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SOME OBSERVATIONS ON THE USE OF STATE CONSTITUTIONS TO PROTECT THE ENVIRONMENT

*By Richard J. Tobin**

In recent years, environmentalists have devoted increasing attention to the legal aspects of environmental degradation. In many cases, they have found that existing statutory legislation is inadequate[1] or improperly enforced by administrative agencies.[2] Concerned with these apparent deficiencies, many have called for a stronger commitment to environmental protection in the form of a constitutional provision guaranteeing citizens a right to a clean, healthful environment.[3]

In view of these claims, it is worthwhile to examine some of the major issues involved with constitutional protection of the environment. Although most recent reports consider constitutional protection at the national level,[4] this article will focus on two aspects of state constitutional action. First, some of the predicted consequences of state constitutional action in the environmental area are examined. Second, and more importantly, several potential problems associated with the implementation of environmental declarations are considered. Hopefully, this policy analysis will be useful to states and individuals currently relying on or considering constitutional declarations concerning the environment.

I. Federal Action

Recent Congressional efforts to amend the constitution in order to expressly guarantee a right to a decent environment have been notable failures. Undaunted, however, some claim that the Ninth Amendment to the Constitution already encompasses such a right.[5] The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The argument that this language implicitly refers to the right to a decent environment was bolstered by the Supreme Court's decision in *Griswold v. Connecticut*.[6] In that decision, the Court reversed convictions for

aiding and abetting a violation of a Connecticut law that prohibited the use of contraceptives by married couples. Mr. Justice Goldberg, in a concurring opinion, noted that "the concept of liberty protects those personal rights [i.e. the right to marital privacy] that are fundamental, and is not confined to the specific terms of the Bill of Rights."[7] In sum, *Griswold* established the Ninth Amendment as a source of previously unenumerated rights.

Armed with the *Griswold* decision, environmentalists marched into federal courts and asked that *Griswold* be extended in order to secure a constitutional right to a decent environment. In all cases to date, however, these efforts to achieve constitutional protection of the environment have failed.

In one case, for example, the Environmental Defense Fund (EDF) brought an action against the Hoerner Waldorf Corporation,[8] claiming that the Corporation's pulp and paper mill in Missoula, Montana, emitted noxious sulfur and other toxic compounds. EDF squarely confronted the constitutional issue by asking the United States District Court in Missoula to find that the Constitution, through the Ninth Amendment and the due process clauses of the Fifth and Fourteenth Amendments, protects environmental rights. However, the case was dismissed because the requisite degree of state or federal governmental action necessary to sustain a suit based on Fifth or Fourteenth Amendments was lacking.[9] Moreover, the presiding judge declined to recognize the Ninth Amendment as a basis for an additional unenumerated right.[10] In other cases[11] as well, lower federal courts have refused to accept these constitutional arguments, stating the Supreme Court will have to determine the applicability of the Ninth Amendment to environmental protection.

Although constitutional progress at the federal level currently seems unlikely, numerous states have adopted constitutional provisions providing for environmental protection (*See* Appendices I and II). Constitutional commissions or conventions in five states (Florida, Illinois, Michigan, Montana, and Virginia) have included environmental provisions in new constitutions, while six states (Massachusetts, Pennsylvania, New York, New Mexico, Rhode Island and North Carolina) have amended their constitutions to provide for environmental rights. Thus, some states have completely bypassed the need for any constitutional action at the federal level.

II. Impact of a Constitutional Right to a Decent Environment

A state legislature committed to strict or lax environmental regulations will do what it wishes.[12] However, a constitutional right to

environmental protection should at least inhibit a legislature from enacting legislation that would lead to serious environmental damage.[13]

Supposedly, a constitution is "the ultimate repository of a people's considered judgment about basic matters of public policy."[14] Thus, a constitution should provide a law higher and more fundamental than common statutes. Constitutional amendments ordinarily require legislative enactment and approval by the voters. In all states that have voted on environmental declarations, the proposals have won by overwhelming margins. In this light, constitutional provisions have an advantage in that they probably cannot be amended or repealed very readily.

Moreover, there is widespread agreement that constitutional environmental declarations can set goals and provide guidance for state agencies. For example, the California Assembly Select Committee on Environmental Quality listed the lack of state goals as one of the prime reasons why the California Assembly should adopt a constitutional provision relating to the environment. The committee noted that the absence of constitutional goals and policies had resulted in unplanned and uncoordinated efforts to protect the state's environment. Consequently, the committee felt the need to develop an orderly process to prevent environmental damage:

> To develop this process we need constitutional goals and policies which establish legislative intent and the means to attain these goals. Implementation of these policies will require improving the planning process at all levels of government. . . . If legislative policies are implemented efficiently, all those whose activities influence California's environment will know what is expected of them. . . .[15]

In short, a constitutional declaration that guarantees citizens the right to a decent environment should also require all state agencies to consider the impact of their decisions on the environment.

