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Updating New York's Constitutional Environmental Rights

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Updating New York's Constitutional Environmental Rights

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Every twenty years, the New York State Constitution mandates a public decision on whether or not to conduct elections for delegates to convene in a convention to rewrite the constitution.[1] 2017 presents New Yorkers again with this question.[2] As voters begin to contemplate what their government should do to prepare for the impacts of climate change, the 2017 ballot opens the door for New York to recognize an environmental right as a preferred way to do so. This article examines the issues that a constitutional convention will encounter as it may debate how best to update protection of New York's environment.

In 1894, New York's Constitutional Convention enacted strict protection for the Forest Preserve of the Adirondack and Catskill regions in the wake of that era's illegal deforestation and flooding.[3] In 1967, the convention drafted a "conservation bill of rights," and when the voters rejected the proposed constitution (upset over non-environmental issues), the voters promptly adopted that same "conservation bill of rights" as an amendment in 1969.[4] Voters acted in the midst of gross levels of air and water pollution and mismanagement of toxic waste.

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1. N.Y. CONST. art. XIX, § 2-3.

2. *See generally* COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, WHETHER NEW YORKERS SHOULD APPROVE THE 2017 BALLOT QUESTION CALLING FOR A CONSTITUTIONAL CONVENTION (2017) (adopted by the House of Delegates on June 17, 2017).

3. For a discussion of the history and case law regarding article XIV, see Nicholas A. Robinson, *"Forever Wild": New York's Constitutional Mandates to Enhance the Forest Preserve* 7-8 (Feb. 15, 2007), http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1283&context=lawfaculty.

4. PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 317, 347 (1996) [hereinafter ORDERED LIBERTY].

Since then, the field of environmental law has become an integral part of the rule of law in New York, as it has nationally and globally. Today, environmental rights are recognized worldwide, although ironically disdained for the federal government in the United States by the administration of President Donald Trump.[5] Washington's retreat from its past mission to protect the environment means that states like New York assume greater obligations to protect ecological integrity and public health.

The stakes are high as New York State considers whether to amend the constitution. The electorate contemplates the gathering crises of sea level rise, disruption of weather patterns, intensified summer heat waves, and other climate change impacts. New York also faces escalating environmental problems, which the newly perceived climate impacts in turn exacerbate.[6] It is timely to debate whether or not New York should recognize the right to the environment to its constitution. In 2016, the House of Delegates of the New York State Bar Association adopted the report of its committee on the constitution,[7] regarding the environmental conservation article

5. Brady Dennis & Juliet Eilperin, *Trump Signs Order at EPA to Dismantle Environmental Protections*, WASH. POST (Mar. 28, 2017), https://www.washingtonpost.com/national/health-science/trump-signs-order-at-the-epa-to-dismantle-environmental-protections/2017/03/28/3ec30240-13e2-11e7-ada0-1489b735b3a3_story.html?utm_term=.7424d479d0cc.

6. Asthma rates from air pollution afflict one in ten New York residents, 256 superfund sites threaten drinking water on Long Island, invasive species are on the increase, half the beehives in New York died in 2016, numbers of songbirds are in decline, and infrastructure is needed to control air and water pollution that is badly outdated. *See* Nicholas A. Robinson, *Environmental Human Rights in New York's Constitution*, N.Y. ST. B. ASS'N J. (forthcoming Oct. 2017).

7. The charge of this committee is as follows:

> The Committee on the New York State Constitution will serve as a resource for the Association with regard to issues related to or affecting the New York State Constitution; finalizing substantive provisions of the state constitution and making recommendations with regard to potential changes; promoting initiatives designed to educate the legal community and the public about the state constitution and providing recommendations with regard to the forthcoming public referendum in 2017 on whether to convene a state constitutional convention, and propose the delegates selection process if the convention takes place.

XIV.[8] That report did not take a position on whether to expand the Constitution's existing environmental rights to recognize a broad environmental right explicitly.[9] A task force of the association's section on environmental and energy law examined the issue for six months and concluded that there is merit in recognizing the right to the environment.[10] This article introduces the emergence of this issue in its historical context.

