

Fordham Environmental Law Review

Volume 9, Number 1

2017

Article 2

The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present

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THE MOVEMENT TO CREATE AN ENVIRONMENTAL BILL OF RIGHTS: FROM EARTH DAY, 1970 TO THE PRESENT

*Carole L. Gallagher**

INTRODUCTION

Environmentalists can trace the development of an “environmental ethic” throughout much of Western history: from the teachings of Saint Francis of Assisi,¹ to the poetry of Wordsworth,² the writings of Thoreau,³ the early conservation efforts of Theodore Roosevelt and Gifford Pinchot,⁴ to the creation of the Sierra Club by John Muir.⁵ Beginning in the 1960s, however, the environmental movement in the United States took on an intensity and gained a public acceptance and support it had not enjoyed previously.

By the first Earth Day on April 22, 1970, the American public had generally come to understand, at the very least, that natural resources are not limitless, and that industrial activities, land development and other human activities can cause irreparable harm. The burgeoning American environmental movement enjoyed a number of landmark successes in this period. Local environmental groups formed throughout the nation to address local problems.⁶ National organizations, such as the Sierra Club, the Environmental Defense Fund and the Natural Resources Defense

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1. See ROGER SORRELL, *ST. FRANCIS OF ASSISI AND NATURE: TRADITION AND INNOVATION IN WESTERN CHRISTIAN ATTITUDES TOWARD THE ENVIRONMENT* 144-45 (1988).

2. See JONATHAN BATE, *ROMANTIC ECOLOGY: WORDSWORTH AND THE ENVIRONMENTAL TRADITION* 9 (1991).

3. See BOB PEPPERMAN TAYLOR, *OUR LIMITS TRANSGRESSED: ENVIRONMENTAL POLITICAL THOUGHT IN AMERICA* 104 (1992).

4. See GEORGE MOWRY, *THE ERA OF THEODORE ROOSEVELT, 1900-1912*, at 214-15 (1958).

5. See PHILLIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 72 (1993).

6. See *id.* at 102-04.

Council brought lawsuits on a variety of environmental issues to test the limits of environmental rights in the law.⁷ The federal Environmental Protection Agency was established in 1970.⁸ Beginning in 1970, with the National Environmental Policy Act (NEPA),⁹ and throughout the rest of the decade, Congress passed sweeping landmark legislation to address myriad environmental problems and concerns.¹⁰

It became apparent to those involved in the development of environmental law, however, that there is no explicit constitutional foundation—that is, a provision in the Constitution that specifically guarantees a “clean and healthful” environment or any other type of environmental right. Environmentalists reasoned that surely the right to drink pure water, to eat safe food, and to breathe clean air must be a fundamental right of every person.¹¹ As part of the effort to expand environmental rights under the law during this period, environmental scholars and activists attempted to read basic environmental rights into the Constitution.¹² Environmentalists looked to the long line of court cases which have interpreted the basic rights contained in the Bill of Rights. In a number of federal cases, they tested theories that environmental rights are also protected by the Constitution.¹³

This article examines efforts to extrude—or create outright—a constitutional right to a clean and healthful environment. Part I provides the legal background and summarizes the arguments for reading environmental rights into the Constitution. Part II

7. *See id.*

8. *See id.* at 130; Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L. & CONTEMP. PROBS. 311, 315-21 (1991).

9. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994).

10. *See* SHABECOFF, *supra* note 5, at 131-35.

11. For citations to scholarly arguments for fundamental environmental rights, see WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 1.5, at 62-67 (West Hornbook Ser. 1994).

12. *See* Rodger Schlickeisen, Symposium, *Protecting Biodiversity For Future Generations: An Argument for Constitutional Amendment*, 8 TULANE ENVTL. L.J. 181, 201-06 (1994).

13. *See infra* Parts I.B-C.

discusses past and present efforts to create an environmental amendment to the Constitution. Part III discusses parallel efforts to create analogous constitutional rights on the state level. The article concludes with an assessment of future prospects.

I. BACKGROUND

A. *Sierra Club v. Morton Decision*

The Supreme Court decision in *Sierra Club v. Morton*¹⁴ came close to holding that fundamental environmental rights exist under the Constitution. The Sierra Club sought preliminary and permanent injunctions to restrain federal officials, including the Secretary of the Interior, Roger Morton, and the United States Forest Service, from approving or issuing permits to allow Walt Disney Enterprises, Inc. to proceed with a plan to build a ski resort on eighty acres of the Mineral King Valley, in the Sierra Nevada Mountains, and adjacent to Sequoia National Park.¹⁵

By a narrow plurality, the Court held against the Sierra Club.¹⁶ It found that the Club lacked standing to sue in this case, because the Sierra Club had failed to allege in its pleadings and to show by evidence that either the club or its members would be "injured in fact" by the Disney development in the Mineral King Valley.¹⁷ Although ruling against the Sierra Club, the majority was sympathetic to the Club's concern for the environment.¹⁸

In a vigorous dissent, with which Justices Blackmun and Brennan concurred, Justice Douglas argued that the Sierra Club had alleged sufficient injury to have standing to sue.¹⁹ He noted that in its complaint the Sierra Club alleged "that '[o]ne of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains.'" ²⁰ Justice Douglas reasoned that the Disney development would surely thwart this purpose of the Club; therefore, the Club was "suffi-

14. 405 U.S. 727 (1972).

15. *See id.* at 728-30.

16. *See id.* at 741.

17. *Id.* at 735-36.

18. *See id.* at 734-35.

19. *See id.* at 741-53.

20. *Id.* at 744.

ciently aggrieved' to have 'standing' to sue on behalf of Mineral King."²¹

Most significant was Justice Douglas' argument that argued for creating standing before federal courts and agencies:

in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation This suit would therefore be more properly labeled as *Mineral King v. Morton*.²²

Justice Douglas' dissent went further than to opine that the members of the Sierra Club had standing to sue to prevent environmental damage.²³ He argued that the environment itself had standing to sue for its own protection and for the benefit of future generations.²⁴ Justice Douglas likened a suit on behalf of the environment to an *in rem* suit in the name of a ship.²⁵ He suggested that guardians could be appointed to represent the environment and any of its unknown beneficiaries, in the same way that representatives are appointed to represent minors, the incompetent, or the indigent.²⁶ In effect, Justice Douglas' dissent implicitly recognized a basic right to a clean and healthful environment.

B. *The Ninth Amendment Argument*

In the 1970s, environmentalists attempted to have the federal courts specifically address the issue of whether fundamental environmental rights are guaranteed by the Constitution.²⁷

In *Griswold v. Connecticut*,²⁸ the Supreme Court held that a Connecticut statute prohibiting the use or sale of contraceptives

21. *Id.*

22. *Id.* at 741.

23. *See id.*

24. *See id.*

25. *See id.* at 742-43.

26. *See id.* at 749-50.

27. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.").

28. 381 U.S. 479 (1965).

was unconstitutional.²⁹ The Court found that the Connecticut law was an unconstitutional infringement on a "penumbrial" right of privacy emanating from the First, Third, Fourth, Fifth and Ninth Amendments to the United States Constitution, as made applicable to the states by the Fourteenth Amendment.³⁰

In his concurring opinion, Justice Goldberg explained that the Ninth Amendment is a protection from governmental infringement of fundamental rights, which, though not specifically mentioned in the first eight amendments, nonetheless exist alongside those rights which are delineated.³¹ According to Justice Goldberg, "[i]n determining which rights are fundamental, judges . . . must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [therein] as to be ranked as fundamental.'" ³²

Encouraged by the decision in *Griswold*, environmentalists hoped that, in its wake, the federal courts would hold "environmental rights" to be so basic and fundamental as to be inherent in the Bill of Rights.³³ In a number of federal court cases, plaintiff-environmentalists argued that certain fundamental environmental rights are guaranteed in the Bill of Rights under the "penumbra theory." They urged that man has a basic, fundamental right to live a healthy life and to enjoy the environment in which he lives. Therefore, although the Constitution and the Bill of Rights do not specifically mention environmental rights, it follows that such rights are implicit to, and emanate from, the penumbra of the Bill of Rights.³⁴ However, no federal court has explicitly recognized a fundamental environmental right, whether emanating from the penumbra of the Bill of Rights or

29. 381 U.S. at 499 (holding the right of privacy within marriage to be a "fundamental and basic . . . personal right 'retained by the people' within the meaning of the Ninth Amendment.").

30. *See id.* at 481-86.

31. *See id.* at 488.

32. *Id.* at 493.

33. For citations to articles, see generally RODGERS, *supra* note 11.

34. *See* VICTOR J. YANNAcone, JR. ET AL., ENVIRONMENTAL RIGHTS & REMEDIES ch. 3 (1972). *See generally* R.H. Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A. J. 1061 (1970).

otherwise.³⁵

In *Environmental Defense Fund v. Corps of Engineers of the U.S. Army*,³⁶ the plaintiffs, which included the Environmental Defense Fund and the Audubon Society, sought to enjoin construction of a government-approved dam across the Cossatot River in Arkansas.³⁷ The plaintiffs asserted that the proposed dam would destroy the natural integrity of the river and would deprive the plaintiffs of their scenic, aesthetic, ecological and recreational enjoyment of the river.³⁸

As part of the legal basis for their suit, the plaintiffs asserted that:

[t]he right to enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of life, is part of the liberty protected by the Fifth and Fourteenth Amendments to the Constitution of the United States . . . and is also one of those unenumerated rights retained by the people . . . as provided in the Ninth Amendment³⁹

The plaintiffs also relied upon provisions of the National Environmental Policy Act of 1969 (NEPA),⁴⁰ the Fish and Wildlife Coordination Act,⁴¹ and several other federal environmental statutes.⁴²

Citing recent landmark decisions, such as *Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference*⁴³ and *Environmental Defense Fund, Inc. v. Hardin*,⁴⁴ the district court agreed that the plaintiff-environmental groups had standing to sue on the basis of their "aesthetic, conservational and recreational grounds, i.e., on other than direct economic interest grounds."⁴⁵ The court even recognized the right of the plaintiffs to sue as

35. See Mary Ellen Cusack, Comment, *Judicial Interpretation Of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 173-74 (1993).

36. 325 F. Supp. 728 (E.D. Ark. 1971)(mem.).

37. See *id.* at 730.

38. See *id.* at 733.

39. *Id.* at 739.

40. 42 U.S.C. § 4331 (1994).

41. 42 U.S.C. § 661 (1994).

42. See 325 F. Supp. at 731.

43. 384 U.S. 941 (1961).

44. 428 F.2d 1093 (D.C. Cir. 1970).

45. 325 F. Supp. at 734-36.

private attorneys general to further the policies of NEPA.⁴⁶ However, the court declined to recognize that the plaintiffs had constitutionally-protected environmental rights upon which to bring their lawsuit.⁴⁷

The court was not unsympathetic to the efforts of the plaintiffs to obtain judicial recognition of environmental rights: "Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition."⁴⁸ Nevertheless, the court found lack of precedent for it to recognize constitutionally-protected environmental rights.⁴⁹ It deferred to the legislative and executive branches of government to write the laws which would provide environmental rights.⁵⁰

Again, the Environmental Defense Fund (EDF) sought recognition of environmental rights pursuant to the Fifth, Ninth and Fourteenth Amendments in *Environmental Defense Fund Inc. v. Hoerner Waldorf Corp.*⁵¹ EDF brought a class action suit for injunctive relief against Hoerner Waldorf, a paper mill company.⁵² EDF alleged that the federal constitutional rights and statutory rights of members of the class had been violated, because Hoerner Waldorf had been permitted to run its plant in such a way as to emit noxious sulfur compounds into the air and to cause irreparable harm to plant, animal and human life.⁵³

In one portion of its analysis, the district court seemed to be on the brink of recognizing a constitutionally-protected right to a salubrious environment:

What would ordinarily appear to be a common law nuisance case is alleged by plaintiff to be a deprivation of the constitutional right to life and liberty.