For example, Pennsylvania's environmental amendment requires state agencies to preserve and maintain clean air, pure water, and the natural scenic, historic, and esthetic values of the environment. In response to this constitutional provision, a Pennsylvania court recently declared that:

> it is axiomatic that in order to avoid capricious action, a public body must give proper consideration to *all* relevant factors. That environmental considerations have become relevant factors is demonstrated by the adoption of Article I, Section 27 of the Pennsylvania Constitution.[16]

Likewise, the Pennsylvania Attorney General's office has interpreted Pennsylvania's constitutional declaration to require that:

> all county planning commissions, regional planning commissions, municipal planning commissions, municipal zoning hearing boards, county governments or municipal governments have the responsibility to ascertain the environmental impact of its activities and incorporate appropriate environmental safeguards into its land use plans and related decisions.[17]

Once state agencies are required to consider environmental factors in their decisions, it should also be possible to challenge agency actions taken without relevant environmental considerations. Pennsylvania's amendment, for example, possibly creates "rights to prevent the government (state, local, or an authority) from taking positive action which unduly harms environmental quality," and the government "agency could be enjoined from continuing such action."[18]

As of April, 1974, there have been several instances in which citizens have used state environmental declarations to challenge agency actions. In one case,[19] a citizen challenged the Pennsylvania Department of Environmental Resources (DER) because the agency had issued a permit for a sewer intercept without considering the full environmental impact of the proposed sewer. The plaintiff complained that DER's failure to consider the effects of the sewer's construction on erosion, transportation, land use patterns, population density, and air and water quality constituted a violation of Pennsylvania's Constitution.[20] The state's Environmental Hearing Board ruled in favor of the plaintiff and stated that environmental considerations must be taken into account. This administrative decision is currently being appealed to the courts.

In another Pennsylvania case, a court permitted, under the state's environmental amendment, a suit seeking to require a municipal water authority to give "full and good faith consideration" to ecological and environmental factors in site selection for wells and water tanks.[21] In this instance, however, the water authority had given no consideration to environmental factors before the suit was brought.

In a third Pennsylvania case, several residents of Wilkes-Barre sought to halt the proposed construction of a highway that would infringe upon a historic park area. The plaintiffs asked the court to interpret Pennsylvania's environmental article in absolute terms, i.e., historic areas should be preserved at all costs. The court, however, upheld the proposed highway construction and stated that the environmental provision was:

> intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust

> concept to the management of public natural resources of Pennsylvania.[22]

One factor in the decision, though, was the court's recognition of the substantial efforts which the Pennsylvania Department of Transportation (Penn DOT) had made to consider and minimize any potential adverse environmental impact.[23]

As a final illustration, a number of residents in Louisa County, Virginia, sought to halt the proposed construction of a state penal facility in their neighborhood.[24] Attempts to enjoin the construction in federal court had failed,[25] and the plaintiffs then brought suit in the state courts under the environmental section (Art.XI) of the Virginia Constitution. The plaintiffs contended that there had been: (1) no consideration given to the environmental impact of the proposed facility; (2) no proper land use study; (3) no environmental impact study; (4) no adequate site selection committee; and (5) no meaningful consideration of available alternative sites.[26] In reply, Virginia argued that it had specifically considered the possible adverse impact of the prison facility. In fact, the state claimed that it had made numerous changes in order to minimize any adverse environmental impact that might occur as a result of the construction. Although the court ruled in the state's favor, the judge stated that Virginia's environmental provision did:

> impose upon individuals and agencies of the State the duty of recognizing that such [a constitutional] policy does exist. But this duty requires only that a person or agency whose actions may affect in some degree a State resource which is of a historical nature take into consideration the State policy and weigh this together with the other considerations in taking the proposed action, or to state the duty negatively, that he or it not ignore the State's desire to preserve its historical sites in planning his course of action. . . .[27]

This case is currently being appealed to the Supreme Court of Virginia.

The cases reviewed indicate that in those states which have environmental declarations in their constitutions, environmental considerations must be taken into account before government agencies can proceed with their projects. The first two cases (i.e. sewer intercept and site selection) illustrate instances in which no environmental considerations had taken place, while in the latter two cases (i.e., highway construction and penal facility), the government agencies prevailed because they had taken relevant environmental factors into account and had demonstrated a reasonable effort to reduce damage to the environment.

In sum, environmental declarations have not matched the more dramatic expectations of their proponents. To date, such declarations have neither eliminated pollution nor redirected a state's priorities. On the other hand, if one views constitutional provisions as policy statements, these provisions can serve as benchmarks against which government agencies must measure their activities.

III. Potential Problems with Environmental Declarations

Although constitutional protection of a state's environment can have numerous advantages, there are also several problems which may arise in the interpretation and utilization of such provisions. These problem areas include, but are not limited to: (1) the provisions' wording; (2) the legislatures' role in implementation; and (3) the courts' role in interpretation and application.

