending upon whether the provision provides sufficient detail and process to be susceptible to judicial enforcement. A key question is what happens if a legislature fails to act on a mandatory provision that is not self-executing.[101] Generally, state courts are unwilling to order legislatures to act because of separation of powers principles.[102]

Mandatory/prohibitory provisions exhibit characteristics of both mandatory and prohibitory provisions.[103] For example, a provision stating "the state shall prohibit the use of steel-jaw leg-hold traps to capture animals" is both mandatory and prohibitory. Mandatory/prohibitory provisions are generally self-executing and judicially enforceable.[104] Mixed provisions do not fit neatly within any of the first three categories but instead contain a mixture of traits, and may or may not be self-executing or judicially enforceable.[105]

As stated above, ultimate determination of whether constitutional provisions are non-mandatory, mandatory, mandatory-prohibitory, or self-executing is a judicial question that must be determined on a case-by-case basis. The remainder of this section examines selected judicial cases interpreting environmental constitutional provisions.

In a recent landmark decision, the Montana Supreme Court held that the Montana Constitution provides a fundamental right to a clean and healthful environment that is subject to a strict scrutiny standard of judicial review.[106] This case involved an application by Seven-Up Pete Joint Venture (Seven-Up Pete) for a large open-pit gold mine in the upper Blackfoot River Valley in Montana.[107] Plaintiffs alleged that the defendant, Montana Department of Environmental Quality (DEQ), illegally allowed Seven-Up Pete to discharge water from groundwater monitoring wells containing high levels of arsenic and zinc into shallow aquifers, without first requiring a showing that the discharge would not degrade the high quality receiving waters.[108] Plaintiffs argued that the Montana statute that authorized DEQ to exclude certain discharges from non-degradation review violated a fundamental right to a clean and healthful environment,

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101. This is presently the situation with the Florida "polluter pays" provision. *See infra* notes 136-37 and accompanying text (noting the reluctance of the Florida Supreme Court to order the legislature to undertake its constitutional duties).

102. *See* Fernandez, *supra* note 97, at 344-45; *see also infra* note 137.

103. *See id.* at 349-51.

104. *See id.* at 342 & 349.

105. *See id.* at 351-53.

106. *See* Montana Envtl. Info. Ctr. v. Department of Envtl. Quality, 988 P.2d 1236, 1249 (Mont. 1999).

107. *See id.* at 1237.

108. *See id.* at 1237-38.

and thus the statute as applied was subject to strict scrutiny.[109] Under a strict scrutiny standard, the statutory exemption could only be upheld if the government demonstrated a compelling state interest and the waiver was both closely tied to effectuating that interest and was the least onerous method of achieving that interest.[110]

The court first determined that plaintiffs had standing,[111] and then turned to the constitutional issue. The statute in question contained standards to determine whether a discharge would degrade receiving waters,[112] but the legislature amended this to provide a blanket exclusion for "categories . . . [that] cause changes in water quality that are nonsignificant . . . . [including] discharges of water from water well or monitoring well tests. . . ."[113] The court determined that the two following constitutional provisions were implicated:

> Article II, Section 3 provides in relevant part that:
>
> > All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . .
> >
> > . . . .
>
> Article IX, Section 1 provides in relevant part as follows:
>
> > (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> >
> > . . . .
> >
> > (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.[114]

The court determined that Article II, Section 3 is a fundamental right entitled to strict scrutiny because it is guaranteed by the Declaration of Rights of the constitution,[115] but that Article IX, Section 1 would normally be subject to an intermediate standard of review because the provision is

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109. *See id.* at 1242. When an action interferes with the exercise of a fundamental right then the appropriate standard of review is strict scrutiny. *See id.*

110. *See id.* at 1245-46 (citing Wadsworth v. State, 911 P.2d 1165, 1174 (Mont. 1996)).

111. *See id.* at 1242-43.

112. *See id.* at 1243 (citing MONT. CODE ANN. § 75-5-317 (1995)).

113. *Id.* at 1244 (quoting MONT. CODE ANN. § 75-5-317(2)(j) (1995)).

114. *Id.* at 1243 (citing MONT. CONST. art. II, § 3 & art. IX, § 1).