I have no difficulty in finding that the right to life and liberty and property are constitutionally protected. Indeed the Fifth and Fourteenth Amendments provide that these rights may not be denied without due process of law, and surely a person's health is what, in a most significant degree, sustains life.

46. *See id.* at 735-36.

47. *See id.* at 738-39.

48. *Id.* at 739.

49. *See id.* at 738-39.

50. *See id.* at 739.

51. 3 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,794 (D. Mont. 1970).

52. *See id.*

53. *See id.*

So it seems to me that each of us is constitutionally protected in our natural and personal state of life and health. But the constitutional protection is against governmental action either federal or state.

The Fifth Amendment protects against federal action and the Fourteenth against state action. It seems clear also, although the point has never been decided by the Supreme Court, that the Ninth Amendment is a limitation upon the powers and conduct of the federal government and by the Fourteenth Amendment such limitation is extended to the power of the state.⁵⁴

This decision by Judge Murray is, arguably, the closest any federal court has ever come to recognizing a constitutionally-protected right to a healthful and clean environment.

After reviewing the facts and pleadings of the case, however, Judge Murray found that there were no allegations of "federal action" that could lead to a violation of the plaintiffs' Fifth Amendment and Ninth Amendment rights.⁵⁵ He also found that the state of Montana had taken neither affirmative nor permissive state action in relation to the paper mill plant which would constitute a violation of the plaintiffs' rights pursuant to the Fourteenth Amendment.⁵⁶ The court dismissed the constitutional and statutory claims of the plaintiffs because no allegations of federal or state action were alleged.⁵⁷

Whereas the *Hoerner Waldorf* case came close to recognizing constitutionally-protected rights to a clean and healthful environment, other federal courts have not cited the dictum in *Hoerner Waldorf*.

In *Ely v. Velde*,⁵⁸ the plaintiffs sought to enjoin construction of a penal facility in an historic neighborhood. Suit was brought against a federal agency, the Law Enforcement Assistance Administration, and the Director of the Department of Welfare and Institutions for the State of Virginia, pursuant to NEPA and the National Historic Preservation Act.⁵⁹ An ancillary claim was made against Virginia's Director of Welfare and Institutions that he had violated the plaintiffs' federal constitutional rights by his

54. *Id.*

55. *See id.*

56. *See id.* at 20,795.

57. *See id.* at 20,794-95.

58. 451 F.2d 1130 (4th Cir. 1971).

59. *See id.* at 1132-33.

“unreasonable and arbitrary action” that would result in environmental degradation.⁶⁰

While the court held that the federal agency was bound to comply with NEPA when planning the prison,⁶¹ the court refused to extend a federal constitutional right to a protected environment to the plaintiffs:

We decline the invitation to elevate to a constitutional level the concerns voiced by the appellants. While a growing number of commentators argue in support of a constitutional protection for the environment, this newly advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so.⁶²

Perhaps the opinion by federal District Court Judge Noel, in *Tanner v. Armco Steel Corp.*,⁶³ best elucidates the reasoning of the federal courts as to why the courts will not recognize a federal constitutional right to a clean and healthful environment. George W. Tanner and his family, residents of Harris County, Texas, sued petroleum refineries in the area for injuries and damages he and his family suffered as a result of the air pollution emitted by the defendants' refineries.⁶⁴ As the legal basis for their suit, the Tanners cited the United States Constitution in its entirety; the Due Process Clause of the Fifth Amendment; the Ninth Amendment; the Fourteenth Amendment in conjunction with the Civil Rights Act of 1871;⁶⁵ NEPA and the general federal question jurisdictional statute.⁶⁶

Turning to the plaintiffs' Ninth Amendment claim, the court noted that counsel for the plaintiffs conceded that there was no precedent for the plaintiffs' claim that:

[t]he right to a healthy and clean environment is at the very foundation of this nation and guaranteed by the laws and Constitution of the United States. Plaintiffs maintain that their right not to be personally injured by the action of the defendants and their right to non-interference with their privacy and the air they breathe are protected by the Ninth Amendment.⁶⁷

60. *See id.* at 1139.

61. *See id.* at 1135.

62. *Id.* at 1139.

63. 340 F. Supp. 532 (S.D. Tex. 1972).

64. *See id.* at 532.

65. *See id.* at 534.

66. 28 U.S.C. § 1331 (1994); *see* 340 F. Supp. at 534.

67. 340 F. Supp. at 534.

The court found no reported cases in which the Ninth Amendment had been construed to embrace environmental rights. In fact, the court cited the *Environmental Defense Fund, Inc. v. Corps of Engineers* case,⁶⁸ and others,⁶⁹ for the proposition that "the Ninth Amendment, through its 'penumbra' or otherwise, embodies no legally assertable right to a healthful environment."⁷⁰ The court suggested that the plaintiffs were inviting it to legislate, and the court would decline the offer.⁷¹

In elaborating why the plaintiffs had no cause of action pursuant to the Fourteenth Amendment and the Civil Rights Act, Judge Noel noted that "there has been something of a boom recently in . . . 'grandiose claims' of the right of the general populace to enjoy a clean environment."⁷² He referred to the efforts by Representative Richard L. Ottinger to pass a federal environmental amendment which would mandate a clean and healthful environment.⁷³ Judge Noel quoted remarks made by Representative Ottinger as support for his position that there is no precedent for constitutionally-protected environmental rights pursuant to the Fourteenth Amendment or any other portion of the Bill of Rights:

We are frank to say that such a provision to the Constitution would have been meaningless to those attending the Constitutional Convention in Philadelphia almost 200 years ago. Indeed, this amendment would have been altogether unpersuasive twenty years ago, although the handwriting was then visible on the wall, if one cared to look for it.⁷⁴

Finally, the court proffered the reason why courts are hesitant to recognize environmental rights:

[F]rom an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social in-

68. 325 F. Supp. at 728.

69. *Cf. Red Lion Broadcasting Co. v. F.C.C.*, 381 F.2d 908, 925 (D.C. Cir.), *aff'd*, 395 U.S. 367 (1967).

70. 340 F. Supp. at 535.

71. *See id.*

72. *Id.* at 535.

73. *See id.*; *infra* Part II.B.

74. *Id.* at 536 (quoting Remarks of Representative Richard L. Ottinger of New York, 114 CONG. REC. 17,116 (1968) (also quoted in Platt, *supra* note 34, at 1062)).

terests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes. Furthermore, the inevitable trade-off between economic and ecological values present a subject matter which is inherently political, and which is far too serious to relegate to the ad hoc process of 'government by lawsuit' in the midst of a statutory vacuum.⁷⁵

In other words, in the absence of clear legal and historical precedent for basic constitutional environmental rights, the courts fear being drawn into political, scientific, social and economic battles of the moment. From a scientific or technical standpoint, the courts feel inadequate to define what is a healthful or clean environment. The courts would prefer to let the legislatures and the administrative agencies define these terms. The basic holdings of *Ely v. Velde*, *EDF v. Corps of Engineers*, and *Tanner v. Armco Steel*—that there are no constitutionally-protected environmental rights pursuant to the Fifth, Ninth and Fourteenth Amendments—have been applied consistently by the federal courts since these decisions.⁷⁶

C. *The First Amendment Argument*

A number of legal scholars have proposed that the First Amendment to the Constitution is another possible source of constitutionally-protected environmental rights.⁷⁷ The Supreme Court has recognized that the rights guaranteed by the First Amendment also encompass other basic rights of individual expression, self-fulfillment, attainment of knowledge and truth, access to information and participation in democratic decision-

75. *Id.* at 535-36.

76. See *In re "Agent Orange" Product Liability Litigation*, 475 F. Supp. 928, 934 (E.D.N.Y. 1979); *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061, 1063-65 (N.D. W. Va. 1973); see also *Concerned Citizens of Neb. v. United States Nuclear Regulatory Commission*, 970 F.2d 421 (8th Cir. 1992); *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

77. See generally David Sive, *The Environment: Is It Protected by the Bill of Rights?*, CIV. LIB., Apr. 1970, at 3; Jennifer D. Jones, Comment, *A New Paradigm for Protection: First Amendment Principles and the Environment*, 69 WASH. L. REV. 183 (1994).

making.⁷⁸

Environmental scholars argue that preservation of the environment is essential to one's individual rights of self-realization, of one's right to learn and to discover truth and of one's right to participate fully in our democracy; and these rights are all necessarily implied by the language of the First Amendment.⁷⁹ If the natural environment is destroyed, the individual loses his chance to learn from the environment, to restore his soul from nature's inspiration, to gain valuable knowledge about science, medicine and history, and to gain information from the environment which will make him an informed citizen.⁸⁰

This First Amendment theory of environmental rights has been tested in a limited way in only a few cases involving preservation of American Indian sacred grounds.⁸¹ In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,⁸² the Supreme Court made clear that it would not recognize environmental rights to be inherent in the First Amendment at any time in the near future.⁸³

Of the many issues in the *Lyng* case, the one relevant to this discussion was whether a plan by the Forest Service to harvest timber and construct a road in the Chimney Rock area of the Six Rivers National Forest, a traditionally sacred area to three American Indian tribes, would violate the Indians' rights under

78. See Jones, *supra* note 77; see also Board of Education, Island Trees v. Pico, 457 U.S. 853 (1982) (rights of students to information within a school library); Globe Newspaper Co. v. Supreme Court, 457 U.S. 596 (1982) (right of the press to access information); Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972) (right to picket as a mode of self-expression).

79. See Jones, *supra* note 77, at 184.

80. See RODGERS, *supra* note 11, at 64-66; Jones, *supra* note 77, at 196-203.

81. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); see also *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990) (following *Lyng* exactly, in holding Indian tribes' First Amendment rights were not violated by a U.S. Forest Service plan for uranium mining operations in a national forest, which contained the Indians' sacred religious sites).

82. 485 U.S. 439 (1988).

83. See *id.* at 452.

the Free Exercise Clause of the First Amendment.⁸⁴ The government had conceded that its plans “could have devastating effects on traditional Indian religious practices.”⁸⁵

The Supreme Court noted that the Indians’ religious practices are inextricably bound to the land and nature.⁸⁶ It also noted that “successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.”⁸⁷ Acknowledging that the road and timber cutting could significantly interfere with the Indians’ religious practices, the Court, nonetheless, held this to be necessary “incidental interference” by the government in its administration of the federal lands and not an “indirect coercion or penalties on the free exercise of religion, [or an] outright [prohibition which is] subject to scrutiny under the First Amendment.”⁸⁸ The Court held that the government’s right to the use of its own land takes precedence over the spiritual interests of the Indians in that land.⁸⁹ The government’s activities in the Chimney Rock area might curtail the Indians’ enjoyment of the land and essentially their religious practices, but the government’s actions would not rise to a First Amendment infringement, as long as the government was not curtailing the Indians’ religious practices *deliberately*.⁹⁰

The *Lyng* case did not decide the exact issue of whether the First Amendment encompasses individual environmental rights. However, the Court’s refusal to recognize the supremacy of the Indians’ First Amendment religious rights over those interests of the federal government to manage its lands, indicates that the Court is not receptive to finding environmental rights in the words of the First Amendment.

