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## Right to a Clean Environment Provisions in State Constitutions, and Arguments as to A Federal Counterpart

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### Summary

The issue arises occasionally whether it might be desirable to amend the U.S. Constitution to add an environmental provision -- such as one declaring an individual right to a clean environment. Some attention was given this issue during the 1970s, when over a dozen states adopted clean environment or other environmentally oriented provisions in their constitutions. Our focus here is solely personal right to a clean environment provisions and the questions they raise. Are they self-executing, or dependent instead on implementing legislation? Do they create private rights of action? If so, on whose behalf, for what remedies, and against what categories of defendants? What is the standard to be enforced, and the level of proof needed to show injury? And so on. All these issues would arise as well were a federal right-to-a-clean-environment provision to be proposed. In addition, a federal provision would implicate federalism concerns if its scope exceeded that of the Commerce Clause.

From time to time, the issue arises whether it might be desirable to amend the U.S. Constitution to add some sort of environmental provision — for example, one declaring an individual right to a clean environment. To be sure, the heyday of this idea was the “environmental Seventies,” quite some time ago, when two unsuccessful efforts were made in the Congress to accomplish this.<sup>1</sup> In their wake, efforts to convince courts that there

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<sup>1</sup>According to one writer, Senator Gaylord Nelson in 1968 first proposed such a constitutional amendment -- one that would have recognized the “inalienable right” of every person “to a decent environment.” H.R. J. Res. 1321, 90th Cong., 2d Sess. (1968). Two years later, Representative Richard Ottinger made a second, more comprehensive attempt at federal constitutional recognition of such a right. H.R. J. Res. 1205, 91st Cong., 2d Sess. (1970). Mary E. Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. Env'tl. Affairs L. Rev. 173, 175-176 (1993).

is already an implicit right to a clean environment in the U.S. Constitution also failed.<sup>2</sup> Nonetheless, environmental protection and natural resource conservation were added to several *state* constitutions before and during the Seventies, and the debate still surfaces periodically whether an analog might be appropriate for the U.S. Constitution. Hence, this brief report.

Our focus here is solely (1) state constitutional provisions asserting a *personal right* to a clean environment; (2) the issues such provisions raise, particularly in the courts, and (3) arguments for and against a comparable addition to the federal constitution. It must be stressed that such personal right provisions are but a fraction of the entire spectrum of environment- and natural resource-oriented provisions in state constitutions. Not discussed in this report are other “healthful environment” constitutional provisions, such as those that grant the state “power” to promote a healthful environment,<sup>3</sup> or declare a state policy (or duty of the legislature) to maintain a healthful environment.<sup>4</sup>

Similarly we do not discuss state constitutional provisions geared to conservation of natural resources, such as those that grant the state or state legislature “power” to conserve natural resources,<sup>5</sup> declare a state policy (or duty of the legislature) to conserve natural resources,<sup>6</sup> grant citizens the personal right to preservation of natural resource values<sup>7</sup> or to restrain violations of natural resource conservation provisions in the state constitution;<sup>8</sup> or state that public natural resources are held in trust by the state for the benefit of the people.<sup>9</sup>

## **Personal Right to a Clean Environment Provisions**

All the state constitutional provisions creating a personal right to a healthful environment took effect in a relatively short period, between 1971 and 1979. Full text of each provision is given unless otherwise noted by ellipses.

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<sup>2</sup>*See, e.g.,* Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971). *See also* David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612, 642-643 (1970).

<sup>3</sup>Haw. Const. art. IX, § 8; Mass. Const. art. of amend. XLIX, par. 2; Va. Const. art. XI, § 2.

<sup>4</sup>Fla. Const. art. II, § 7; Illinois Const. art. XI, § 1; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; Va. Const. art. XI, § 1.

<sup>5</sup>Ga. Const. art. III, § VI, par. II(a)(1); Mass. Const. art. of amend. XLIX, par. 2; Va. Const. art. XI, § 2.

<sup>6</sup>Ala. Const. amend. 543; Alaska Const. art. VIII, § 2; Fla. Const. art. II, § 7; Hawaii Const. art. XI, § 1; La. Const. art. IX, § 1; Mass. Const. art. of amend. XLIX, par. 1; Mich. Const. art. IV, § 52; N.Y. Const. art. XIV, §§ 3-4; N.M. Const. art. XX, § 21; No. Car. Const. art. XIV, § 5; Pa. Const. art. I, § 27; R.I. Const. art. I, § 17; Texas Const. art. XVI, § 59; Va. Const. art. XI, § 1.

<sup>7</sup>R.I. Const. art. I, § 17.

<sup>8</sup>N.Y. Const. art. XIV, § 5.