A. *Drafting*

For the most part, constitutional declarations tend to be general policy statements; that is, they lack specific definitions. The United States Constitution, for example, guarantees citizens a right to "freedom of speech," but nowhere defines what constitutes free speech. But, as Joseph L. Sax points out:

> the substantive content that surrounds constitutional provisions like those governing free speech or the free exercise of religion, . . . for all their uncertainty, incorporate specific historical experiences that infuse meaning based on a common understanding within the community.[28]

An environmental bill of rights, however, lacks the important advantage of historical experience. Consequently, the generality of most environmental declarations can be a major problem in the understanding of such provisions.

In most current or proposed environmental declarations, adjectives such as decent, liveable, unsullied, habitable, healthful, natural, unimpaired, and high quality are used to describe the desired environment. (Pennsylvania's amendment is more specific, however,—it speaks of clean air, pure water, and the preservation of the environment's natural scenic, historic and esthetic values.)

Obviously, each descriptive term has a slightly different meaning, but each term shares a common element in its lack of specificity. In Illinois, for example, the Constitutional Convention considered several different terms before agreeing on the standard of "healthful environment." According to the proponents of this term, the work "healthful" was meant to be a precise, all encompassing phrase.

The committee that proposed the environmental article selected the word "healthful":

> as best describing the kind of environment [we] ought to obtain. 'Healthful' is chosen rather than 'clean', 'free of dirt, noise, noxious, and toxic materials' and other suggested adjectives because 'healthful' describes the environment in terms of its direct effect on human life while the other suggestions describe the environment more in terms of its physical characteristics. A description in terms of physical characteristics may not be flexible enough to apply to new kinds of pollutants which may be discovered in the future . . . . The word 'healthful' is meant to describe that quality of physical environment which a reasonable man would select for himself were a free choice available.[29]

Concerned about the absence of specificity in the term "healthful," one Illinois Convention delegate asked: "Who decides what constitutes a healthful environment? Who defines that term for the purposes of the enforcement of these rights?"[30] In reply it was noted that courts would decide the meaning of "healthful" in the same way they have defined "due process" and "equal protection". Recent legislative attempts to define "healthful" indicate that a person's right to such an environment would be violated by any act that caused mental or physical injury.[31] Thus, medical testimony would certainly be required to vindicate one's right to a "healthful" environment. Under such circumstances, the term "healthful" could be defined by the admission of competent technical testimony in a courtroom.[32]

Despite the apparent enthusiasm for "healthful," this term is probably one of the least stringent words available. It is possible, for example, for the environment to deteriorate substantially, but still be "healthful." As one delegate commented, this environmental article would allow Illinois to have "a lake that is technically healthful, but completely unusable by the citizens."[33] Perhaps the most telling comments came during the Convention debate when the strongest backer of the environmental provisions stated:

> I think healthful — well, to put the cards on the table, *this was the most we could get through the committee and thought we could get through the Convention.* The majority of the committee [that proposed the article] just simply didn't feel that words like recreational, esthetic, pleasant, clean, et cetera, would make it through the committee or through the Convention.
>
> Now, I would be in favor of such type of language, but I don't feel that I should answer for the rest of the committee. (emphasis added)[34]

The Pennsylvania and Massachusetts provisions both mandate

"clean air" and "pure water." These terms call for more stringent standards than would be imposed by "healthful," but neither provision defines what constitutes "clean air" or "pure water." The Illinois Constitutional Convention considered substituting "clean" for "healthful," but the idea was rejected because many delegates believed "clean" to be too idealistic and too difficult to define.[35]

Perhaps one of the most controversial and difficult terms to define concerns the environment's esthetic values or qualities mentioned in Pennsylvania's and Massachusetts' amendments, and the term, "beautiful" which is included in New Mexico's environmental declaration. One lawyer suggests that the esthetic protection of the environment should be defined as "freedom from negative or disvalued effects upon visual sensibilities."[36] This definition however, provides little guidance for a judge confronted with the need to resolve a case based on esthetic considerations.