84. *See id.* at 441-42.

85. *Id.* at 451.

86. *See id.*

87. *Id.* at 442 (alteration in original) (footnote omitted).

88. *Id.* at 450.

89. *See id.* at 453.

90. *See id.* at 453-57.

II. ATTEMPTS TO AMEND THE FEDERAL CONSTITUTION TO PROVIDE FOR A RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

A. *The Nelson Amendment*

In 1968, Senator Gaylord Nelson proposed an amendment to the United States Constitution which read as follows:

Every person has the inalienable right to a decent environment.

The United States and every State shall guarantee this right.⁹¹

In the late 1960s, most Congressmen were not yet concerned with environmental issues and did not consider themselves "environmentalists." Senator Nelson later recalled that he had difficulty raising interest among politicians for most environmental issues.⁹² There was a lack of appreciation of the magnitude of many of the environmental problems.⁹³ Philip Shabecoff credits Senator Nelson with the creation of Earth Day, April 22, 1970, in order to raise the American consciousness about environmental problems:

"I thought, my God, why not a national teach-in on the environment?" Returning to Washington, he enlisted the support of Republican Congressman Pete McCloskey of California to make the effort bipartisan, found space in the offices of Common Cause, and began hiring a staff, headed by Denis Hayes, then a Howard Law School student, to help organize Earth Day. The money came from Nelson's speaking fees, a few personal and corporate contributions, and a small amount given in response to an advertising appeal. April 22 was chosen, Senator Nelson explained, because it was when most colleges around the country were neither on holiday nor in the middle of examinations.⁹⁴

Earth Day 1970 was a success for the environmentalists. As had been the case for the Vietnam War, civil rights and feminism, the environmental movement ignited student interest.⁹⁵ More importantly, the consciousness of the American people was raised by Earth Day, and the public began to give its support to the environmental movement. In response, politicians began calling themselves "environmentalists," at least in name if, not in fact.

91. H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968); see Cusack, *supra* note 35, at 175-76.

92. See SHABECOFF, *supra* note 5, at 114-15.

93. See *id.*

94. *Id.* at 115.

95. See *id.* at 116.

The environment was now in vogue.⁹⁶

In honor of Earth Day, 1970, Senator Nelson again introduced his constitutional amendment for a "right to a decent environment."⁹⁷ The resolution again failed to win support for passage.⁹⁸

B. *The Ottinger Amendment*

Also in 1970, then Representative Richard Ottinger (D-NY)⁹⁹ proposed his own amendment, which elaborated on a constitutional right to a clean environment:

Sec. 1. The right of the people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and esthetic qualities of their environment shall not be abridged.

Sec. 2. The Congress shall, within three years after the enactment of this article, and within every subsequent term of ten years or lesser term as the Congress may determine, and in such a manner as they shall by law direct, cause to be made an inventory of the natural, scenic, esthetic and historic resources of the United States with their state of preservation, and to provide for their protection as a matter of national purpose.

Sec. 3. No Federal or State agency, body, or authority shall be authorized to exercise the power of condemnation, or undertake any public work, issue any permit, license, or concession, make any rule, execute any management policy or other official act which adversely affects the people's heritage of natural resources and natural beauty.¹⁰⁰

Congressman Ottinger's bill was never reported out of Committee.¹⁰¹

96. *See id.* at 116-28.

97. S.J. Res. 169, 91st Cong. (1970) (co-introduced with Sens. Alan Cranston and Claiborne Pell); *see also* Lynton Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 225 (1998).

98. *See* Schlickeisen, *supra* note 12, at 183.

99. Richard Ottinger, who is an attorney and a life-long environmentalist, is now the Dean of Pace University Law School, in White Plains, New York.

100. H.R.J. Res. 1205, 91st Cong. (1970); *see* Cusack, *supra* note 35, at 176.

101. *See* Interview with Dean Richard L. Ottinger, Pace Univ. (Nov. 6, 1997).

In a recent interview, Dean Ottinger explained that, at the time, he was trying to do his part to influence the burgeoning environmental movement and to show the American people the importance of preserving the environment.¹⁰² He had been elected to his congressional seat on environmental issues, and he felt a responsibility to be a force in Congress for environmental conservation.¹⁰³ He admits that his attempts at passage of an environmental constitutional amendment were not "successful," but he does not consider his efforts to be a "failure," since the proposed amendment had a "moral force" at the time.¹⁰⁴ His efforts helped to raise the Congress and the American people's awareness of environmental issues. Dean Ottinger suspects that a constitutional amendment was not considered more carefully by Congress because Congress had already begun to pass landmark federal environmental legislation which would specifically address many of the environmental problems then in the forefront.¹⁰⁵

C. *Landmark Environmental Legislation*

From 1969 to 1980, a great deal of landmark environmental legislation was enacted.¹⁰⁶ During this period, it appears that the

102. *See id.*

103. *See id.*

104. *Id.*

105. *See id.*

106. *See* SHABECOFF, *supra* note 5, at 129-36; Lazarus, *supra* note 8, at 311. *E.g.* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988 (FIFRA), Pub. L. 100-532, 102 Stat. 2654 (codified in scattered sections of 7 U.S.C.); Toxic Substances Control Act of 1974 (TSCA), Pub. L. 94-469, 90 Stat. 2003 (codified as amended in scattered sections of 15 U.S.C.); Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1534 (1995); Coastal Zone Management Act of 1972 (CZMA), Pub. L. 92-583, 86 Stat. 1280 (codified as amended in scattered sections of 16 U.S.C.); Marine Mammal Protection Act of 1972 (MMPA), Pub. L. 92-522, 86 Stat. 1027 (codified as amended in scattered sections of 16 U.S.C.); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (Superfund Act), Pub. L. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26 U.S.C. & 42 U.S.C.); Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-677 (1995); Federal Water Pollution Control Act Amendments of 1972 (FWPCA), Pub. L. 92-500, 86 Stat. 816 (codified in scattered sections of 33 U.S.C.) (now the Clean Water Act (CWA)); Clean Air Act Amendments of 1977 (CAA), Pub. L. 95-95, 91

need for a general, perhaps ambiguous, constitutional amendment guaranteeing a "decent," "clean" or "healthful" environment was superseded by a wealth of specific, federal environmental legislation designed, in many cases, to micro-manage environmental problems. Consequently, most Congressmen believed that an amendment was not necessary. Moreover, environmental laws passed by Congress might be changed by court interpretation of a subsequent environmental constitutional amendment. Thus, Congress preferred to avoid exposing all environmental laws to constitutional interpretation by not adopting an amendment.¹⁰⁷

A second reason why a constitutional amendment failed to pass the Congress at this time is that these amendments are necessarily vague and undefined. What did Senator Nelson mean by a right to a "decent" environment? Is a "decent" environment as "healthful" as Congressman Ottinger's "clean air" and "pure water"? How clean must the environment be to be "healthful"? What does it mean to "preserve" and to "protect" our "natural, scenic, esthetic and historic resources"? Would this amendment allow any change or degradation of natural resources? Which natural resources? How much degradation is too much? Like the federal courts in the Ninth Amendment and First Amendment environmental cases cited above,¹⁰⁸ Congress, not surprisingly, has preferred to address environmental problems piecemeal, rather than to face the attendant difficulties in trying to change

Stat. 685 (codified in scattered sections of 42 U.S.C.); Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C.); Safe Drinking Water Act of 1974 (SDWA), Pub. L. 93-523, 88 Stat. 1660 (codified in scattered sections of 42 U.S.C.); Noise Control Act of 1972 (NCA), 42 U.S.C. §§ 4901-4918 (1995); National Environmental Policy Act of 1969 (NEPA) Pub. L. 91-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.); Federal Land Policy and Management Act of 1976 (Bureau of Land Management Organic Act) (FLPMA), Pub. L. 94-579, 90 Stat. 2744 (codified as amended in scattered sections of 43 U.S.C.).

107. See Ottinger interview, *supra* note 101; Schlickeisen, *supra* note 12, at 182-84.

108. See *supra* Part I.B-C.

the United States Constitution in order to recognize environmental rights and issues.

D. *Recent Efforts*

Although efforts are presently being made to pass an environmental amendment to the federal Constitution, the current movement lacks the enthusiasm which the movement had in the early 1970s.

1. The Brodsky Amendment and CLEAN

The most significant recent efforts to pass an amendment are those of New York State Assemblyman Richard L. Brodsky, a Democrat from Westchester County. Assemblyman Brodsky is Chairman of the New York State Assembly Committee on Environmental Conservation. He has been an outspoken supporter of environmental causes for many years in New York State.¹⁰⁹

Assemblyman Brodsky is a Co-Chair, together with State Delegate Leon G. Billings of Maryland and State Senator Richard L. Russman of New Hampshire, of an organization he founded called "CLEAN," or the Coalition of Legislators for Environmental Action Now.¹¹⁰ CLEAN has been characterized as a "bipartisan coalition of state legislators [that have] agreed that decisive action must be taken to guarantee present and future generations the right to a clean and healthful environment."¹¹¹ CLEAN purports to have support from legislators in forty states who have agreed to sponsor state resolutions that request Congress to send CLEAN's proposed "Environmental Rights Amendment" to the states for ratification.¹¹²

109. See Interview with N.Y.S. Assemblyman Richard L. Brodsky (Nov. 18, 1997).

110. See Letter of Support to CLEAN (Mar. 26, 1997) (from the file of Assemblyman Richard L. Brodsky).

111. See CLEAN, *The Constitutional Amendment for Environmental Rights* (1997) (on file with Assemblyman Richard L. Brodsky) [hereinafter CLEAN, Position Paper (file)].

112. See CLEAN, *The Constitutional Amendment for Environmental Rights*, available at Pace University School of Law Virtual Environmental Law Library (visited Nov. 30, 1997) <<http://www.law.pace.edu/env/summary.html>> [hereinafter CLEAN, Position Paper (Internet)].

CLEAN is seeking to pass the Environmental Rights Amendment by the same method used to pass the previous twenty-seven amendments. The amendment would be proposed by a two-thirds vote in both houses of Congress and sent to the states for ratification by three-fourths of the states. CLEAN does not support using the second method of amending the federal Constitution—that is, by the calling of a constitutional convention.¹¹³ The main reason why CLEAN does not want a constitutional convention is because a convention would expose the federal Constitution to additional amendment, which CLEAN is not advocating. Also a general constitutional convention would undoubtedly divert attention from the Environmental Rights Amendment to other issues. Thirdly, there would be virtually no support in this country for exposing the Constitution to an overhaul at a constitutional convention.