I. Exercising the Constitutional Right to Convene a Convention

Acting pursuant to article XIX,[11] New Yorkers have twice drafted major reforms to protect the environment through a constitutional convention, in 1894 and 1967.[12] The successful use of the convention confirms the wisdom of Thomas Jefferson, who has urged "generational sovereignty."[13] In his view, each generation should be able to address the most pressing issues of its age, and not be constrained by outdated decisions. Constitutions should adapt to changing circumstances.[14] Writing to a Virginian lawyer, Samuel Kercheval, Jefferson stated that the Constitution should be revised every nineteen to

Committee on the New York State Constitution, N.Y. STATE BAR ASS'N, http://www.nysba.org/CustomTemplates/Content.aspx?id=71176 (last visited Sept. 12, 2017). The Chairman is Henry Greenberg, esq. The author of this article also serves on the Committee.

8. *See* COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV) (2016).

9. *Id.* at 6.

10. TASK FORCE ON ENVTL. ASPECTS OF THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, REPORT AND RECOMMENDATIONS CONCERNING ENVIRONMENTAL ASPECTS OF THE NEW YORK STATE CONSTITUTION (2017).

11. N.Y. CONST. art. XIX, § 2 ("At the general election to be held . . . every twentieth year . . . the question 'Shall there be a convention to revise the constitution and mend the same?' shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district . . . shall elect three delegates . . . . [Who] shall convene . . . on the first Tuesday of April next ensuing after their election . . . . [and] [a]ny proposed constitution . . . shall be submitted to a vote . . . not less than six weeks after the adjournment of such convention.").

12. ORDERED LIBERTY, *supra* note 4, at 317.

13. JOSEPH J. ELLIS, THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION 1783-1789, at 235-236 (2015).

14. *Id.*

twenty years.[15] Jefferson's time-period was based on the mortality rate of his times. Since a majority of adults could be expected to be dead in approximately nineteen years, Jefferson believed that each new generation should have the right to adapt its government to changing circumstances, rather than being ruled by the past.[16] Some criticize this "utopian vision."

When New York adopted its constitution, there were no threats to the environment, and not surprisingly the various constitutions before 1894 had not addressed environmental issues.[17] Over the years, the constitution's text has grown by accretion. In July 1776, after the first constitution convention sessions in White Plains, New York,[18] the convention reconvened in April 1777 in Kingston,[19] where the first state constitution was adopted April 20, 1777, consisting of seven thousand words.[20] Amendments were promptly needed, and a convention convened to adopt the 1801 Constitution.[21] Thereafter, it was the 1846 "People's Constitution" that added the provision for the public vote every twenty years on whether or not to convene a convention.[22] Altogether, there have been eight conventions: 1801, 1821 (adopting a bill of rights), 1846, 1867, 1894 (adopting the education & forest preserve articles), 1915, 1938, 1967 (adopting the conservation bill of rights).[23] Voters twice turned down the results of the conventions in 1915 and 1967,[24] but then approved the 1967 Convention's proposed conservation bill of rights provisions by popular vote after the same text had been approved by two successive legislative sessions.[25] Today's constitution is still the text adopted in 1938, grown to a length

15. *See* Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (on file with the National Archives).

16. *Id.*

17. ORDERED LIBERTY, *supra* note 4, at 173.

18. 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 45 (1906).

19. *Id.* at 162.

20. ORDERED LIBERTY, *supra* note 4, at 48.

21. Lincoln, *supra* note 18 at 189.

22. ORDERED LIBERTY, *supra* note 4, at 110-11.

23. Peter J. Galie & Christopher Bopst, *Constitutional Revision in the Empire State: A Brief History and Look Ahead*, *in* Making a Modern Constitution 79, 86-87.