115. *See id.* at 1245-46.

included in a different section of the constitution.[116] However, after reviewing previous decisions and the records of the Montana Constitution Convention that adopted the environmental provisions in 1972, the court determined that the two sections are interrelated and must be read together.[117] In other words, the court determined that the provisions should be treated consistently because they are interrelated, and thus applied "strict scrutiny to state or private action which implicates either constitutional provision."[118]

In 1984, the Illinois Supreme Court considered whether an Illinois statute requiring mandatory fluoridation of the public water supply violated the state's constitutional right to a healthful environment.[119] The constitutional provisions in question stated:

> The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.
>
> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.[120]

Plaintiffs contended that fluoridation was a health risk and that the statute requiring fluoridation violated citizens' fundamental right to a healthful environment.[121] Thus, plaintiffs argued, the statue should be subjected to strict scrutiny and upheld only upon a showing of compelling state interest.[122]

After only a cursory analysis, the court rejected plaintiffs' assertion that the constitution provided a fundamental right to a healthful environment.[123] The court's reasoning was that plaintiffs failed to provide adequate authority or reasoning as to "why we should subject statutes affecting the environment to a higher level of scrutiny."[124] The court then applied a

116. *See id.* at 1246.
117. *See id.*
118. *Id.*
119. *See* Illinois Pure Water Comm., Inc. v. Director of Pub. Health, 104 Ill. 2d 243, 245 (Ill. 1984).
120. ILL. CONST. art. II, §§ 1, 2.
121. *See Illinois Pure Water Comm.*, 104 Ill. at 245-46.
122. *See id.* at 249, 251.
123. *See id.* at 250-52.
124. *Id.* at 251-52.

reasonableness standard and determined the plaintiffs had failed to establish that the statute was an unreasonable exercise of the police power.[125]

In Florida, there have been no decisions concerning whether the constitution grants any fundamental environmental rights. However, Florida decisions have examined whether constitutional environmental provisions are self-executing, which affects a provision's enforceability. In 1996, the South Florida Water Management District requested an advisory opinion from the Florida Attorney General concerning whether recent constitutional amendments pertaining to pollution control in the Florida Everglades were self-executing or required implementing legislation.[126] The first provision in question was article II, section 7, which provides:

> Those in the Everglades Agricultural Area (EAA) who cause water pollution within the Everglades Protection Area (EPA) or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution. For the purposes of this subsection, the terms "Everglades Protection Area" and "Everglades Agricultural Area" shall have the meanings as defined in statutes in effect on January 1, 1996.[127]

This amendment is known as the "polluter pays" provision.[128] The second amendment established the Everglades Trust Fund, designated sources of funds, designated purposes for which trust funds may be spent, and directed the South Florida Water Management District to administer the fund.[129] The Attorney General applied the following Florida Supreme Court test for determining whether a constitutional provision is self-executing:

> The basic . . . test . . . is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment.[130]

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125. *See id.* at 251.

126. *See* 96 Op. Fla. Att'y Gen. 92 (1996).

127. FLA. CONST. art. II, § 7(b).

128. *See* Advisory Opinion to the Governor—1996 Amendment 5 (Everglades), Fla. Sup. Ct. Case No. 90,042, 8 (1997).

129. *See* FLA. CONST. art. X, § 17.

130. 96 Op. Fla. Att'y Gen. 92, 4 (1996) (citing Gray v. Bryant, 125 So. 2d 846 (Fla. 1960)).

The Attorney General determined that both provisions were self-executing, stating it is presumed that constitutional amendments are self-executing because, otherwise, the legislature could defeat the will of the people.[131]

Subsequently, the Governor of Florida balked at the Attorney General's Opinion regarding the polluter pays provision and requested that the Florida Supreme Court review the issue. The court applied the same basic test quoted above to determine whether the provision was self-executing but came up with the opposite result. The court determined the provision failed to lay down a sufficient rule and left too many policy questions unanswered.[132] For example, the amendment raised questions concerning what constitutes water pollution, how to determine who is a polluter, how to assess the cost of pollution abatement, and who can assert claims.[133] The court's reasoning ignores the existence of widely used definitions of water pollution[134] and the Florida Environmental Protection Act, which authorizes citizens to maintain actions for injunctive relief against persons, companies, or agencies that violate laws for air, water, or natural resource protection in Florida.[135]

In finding that the provision requires implementing legislation, the court acknowledged the Everglades Forever Act, the purpose of which is much the same as the constitutional provision, but stated "we believe the voters adopted Amendment 5 to effect a change, and construing the

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131. *See id.* at 5.