CLEAN feels that a federal constitutional amendment is essential because in recent years environmental protection laws have been under attack from critics who would like to see them weakened and repealed. In its position papers, CLEAN refers specifically to attempts by United States Congressmen to repeal or emasculate federal environmental statutes and to decisions by the United States Supreme Court which have weakened environmental rights and protections.¹¹⁴ CLEAN is particularly disturbed by proposals in Congress to make all new environmental regulations subject to economic cost-benefit analyses. CLEAN sees this as an attempt to “compromise public health standards without regard to what science identify[s] as necessary to protect human health.”¹¹⁵ CLEAN also finds repugnant the attempts by certain congressmen to “gut” the Clean Water Act and to repeal, or at least emasculate, the Endangered Species Act.¹¹⁶ CLEAN fears for the survival of the present federal environmental statutes and regulations in what it characterizes as an anti-environmentalist, pro-business and pro-property rights Congress.¹¹⁷

113. *See id.*

114. *See id.*; CLEAN, Position Paper (file), *supra* note 111.

115. *See* CLEAN, Position Paper (file), *supra* note 111.

116. CLEAN, Position Paper (Internet), *supra* note 112; *see* Letter of Support to CLEAN, *supra* note 110.

117. Interview with Richard L. Brodsky, *supra* note 109. *See generally*

CLEAN is also upset by recent Supreme Court rulings. According to CLEAN, “[t]he Court has quietly but radically undermined the constitutional foundation on which thirty years of federal law is based.”¹¹⁸ CLEAN is outraged by recent Supreme Court decisions declaring “unconstitutional lawsuits by private individuals to compel states to carry out environmental responsibilities” and eliminating “Congress’ authority to require states to adopt policies essential for achievement of national environmental standards.”¹¹⁹ Finally, CLEAN feels that the Supreme Court has begun to reinterpret the Commerce Clause of the Constitution in ways that are a threat to environmental protection. CLEAN notes that:

[M]any of the federal laws protecting public health and the environment are premised on Congress’ power to regulate interstate commerce. In a reversal of many earlier rulings, the Supreme Court has suggested that it could reject federal laws that attempt to protect public health, safety and welfare if it believes the objectives of these laws could be accomplished by states acting alone.¹²⁰

Basically, Assemblyman Richard Brodsky and his organization, CLEAN, feel that this proposed Environmental Rights Amendment will be the only line of defense against Congressional and Supreme Court attempts to turn back the progress in environmental protection gained over the last thirty years.

Supporters of Brodsky and CLEAN are also concerned about those environmental problems that still have not been adequately addressed in the United States, such as global warming and biodiversity.¹²¹ Supporting organizations worry about the environmental legacy we are leaving to future generations. They feel that these problems will never be addressed in the present-day political climate of the United States.¹²² Brodsky’s supporters feel that an environmental constitutional amendment “may be our only effective long-term recourse” to compel Congress to act

CLEAN, *The Constitutional Amendment for Environmental Rights—Questions and Answers* (1997) (on file with Assemblyman Richard L. Brodsky) [hereinafter CLEAN, *Questions & Answers*].

118. CLEAN, Position Paper (file), *supra* note 111.

119. *Id.*

120. CLEAN, *Questions and Answers*, *supra* note 117.

121. *See* Letter of Support to CLEAN, *supra* note 110.

122. *See id.*

on new problems and to preserve our present-day environmental protection laws.¹²³

CLEAN's proposed environmental rights amendment reads as follows:

The natural resources of the nation are the heritage of present and future generations. The right of each person to clean and healthful air and water, and to the protection of the other natural resources of the nation, shall not be infringed upon by any person.¹²⁴

The proposed amendment is very short and similar to the amendments proposed by Senator Nelson and Congressman Ottinger nearly thirty years ago. Unfortunately, Brodsky's proposed amendment is subject to the same criticisms which have been raised against previously proposed environmental rights amendments: its terms are vague and undefined, and the amendment may confuse environmental issues when it is construed in relation to other environmental laws and regulations already adopted.¹²⁵

Support for Assemblyman Brodsky's amendment is mixed among environmental groups. At least sixty environmental groups from throughout the nation have written to CLEAN pledging their support for the amendment. These supporters include state and local Audubon societies, Sierra Clubs, student environmental action coalitions, and many other local environmental groups and societies.¹²⁶ Despite the show of enthusiasm for the amendment by Brodsky and the other members of CLEAN during the fall election of 1996, CLEAN has had little success in having the proposed amendment resolution passed in the state legislatures. Furthermore, the CLEAN movement has had lukewarm support from the major environmental groups and organizations.¹²⁷

123. *See id.*

124. CLEAN, Position Paper (Internet), *supra* note 112.

125. *See supra* Part II.C.

126. *See* Letter of Support to CLEAN, *supra* note 110.

127. *See* Editorial, *Another Constitutional Amendment*, HARTFORD COURANT, Oct. 17, 1996, at A14; Environmental Advocates, *Bill Descriptions* (visited Nov. 25, 1997) <http://www.envadvocates.org/public_html/vg97/billdescrip.htm>; Environmental Advocates, *Letter from the EA Board President* (last modified Jan. 6, 1998) <http://www.envadvocates.org/public_html/letter.html>; Sierra Club, *SC Action #277 -State Legislators Seek Constitutional Amendments* (last modified Sept.

2. Other Recent Efforts

In April 1990, in honor of the twentieth anniversary of Earth Day, the National Wildlife Federation launched a campaign to pass an "environmental quality" amendment to the United States Constitution.¹²⁸ The Wildlife Federation circulated petitions calling for the amendment. The group planned " 'a serious effort' to get the proposal before state legislatures this year."¹²⁹ The Wildlife Federation's campaign, however, was criticized by some environmental groups as a waste of money and effort on a lost cause.¹³⁰ Presently, the National Wildlife Federation is giving far greater attention to the "takings" issue, the Endangered Species Act and biodiversity.¹³¹

The Environmental Defense Fund (EDF), which has been at the forefront in launching legal challenges in the courts on a variety of environmental issues, is not presently involved in any effort to pass an environmental rights amendment. In his Director's Message, the Executive Director of EDF listed EDF's four major goals for the coming year to be: global warming, protecting the oceans, protection of human health, and biodiversity.¹³²

26, 1996) <<http://www.sierraclub.com/news/sc-action/1996/0133.html>>.

128. Tony Mauro, *Some Want an Amendment to Protect the Environment*, USA TODAY, Apr. 24, 1990, at 8A.

129. *Id.*

130. Telephone interview with Jeff Jones, Communications Dir., Envtl. Advocates (Nov. 24, 1997). Environmental Advocates (EA) is one of the most influential environmental organizations in New York State. From its offices in the State Capitol of Albany, EA serves as a watchdog and lobbyist for all major environmental issues, legislation and actions pending in the state. See *Letter from the EA Board President*, *supra* note 127.

131. See National Wildlife Fed'n, *Takings Bills Could Cost Taxpayers Billion\$* (last visited Nov. 30, 1997) <<http://www.nwf.org/nwf/nwf/nwf/nwf/lands/takings/takfiscl.html>>; see also Glenn P. Sugameli, *Takings Bills Threaten Private Property, People and the Environment*, 8 FORDHAM ENVTL. L.J. 521 (1997); Glenn P. Sugameli, *The Endangered Species Act (ESA) and the Fifth Amendment*, 9 FORDHAM ENVTL. L.J. (forthcoming 1998).

132. See Environmental Defense Fund (EDF), *Directors Message: New Strategies Plan Will Focus EDF on Four Key Goals* (Vol. XXVIII, No.5, EDF Letter) (last updated Nov. 1997) <http://www.edf.org/pubs/EDF-Letter/1997/Nov/a_director.html>; EDF, *The Birth of Environmentalism*

Whereas an environmental amendment necessarily could encompass all these issues, EDF does not suggest an amendment as one of the solutions to these problems.

In the Fall of 1996, members of CLEAN staged a number of press conferences, touted as "A National Round-Up," to announce that state representatives (members of CLEAN) would be introducing resolutions in their state legislatures requesting that Congress pass the proposed Environmental Rights Amendment and send it back to the states for ratification.¹³³

Although Assemblyman Brodsky succeeded in passing a resolution in support of the proposed environmental amendment in the New York State Assembly on June 16, 1997,¹³⁴ the resolution has not been introduced in the State Senate.¹³⁵ The Senate is controlled by a Republican majority which is not sympathetic to the resolution, and Assemblyman Brodsky has no apparent strategy for inducing the Senate to pass it.¹³⁶

In addition, resolutions in support of the proposed Environmental Rights Amendment have been passed in the Rhode Island State Senate¹³⁷ and the New Hampshire State Senate.¹³⁸ According to CLEAN, resolutions were also passed in the Alabama House and the Louisiana House and Senate.¹³⁹

III. ENVIRONMENTAL AMENDMENTS TO STATE CONSTITUTIONS

Prior to the 1970s, many states had constitutions which contained environmental provisions. New York State, for example,

(visited Nov. 30, 1997) <<http://www.edf.org/aboutedf/f%5Fbirthof.html>>; EDF, *EDF's Mission* (visited Nov. 30, 1997) <http://www.edf.org/AboutEDF/g_mishstat.html>; EDF, *Where It All Began* (visited Nov. 30, 1997) <http://www.edf.org/AboutEDF/d_history.html>.

133. See CLEAN, Position Paper (Internet), *supra* note 112.

134. A. 502, 220th Ann. Sess. (N.Y. 1997) (passed June 16, 1997).

135. See Brodsky Interview, *supra* note 109.

136. Environmental Advocates maintains that the resolution has no chance of passing, given the Senate's present make-up. See Jones Interview, *supra* note 130.

137. S. 347, 1997-98 Legis. Sess. (R.I. 1997) (passed Apr. 22, 1997); H.R. 5791, 1997-98 Legis. Sess. (R.I. 1997) (introduced Feb. 4, 1997).

138. S.J. Res. 3, 1997 Reg. Sess. (N.H. 1997) (passed Mar. 6, 1997).

139. See CLEAN, Position Paper (file), *supra* note 111.

has had environmental provisions in its constitution since 1894.¹⁴⁰ New York's is the earliest state constitutional provision, and it created the Adirondack Forest Preserve.¹⁴¹ Within the past thirty years many states have revised their constitutions, in whole or in part, and have included environmental provisions.¹⁴² Like the Congress, the state legislatures also passed sweeping state environmental legislation in the 1970s and 1980s. Often the legislation mimicked federal legislation. A good example is the state "Little NEPA" laws, which are state versions of NEPA.¹⁴³

But the states went further than to just mimic the federal legislation. Most states have amended their state constitutions to include environmental provisions. There are several reasons why constitutional provisions have been easily passed on the state level, whereas it has been impossible, so far, to pass a provision on the federal level.

140. N.Y. CONST. art XIV, §§ 1, 2 & 5 (derived from N.Y. CONST. of 1894, art. VII, § 7 (as amended)).

141. See Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 *RUTGERS L.J.* 863, 871 (1996).

142. See also Cusack, *supra* note 35, at 181 (citing Robert A. McLaren, *Environmental Protection Based on State Constitutional Law: A Call For Reinterpretation*, 12 *U. HAW. L. REV.* 123, 126 (1990)). E.g. ALASKA CONST. art. VIII, §§ 1-7; CAL. CONST. arts. X, § 2, X(A), §§ 1-3, XIV, § 3; COLO. CONST. art XVIII, § 6; FLA. CONST. art. II, § 7; HAW. CONST. art. IX, § 8, art. XI, §§ 1, 9; ILL. CONST. art. XI, §§ 1-2; LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII; MICH. CONST. art. IV, § 54; MONT. CONST. art. IX, § 1; N.C. CONST. art. XIV, § 5; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, §§ 4, 5; OHIO CONST. art. II, § 36; OR. CONST. art. XI-H, § 6; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17; TENN. CONST. art. XI, § 13; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVIII, § 1; VA. CONST. art. XI, §§ 1-2.