24. *Id.*

25. *Id.* at 88.

of fifty thousand words, and additional specific amendments adopted from time to time.[26]

Because of its unnecessary length, it is difficult for the public to read or understand the present constitution. Even the provisions of article XIV appear to many to be arcane and inaccessible, including section 1 of article XIV, which has accumulated every amendment to metes and bounds of the "forever wild" Forest Preserve adopted over time since 1894.[27]

Article XIV began with the struggle to save the Adirondack and Catskill mountains in the last decade of the nineteenth century.[28] In 1894, the constitutional convention adopted article VII, section 7, to confer constitutional protection on the Forest Preserve.[29] In 1938, additional forest and wildlife conservation measures were mandated, now article XIV, section 3(1).[30] To increase the area of the Forest Preserve, the constitution also came to provide that state lands, situated outside contiguous Forest Preserve acres, might be sold in order to permit further acquisitions within the Forest Preserve, in article XIV, section 3(2).[31] In 1969, provisions were added providing for pollution control, protection of the environment, natural resource stewardship, preserving natural beauty, and sustaining agriculture, in article XIV, section 4.[32] These comprised the intended "conservation bill of rights," to ensure environmental quality, and the rapid enactment of new environmental laws in the 1970's both fulfilled the spirit of section 4 and left it as a constitutional relic.[33]

26. ORDERED LIBERTY, *supra* note 4, at 358.

27. N.Y. CONST. art. XIV, § 1.

28. ORDERED LIBERTY, *supra* note 4, at 173.

29. *Id.*

30. *See* N.Y. CONST. art. XIV, § 3(1); *see also* ORDERED LIBERTY, *supra* note 4, at 253-54.

31. *See* N.Y. CONST. art. XIV, § 3(2).

32. *See id.* Art. XIV, § 4.

33. *See generally* NICHOLAS A. ROBINSON, NEW YORK ENVIRONMENTAL LAW HANDBOOK 1-4 (1988) [hereinafter N.Y. ENVIRONMENTAL LAW HANDBOOK].

II. The "Forever Wild" Provisions

New York inaugurated constitutional environmentalism in the last quarter of the nineteenth century because citizens were increasingly troubled by mismanagement of forests in both the Catskill and Adirondack regions of the state.[34] Verplank Colvin, appointed state surveyor in 1870, had been mapping the Adirondacks.[35] He and others reported the emerging widespread environmental degradation from logging. As early as 1868, Colvin had urged for "the creation of an Adirondack Park or timber preserve, under the charge of a forest warden and deputies."[36] Vast areas of trees were clear-cut and the lands abandoned to fires and erosion. Based on Colvin's topographical survey reports, in 1883 the legislature banned sales of state lands in the ten Adirondack counties, appropriated funds for the first time to buy land, and mandated Colvin to locate and survey all state land ("State Land Survey").[37] In 1884, the state comptroller issued a report of investigations into unpaid taxes on abandoned lands. His report featured maps of the state's lands in the Forest Preserve, along with a more extensive map depicting the wider Adirondack region as a "park," with its borders delineated in blue.[38] This distinction became the origin of the term "blue line," which still refers to the Adirondack Park's borders, an area encompassing both the Forest Preserve lands and other public and private lands.[39]

34. *See generally* FRANK GRAHAM, JR., THE ADIRONDACK PARK: A POLITICAL HISTORY (1978) (describing extreme forest fires, erosion, flooding, loss of flora and fauna, accompanied extensive logging operations in the Catskills; the public debates and legislative lobbying of the time; economic trade-offs between advocates of scientific forestry as opposed to unbridled timber exploitation; distress about unlawful corruption by lumbermen; concerns to preserve watersheds to ensure water supplies for many uses especially the flow for the Erie Canal; other nature conservation demands); GEORGE PERKINS MARSH, MAN AND NATURE: OR PHYSICAL GEOGRAPHY AS MODIFIED BY HUMAN ACTION (1864) (vocal calls to preserve resources for fish and game, other recreation, health and for spiritual values).

35. 2 ALFRED L. DONALDSON, A HISTORY OF THE ADIRONDACKS 164-65 (1921).

36. *Id.* at 164.

37. *Id.* at 171-75.

38. *Id.* at 174-75.

39. *See generally* ORDERED LIBERTY, *supra* note 4, at 254.

On May 15, 1885, the legislature enacted a law to establish the Forest Preserve in both the Catskills and Adirondacks and established a commission to manage it.[40] Just before, on April 20, 1885, the legislature had transferred the mountain lands and forests, then held by Ulster County, to the State in settlement of the State's outstanding claims for tax revenues.[41] Many parcels of land in the North Woods had escheated to the state[42] because loggers had ceased to pay annual taxes due and abandoned their properties after clear-cutting the timber.[43] These damaged lands became the first Forest Preserve acreage.