<sup>9</sup>*See, e.g.,* Ala. Const. amend. 543; Hawaii Const. art. XI, § 1; Pa. Const. art. I, § 27.

*Hawaii Const. art. XI, § 9:* 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. (Effective Jan. 1, 1979.)<sup>10</sup>

*Illinois Const. art. XI, § 2:* Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law. (Effective July 1, 1971.)

*Massachusetts Const. article of amendment XLIX:* The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment. .... (Effective Nov. 7, 1972.)

*Montana Const. art II, § 3:* All persons are born free and have certain inalienable rights. They include the right to a healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health, and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. (Effective July 1, 1973.)<sup>11</sup>

*Pennsylvania Const. art. I, § 27:* The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. .... (Effective May 18, 1971.)

## Analysis

The state constitutional provisions provisions above appear not to have played nearly as important a role in environmental protection as the extensive statutory regimes enacted by the states. Still, these provisions have received some interpretation by the courts.<sup>12</sup>

Most court cases analyzing such state constitutional provisions, and most scholarly commentary, begin with whether the provision is self-executing — that is, whether it can be implemented in the absence of legislation. This issue, in turn, hinges on whether the state constitution speaks directly to the self-executing question. Where the constitution is silent, the decisions are mixed. In Pennsylvania, for example, the high court initially ruled (by plurality) that the state's environment provision was not self-executing so as to support a state effort, on the authority of the provision alone, to curb the property rights

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<sup>10</sup>See generally Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. Haw. L. Rev. 123 (1990).

<sup>11</sup>See generally John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self Execution or Self-Delusion?*, 57 Mont. L. Rev. 323 (1996); Tammy Wyatt-Shaw, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something,"* 15 Pub. Land L. Rev. 219 (1994).

<sup>12</sup>See generally Mary E. Cusack, *supra* note 1.

of individuals.<sup>13</sup> Three years later, however, the same environment provision was held self-executing in the reverse situation -- that is, where it was asserted *against* the state.<sup>14</sup> It should be noted that both these decisions focused as well on constitutional text immediately following the right-to-a-clean-environment sentence quoted above, affixing public trust responsibilities on the state.

Another decision, addressing a Virginia constitutional provision establishing a Commonwealth policy to conserve historical buildings, opted for non-self-executing status.<sup>15</sup> Though not dealing with a right to a clean environment, our topic here, the court's rationale was instructive. A constitutional provision is self-executing, it noted, when it expressly so declares. In the absence of such a declaration, it said, constitutional provisions in bills of rights, those declaratory of common law, and those that prohibit particular conduct, are usually considered self-executing.

Where the constitutional provision expressly states a right to enforce, that statement, of course, must be given effect. Thus, courts have assumed section 2 of Article XI of the Illinois Constitution to be self-executing.<sup>16</sup> Contrariwise, the Massachusetts Constitution comes close to stating that its declared right to clean air and water is not self-executing.<sup>17</sup>

A question closely related to whether the constitutional provision is self-executing is whether it creates a private right of action, or is merely a declaration of intent or policy. The Illinois Constitution, while (as noted above) deemed to be self-executing, has been held not to create any new remedies.<sup>18</sup> The Hawaii Constitution's provision also has been construed by a court (without discussion) to create no private right of action<sup>19</sup> -- a dubious result, it would seem, in light of the "Any person may enforce this right ..." language following the sentence stating the right to a healthful environment.

If the constitution is self-executing and creates, of itself, a private right of action, follow-up issues include who can sue (Private individuals only? Government agencies, too?) and against whom the right may be enforced (Legislature only? Executive branch? Private polluters?).

Courts in two states have addressed whether the constitutional right-to-a-clean-environment provision was intended to alter standing doctrine in the state. Official

<sup>13</sup>Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588 (Pa. 1973).

<sup>14</sup>Payne v. Kassab, 361 A.2d 263, 272-273 (Pa. 1976).

<sup>15</sup>Robb v. Shockoe Slip Fdn., 324 S.E.2d 674 (Va. 1985).

<sup>16</sup>See, e.g., People v. Fiorini, 574 N.E.2d 612, 625 (Ill. 1991).

<sup>17</sup>Following the constitutional language quoted on page 3 of this report, the Massachusetts Constitution states "The general court [i.e., legislature] shall have the power to enact legislation necessary or expedient to protect such rights."

<sup>18</sup>City of Elgin v. County of Cook, 660 N.E.2d 875, 891 (Ill. 1995); Morford v. Lensey Corp., 442 N.E.2d 933, 937 (Ill. App. 1982).

