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Environmental Law

Expert Analysis

Debate Over Environmental Rights And State Constitutional Convention

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During the election on November 7, the voters in New York state will be presented with the ballot question (as they are every 20 years), "Shall there be a convention to revise the constitution and amend the same?" If the referendum passes, the delegates to the Constitutional Convention will be elected in November 2018, and the Convention's proposed changes will appear on the ballot, most likely in November 2019.

Many issues are under debate: ethics reform, reorganizing the judiciary, voting rights, and several more. This column focuses on environmental rights.

The current Constitution has a "Forever Wild" clause—Article XIV, §1, adopted in 1894—which has helped preserve the wild areas of the Adirondack and Catskill parks. It also has a Conservation Bill of Rights in Article XIV, §4, declaring a state policy of protecting natural resources and scenic beauty, but it has been held to be unenforceable, *Leland v. Moran*, 235 F. Supp. 2d 153 (N.D.N.Y. 2002), aff'd, 80 F. App'x 133 (2d Cir. 2003), and has been of little consequence.

Bar Association Positions

Both the New York state and New York City bar associations have come out in favor of a Constitutional Convention. Both would leave the Forever Wild clause untouched. However, they come to opposite positions on an environmental rights provision.

The State Bar assembled a task force, chaired by Prof. Katrina Fischer Kuh of Pace Law School, to examine the environmental aspects of the Constitution. It recommended (and the full State Bar endorsed) the adoption of a constitutional right to a clean and healthful environment, to be embodied in a new §19 of Article I, which contains other bill of rights provisions such as free speech and equal protection. The task force's detailed report recommended that a constitutional environmental right should:

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- define the right to a healthy environment to include *inter alia* resilient and diverse ecosystems;
- clarify that the public natural resources of New York furnish the fundaments of a healthy environment

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and are held in trust by the State for the benefit of the people, including future generations;

• assert the State's duty to conserve and protect New York's public natural resources to safeguard the people's right to a healthy environment; and

• provide for any person to enforce the right against the State and its subdivisions through appropriate legal proceedings.

With respect to the last point, the report recommends "making an environmental right self-executing only as against the State with respect to satisfaction of its public trust duty. As such, it could not be relied upon to bring suit directly against the owner of private property."

Prof. Nicholas Robinson of Pace Law School, a leading proponent of incorporating environmental rights into the State Constitution, wrote in the *New York State Bar Association Journal* that Pennsylvania's Environmental Rights Amendment (adopted in 1970) is a good model. Its text reads:

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

Similarly, the Committee for a Constitutional Convention, a group of prominent lawyers and others led by Evan Davis, declared that the Convention should "extend to the environment the State's existing constitutional commitment to conservation so as to ensure healthy air to breathe, clean water to drink and progress in addressing the causes and consequences of climate change."

On the other hand, the City Bar report (written by a task force chaired by Judge Michael Sonberg and Margaret Dale) opposed creation of an environmental right, concluding that it "would have the effect of transferring much decision-making power over environmental matters from the legislative and executive branches to the judiciary, and would empower judges to make decisions about the appropriate levels of pollution and other forms of environmental degradation."

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It added that "giving judges the authority to determine appropriate levels of pollution or other kinds of environmental impacts would create uncertainty as to whether compliance with a permit issued by a government agency would satisfy all applicable requirements, or whether additional restrictions could be imposed before or during construction, or even after operations have begun. The common law doctrines of nuisance and trespass are still available to the courts to remedy egregious impacts, and additional constitutional authority seems neither necessary nor wise."

Other States

Several other states have environmental rights in their constitutions (as do 174 national constitutions). Those in Pennsylvania, Hawaii and Montana have been given force by those states' courts.

Best known, perhaps, is the decision of the Pennsylvania Supreme Court in *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013), which relied on the Environmental Rights Amendment to strike down as unconstitutional a state statute that blocked municipalities from regulating hydraulic fracturing to extract natural gas. The same court subsequently invalidated legislation that allowed royalties from oil and gas drilling to be used for non-environmental (general) purposes, invoking the public trust principles embodied in the Amendment. *Pa. Envtl. Def.*

Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).

The environmental rights provisions of the Hawaii Constitution have been found to support liberalized standing for environmental plaintiffs, provide an implied private right of action to enforce state environmental laws, require especially searching judicial review when public trust duties are involved, and require that administrative proceedings consider public trust values. *E.g.*, *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376 (2015); *County of Hawaii v. Ala Loop Homeowners*, 123 Haw. 391 (2010).

The Montana Supreme Court has subjected certain legislative actions that weaken environmental protections to strict scrutiny. *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 296 Mont. 207 (1999). It has also applied the constitutional provision to private actions, invalidating a private contractual provision that would have required drilling a well through a contaminated aquifer. *Cape-France Enters. v. Estate of Peed*, 305 Mont. 513 (2001).

The analysis of the experience in Pennsylvania, Hawaii and Montana by the State Bar Association's task force concluded: "Ultimately, while a robust, self-executing constitutional environmental right would allow for increased judicial participation in significant environmental disputes, it is unlikely that such participation would unduly encroach on the core role of the legislature. States that recognize a robust, self-executing environmental right have not experienced a radical or undesirable shift of environmental policymaking authority to the judiciary."

Opposition

The strongest opposition to a Constitutional Convention on environmental grounds comes from groups that are dedicated to the preservation of the Adirondacks. William C. Janeway, Executive Director of the Adirondack Council, has written: "Having a convention would be like opening Pandora's Box and could open our priceless Adirondack and Catskill Forest Preserves to development, clear-cut logging, and other commercial exploitation for the first time in 131 years. Even a minor change could wipe out the greatest forest conservation law in history."

The relevant clause in Article XIV states that lands within the Forest Preserve "shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

Environmental Advocates of New York, the leading Albany-based lobbying organization for the environmental movement, is likewise opposing a Constitutional Convention out of concern for changes to the Forever Wild clause. Instead it is supporting the addition of an environmental right to the state Constitution by the legislature. That would require passage by both houses of the legislature in two consecutive sessions, followed by approval by the voters in a referendum.

A bill to accomplish this, A06279, sponsored by Assemblyman Steven Englebright, passed the Assembly on April 24, 2017 by a vote of 113 to 26. The companion Senate bill, S5287, sponsored by Sen. David Carlucci, is pending in committee. It would add a new item to the State Constitution's bill of rights, reading in its entirety: "Environmental Rights. Each person shall have a right to clean air and water, and a healthful environment."

A separate proposition on the November 7 ballot would create a 250-acre land bank, purchased from private parties, that would offset an equal amount of land that towns and villages in the Adirondacks and Catskills could use for small projects along local and county roads, such as straightening dangerous curves or drilling drinking water wells. This provision is supported by the environmental and Adirondacks groups, and would obviate the need for separate constitutional amendments for each small land transaction.