Despite the commission's oversight, in the decade after 1885, one-hundred thousand acres of forest were logged unlawfully in the Adirondacks.[44] These years saw both increased land degradation and public demands for enhanced protection. In 1886, Forest Commissioner Cox visited the Catskills and noted its value for watershed and recreation, encouraging its protection.[45] By 1890, the Forest Commission had issued a special report, "Shall a Park be established in the Adirondack Wilderness?"[46] On the other hand, in 1893 the

40. ALF EVERS, THE CATSKILLS: FROM WILDERNESS TO WOODSTOCK 586-87 (1972). Chapter 283 of the Laws of 1885 provided that:

> All the lands now owned or which may hereafter be acquired by the State of New York, within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster, and Sullivan, shall constitute and be known as the Forest Preserve.

Act of May 15, 1885, ch. 283 § 7, 1885 N.Y. Sess. Laws (McKinney). Section 8 provided that: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." *Id.* at § 8.

41. EVERS, *supra* note 40, at 586-87 (1972).

42. *See, e.g.*, People v. Turner, 22 N.E. 1022 (N.Y. 1889) (involving a plea that defendant had not cut state trees unlawfully based on defects in an 1877 tax sale of lands in default of taxes for the years 1864 through 1871).

43. The State owned 681,374 acres in the Adirondacks in 1885. Ass'n for the Prot. of the Adirondacks v. MacDonald, 239 N.Y.S. 31, 36 (App. Div. 3d Dep't 1930), *aff'd*, 170 N.E. 902 (N.Y. 1930).

44. LINCOLN, *supra* note 18, at 437.

45. EVERS, *supra* note 40, at 579-80.

46. FOREST COMM. OF N.Y., *Shall a Park be Established in the Adirondack Wilderness?*, *in* ANNUAL REPORT OF THE NEW YORK FOREST COMMISSION 67-111

commission also would grant extensive wood cutting contracts, which both the state surveyor and the state engineer disapproved.[47]

The inadequacies of the regime set up in 1885 became an issue in the Constitutional Convention of 1894. Joseph H. Choate, a founder of the American Museum of Natural History, chaired the convention.[48] A delegate from New York City, Colonel David McClure, assisted by the renown constitutional lawyer, Louis Marshall, introduced an amendment to the constitution, which the New York Board of Trade and Transportation has prepared based on the language of the Forest Laws of 1885.[49] It read: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private."[50] During the convention's debates, Judge William P. Goodelle of Syracuse proposed the addition of the words "or destroyed," at the end of this first "forever wild" clause.[51] The convention adopted the revised text by a vote of 122 to 0, which made it the only amendment to be unanimously embraced at that convention or any prior convention.[52]

The clause appeared as article VII, section 7, and when joined with a miscellany of other amendments to submit to the voters, it was adopted 410,697 for and 327,402 against the amendment.[53] Opponents of article VII, section 7, at once secured legislative enactment of proposed amendments in 1895 and 1896 to modify this "forever wild" clause to allow timbering on state lands.[54] The proposed amendment was submitted to the

(1891).

47. DONALDSON, *supra* note 35, at 186.

48. *Id.* at 190.

49. *Id.* at 189-191.

50. Forest Preservation Act § 8 (1885); *see* DONALDSON, *supra* note 35, at 189-91.

51. DONALDSON, *supra* note 35, at 191-92.

52. *Id.* at 192. The State owned 33,893 acres in the Catskills in 1885. *See* Harold Faber, *A Centennial Celebration of the Adirondacks*, N.Y. TIMES (Apr. 21, 1985), http://www.nytimes.com/1985/04/21/magazine/a-centennial-celebration-of-the-adirondacks.html?mcubz=1&pagewanted=1.