132. *See* Advisory Opinion to the Governor—1996 Amendment 5 (Everglades), Fla. Sup. Ct. Case No. 90,042, 9 (1997).

133. *See id.* at 10.

134. *See, e.g.*, FLA. STAT. § 403.031(7) (defining pollution for purposes of the Florida Air and Water Pollution Control Act) (1999); 33 U.S.C. § 1362(6) (defining pollutant for purposes of the Clean Water Act).

135. *See* FLA. STAT. § 403.412 (1999). The statute provides:

> The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:
>
> 1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;
> 2. Any person, natural or corporate, or governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.

Id. § 403.412(2)(a). The provision has been little used, however, because it also provides that "the prevailing party or parties shall be entitled to costs and attorney's fees." *Id.* § 403.412(2)(f). The risk that the losing party may have to pay these fees has deterred plaintiffs from bringing good faith actions under this statutory provision.

Everglades Forever Act as Amendment 5's implementing legislation would effect no change, nullify the Amendment, and frustrate the will of the people."[136] Paradoxically, the court's decision is having exactly the effect that the court was concerned about, at least in the short term. It has been over two years since the court held the provision was not self-executing, and the Florida Legislature has not yet adopted implementing language. It seems the will of the people continues to be frustrated.[137]

Florida decisions have also cited environmental constitutional provisions as authority in support of statutes and regulations relating to land use and environmental protection.[138] In 1995, the Florida Supreme Court upheld an ordinance banning fences that restricted the movement of endangered key deer on Big Pine Key.[139] The court applied a rational basis test and found that the ordinance was valid "because it was based on a rational basis consistent with state environmental policy."[140] The court referenced Article II, Section 7 as clearly establishing the state's environmental policy.[141]

Perhaps more significant is the court's language concerning the relationship between the environment and other basic, and presumably "fundamental" rights. While the court did not refer to the environment as a fundamental right, the court did compare the environment to the right of equal protection, the right of privacy, the right of due process, and the right

136. Advisory Opinion to the Governor—1996 Amendment 5 (Everglades), Fla. Sup. Ct. Case No. 90,042, 12 (1997).

137. The Florida Supreme Court could consider ordering the Legislature to adopt implementing legislation, or, in the alternative, rescind its decision finding the provision non-self-executing. Courts are notoriously reluctant to order the legislative branch to undertake its constitutional duties, because of separation of powers principles. *See* Miami Beach v. Kaiser, 213 So. 2d 449, 453 (Fla. 3d DCA 1968). *But see* Dade County Classroom Teachers Ass'n v. The Legislature, 269 So. 2d 684, 686 (Fla. 1972) (denying a request to issue a constitutional writ to compel the Florida Legislature to enact standards or guidelines regulating the right of collective bargaining by public employees, as guaranteed by section 6, article I, of the Florida Constitution, but stating: "We think it is appropriate to observe here that one of the exceptions to the separation-of-powers doctrine is in the area of constitutionally guaranteed or protected rights. The judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it.").

138. *See, e.g.*, Orange County, Fla. v. Florida Dep't of Env'l Regulation, DOAH Case No. 77-648, 16 (1977) (citing article II, section VII of the Florida Constitution as a constitutional mandate for the Florida Land and Water Pollution Control Act); Hodges v. Department of Env'l Regulation, DOAH Case No. 81-1088, 12 (1981) (citing article II, section VII of the Florida Constitution as establishing state policy to conserve and protect natural resources, in support of the state's statute regulating dredge and fill activities).

139. *See* Department of Community Affairs v. Moorman, 664 So. 2d 930 (Fla. 1995).