<sup>19</sup>Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149, 175 n.31 (D. Haw. 1982), *rev'd on other grounds*, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

commentary in the Illinois state code explains that Art. XI, section 2 of that state's constitution was *only* intended to enlarge standing.<sup>20</sup> It does not (as noted) establish a new remedy. More specifically, it cancels the judicial requirement that the plaintiff have suffered “special damage” before he/she has standing to bring an action against alleged polluting activities. That prerequisite foreclosed lawsuits by an individual who is among many persons similarly affected by pollution. Similarly, the constitution of Hawaii provision has been held to enlarge plaintiff standing.<sup>21</sup>

A potpourri of other issues that may arise in connection with a right-to-a-clean-environment provision includes:

- Does it empower administrative agencies to exceed the bounds of their statutory authority?<sup>22</sup>
- What is the standard to be enforced? Is there to be any balancing of economic concerns?
- What is the level of proof needed to show injury?
- What remedies are available? Injunctions? Damages?
- Is a preexisting requirement that environmental impact statements be prepared given constitutional status?<sup>23</sup>

One commentator suggests that a constitutional right-to-a-clean-environment provision might be useful for advancing the cause of environmental justice.<sup>24</sup>

Whether a right to a clean environment provision stands alone or is accompanied by related provisions may be pivotal. For example, Montana's constitution proclaims a right to clean environment, but also obligates the state and each person to maintain and improve that environment. Read together, these provisions suggest a right of action against those who do not “maintain and improve.”

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<sup>20</sup>The commentary follows the cited constitutional provision in the state code. *See also* Fiedler v. Clark, 714 F.2d 77, 80 (9th Cir. 1983) (“legislative history of article XI, section 9 of the Hawaii Constitution suggests the legislature was attempting to remove barriers to standing to sue”); *Life of the Land v. Land Use Comm’n*, 623 P.2d 431, 441 (Haw. 1981) (accord).

<sup>21</sup>Fiedler v. Clark, 714 F.2d 77 (9th Cir. 1983). *But see* Community College of Delaware County v. Fox, 342 A.2d 468, 474 (Pa. Commw. Ct. 1975) (constitutional provision making state trustee of natural resources does not expand standing for purposes of review actions challenging agency decisions).

<sup>22</sup>*See, e.g.*, Pennsylvania Game Comm’n v. DER, 97 Pa. Commw. 78, 509 A.2d 877 ([year]) (no), *aff’d*, 521 Pa. 121, 555 A.2d 812.

<sup>23</sup>*Kadillak v. The Anaconda Co.*, 184 Mont. 127, 602 P.2d 147 (1979) (no).

<sup>24</sup>Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 Stan. Envtl. L. J. 338 (1996).

## Amend the Federal Constitution?

Plainly, all the issues noted above in connection with state constitutional provisions also could be raised were a right to a clean environment proposed as an amendment to the federal constitution. And arguably at least the major such issues should be addressed textually to spare the affected parties and the courts a potentially long period of uncertainty.

Beyond these issues, arguments in favor of a constitutional amendment include, first, its considerable symbolic value. As a rhetorical flourish in congressional debate, even a relatively undefined and non-self-executing right to a clean environment has a compelling quality. Such a provision could also tip the balance in executive and judicial branch decision making — again, even were the provision but a non-self-executing declaration rather than a binding mandate.

How an amendment would relate to the Commerce Clause of the federal constitution is particularly interesting. On the one hand, the existence of an environmental amendment (particularly one phrased as a grant of congressional power, as well as a personal right of action) might end the attenuated logic that modern courts indulge in order to find an interstate commerce nexus that supports federal environmental legislation.<sup>25</sup> On the other hand, if an environmental amendment dispensed with the interstate-commerce foundation for federal environmental laws, the question would arise why environmental protection should be singled out for such coveted treatment. Why not civil rights or consumer protection legislation as well? And of course, states might be quite vocal in opposing what they would doubtless perceive as federal overreaching. Indeed, would the amendment belie assertions in federal environmental statutes that the primary responsibility for environmental protection lies with the states?

One might also ask what new protection a broadly worded constitutional provision could add to that already contained in the thousands of pages of federal environmental statutes and regulations now on the books? (Perhaps, though, it would inhibit retrenchment by some future Congress.) Finally, it hardly needs to be said how difficult it is to amend the Constitution, as compared to a statute. Thus, an environmental amendment would have to contain some escape mechanism to ensure that it did not become an unwanted straightjacket preventing needed flexibility in dire times.

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<sup>25</sup>See, e.g., *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (regulation of purely intrastate species under Endangered Species Act satisfies Commerce Clause by preventing destruction of biodiversity on which certain interstate commerce depends), *cert. denied*, 118 S. Ct. 2340 (1998).

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