53. DONALDSON, *supra* note 35, at 193.

54. *Id.* at 196-98.

voters, and defeated by 710,000 to 320,000, and failed to carry any of New York's counties.[55] In 1899, the court of appeals took note of the new constitutional Forest Preserve: "The primary object of the park, which was created as a forest preserve, was to save the trees for the threefold purpose of promoting the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving the timber for use in the future."[56] At the next constitutional convention, in 1915, amendments to article VII, section 7, were proposed and adopted, but the voters defeated this proposed constitution by a vote of 893,635 to 388,966, so the 1894 Constitution's language remained in force.[57] Individual amendments to article VII, proposed apart from conventions were to be adopted. In 1913, the voters had adopted the "Burd Amendment," which today still appears as section 2 of article XIV, allowing the conversion of up to three percent of Forest Preserve to be allocated for the state to operate public water reservoirs.[58] This allotment of potential dam and reservoir sites has never been used. In 1954, a much-debated amendment was put forth to permit construction of a dam at Panther Mountain and was defeated by a vote of 1,622,196 to 613,927.[59]

Voters repeatedly also have reaffirmed the "forever wild" Forest Preserve by adding to its acreage. Decisions to remove lands have been narrowly framed and appear in section 1 of article XIV today.[60] For example, in 1916, by a majority of 150,496, voters approved a Bond Act to acquire lands both for the Palisades Interstate Park and to increase lands in the Forest Preserve.[61]

In 1918, the voters adopted a second constitutional

55. *See* N.Y. DEP'T OF STATE, VOTES CAST FOR AND AGAINST PROPOSED CONSTITUTIONAL CONVENTIONS AND ALSO PROPOSED CONSTITUTIONAL AMENDMENTS 7 (1987), http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf [hereinafter VOTES CAST]; s*ee also* DONALDSON, *supra* note 35, at 198.

56. People v. Adirondack Ry. Co., 54 N.E. 689, 696 (N.Y. 1899), *aff'd*, 176 U.S. 335 (1900).

57. DONALDSON, *supra* note 35, at 243.

58. *Id.* at 238-239.

59. GRAHAM, *supra* note 34, at 207.

60. N.Y. CONST. art. XIV, § 2.

61. DONALDSON, *supra* note 35, at 244.

amendment to the Forest Preserve, permitting constructing a state highway from Saranac Lake to Long Lake, and on to Old Forge by way of Blue Mountain Lake and Raquette Lake.[62] Voters approved this amendment 609,103 to 299,899.[63] This provision had been a part of the proposed Constitution of 1916, which voters had rejected.[64] In 1927, voters approved an amendment to permit construction of a road to the top of Whiteface Mountain as a memorial to veterans of World War I.[65] In 1930, Robert Moses campaigned for the adoption of the "Closed Cabin Amendment," which would have allowed construction of lodges, hotels and recreational facilities on preserve lands.[66] In 1932, voters overwhelmingly defeated this proposed amendment, which would also have introduced many new roads into the wilderness.[67] Again, in 1959, voters allowed the removal of three hundred acres to permit the construction of the Adirondack Northway, I-87, in response to Congress's enactment of the Interstate Highway Act.[68]

This pattern of carefully framing and debating amendments to article XIV on a case-by-case basis, to adjust the strictures of the "forever wild" Forest Preserve, has persisted until today. The "forever wild" clause is preserved as adopted. Meanwhile, the Department of Environmental Conservation, and its predecessor the Conservation Department, continuously have governed the Forest Preserve. Initially, the state planted trees from the state nursery to restore lands that had been denuded of trees, replenished fish stocks with fish from state hatcheries, and reintroduced beaver and deer.[69] Moreover, nearly every year since 1894, the state has acquired lands in the Catskills and Adirondacks to add to the Forest Preserve with funds provided by Bond Acts approved by the voters, or from

62. *Id.* at 248-249.

63. *Id.* at 249.

64. *Id.* at 243.

65. *See* JANE EBLEN KELLER, ADIRONDACK WILDERNESS: A STORY OF MAN AND NATURE 196 (1980).

66. *See* PAUL SCHNEIDER, THE ADIRONDACKS: A HISTORY OF AMERICA'S FIRST WILDERNESS 190 (1997).

67. *See id.* at 190-191.

68. *See id.* at 295.

69. JANE EBLEN KELLER, ADIRONDACK WILDERNESS: A STORY OF MAN AND NATURE 194-95 (1980).

appropriations enacted by the legislature.[70] Voters have exercised their right periodically to debate and approve small changes to delete or exchange Forest Preserve lands.