140. *Id.*

141. *See id.* at 932.

to enjoy property—in effect elevating the environment to the same level.[142] With respect to equal protection, the court stated that equal protection "does not restrict the State's ability to establish or mandate reasonable environmental regulations, even those that may apply only in a certain area, where the State is addressing an environmental problem peculiar to the area."[143] The right of privacy does not conflict with the state environmental policy because "the decision to use land in a manner contrary to lawful public environmental policy is simply not a private act . . . [and] [l]andowners do not have an untrammeled right to use their property regardless of the legitimate environmental interests of the State."[144]

The court also spoke of the constitutional right of due process, which guarantees the right to enjoy property. While recognizing that property owners are protected from laws that erode property values beyond reasonable limits,[145] the court cautioned that "this personal right does not necessarily supervene the rational concerns of public environmental policy. Due process, in other words, seeks to find a balance between public and private interests, not to make the landowner lord over the State, nor the State lord over the landowner."[146]

Florida courts have also tested the constitutionality of environmental provisions. In *Lane v. Chiles*,[147] the Florida Supreme Court considered a constitutional amendment banning use of certain fish nets in near-shore coastal waters. Plaintiffs alleged the court should apply strict scrutiny to review the amendment's validity.[148] The court rejected this argument, instead embracing the rational basis standard used to review the constitutional validity of state statutes as the appropriate test.[149] Strict scrutiny would only be appropriate if a constitutional provision infringed upon a fundamental right or adversely affected a suspect class.[150] The court determined that fishing is not a fundamental right and fishermen are not a suspect class and that, therefore, the rational basis test was appropriate.[151] Interestingly, however, when the plaintiff alleged the amendment interfered

142. *See id.* at 932-33.

143. *Id.* at 932. The area in question in this case had been previously identified as an Area of Critical State Concern (ACSC) by the Florida Legislature. The ACSC program authorizes the Legislature to identify and provide for regulation of areas of ecological importance to the entire state. *See* FLA. STAT. §§ 380.012-.12 (1999).

144. *Id.* at 933.

145. *See* U.S. CONST. amend. V (prohibiting the government from taking private property without compensating landowners); FLA. CONST. art. X, § 6; FLA. CONST. art. I, § 9.

146. Department of Community Affairs v. Moorman, 644 So. 2d 930, 932 (Fla. 1995).

147. 698 So. 2d 260, 262 (Fla. 1997).

148. *See id.*

149. *See id.* at 265.

150. *See id.* at 262-63.

151. *See id.*

with fundamental due process, liberty, and property rights, the court continued to apply the rational basis test, finding the amendment was rationally based in each instance.[152]

The net ban amendment was tested again a year later when defendants charged with criminally violating the amendment asserted that it was unconstitutionally vague.[153] The case turned on whether terms contained in the amendment were sufficiently defined, including the meaning of "gill nets" or other "entangling nets" and "near-shore and inshore Florida waters."[154] The court applied a rational basis type standard to test the constitutional provision for vagueness, evaluating "whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice."[155] The court determined the meaning of the terms was discernable, and, thus, the provision was not void for vagueness.[156]

B. *Political Significance*

Constitutional amendments are useful political tools to prod elected officials to make difficult decisions. Two recent amendments to Florida's Constitution illustrate the usefulness of citizen initiatives. In 1994, after years of frustration with the state's inability to establish regulations to halt rapidly diminishing fisheries, voters proposed and ratified an amendment banning the use of certain nets in near-shore coastal waters.[157] In 1996, dissatisfied with the state's progress in controlling pollution and restoring the Florida Everglades, voters proposed and ratified an amendment creating a "polluter pays" obligation for entities that pollute designated portions of the Everglades system.[158] Both of these initiatives were driven by citizen perceptions that government had failed to adequately protect natural resources.

Regardless of the legal effect of these two amendments, they send powerful messages to state legislators and regulators that citizens will no longer accept inadequate action or inaction concerning certain environmental problems. While some observers contend that highly specific amendments to constitutions, such as Florida's net ban, are

152. *See id.* at 263-64.

153. *See* Florida v. Kirvin, No. 97-3266, 1998 Fla. ENV LEXIS 224, at *1 (Fla. 1st DCA Sept. 17, 1998).

154. *Id.* at *14-15.

155. *Id.* at *7 (citing State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980)).

156. *Id.* at *26.

157. *See* FLA. CONST. art. X, § 16 (proposed by initiative petition filed with the Secretary of State, Oct. 2, 1992, adopted 1994); *supra* note 68.