In short, the absence of any commonly accepted standards creates an area fraught with ambiguity. It has already been pointed out that most courts:

> have been very reluctant to impose restraints on property interests merely on the basis of aesthetic considerations. This reluctance is based on a strong policy in favor of allowing the fullest possible beneficial use and enjoyment of real property and upon the belief, however well-founded, that beauty is a matter of individual taste.[37]

A recent case in Pennsylvania amplifies these observations. The controversy involved a developer's attempt to construct a 307-foot observation tower overlooking the Gettysburg National Battlefield. Previous attempts to halt construction had failed,[38] and in July, 1971 Governor Milton J. Shapp intervened in the controversy. Shapp claimed that the proposed tower would cause irreparable damage to Gettysburg's historic, scenic, and esthetic environment and would, therefore, violate the state's new constitutional provision. To buttress its case, the state presented testimony from Bruce Catton, the Civil War historian, from George Hartzog, Director of the National Park Service, and from Robert Garvey, the Executive Secretary of the President's Advisory Council on Historic Preservation. Each testified that the tower would be discordant with its surroundings. In fact, the state claimed that it had presented "clear, abundant and substantially uncontroverted evidence that construction" of the tower "would desecrate the natural, scenic, aesthetic and historic values of the Gettysburg environment."[39]

In the initial court decision,[40] which the state lost, the judge noted that neither the environmental amendment nor procedures for its

implementation were defined. Upon appeal to a higher court, the state was again told that it had failed to carry its burden of proof on the issue of whether the tower would injure the Gettysburg environment.[41] Finally, the Commonwealth appealed to the Pennsylvania Supreme Court. That court also ruled in the developer's favor and rejected the state's contention that the environmental provision in the state constitution gave the state broad powers to determine what is and is not environmentally beneficial to all the people. The court also said that the amendment should only be considered as a general principle of law and that additional legislation would be required to define the values which the amendment seeks to protect.[42]

The Gettysburg tower controversy may well be an example of taking a bad case to court. In effect, the courts were asked to validate a broad policy statement based on subjective statements to the effect that the tower would further add to Gettysburg's commercialism and esthetic deterioration.

In sum, the wording of environmental declarations is of the utmost importance. If one believes that constitutions should outline a society's goals and that one goal should be environmental protection, then the strongest possible language may be desirable. "Healthful" is probably the least likely to protect the environment. By contrast, "clean" and "pure", though vague, provide a firmer basis for preserving the environment. At the same time, however, the absence of relatively clear-cut and self-enforcing terms will tend to increase the need for judicial intervention.

B. *The Legislatures' Role in Implementation*

Nearly all environmental declarations adopted to date specifically call for legislative implementation. In other words, the declarations are not self-executing,[43] and legislatures are expected to enact legislation designed to enunciate or supplement the constitutional provisions. On the one hand, some declarations (e.g., Virginia) state that the legislature "may" enact legislation consistent with the constitutional policy of environmental preservation. But, all state constitutions allow legislatures to act unless specifically forbidden to do so, and environmental provisions "stating that a legislature 'may' act often do nothing more than state the legislative power that body already had."[44]

On the other hand, most recent environmental provisions in state constitutions (e.g., Illinois, Montana, New Mexico, Massachusetts) *command* legislatures to pass supplemental legislation. In New

Mexico, for example, the environmental article (Article XX, Section 21) declares that "the legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state. . . ." Thus, the language is mandatory rather than permissive.[45]

Despite this affirmative constitutional duty, state legislatures have fulfilled their responsibilities with varying degrees of commitment and success.[46] Illinois provides an illustration of a legislature that is either unable or unwilling to pass legislation required to supplement the state's environmental article (Article XI). Although the 1970 Illinois Constitutional Convention intentionally delayed implementation of one part of Illinois' article so that the legislature could pass supplemental legislation, the legislature failed to act. Several bills designed to implement the environmental article were introduced in the 77th General Assembly (1971-1972), but, again, none were passed. Related legislation has not yet been introduced in the current Assembly session (1973-1974).

If legislatures do not act, there is usually no means to require action since this is considered a political and not a legal problem.[47] In the absence of supplemental legislation, it may be impossible to vindicate certain portions of constitutional provisions, such as the sections guaranteeing Pennsylvania's and Massachusetts' citizens a right to the preservation of the environment's scenic, historic, and esthetic values.

Thus, in those states with environmental declarations which are not self-executing, the future of environmental protection is up to the legislature. Past experiences with environmental legislation, however, have made many environmentalists wary of legislatures' intentions in implementing constitutional declarations. In sum, if legislatures are unwilling to enact legislation to guarantee citizens' rights to a decent or healthful environment, constitutional provisions may remain ineffectual platitudes. As a consequences, citizens hoping to vindicate their environmental rights may have to move from the legislative to the judicial arena.

C. *The Courts' Role in Interpretation and Application*

According to Joseph Sax, there is an important, and improperly understood, difference between a right to a clean or healthful environment set forth in a statute and one set forth in a constitution.[48] Although both create the opportunity for enforcement in the courts, constitutional rights give courts ultimate authority since legislatures cannot overrule court decisions grounded on constitutional

norms except, perhaps, through complicated amendment proceedings. "By contrast, a court enforcing a statutory right (even though it may have the same wording as a constitutional provision) can always be overruled by subsequent legislation."[49]

Although constitutional protection of the environment may allow courts to become final arbiters of environmental disputes, there is substantial disagreement about the merits of this arrangement. On the one hand, many[50] assert that the courts are the most favorable arena in which to insure environmental protection. Sax, for example, asserts that:

> an essential format for reasserting participation in the governmental process is in the courtroom . . . because the court preeminently is a forum where the individual citizen or community group can obtain a hearing on equal terms with the highly organized and experienced interests that have learned so skillfully to manipulate legislative and administrative institutions.[51]

By going to court, environmentalists can "lay the matter [of pollution] before the conscience of the community in a forum where the conflict can be resolved and evidence tested in cross-examination" before an impartial arbiter.[52] This may be especially important because the judicial branch can respond to massive problems (e.g., race and malapportionment) that the other two branches are unresponsive to or are unwilling to resolve.[53] Among the possible advantages of litigation are the facts that: (1) the judicial process is less amenable than the legislature to political pressures; (2) courts generally guarantee access; (3) defendants must respond to questions and justify their actions; and (4) courts help to equalize the political and administrative leverage of the adversaries.[54] Accordingly, at first glance the judicial process's apparent advantages seem to outweigh the legislative process's advantage in protecting environmental rights.

On the other hand, there are observers who suggest that the courts may not be an effective place in which to vindicate environmental rights. *First*, some legal scholars believe the judicial to be the least well-equipped of the three governmental branches to assume responsibility for decision-making that can affect such a complex system.[55] Problems such as thermal pollution and photochemical smog have unexpected effects upon the environment—effects which, while endangering man's health, have not often coincided with traditional legal concepts.[56] Courts arguably do not have either the staff or technical expertise to evaluate properly the scientific and engineering principles of pollution control and must rely on expert

testimony to determine the degree to which a decent, healthful, or habitable environment is impaired. According to one source:

> The court[s] would have a particularly arduous time assessing allegations that the seemingly innocuous impairment of one ecological system will affect inter-dependent life-sustaining processes. Moreover, since the basis of such allegations approach the fringes of current scientific knowledge, expert opinion will be speculative and possibly contradictory.[57]

Notwithstanding this warning, some argue that courts cannot delay decisions until the results of long term research become available: "It will be increasingly necessary for courts and administrative bodies to give due weight to and render decisions on the basis of interim scientific conclusions. . . ."[58] *Second,* courts may reject a citizen's plea for environmental protection for many reasons. In these instances, a court may not even reach the issue of environmental rights because of procedural barriers. *Third,* even if a citizen can bypass these potential problems, once in the courtroom he frequently faces protracted litigation and must retain counsel of sufficient ability to match that of the offending polluter. Coupled with expert witness fees and the financing of necessary legal and technical research,[59] the costs of an environmental lawsuit can be prohibitive.

Fourth, as noted earlier, one frequent problem with constitutional provisions is their generality. Because constitutions tend to be broad policy statements, judges may be reluctant to enforce environmental declarations in the absence of specific guidelines provided by the legislature. The Gettysburg tower controversy mentioned earlier serves as an excellent illustration of this point. The courts there believed that injunctive relief was inappropriate because there were no standards that could be used to judge the state's claims of environmental despoilment.

In the absence of specific guidelines, courts may also be reluctant to intervene in the administrative process. Even when an administrative agency is subject to judicial review, the scope of review is usually "limited to whether there has been a manifest abuse of discretion, and absent such a finding, [courts] will not substitute judicial discretion for administration even though the court might, upon initial consideration, have reached a different result . . . ."[60] Another problem with the absence of specific guidelines is that courts "may only parrot agency expertise, no matter how erroneous or inadequate the conclusions that expertise may have fostered."[61]

Moreover, incautious litigation may set poor precedents and may seriously jeopardize the progress of environmental reform.[62]

The preceding discussion has not resolved the debate over the

courts' role in the interpretation and utilization of environmental declarations. In fact, the discussion offers more questions than answers. What it does indicate, however, is that courts need guidelines before they can properly act. It is the legislatures' responsibility to provide this guidance; and, once guidance is provided, it should be possible for courts to judge environmental disputes in a relatively clear-cut manner.

Conclusion

This article has attemped to summarize briefly some of the major consequences and problems associated with constitutional protection of the environment. Few such constitutional provisions have matched all expectations, but their future usefulness may be far-ranging in preventing senseless environmental degradation. However worded, environmental provisions state public policies. These policies frequently conflict with the traditional legal view that pollution is often an inevitable consequence of economic and industrial progress. At the least, constitutional declarations should alter these biases since environmental provisions mandate consideration of environmental factors. In other words, when state courts apply their traditional balancing of interests, they must now include environmental concerns in the scales. Thus, constitutional provisions may tip the scales in favor of environmental protection at the expense of unrestrained industrial development.

Environmental declarations, useful as they may be, also introduce certain problems such as the interpretation of their wording and the courts' and legislatures' role in implementation. As with other constitutional articles, the problems of environmental provisions will have to be refined and resolved through legislation and through judicial interpretation. Only in this manner will such provisions obtain the constitutional gloss necessary to be truly effective.