At the Constitutional Convention of 1938, the Forest Preserve provisions were renumbered to become article XIV section 1, but the substance was virtually unchanged.[71] In the ensuing years, specific amendments were approved in 1941, 1947, 1957, 1959, 1963 and 1965.[72] The 1967 Constitutional Convention proposed a modest amendment on allowing campsites was included in the proposed constitution but died when voters rejected the entire proposed constitution.[73] Afterward, no attempt was made to present this matter for statewide consideration as a separate amendment. In 2013, by a narrow margin of 1,276,595 to 1,122,055, voters approved a swap of land for a mining operation to expand into Forest Preserve Lands by removing those lands in exchange for a larger expansion of the preserve elsewhere.[74]

Thereafter, the most significant amendments to enhance the state's environmental stewardship were those proposed and accepted as a "conservation bill of rights" at the Constitutional Convention of 1966-67.[75] While accepted by the convention, this

70. In the great "blowdown" of 1950, a storm of hurricane propositions, on the advice of the Attorney General, New York's legislature authorized the removal of vast amounts of destroyed trees to avert forest fires and disease, and funds from the wood collected and sold were used to buy more lands to add to the Forest Preserve. *Id.* at 228-30.

71. ORDERED LIBERTY, *supra* note 4, at 262.

72. *Id.* at 295-96.

73. Henrik N. Dullea, at 339.

74. The amendment in Proposition 5 provided:

> The proposed amendment to section 1 of article 14 of the Constitution would authorize the Legislature to convey forest preserve land located in the town of Lewis, Essex County, to NYCO Minerals, a private company that plans on expanding an existing mine that adjoins the forest preserve land. In exchange, NYCO Minerals would give the State at least the same amount of land of at least the same value, with a minimum assessed value of $1 million, to be added to the forest preserve. When NYCO Minerals finishes mining, it would restore the condition of the land and return it to the forest preserve.

N.Y. CONST. art. XIV, § 1 (amended 2013).

75. ORDERED LIBERTY, *supra* note 4, at 317.

addition failed when the voters rejected its proffered constitution in 1967.[76] These same provisions were thereafter presented as a separate amendment to article XIV and adopted by the electorate in 1969.[77] They appear today in article XIV, section 4.[78]

III. The Constitutional Forest Preserve

Central to the debates about convening a convention will be the reaffirmation of the "forever wild" Forest Preserve safeguards. It is important to consider how to preserve this celebrated mandate, while still improving the other provisions associated with it. Perpetuating obsolete verbiage and provisions does not serve to strengthen "forever wild." The issues involved may be briefly described. The core constitutional provisions for the Forest Preserve are found in sections 1, 2, and 5 of article XIV. The Forest Preserve has become world renown. In New York law, it has a unique legal status.[79]

A. *Sections 1 and 5 of Article XIV*

Through occasional amendments proffered by the

76. *Id.*; Henrik N. Dullea, at 339.

77. VOTES CAST, *supra* note 55.

78. N.Y. CONST. art. XIV, § 4.

79. The Forest Preserve exists in the Catskills and Adirondacks, where it is distinct from the Adirondack Park. *See* N.Y. CONST. art. XIV, § 3. It is under the stewardship of the New York State Department of Environmental Conservation. *See, e.g.*, Balsam Lake Anglers Club v. Dep't of Envtl. Conservation, 583 N.Y.S.2d 119 (Sup. Ct. 1991), *aff'd in part*, *rev'd in part*, 605 N.Y.S.2d 795 (App. Div. 1993); Helms v. Reid, 394 N.Y.S.2d 987 (Sup. Ct. 1977). The legislature recognized the Adirondack Park in the Laws of 1892. Act of May 20, 1982, ch. 707, § 1, 1892 N.Y. Sess. Laws (McKinney). The Forest Preserve is not legally in the purview of local authorities or the Adirondack Park Agency, both of which govern privately held lands in the Adirondack Park, or the local authorities in the Catskills, or New York City Department of Environmental Protection which manages the reservoirs in the Catskills. When State agencies, such as the Department of Transportation, violate the Forest Preserves "forever wild" status, enforcement proceedings result. *See* Rosemary Nichols & Nicholas A. Robinson, *The 2005 Constitutional Violation of New York's Forest Preserve: What Remedy*?, 26 N.Y. ENVTL. LAW. 31 (2006); *New York State Department of Environmental Conservation Adirondack Park Agency Order on Consent*, 26 N.Y. ENVTL. LAW. 9 (2006).