158. *See* FLA. CONST. art. II, § 7(b) (proposed by initiative petition filed with the Secretary of State, Mar. 26, 1996, adopted 1996); *supra* note 70.

inappropriate for constitutions and are more suitable for statutes or regulations, the stark reality is that there are times when legislative bodies become permanently grid-locked or just plain refuse to do the will of the people. Constitutional amendments engendered by citizen initiative and periodic constitutional revisions provide a potential avenue to overcome non-responsive elected officials.[159] Citizen initiated amendments, while perhaps not as legally artful or desirable as a legislative solution, offer a powerful and necessary tool to spark government action in certain situations.

C. *Societal Significance*

Environmental provisions are becoming part of the constitutional fabric of many states and nations. This is a significant phenomenon for several reasons. First, it strengthens the legal basis for environmental protection. As previously stated, this may prove to be increasingly important as the key challenge for environmental law shifts from pollution control to conserving ecosystems and biodiversity.[160] Second, and perhaps most important, it reflects societal recognition and acceptance of the importance of the environment to humankind.

Unlike other fundamental values, such as property rights, societal values regarding the environment are a recent phenomenon, largely unthought of at the time our federal and state constitutions were formed. Today, however, the environmental consciousness of society has increased to the point where many citizens understand the importance of maintaining the environment. This is because citizens have an increasingly sophisticated understanding of basic ecological relationships and scientific principles. Equally important, many citizens understand that economic self-interest often trumps the environment in the absence of law.[161] Environmentalism, often used in the past to describe a fringe movement, has become part of the mainstream human ethos. This is clearly the case in Florida, where citizens have voted to add environmental provisions to the constitution in the last three elections.[162]

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159. Of course, "voting the ___ out of office" is another potential remedy to gridlock or non-responsiveness. Analysis of the wisdom of the initiative process and periodic constitutional revision is beyond the scope of this article.

160. *See generally* Tarlock, *supra* note 10, at 555-60 (noting that current environmental policy has the added objective of protecting biodiversity).

161. Garrett Hardin eloquently described this truth in his prophetic "tragedy of the commons" and called for government to adopt laws to protect the broader public interest by protecting the environment. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

162. *See* FLA. CONST. art. X, § 16 (proposed by initiative petition filed with the Secretary of State, Oct. 2, 1992, adopted 1994) (banning use of inshore nets); *id.* art. II, § 7(b) (proposed by initiative petition filed with the Secretary of State, Mar. 26, 1996, adopted 1996) (creating "polluter

V. FUTURE TRENDS

The constitutionalization of an environmental ethic is being driven by society. As human population continues to increase, so will the scope and scale of environmental problems. Thus, it is likely that the environment will find its way into constitutions with increasing frequency. One commentator recently argued that environmental provisions are inappropriate for constitutions and invented a complicated test to support this viewpoint.[163] This commentator argues that environmental issues are too complicated to be included in the U.S. Constitution and enforced by the courts. While there may be some truth to these assertions, complexity is not a suitable basis to exclude a fundamental human concern from constitutions or review by courts. Society should not shy away from amending constitutions to reflect societal norms.

The enforceability of existing environmental provisions will continue to be tested in the courts. In states that have articulated a right to a clean and healthful environment, the key issue will be whether this is a fundamental right subject to a strict scrutiny standard of judicial review. Judicial decisions finding environmental provisions to be not self-executing are likely to stimulate new citizen initiatives. Similarly, judicial decisions that apply a rational basis standard to review the constitutionality of practices or statutes may also stimulate citizen initiatives, if the end result of those decisions is to frustrate the intent of environmental constitutional provisions. Finally, legislatures will inflame the initiative fire even more if they fail to implement environmental constitutional provisions that courts have determined are not self-executing.

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pays" provision and trust fund for Florida Everglades); *id.* art. VII, § 3(f) (proposed by Florida Constitutional Revision Commission, adopted 1998) (authorizing tax exemptions for conservation lands).

163. *See* J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 252 (1999).

VI. CONCLUSION

An environmental ethic is being integrated throughout the world into constitutions, the highest expression of sovereign law. The ethic is also being integrated into international law. This phenomenon reflects the maturation of environmental consciousness and concern as a legitimate social value. While the immediate legal and political significance of this phenomenon varies, the long-term effect will likely be greater consideration and protection of the environment. Constitutions like those of Brazil and Florida are at the forefront of this phenomenon and serve as useful models for other jurisdictions.