143. See, e.g., California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE § 21,000 et seq. (West 1996 & Supp. 1998); Hawaii Environmental Policy Act (HEPA), HAW. REV. STAT. §§ 343-1 to 343-8 (1993); Massachusetts Environmental Policy Act (MEPA), MASS. ANN. LAWS ch. 30, §§ 61-62H (Law. Co-op. 1995); New York State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1997); North Carolina State Environmental Policy Act (SEPA), N.C. GEN. STAT. §§ 113A-1 to 113A-13 (Michie 1994). See generally David Sive, *National Environmental Policy Act, "Little NEPAs," and the Environmental Impact Assessment Process*, C127 *A.L.I.-A.B.A.* 1191 (1995).

First, the process for amending state constitutions is generally easier than the process for amending the federal Constitution. Most states require a majority vote in both state legislative houses to propose an amendment, and a majority vote in a popular election to ratify the amendment.¹⁴⁴

Second, it is generally easier for state residents to reach a consensus on issues to be amended in a state constitution than it is for Americans to reach a national consensus to amend the federal Constitution. Often environmental problems are regional, and state voters want "something done" about them.¹⁴⁵

The ease with which state residents amend their state constitutions when environmental problems and other issues are raised has led many legal scholars to criticize state constitutions for being no more than "superlegislation . . . no different in quality or type from ordinary laws."¹⁴⁶ Critics charge that many state constitutions are too "policy specific." A good constitution just shapes the general process of government, as does the United States Constitution, without laying out specific policy directives.¹⁴⁷

This section reviews how most states have taken the approach of amending their constitutions to include many policy-specific environmental provisions. It analyzes whether this approach has brought state residents any greater environmental preservation and protection than is enjoyed by all Americans under the federal Constitution, which contains no environmental provisions at all.

A 1996 survey found that "all but 18 state constitutions currently include one or more . . . substantive environmental provisions."¹⁴⁸ Each year there are dozens of proposals throughout the states to add new substantive environmental provisions to state

144. See Cusack, *supra* note 35, at 180. See, e.g., N.Y. CONST. art. XIX, §§ 1-2. For example, the Adirondack Forest Preserve constitutional provision has been amended ten times since 1941. See N.Y. CONST. art. XIV, § 1 (McKinney 1987 & Supp. 1998) (annotation).

145. See Thompson, *supra* note 141, at 864.

146. *Id.* at 863-64.

147. See Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 340 (1993).

148. Thompson, *supra* note 141, at 868.

constitutions.¹⁴⁹ Legal scholars, as well as the courts, have differing opinions as to how to categorize the various environmental provisions contained in state constitutions.

State provisions fall into three main categories: public access and use provisions, policy statements, and individual rights (to a clean or healthful environment or a similar right).

A. *Public Access and Use Provisions*

According to the 1996 survey,¹⁵⁰ over a third of all state constitutions contain public access and use provisions which guarantee the public access to and rights in navigable waters, tidelands, water use, or other use of natural resources of the state.¹⁵¹ Public access and use provisions are generally the oldest type of provision found in state constitutions and they are derived from the legal thought associated with the ancient "Public Trust Doctrine."¹⁵² The Public Trust Doctrine has been incorporated into American law from the country's beginnings.¹⁵³ For example, the Northwest Ordinance of 1787 states that:

The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefore.¹⁵⁴

In *Light v. United States*,¹⁵⁵ the Supreme Court recognized the Public Trust Doctrine, which is the rationale behind the public access and use provisions contained in more than a third of the state constitutions.

149. *See id.* at 866.

150. *See supra* note 148.

151. *See* Thompson, *supra* note 141, at 868.

152. *See id.*

153. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 *IOWA L. REV.* 631, 633 (1986); Joseph L. Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 *U.C. DAVIS L. REV.* 185, 185 (1980); Thompson, *supra* note 141, at 868.

154. Ordinance of 1787: The Northwest Territorial Government art. IV, 1 Stat. 50 (1789).

155. *Light v. United States*, 220 U.S. 523 (1911).

The Alaska, California, Florida, Georgia, Hawaii, Louisiana and Washington constitutions have public use or public access constitutional provisions stating that submerged and tidal lands are state public domain.¹⁵⁶ For example, article X, section 3 of the California Constitution provides in part:

All tidelands within two miles of any incorporated city, city and county, or town in this state, and fronting on the water of any harbor, estuary bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale . . . provided, however, that any such tidelands, reserved to the State solely for street purposes, which the Legislature finds and declares are not used for navigation purposes . . . may be sold . . . subject to such conditions as the Legislature determines are necessary . . . in order to protect the public interest.¹⁵⁷

Whereas California's constitutional public trust provision for tidal lands allows the state legislature to make exceptions for the building of streets, Hawaii's constitution declares, without exceptions: "The lands granted to the State of Hawaii . . . shall be held by the state as a public trust for native Hawaiians and the general public."¹⁵⁸

Eight states have provisions ensuring free access to navigable waterways.¹⁵⁹ For example, Alabama's constitution reads:

That all navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll; and that no tax, toll, impost, or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores, or in or over the waters of any navigable streams, unless the same be expressly authorized by law.¹⁶⁰

Several states ensure fishing rights to their citizens. The California Constitution reads:

The people shall have the right to fish upon and from the public lands of the state and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the

156. ALASKA CONST. art. VIII, § 6; CAL. CONST. art. X, § 3; FLA. CONST. art. X, § 11; GA. CONST. art. I, § 3; HAW. CONST. art. XII, § 4; LA. CONST. art. IX, § 3; WASH. CONST. art. XVII, § 1; *see* Thompson, *supra* note 141, at 869.

157. CAL. CONST. art. X, § 3.

158. HAW. CONST. art. XII, § 4.

159. *See* Thompson, *supra* note 141, at 869.

160. ALA. CONST. art. I, § 24.

State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.¹⁶¹

Whereas the California Constitution is verbose, the Alaska Constitution ensures fishing rights to its citizens in one concise sentence: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."¹⁶²

One final type of "public trust" provision establishes and preserves various state land reserves. The New York State Adirondack Forest Preserve is the oldest of these land preserve provisions.¹⁶³ The present-day amended version reads in part:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged . . . nor shall the timber thereon be sold, removed or destroyed¹⁶⁴

At their strongest, public access and use provisions emphasize the public trust doctrine that common resources are held in trust by the state for its people. Most of these provisions restrict the state's ability to sell or lease the specified public lands. State courts have often construed these provisions to be a restriction upon the state's ability to license certain common resources, such as fishing licenses.¹⁶⁵

B. *Policy Statements*

Nearly all state constitutions that have environmental provisions also include environmental policy statements.¹⁶⁶ Most of

161. CAL. CONST. art. I, § 25.

162. ALASKA CONST. art. VIII, § 3.

163. See N.Y. CONST. art. XIV, §§ 1, 2 & 5 (derived from N.Y. CONST. of 1894, art. VII, § 7 (as amended)); Thompson, *supra* note 141, at 871.

164. N.Y. CONST. art. XIV, § 1.

165. See Thompson, *supra* note 141, at 869-70.

166. See *id.* at 871.

these policy statements have been included deliberately.¹⁶⁷ Sometimes, courts have interpreted unclear environmental constitutional provisions to be policy statements.¹⁶⁸ For example, Michigan's constitution defines the state's environmental policy thus:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.¹⁶⁹

Similarly, Virginia's Constitution reads:

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.¹⁷⁰

Most state environmental policy provisions set environmental "goals" for the state, the public, and usually the legislature.¹⁷¹ These goals always concern preserving and protecting natural resources.¹⁷² Like the Michigan provision quoted above, these policy provisions often call upon the state legislature to pass additional legislation to implement the stated goals.¹⁷³

The New York State Constitution is unique in that it is the only state constitution that provides for citizen suit enforcement of the other environmental provisions in the constitution.¹⁷⁴ New York's constitutional environmental policy statement reads in part:

The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the develop-

167. *See id.*

168. *See id.*

169. MICH. CONST. art. IV, § 52.

170. VA. CONST. art. XI, § 1.

171. *See* Thompson, *supra* note 141, at 871.

172. *See id.*

173. *See id.*

174. *See* N.Y. CONST. art. XIV, § 5.

ment and improvement of its agricultural lands 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, . . . 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.¹⁷⁵

Section 5 of article XIV provides that “[a] violation of any of the provisions of this Article [XIV] 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.”¹⁷⁶ Thus, arguably, the New York State Constitution provides for citizen suit enforcement of New York’s environmental policies.¹⁷⁷

Generally, state courts have held state environmental policy provisions without accompanying enforcement provisions to be non-self-executing.¹⁷⁸ That is, they are merely goals and aspirations of the state’s citizenry and legislature. As such, they do not give individuals the right to sue to prevent environmental damage, the right to recover for damages, or the right to compel state agencies to take action to conserve or preserve the environment. The courts have held that state legislatures must pass additional enabling legislation in order to give these provisions force and effect.¹⁷⁹ The issue of self-execution of environmental constitutional provisions leads to the final category of state environmental provisions: those that purport to convey individual environmental rights.

175. *Id.* § 4.

176. *Id.* § 5.

177. See Thompson, *supra* note 141, at 872.

178. See *infra* Part III.C.

179. See Cusack, *supra* note 35, at 182-84; Thompson, *supra* note 141, at 871-73.

C. *Individual Rights to a Clean and Healthful Environment: Are These Provisions Self-Executing?*

1. Hawaii Cases

Many state constitutions have provisions which suggest individual environmental rights, but court interpretation has often blunted their usefulness to environmentalists by rendering them "vague" or "non-self-executing." Article XI, section 9 of the Hawaii Constitution states:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.¹⁸⁰

On its face, the Hawaiian provision appears to bestow an individual right to "a clean and healthful environment."¹⁸¹ It is essentially the same type of provision that Senator Nelson and Congressman Ottinger had tried to pass for the federal Constitution in the early 1970s.¹⁸² To forestall the criticism that the standards of environmental quality are vague and unenforceable, the provision defines a clean and healthful environment, "as defined by laws relating to environmental quality."¹⁸³ "Each person" is said to have these environmental rights, and "any person may enforce this right against any party, public or private."¹⁸⁴

However, the federal district court, in *Stop H-3 Ass'n v. Lewis*,¹⁸⁵ held that a private right of action did not exist under article XI, section 9 of the Hawaii Constitution to persons trying to prevent construction of a highway which would endanger certain species of birds.¹⁸⁶ The defendants in this case included both the United States Department of Transportation and the Director of the Department of Transportation of the State of Hawaii. Whereas the district court held that a Hawaiian statute was controlling in rela-

180. HAW. CONST. art. XI, § 9.

181. *Id.*

182. *See supra* Part II.A-B.