Appendix I

States with Environmental "Bills of Rights"

State	Section of Constitution	Method of Adoption*	Effective Date
Florida	Art. II, Sec. 7	LE	Jan. 7, 1969
Illinois	Art. XI	CC	Jan. 1, 1972
Massachusetts	Art. 97 of the Amendments	LE	Nov. 7, 1972
Michigan	Art. IV, Sec. 52	CC	Jan. 1, 1964
Montana	Art. XI	CC	July 1, 1973
New Mexico	Art. XX, Sec. 21	LE	Nov. 2, 1971
New York	Art. XIV	LE	Jan. 1, 1970
North Carolina	Art. XIV, Sec. 5	LE	July 1, 1973
Pennsylvania	Art. I, Sec. 27	LE	May 18, 1971
Rhode Island	Art. I, Sec. 17	LE	Nov. 3, 1970
Virginia	Art. XI	LE	July 1, 1971

*CC - Constitutional Convention and Popular Vote
LE - Constitutional Commission, Legislative Enactment and Popular Vote

Appendix II

Text of Selected Environmental "Bills of Rights"

Pennsylvania (Art. I, Sec. 27)

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 a trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Illinois (Art. XI)

Sec. 1. 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.

Sec. 2. 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 by law.

New York (Art. XIV, Sec. 4 and 5)

Sec. 4. The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.

Sec. 5. A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney general at the suit of any citizen.

New Mexico (Art. XX, Sec. 21)

The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

North Carolina (Art. XIV, Sec. 5)$

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

To accomplish the aforementioned public purposes, the State and its counties, cities and towns, and other units of local government may acquire by purchase or gift properties or interests in properties which shall, upon their special dedication to and acceptance by resolution adopted by a vote of three-fifths of the members of each house of the General Assembly for those public purposes, constitute part of the 'State Nature and Historic Preserve', and which shall not be used for other purposes except as authorized by law enacted by a vote of three-fifths of the members of each house of the General Assembly. The General Assembly shall prescribe by general law the conditions and procedures under which such properties or interests therein shall be dedicated for the aforementioned public purposes.

Massachusetts (Art. 97 of the Amendments)

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

Virginia (Art. XI)

Sec. 1. Natural resources and historical sites of the Commonwealth.

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, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

Sec. 2. Conservation and development of natural resources and historical sites.

In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations. . . .

FOOTNOTES

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[1]For example, *see* Ottinger, R. L., *Legislation and the Environment: Individual Rights and Government Accountability,* 55 CORNELL L. REV. 671 (May 1970); Lohrman, R.R., *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution,* 16 WAYNE L. REV. 1085 (Summer 1970); Neustadter, G., *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality,* 17 UCLA L. REV. 1071 (May 1970); Gross, R.J., and J. P. Bailey, Note: *Constitutionalism and Ecology,* 48 N. DAKOTA L. REV. (Winter 1972).

[2]For example, *see* Esposito, J.C., *Air and Water Pollution: What to Do While Waiting for Washington,* 5 HARVARD CIVIL RIGHTS CIVIL LIBERTIES L. REV. 41-5 (January 1970); Maechling, C., *The Emergent Right to a Decent Environment,* 1 HUMAN RIGHTS 66-7 (August 1970); Click D.F., and H. Sullivan, ENVIRONMENTAL PROTECTION ACT, at 2, (New Haven, Yale Legislative Services, 1971); Leaphart, W.B., *Public Trust as a Constitutional Provision in Montana,* 33 MONTANA L. REV. 175, 182 (Winter 1972) and J.L. Sax, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (New York: Alfred A. Knopf, 1971).

[3]TRIAL, 5:22-3, (Aug./Sept. 1969); Roberts, E.F., *The Right to a Decent Environment: Progress Along a Constitutional Avenue,* in LAW AND THE ENVIRONMENT, at 156, ed. Baldwin, M.F. and J. K. Page, Jr. (New York: Walker and Co., 1970); *See also* Sax, *supra* n. 2, at 235.

[4]*See* Roberts, *supra* n. 3; Hanks, E.H., and J.L. Hanks, *The Right to a Habitable Environment,* in THE RIGHTS OF AMERICANS: WHAT THEY ARE — WHAT THEY SHOULD BE, at 146-71, ed. Dorsen, N., (New York: Pantheon Books, 1970); and Pearson, J.Y., *Toward a Constitutionally Protected Environment,* 56 VA. L. REV. 458-86 (April 1970).

[5]Beckman, B.A., *The Right to a Decent Environment Under the Ninth Amendment,* 46 LOS ANGELES BAR BULLETIN 415-23 (Sept. 1971); Hanks, *supra* n. 4, at 149-58; Cohen, B.S., *The Constitution, The Public Trust Doctrine and the Environment,* 1970 UTAH L. REV. 388 (June 1970); Esposito, *supra* n. 2, at 47-8.