183. HAW. CONST. art. XI, § 9.

184. *Id.*

185. 538 F. Supp. 149 (D. Haw. 1982), *rev'd on other grounds*, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

186. *See* 538 F. Supp. at 175.

tion to a portion of the federal lawsuit, it held that article XI, section 9 was not controlling.¹⁸⁷ The court also stated that article XI, section 9 does not afford a private right of action, but it gave no reason for its finding.¹⁸⁸

In a second federal case, *Fiedler v. Clark*,¹⁸⁹ Fiedler, a private individual, sued the pineapple growers, dairy farmers, the State of Hawaii and the United States for declaratory and injunctive relief against the use of heptachlor and the contamination of dairy products with the pesticide.¹⁹⁰ Jurisdiction was alleged under several federal statutes, including the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),¹⁹¹ and under the Hawaii State Constitution.¹⁹² The district court had dismissed the complaint for lack of subject matter jurisdiction, and the Ninth Circuit affirmed.¹⁹³ The court of appeals held that the federal statute which Fiedler had pleaded did not create private rights of action.¹⁹⁴

Concerning Fiedler's claim under the citizen suit provision of the Hawaii Constitution, the district court had held that the states have no power to enlarge or contract federal jurisdiction and that the Hawaiian Constitution did not enlarge the subject matter jurisdiction of the federal courts.¹⁹⁵ The Ninth Circuit affirmed this ruling, as well.¹⁹⁶ The court of appeals did not address the issue of whether article XI, section 9 provides a private cause of action in Hawaii state courts. This issue had been raised and decided in the *Stop H-3 Ass'n* case. The court of appeals, however, did concede that the legislative history of article XI, section 9 suggests that the legislature was attempting to remove barriers to standing to sue.¹⁹⁷

In the few reported cases in which the Supreme Court of Hawaii has construed article XI, section 9, the court has held that the provision does afford private individuals the right to sue to

187. *See id.*

188. *See id.*

189. 714 F.2d 77 (9th Cir. 1983).

190. *See id.*

191. 7 U.S.C. §§ 136-136y.

192. HAW. CONST. art XI, § 9; *see* 714 F.2d at 77.

193. *See* 714 F.2d at 78.

194. *See id.* at 79.

195. *See id.* at 79-80.

196. *See id.* at 80.

197. *See* 714 F.2d at 80; 538 F. Supp. at 175.

enforce environmental laws. In *Life of the Land v. Land Use Comm'n of State of Hawaii*,¹⁹⁸ an environmental organization challenged a reclassification by the State Land Use Commission of certain lands which were not owned by any of its members.¹⁹⁹ Although the plaintiffs did not have an ownership interest in the lands, the supreme court held that the plaintiffs did have standing.²⁰⁰ It recognized that plaintiffs' "aesthetic and environmental interests" were enough to show standing to sue because "their aesthetic and environmental interests are 'personal' and 'special'."²⁰¹ The court identified article XI, section 9 as the source of the "personal and special interests or 'rights' " asserted by the plaintiffs.²⁰²

Again in the 1996 decision of *Richard v. Metcalf*,²⁰³ the Supreme Court of Hawaii cited to its *Life of the Land* decision and affirmed its position that article XI, section 9 of the Hawaiian Constitution provides individual standing to sue for environmental damage.²⁰⁴

Finally, in a very recent opinion, *Kahuna Sunset Owners Ass'n v. Mahui County Council*,²⁰⁵ the Supreme Court of Hawaii again affirmed that article XI, section 9 gives the Hawaiian people the right to bring lawsuits to enforce environmental laws.²⁰⁶ *Kahuna Sunset Owners* was a suit regarding a Hawaii statute, section 607-25.²⁰⁷ This statute awards attorneys' fees to the prevailing party in civil actions for injunctive relief, when one private party sues another private party who has been undertaking development of land without obtaining the permits or approvals required by law.²⁰⁸

The legislative history of section 607-25 reveals that it was passed to enable private individuals to serve as private attorneys general. This aids the overworked state and county agencies in stopping illegal development by private parties.²⁰⁹ In reviewing

198. 623 P.2d 431 (Haw. 1981).

199. *See id.* at 437.

200. *See id.* at 441-42.

201. *Id.* at 441.

202. *Id.* at 441 n.10.

203. 921 P.2d 169 (Haw. 1996).

204. *See id.* at 173 n.7.

205. 948 P.2d 122 (Haw. 1997).

206. *See id.* at 124-25.

207. HAW. REV. STAT. § 607-25 (1993).

208. *See* 948 P.2d at 123.

209. *See id.* at 124-25 (discussing SEN. STAND. COMM. REP. NO. 480-

the legislative history of section 607-25, the Supreme Court of Hawaii noted that it was passed by the state legislature to improve the ability of individuals to sue for environmental damage and protection pursuant to article XI, section 9 of the Hawaii Constitution.²¹⁰ Whereas article XI, section 9 gave:

the public standing to use the courts to enforce laws intended to protect the environment, . . . the public has rarely used this right and . . . there have been increasing numbers of after-the-fact permits for illegal private development [T]he impediment of high legal costs must be reduced for public interest groups by allowing the award of attorneys' fees²¹¹

The court held that a plaintiff who prevails in a lawsuit against illegal development shall be awarded attorneys' fees pursuant to section 607-25. A defendant who prevails against a plaintiff shall be awarded attorneys' fees only if the plaintiff's lawsuit is adjudged frivolous.²¹² The Supreme Court of Hawaii implicitly recognized the rights of private individuals to sue pursuant to article XI, section 9 for environmental protection.²¹³

Review of the Hawaiian line of cases is pertinent to the discussion of the development of environmental constitutional amendments for several reasons. Analysis of the *Fiedler v. Clark*²¹⁴ and the *Stop H-3 Ass'n v. Lewis*²¹⁵ opinions reveals the tendency of the federal courts to reject the merits of constitutional environmental claims. On the other hand, the Supreme Court of Hawaii has given an expansive interpretation to article XI, section 9. As the court explained in *Kahuna Sunset*, it intends to look at the legislative history of constitutional environmental provisions and any accompanying legislation and to give the provisions the full meaning intended by the state legislature.²¹⁶ It also appears from the *Kahuna Sunset* decision that the Supreme Court of Hawaii will uphold the award of attorneys' fees to plaintiffs who sue pursuant to article XI, section 9, whenever there is legislation au-

86, reprinted in 1986 SENATE JOURNAL 976).

210. See *id.* at 124.

211. *Id.*

212. See *id.* at 125.

213. See *id.* at 124.

214. 714 F.2d 77 (9th Cir. 1983).

215. 538 F. Supp. 149 (D. Haw. 1982), *rev'd on other grounds*, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

216. See 948 P.2d at 124.

thorizing attorneys' fees.²¹⁷

The Hawaiian example of how the high court has worked with the state legislature to give effect to the state's environmental constitutional provisions is, undoubtedly, the type of working relationship that Senator Nelson and Congressman Ottinger hoped for when they proposed their constitutional amendments to the federal Constitution.

2. Pennsylvania Cases

Hawaii is an exception, however. Most state courts have been more tentative and contradictory on the issues of whether state environmental constitutional provisions are self-executing and if they provide for individual rights and standing. Perhaps the best-known and classic example of state court confusion on these issues is the line of Pennsylvania cases interpreting Pennsylvania Constitution article I, section 27.²¹⁸ It reads similarly to the Hawaii provision:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefits of all the people.²¹⁹

The 1973 case of *Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower*²²⁰ is undoubtedly the best known of any state court opinion which has construed the meaning of a state environmental constitutional provision. There was national interest in this case because it involved possible alteration, even desecration, of the Gettysburg Battlefield.²²¹

National Gettysburg Battlefield Tower, Inc. (Tower Corporation), had plans to construct a 307-foot tourist observation tower near the Gettysburg Battlefield.²²² After negotiations with the Tower Corporation, the National Park Service was willing to per-

217. *See id.*

218. PA. CONST. art. I, § 27.

219. *Id.*

220. 311 A.2d 588 (Pa. 1973).

221. *See id.* at 590.

222. *See id.* at 589.

mit the tower construction.²²³ However, the Commonwealth of Pennsylvania filed suit against the Tower Corporation to enjoin construction because the tower would be “ ‘a despoliation of the natural and historic environment.’ ”²²⁴ The National Park Service then changed sides and assisted the Commonwealth in its opposition to the tower.²²⁵

The Commonwealth's only basis for suit in this case was article I, section 27 of the Pennsylvania State Constitution, which had been ratified by the voters on May 18, 1971.²²⁶ The Commonwealth's entire ability to prevent the tower, therefore, rested on whether the new provision was self-executing.²²⁷ Did the Pennsylvania legislature have to pass additional legislation in order to vest the rights of article I, section 27 in the people?

In a rather convoluted line of reasoning, the Supreme Court of Pennsylvania held that article I, section 27 was not self-executing.²²⁸ First, the court conceded that none of the other twenty-six sections of article I ever had been declared to be non-self-executing.²²⁹ The court attempted to distinguish section 27 from the other sections on the grounds that the first twenty-six sections are all “limitations” on the power of the state government; whereas, section 27 also “expands” the powers of the state government by declaring it to be “trustee” of the resources of the Commonwealth and by directing it to “ ‘conserve and maintain them for the benefit of all the people.’ ”²³⁰ The court then admitted that the Commonwealth always had been the trustee of the state's resources and that this portion of section 27 was “merely a general reaffirmation of past law.”²³¹

What particularly seemed to bother the court was that section 27 would allow suit on purely “aesthetic or historical considerations”:

Now, for the first time, at least insofar as the state constitution is concerned, the Commonwealth has been given power to act in areas of purely aesthetic or historic concern. The Common-

223. *See id.*

224. *Id.* at 589-90.

225. *See id.* at 590 n.1.

226. *See id.* at 590-91.

227. *See id.* at 591.

228. *See id.* at 592-95.

229. *See id.* at 591-92.

230. *Id.* at 592.

231. *Id.*

wealth has cited no example of a situation where a constitutional provision which expanded the powers of government to act against individuals was held to be self-executing.²³²

In another odd passage, the court held that the governor and the attorney general were not authorized to sue on behalf of the Commonwealth of Pennsylvania for environmental preservation.²³³ Section 27 named the "Commonwealth" as the trustee of the State's resources, but it did not specify who could bring suit in the name of the Commonwealth.²³⁴ The court held that it violated the balance of powers among the three branches of state government for the governor and the attorney general to assume the authority to bring suit against the defendants pursuant to article I, section 27.²³⁵ Also, although the reasoning was not developed, the court indicated that it was concerned that holding section 27 to be self-executing would affect property rights within the state.²³⁶

Finally, the court indulged in a little gratuitous decision-making for a few other states when it compared Pennsylvania's section 27 to similar constitutional amendments enacted in Massachusetts,²³⁷ Illinois,²³⁸ New York,²³⁹ and Virginia.²⁴⁰ It declared them all to be "obviously not self-executing" as well.²⁴¹

The majority of the Pennsylvania Supreme Court was unmoved by the aesthetic and historical arguments of the Commonwealth. In a concurring opinion, one justice agreed with the trial court's findings that "(t)he Commonwealth [had] failed to show by clear and convincing proof that the natural, historic, scenic and aesthetic values of the Gettysburg area [would] be irreparably harmed by the erection of the proposed tower at the proposed site."²⁴² Portions of the opinion reveal that the justices may have been unsympathetic to the Commonwealth's cause because the National Park Service had first negotiated a settlement with the

232. *Id.*

233. *See id.* at 593.