[6]381 U.S. 479 (1965).

[7]*Id.* at 486; *see,* Roberts, *supra* n. 3, at 140-2; Esposito, *supra* n. 2, at 47-8; Pearson, *supra* n. 4, at 459-63.

[8]EDF v. Hoerner Waldorf Corporation, 1 ERC 1640 (D. Mont. 1970). For a discussion of this case, *see* Mudd, J.E., *Environmental Defense Fund v. Hoerner Waldorf Corporation: Environment, In-*

dustry and Constitutional Rights, 37 MONTANA L. REV. 161-72 (Winter 1971).

[9]Mudd, *supra* n. 8, at 167, 169; for a discussion of the state action requirement, *see* Pearson, *supra* n. 4, at 474-6.

[10]Mudd, *supra* n. 8, at 165.

[11]For example, In re Multidistrict Air Pollution, 52 F.R.D. at 402 (C.D. California, 1970); EDF v. Corps of Engineers, 325 F.Supp. 728, 738-9 (E.D.Ark. 1971); Ely v. Velde, 321 F.Supp. 1088 (1971), 451 F.2d 1130 (1971); United States v. 247.37 Acres of Land, 3 ERC 1098, 1102 (S.D.Ohio 1971); Citizens Environmental Council *et al.* v. Volpe *et al.*, 364 F. Supp. 286 (1973); and River v. Richmond Metropolitan Authority, 359 F.Supp. 611 (1973).

[12]At the national level, however, Pearson, *supra* n. 4, at 486, notes that judicial recognition of environmental rights would allow Congress to pass legislation "attacking environmental degradation that it could not reach through its regulatory powers under the commerce clause."

[13]For example, *see* the opinion of the Attorney General of Michigan issued on January 27, 1969. This opinion, which is published in the *1969-1970 Biennial Report of the Attorney General of Michigan,* interprets Michigan's environmental article so as to prohibit the Michigan Water Resources Commission from granting a permit that would result in the destructive pollution of a state waterway. In the opinion, the Attorney General implied that no law can be construed as empowering any state agency to issue an order that "patently would be in derogation" of Michigan's constitutional policy.

[14]Howard, A.E., *State Constitutions and the Environment,* 58 VA. L. REV. 229 (Feb. 1972).

[15]California Assembly Select Committee on Environmental Quality, Environmental Bill of Rights, at 20, (Sacramento: 1970).

[16]Flowers *et ux et al.* v. Northampton Bucks County Municipal Authority *et al.* (Court of Common Pleas, Bucks Co., 1972) also reported at 2 E.L.R. 20313.

[17]Richman, H.J., Pennsylvania Assistant Attorney General, in *Pennsylvania Department of Environmental Resources' Brief Regarding the Applicability of the Article I, Section 27, of the [Pennsylvania] Constitution to the Case at the Bar,* at 4. The "Case at the Bar" refers to Commonwealth of Pennsylvania, Department of Environmental Resources v. Mrs. Cyril G. Fox, Natural Lands Trust, Inc., and Community College of Delaware County, Pennsylvania Environmental Hearing Board, Docket No. 73-078.

[18]Broughton, R., *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958,* 16 PENNSYLVANIA BAR ASSOC. QUARTERLY, 438, (June, 1970).

[19]Commonwealth of Pennsylvania v. Fox, *supra,* n. 17.

[20]*Id.*; Plaintiffs' Statement of Reasons of Appeal, filed with the Pennsylvania Environmental Hearing Board on March 23, 1973.

[21]Flowers v. Northampton Bucks Co., *supra* n. 16.

[22]Payne *et al.* v. Kassab, 312 A.2d 86 (Pa. 1973).

[23]PennDOT indicated that it would replace trees, re-landscape affected areas, relocate historical markers, and otherwise protect the park during construction. *Id.* at 95.

[24]Ely *et al.*, v. Lukhard, decision rendered by Judge Alex H. Sands, Jr., in the Law and Equity Court of the City of Richmond, Virginia, August 7, 1973.

[25]Ely v. Velde, 321 F.Supp. 1088 (Jan. 22, 1971); Ely v. Velde, 451 F.2d 1130 (1971), (opinion of the District Court of the 4th Circuit dated Dec. 21, 1972); and Ely v. Velde (opinion of District Court dated July 9, 1973), also reported at 5 ERC 1658.

[26]Ely v. Lukhard, *supra* n. 24, at 11-12.

[27]*Id.* at 15.

[28]Sax, *supra* n. 2, at 236.

[29]*Sixth Illinois Constitutional Convention, General Government Committee proposal No. 16,* at 2-3, 6.

[30]RECORD OF PROCEEDINGS: SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, at 3000, December 8, 1969 - September 3, 1970.