234. *See id.*

235. *See id.*

236. *See id.*

237. *See id.* at 594; MASS. CONST. art. XLIX.

238. *See* 311 A.2d at 594; ILL. CONST. art. XI, §§ 1-2.

239. *See* 311 A.2d at 594; N.Y. CONST. art. XIV, § 4.

240. *See* 311 A.2d at 594; VA. CONST. art. XI, §§ 1-2.

241. *See* 311 A.2d at 594.

242. *Id.* at 596 (Roberts, J., concurring).

Tower Corporation and then switched sides.²⁴³

Whatever the majority's true feelings in this case, it is fair to say that it is not a well-reasoned opinion. What is the state Attorney General's job, if it is not to sue on behalf of the Commonwealth? In a dissenting opinion, Chief Justice Jones said, "the Court has chosen to emasculate a constitutional amendment by declaring it not to be self-executing."²⁴⁴ At the end of his dissent he concluded that:

[T]he proposed structure will do violence to the 'natural, scenic, historic and aesthetic values' of Gettysburg. This Court's decision today imposes unhappy consequences on the people of this Commonwealth. In one swift stroke the Court has disemboweled a constitutional provision which seems, by unequivocal language, to establish environmental control by public trust and, in so doing consequently sanctions the desecration of a unique national monument.²⁴⁵

Three years later, the Pennsylvania Supreme Court reversed itself in *Payne v. Kassab*,²⁴⁶ and held that article I, section 27 of the Pennsylvania Constitution is self-executing, at least in terms of the duties of the Commonwealth to uphold the public trust of natural resources.²⁴⁷ Plaintiffs, Marian Payne and others, brought suit against municipal and state officials to enjoin a street widening project in Wilkes-Barre.²⁴⁸ The court held that the plaintiffs had standing to bring suit pursuant to section 27 to compel the Commonwealth to conserve the public trust of natural resources.²⁴⁹ In this case, these resources were a historic River Commons area, part of which would have been taken for the proposed road widening.²⁵⁰ The court gave virtually no reason why it was reversing its *Gettysburg Tower* decision. It seemed satisfied that both the plaintiffs and the defendant, the Commonwealth of Pennsylvania, were in agreement that section 27 was self-executing and that the plaintiffs had standing to bring suit. The court entirely ignored the issue of self-execution.²⁵¹

243. *See id.* at 590 n.1.

244. *Id.* at 596 (Jones, C.J., dissenting).

245. *Id.* at 599.

246. 361 A.2d 263 (Pa. 1976).

247. *See id.* at 272.

248. *See id.* at 267.

249. *See id.* at 272.

250. *See id.* at 264.

251. "We see no need, in this case, to explore the difficult terrain

Although the Pennsylvania Supreme Court reversed itself on the question of self-execution, *Kassab* is far from a clear victory for Pennsylvania environmentalists. First of all, the court reserved the question as to whether section 27 would be self-executing if the Commonwealth:

as trustee [were] seeking [to use section 27] to curtail or prevent the otherwise entirely legal use of private property on the ground that the proposed use impinges, in the words of the amendment's first sentence, on 'natural scenic, historic and esthetic values of the environment.'²⁵²

In other words, the court might not hold section 27 to be self-executing, if it were to be used against private property owners. The court may require further legislation to flesh-out how the provision will affect private property rights.

Second, the court adopted a test that limits the effectiveness of section 27 to citizen plaintiffs who sue the Commonwealth.²⁵³ The Supreme Court adopted a three-part balancing test which had been devised by the lower appellate court, the Commonwealth Court, in this case.²⁵⁴ This test requires a reviewing court to evaluate and balance three factors every time it adjudges whether or not the Commonwealth has honored the public trust pursuant to section 27:

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?²⁵⁵

The environmental harm versus public benefit analysis required by this three-part test gives a reviewing court a basis for justifying almost any threat to the environment.

of whether the amendment is or is not 'self-executing.' " *Id.* at 272.

252. *Id.*

253. *See id.* at 273.

254. *See id.*; *see also* *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), *decree nisi aff'd*, 323 A.2d 407 (1974), *aff'd*, 361 A.2d 263 (1976).

255. 361 A.2d at 273 n.23.

The completely different ways in which the Supreme Court of Hawaii and the Supreme Court of Pennsylvania have interpreted similarly-worded state environmental constitutional provisions illustrates the problems environmentalists face, not only in getting environmental constitutional provisions passed, but also in breathing life and efficacy into these provisions. The Supreme Court of Hawaii is the exception, as one of the few state courts which has made it a policy to research and carry out legislative intent when it interprets state environmental constitutional provisions. It has readily interpreted the state constitutional provisions to be self-executing.²⁵⁶ At the other extreme (especially at first) the Pennsylvania Supreme Court disregarded legislative intent by declaring the Pennsylvania constitutional provision to be non-self-executing,²⁵⁷ and it outraged the nation by permitting a tower to be built near the Gettysburg Battlefield. Although the Pennsylvania Supreme Court later relented, in somewhat caustic terms, its three-pronged balancing test and restrictive holding took the real "teeth" out of the constitutional provision.

Certainly the inclusion of environmental provisions in most state constitutions has not been the panacea that environmentalists had hoped for.²⁵⁸ The vast majority of state environmental provisions read like policy statements,²⁵⁹ and the courts generally have interpreted them to be non-self-executing.²⁶⁰ They require further enabling legislation in order for either the state or its citizens to bring suit to enforce environmental rights or duties.²⁶¹ In general, however, state environmental provisions have been interpreted by the state courts to give state citizens more individual environmental rights than they would have been accorded in the absence of these provisions.²⁶² Citizens of most states have some individual environmental rights pursuant to their state con-

256. See *Richard v. Metcalf*, 921 P.2d 169, 173 n.7 (Haw. 1996).

257. See *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 594-95 (Pa. 1973).

258. See Bruce Ledewitz, *The Challenge of, and Judicial Response to, Environmental Provisions in State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 33, 33-42 (1991).

259. See *supra* Part III.B.

260. See Fernandez, *supra* note 147, at 338-57; Ledewitz, *supra* note 258, at 342-54.

261. See Cusack, *supra* note 35, at 181-89; Thompson, *supra* note 141, at 871-74.

262. See Ledewitz, *supra* note 258, at 33-44.

stitutions, whereas the United States Constitution affords no environmental rights.²⁶³

The trend of state supreme courts in recent years to interpret their state constitutions to afford more individual rights to their citizens than the federal courts recognize under the federal Constitution has been termed the "new federalism."²⁶⁴ It has been suggested that the new federalism is a reaction by state courts to the predominantly conservative stance of the Burger and Rehnquist Courts, which have refused to extend individual rights through constitutional interpretation.²⁶⁵ The differing approaches of the Ninth Circuit and the Supreme Court of Hawaii in regard to article 11, section 9 of the Hawaii State Constitution clearly illustrates the new federalism.²⁶⁶

D. *The Present Trend to Pass Environmental Constitutional Amendments at the State Level*

Although there does not seem to be much national interest in passing a federal constitutional amendment, in the states there continues to be great interest in passing state environmental constitutional amendments. In recent years, during each election period, many states have had propositions on their ballots to amend their state constitutions to include environmental provisions.²⁶⁷ The focus of these state amendments is different from the focus of the state amendments adopted in the 1970s. In the 1970s, the states passed environmental constitutional provisions to encompass broad environmental policies and in order to give state citizens individual environmental rights.²⁶⁸ Most of the state amendments proposed in recent years deal with narrow environmental issues that are topics of debate or controversy within the particular state.²⁶⁹

263. See *id.* at 33-34.

264. See Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 317-23, 339-41 (1986).

265. See *id.* at 317-23, 339-41.

266. See *supra* Part III.C.

267. See John Kennedy, *Few Items are Bound for Ballot in November*, ORLANDO SENTINEL, June 23, 1996, at B1.

268. See sources cited *supra* note 142.

269. See Fernandez, *supra* note 147, at 386; Kennedy, *supra* note

For example, environmental groups in Florida, including an organization called "Save Our Everglades" worked for years for an amendment to the Florida Constitution that would impose a penny-per-pound tax on raw sugar production and would create a trust fund with the tax money collected to clean-up the Everglades.²⁷⁰ Environmental groups charged the agricultural industry, particularly the huge sugar-growing industry, with destroying the Everglades with agricultural run-off.²⁷¹ For years, a feud raged between the environmentalists and the sugar industry. Large amounts of money were funneled into campaigns for both sides, and the legislature was influenced by special interests on both sides.²⁷²

Finally, the environmentalists were successful in placing a constitutional amendment proposition on the November 1996 ballot.²⁷³ Critics of the amendment charged that the proposition was really just legislation and that it should be included in a statute rather than in the Florida Constitution.²⁷⁴ It is fairly easy in Florida to use the petition process to place propositions for constitutional amendments on the election ballot.²⁷⁵ Environmentalists felt their only hope of passing the sugar tax was by petition for a constitutional amendment, so they took that route.²⁷⁶ Although it was rather easy for proponents to raise the requisite signatures

267, at B1.

270. See Kennedy, *supra* note 267, at B1; Bo Poertner, *Protecting Everglades Not Just Issue-of-the-Moment for Audubon Society*, *ORLANDO SENTINEL*, Oct. 26, 1996, at D1.

271. See Azure, Editorial, *Get Glades Settlement First*, *ORLANDO SENTINEL*, Oct. 5, 1993, at A10.

272. See Kirk Brown, *Save Our Everglades, Inc. Receives \$345,000 Donation*, *PALM BEACH POST*, Jan. 11, 1994, at 8A; Lloyd Dunkelberger, *Sugar Tax Amendment Defeated; Florida Referendum*, *LEDGER* (Lakeland, Fla.), Nov. 6, 1996, at A12; Kennedy, *supra* note 267, at B1.

273. See Dunkelberger, *supra* note 272, at A12.

274. See Tom Palmer, *Battle Over Sugar Tax Reaches in Polk; The Everglades: Agriculture v. Environment; The Amendments*, *LEDGER* (Lakeland, Fla.), Oct. 18, 1996, at A1; Peter Wallsten, *League to Oppose Penny Sugar Tax*, *ST. PETERSBURG TIMES*, Oct. 3, 1996, at 7B.

275. See FLA. CONST. art XI, § 3; see also Editorial, *Revise the Initiative*, *LEDGER* (Lakeland, Fla.), Feb. 5, 1995, at 2F.

276. See Palmer, *supra* note 274, at A1.

among the public, the sugar industry put large amounts of money into a campaign to defeat the proposition on the November 1996 ballot.²⁷⁷ It charged that the radical environmentalists were trying to unfairly burden the industry with taxes and that ultimately the sugar consumer would pay the extra penny tax. The sugar tax amendment was defeated.²⁷⁸

Two years earlier, the environmentalists had placed a proposition on the 1994 Florida ballot for a constitutional amendment prohibiting the use of net fishing in Florida's waters. Fishing nets have a devastating effect on manatees, dolphins, turtles, and mullet populations.²⁷⁹ Again, the environmentalists felt that they had tried every other way to end net fishing, and they finally felt forced to use the amendment process. The net ban was passed by the Florida voters.²⁸⁰

Eighteen states, including Florida, use the initiative process to amend their constitutions.²⁸¹ In these states, the trend has been for environmentalists to use the amendment process to adopt constitutional amendments on very specific issues that generally would be addressed in regular, state environmental law and regulations.²⁸² Environmentalists usually use the constitutional amendment process to circumvent a state legislature which will not act upon an environmental issue or is hostile to the cause. Critics ar-

277. See Dunkelberger, *supra* note 272, at A12.

278. See *id.*

279. See Editorial, *No. 3: Vote to Limit Nets*, ST. PETERSBURG TIMES, Oct. 31, 1994, at 8A.

280. See *id.*; Palmer, *supra* note 274, at A1; *Revise the Initiative*, *supra* note 275, at 2F.

281. ARIZ. CONST. art. XXI, § 1; ARK. CONST. amend. 7; CAL. CONST. art. XVIII, § 3; COLO. CONST. art. V, § 1; FLA. CONST. art. XI, § 3; ILL. CONST. art. XIV, § 3; MASS. CONST. art. XLVIII; MICH. CONST. art. XII, § 2; MISS. CONST. art. XIV, § 273; MO. CONST. art. III, § 50; MONT. CONST. art. XIV, § 9; NEB. CONST. art. III, § 2; NEV. REV. CONST. art. XIX, § 2; N.D. CENT. CONST. art. III, § 1; OHIO REV. CONST. art. II, § 1a; OKLA. CONST. art. V, § 2; OR. CONST. art. XVII, § 1; S.D. CONST. art. XX-III, § 1; see *Revise the Initiative*, *supra* note 275, at 2F.

282. See generally Dennis W. Arrow, *Representative Government And Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment By Initiative Petition*, 17 OKLA. CITY U. L. REV. 3 (1992).

gue that these provisions should be in state statutes, not in constitutions, but the environmentalists are driven to use the constitutional amendment process because it is expedient. Also, environmentalists hope that if a provision is contained in the state constitution, it will be safeguarded from simple repeal by the legislature, as can happen with a statute which goes out of favor.²⁸³

In many states, like Florida, environmentalists are no longer thinking in terms of broad, constitutional principles, such as the general environmental rights contained in Congressman Ottinger's resolution of 1970 or Assemblyman Brodsky's resolution of 1997.²⁸⁴ Rather, they are looking for a quick fix to a specific environmental problem.

At the opposite end of the spectrum, environmentalists in New York State opposed a proposition on the November 1997 ballot to call for a constitutional convention to amend the New York State Constitution.²⁸⁵ Although New York does not have the petition initiative process, it does have two methods of amendment. First, if the New York Assembly and Senate pass a particular amendment at two successive sessions of the legislature, the amendment is placed on the general ballot for ratification by the voters.²⁸⁶ Second, the voters can vote to hold a constitutional convention.²⁸⁷ When the question of holding a constitutional convention came up before the voters in November 1997, the environmentalists joined with labor unions, the NAACP, the League of Women Voters, feminists and a host of special interest groups to oppose it.²⁸⁸

Each of these diverse groups had a different reason for oppos-

283. See Fernandez, *supra* note 147, at 340.

284. See *supra* Parts II.B, II.D.1.

285. See Jeff Jones, *Byline: A Constitutional Question; Convention Could Risk Forever Wildland*, NEWSDAY (N.Y.), Oct. 21, 1997, at A43 [hereinafter Jones, *Byline*].

286. See N.Y. CONST. art. XIX, § 1.

287. See *id.* § 2.

288. See Associated Press, *Ad Blitz Opposes Amendment*, TIMES UNION (Albany, N.Y.), Oct. 31, 1997, at B2; Marc Humbert, *Opponents Predict Dominant Role By 'Same Old Insiders'*, BUFFALO NEWS, Oct. 21, 1997, at 1A; Erik Kriss, *Realities of Politics Intrude on Ideals*, TIMES UNION (Albany, N.Y.), Oct. 21, 1997, at A1.

ing the convention.²⁸⁹ Environmental groups such as the Green Party,²⁹⁰ the Sierra Club,²⁹¹ the Audubon Society,²⁹² and Environmental Advocates²⁹³ feared opening up the issue of environmental rights at a constitutional convention. The environmentalists were especially concerned that the delegates to the convention would tamper with article 14, section 1 of the New York Constitution, which provides for the Adirondack Forest Preserve.²⁹⁴ In the end, the voters of New York defeated the convention proposition by a wide margin, thus preventing the environmental constitutional crisis in New York which most environmental groups feared.²⁹⁵

Environmentalists should be encouraged by the trend of state legislatures and state voters passing constitutional provisions guaranteeing individual rights. At the same time, they cannot help but be discouraged by the lack of clear direction from most state courts. State environmental constitutional provisions are often poorly-worded, unclear and ambiguous. They may be expeditiously assembled by state legislators, environmental groups and interested citizens seeking only a quick solution to the latest environmental problem. The courts are thus caught in the middle of political struggles when they attempt to interpret these carelessly-drafted provisions. As such, the charge that state constitutions have become nothing more than "super codes" is well-

289. See Lois Weiss, *Weighing Pros and Cons of the Constitutional Convention Vote*, REAL EST. WKLY., Oct. 29, 1997, at 12.

290. See Associated Press, *News from the New York State Capitol*, ASSOC. PRESS. POL. SERV., Oct. 29, 1987, available in 1997 WL 2558562.

291. See Mark Weiner, *Adirondack Park Fans Fear Convention: A New State Constitution Might Not Give The Adirondacks "Forever Wild" Protections*, POST STANDARD (Syracuse, N.Y.), Oct. 30, 1997 at A10.

292. See Weiss, *supra* note 289, at 12.

293. See Jones Interview, *supra* note 130.

294. See John Caher, *Big Bucks Get Behind Convention Proposal*, TIMES UNION (Albany, N.Y.), Oct. 9, 1997, at B2; Jones, *Byline*, *supra* note 285, at A43; Jones Interview, *supra* note 130; Telephone Interview with Harry Ross, Representative, Orange Env't (Orange County, N.Y.) (Dec. 1, 1997). Orange Environment is the leading environmental advocacy group in the author's home county.

295. See Marc Humbert, *Multiple Factors Brought Down ConCon*, ASSOC. PRESS POL. SERV., Nov. 6, 1997, available at 1997 WL 2560280.

founded.²⁹⁶

Finally, after reviewing various state environmental constitutional provisions and state court interpretations of them, one must wonder if these provisions are really necessary. All of the states have adopted environmental legislation, similar to federal statutes, in a variety of environmental areas. Often the existence of both a statute and a constitutional provision regarding a particular environmental subject raises the issue of which is the controlling law and in what context. Sometimes a state court will hold a constitutional provision to be non-self-executing, partly to end the confusion as to how to reconcile the constitutional provision and the statute. Once the constitutional provision is declared to be non-self-executing, the court can then rely on the more specific language and requirements of the environmental statute to adjudicate the case at hand.²⁹⁷

CONCLUSION

The time for adoption of a general, environmental rights amendment to the United States Constitution has probably passed. However, there are three areas of environmental law in which there may be new support for a federal constitutional amendment: environmental justice for the disadvantaged and oppressed; international constitutional law, particularly in third world and formerly Communist countries; and the effort to preserve biodiversity.

For a variety of social, economic, and political reasons, minorities and the poor make up the greatest percentage of Americans who suffer the effects of living in environmentally contaminated neighborhoods and of working in environmentally hazardous workplaces. Typically, minorities and the poor have been unable to sue and to recover for environmental damage. They are often unable to make state and federal agencies respond to their environmental problems. The legal study of this problem has been termed "environmental justice," and it is a new and growing

296. See Fernandez, *supra* note 147, at 338-41.

297. See *id.* at 338-57 (discussing state cases which have held constitutional provisions to be non-self-executing).

field of environmental law.²⁹⁸

In order to advance the cause of environmental justice, it has been urged that minorities should sue for their rights pursuant to state environmental constitutional provisions.²⁹⁹ In a unique article, published in the *Stanford Environmental Law Journal* in 1996, Neil Popovic, an attorney for the Sierra Club Legal Defense Fund, makes the suggestion that minorities should sue in state courts, pursuant to state environmental constitutional provisions, and cite international treaties and human rights conventions as precedent for their civil rights positions.³⁰⁰ Popovic notes that state courts have often used international treaties and conventions for information or precedent in cases involving human rights, such as cases involving prisoners.³⁰¹ He feels that the use of international law to construe state environmental constitutional provisions in environmental justice cases will breathe new life into these provisions and may revive the movement to pass a federal environmental rights amendment.³⁰²

Since the fall of Communism, formerly Communist countries have gone about the arduous business of revising, or totally re-writing, their constitutions.³⁰³ Environmental issues are of great concern in former Eastern Bloc countries, because Communist dictatorships paid little attention to environmental preservation. In most of these countries the factories pollute the air, the water is fouled by industry, and the forests and other natural resources have been squandered.³⁰⁴ Developing countries have also suffered environmental damage at the hands of occupying powers or in their attempt to catch up with the rest of the world.³⁰⁵

298. See generally Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 *STAN. ENVTL. L. J.* 338 (1996).

299. See *id.* at 355-66.

300. See *id.* at 367-70.

301. See *id.* at 370-73.

302. See *id.* at 373-74.

303. See Elizabeth F. Brown, Comment, *In Defense of Environmental Rights in East European Constitutions*, 1993 *U. CHI. L. SCH. ROUNDTABLE* 191, 193-202 (1993).

304. See *id.* at 192, 215.

305. See generally Jennifer M. Gleason & Bern A. Johnson, *Environmental Law Across Borders*, 10 *J. ENVTL. L. & LITIG.* 67 (1995).

Because of the severe environmental damage that they have suffered, former Communist and developing countries are disposed to adopt strong environmental provisions in their new constitutions, including individual environmental rights provisions.³⁰⁶ These countries often look to American law when writing and interpreting their new constitutions.³⁰⁷ It has been suggested that the interest that other countries show in our state environmental constitutional provisions and court decisions may serve to redirect the attention of the American legal community toward the adoption and use of environmental constitutional provisions. Furthermore, the sharing of ideas may foster the development of international environmental rights.³⁰⁸

Finally, in an imaginative 1994 article, Rodger Schlickeisen, President of Defenders of Wildlife, argues for an amendment to the United States Constitution that will require the United States to take an active role in ensuring global biodiversity.³⁰⁹ Mr. Schlickeisen raises the question of "intergenerational fairness." He suggests that present generations have a moral responsibility to preserve life on earth for the welfare of future generations.³¹⁰ He argues that the work necessary to save the world's species can be better accomplished if the United States Constitution is amended to contain a right to biodiversity on behalf of all generations.³¹¹ Since the biodiversity problem is global in nature, he sees a time when the world situation will require the United States to adopt such a constitutional amendment.³¹²

Although it is not a pressing concern of environmentalists at the moment, the movement for adoption of an amendment to the United States Constitution, which guarantees individual environmental rights, could be revived at any time by an imaginative environmental argument.

306. See Brown, *supra* note 303, at 193-202.

307. See *id.* at 204-15.

308. See Gleason & Johnson, *supra* note 305, at 82-83.

309. See generally Schlickeisen, *supra* note 12.

310. See *id.* at 192.

311. See *id.* at 205.

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