[31]H.B. 3074, 77th Illinois General Assembly (1971-1972).

[32]*Environmental Protection,* in MONTANA CONSTITUTIONAL CONVENTION STUDIES, REPORT NO. 10: BILL OF RIGHTS, at 253.

[33]ILLINOIS CONSTITUTIONAL CONVENTION, *supra* n. 30, at 3014.

[34]Statement by Mary Lee Leahy; *Id.* at 2995.

[35]*Id.* at 3012.

[36]Michelman, F., *Toward a Practical Standard for Aesthetic Regulations,* 15 THE PRACTICAL LAWYER 26, (February, 1969).

[37]Leighty, L.L., *Aesthetics as a Legal Basis for Environmental Control,* 17 WAYNE L. REV. 1347 (Nov.-Dec. 1971). *See also,* Broughton, R., *Aesthetics and Environmental Law: Decisions and Values,* 7 LAND AND WATER L. REV., 495 (1972).

[38]For a thorough discussion of these attempts, *see* Roe, C.E., *The Second Battle of Gettysburg: Conflict of Public and Private Interests in Land Use Policies,* 2 ENVIRONMENTAL AFFAIRS, 16-63 (Spring 1972).

[39]Appellants' Brief, Commonwealth of Pennsylvania, *et al.* v. National Gettysburg Battlefield Tower, Inc. *et al*, at 57, filed in the Supreme Court of Pennsylvania, Eastern District, No. 365, January Term, 1973.

[40]Commonwealth v. National Gettysburg Battlefield Tower, Inc. (Court of Common Pleas, Adams County), No. 2, July Term 1971, also reported at 3 ERC 1270.

[41]Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commonwealth Court 231, 302 A.2d 886 (1973).

[42]Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588 (1973); also reported at 5 ERC 1949.

[43]A constitutional provision is self-executing if the duty it imposes may be enforced without further legislation. *See*, Howard, *supra* n. 14, at 207-8. A major issue in Pennsylvania is whether or not that state's environmental article is self-executing. In several instances (e.g. Payne v. Kassab, *supra* n. 22 and Commonwealth v. National Gettysburg, *supra* n. 41), courts have ruled that the amendment is self-executing. By contrast, in Commonwealth v. National Gettysburg, *supra* n. 42, four justices expressed their views on the question of whether the Pennsylvania provision is self-executing, and they were equally divided on the point. Three other justices of the court did not express opinions on this question. In Ely v. Lukhard, *supra* n. 24, the plaintiffs went to great lengths to establish that Virginia's environmental article was self-executing. The presiding judge stated: "It would make little difference, however, to the outcome of this case whether the Article is or is not self-executing. It can be assumed for the purposes of the case at hand that it *is* self-executing." (italics in original). *Id.* at 15.

[44]Howard, *supra* n.14, at 201.

[45]*See, Id.* at 199 for a discussion of the meaning and impact of the term "shall" as opposed to "may." *See also*, OFFICIAL RECORD, MICHIGAN CONSTITUTIONAL CONVENTION, 1961-1962, at 2606, 2612; and Wheeler, J.P. and M. Kinsey, MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967-1968, at 123, (New York: National Municipal League, 1970).

[46]MONTANA CONSTITUTIONAL CONVENTION STUDIES, *supra* n. 32, at 255; *see also* PITTSBURGH PRESS, Nov. 26, 1973, at B-9.

[47]Broughton, *supra* n. 18, at 428; Lohrman, *supra* n. 1, at 1097; Howard, *supra* n. 14, at 199-200.

[48]Sax, *supra* n. 2, at 237.

[49]*Id.*

[50]*See*, Lohrman, *supra* n. 1, at 1135; Sax, J., *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471-566 (Jan. 1970).

[51]Sax, *supra*, n. 2, at xviii.

[52]TRIAL, 5:10-11, (Aug./Sept. 1969).

[53]"Litigation can also promote environmental values by putting a price on them." Sax, *supra*, n. 2 at 59.

[54]*Id.* at 108, 111, 112, 239.

[55]Neustadter, *supra* n. 1, at 1075.

[56]Chambers, S.P., *Private Action Under the Public Trust: An Environmental Bill of Rights for California*, 2 PACIFIC L.J. 621 (1971).

[57]Pearson, *supra* n. 4, at 478; Esposito, *supra* n. 2 at 37.

[58]Maechling, *supra* n. 2, at 70.

[59]Lohrman, *supra* n. 1, at 1135; Broughton, *supra*, n. 18, at 433-4.

[60]Flowers v. Northampton Bucks Co., *supra* n. 16, and cases cited therein.

[61]McLennan, J., *State Legislation to Grant Standing: Questions, Answers and Alternatives*, 2 ENVIRONMENTAL LAW 313 (Spring 1972).

[62]Bechman, *supra* n. 5, at 453-4; TRIAL 5:28 (Aug/Sept. 1969).