legislature, voters have determined the appropriateness of any derogation from the constitution's "forever wild" mandate. These modest adjustments have been more than matched by annual enlargements of the Forest Preserve, by lands added to it. Once in the Forest Preserve, new acres enjoy "forever wild" status and constitutional protection. The Department of Environmental Conservation provides on-going administrative management by the Department of Environmental Conservation, and judicial oversight. Moreover, in section 5 of article XIV, any person is authorized to seek judicial enforcement of the "forever wild" provisions.[80]

One early historian of the Constitution, Charles Z. Lincoln, observed that the function of removing the Forest Preserve from the control of the legislature was to vest its application in the powers of the judiciary: "[b]y including these subjects in the Constitution they are withdrawn from legislative control, and this withdrawal is in most cases the chief reason for constitutional interference."[81] The clarity and mandatory nature of the "forever wild" clause is a classic illustration of a constitutional norm amendable to judicial interpretation and application.

Soon after the 1894 Convention, New Yorkers formed a civic group to monitor compliance with the "forever wild" norms. In the 1920's, the Association for the Preservation of the Adirondacks availed itself of its constitutional rights and sought judicial rulings to apply the "forever wild" provisions of article XIV, section 1.[82] The Association opposed siting Winter Olympic facilities in the Forest Preserve.[83] The appellate division of the supreme court determined that the constitution required that the Forest Preserve be preserved "in its wild nature, its trees, its rocks, its streams. It was to be a great resort for the free use of all the p[e]ople, but it was made a wild resort in which nature is given free rein."[84] The court of appeals affirmed:

80. N.Y. CONST. art. XIV, § 5.

81. 3 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 433-434 (1906).

82. Ass'n for the Prot. of the Adirondacks v. MacDonald, 239 N.Y.S. 31 (App. Div. 3d Dep't 1930), *aff'd*, 170 N.E. 902 (N.Y. 1930).

83. *Id.* at 41.

84. *Id.* at 40.

> The Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole. Whatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for every one within the State and for the use of the people of the State. Unless prohibited by the constitutional provision, the use and preservation are subject to the reasonable regulations of the Legislature.[85]

Thus, the people's rights in the Forest Preserve are directly effective, and enforceable by a court. The means by which the public may access or enjoy the Preserve may be addressed by the legislature, so long as the "wild" characteristic is sustained.[86] The court expressly cited an essay by the son of Louis Marshall, Robert Marshall, on the permissible uses of wilderness for recreation and other activities.[87]

As a constitutional norm, article XIV, section 1, is clear and succinct. Courts have no difficulty to construe and apply it: "[i]t is thus clear that the court of appeals determined that insubstantial and immaterial cutting of timber-sized trees was constitutionally authorized in order to facilitate public use of the forest preserve so long as such use is consistent with wild forest lands."[88] Although always a focus of spirited debate, decisions about the Forest Preserve by the Department of Environmental Conservation reveal that it has understood and applied article XIV, section 1, with predictable consistency.

While the "forever wild" clause in the first part of Section 1 is a model of clarity, the balance of section 1 is unwieldy. It consists of each specific exception ("notwithstanding") as an amendment to the rule of "forever wild" in the constitution. The

85. Ass'n for the Prot. of the Adirondacks v. MacDonald, 170 N.E. 902, 904 (1930).

86. *Id.* at 904-05.

87. *See id.* at 905 (citing Robert Marshall, *The Problem of Wilderness*, SCIENTIFIC MONTHLY, Feb. 1930, at 141).

88. Balsam Lake Anglers Club v. Dep't of Envtl. Conservation, 583 N.Y.S.2d 119, 122 (Sup. Ct. 1991), *aff'd in part*, *rev'd in part*, 605 N.Y.S.2d 795, 798 (App Div. 1993) (on appeal the Appellate Division clarified the recreation uses allowed).

balance of article XIV reads like a cumbersome statute. There are ways to simplify this, such as authorizing the establishment of a public registry of Forest Preserve Amendments, either in a provision of the Environmental Conservation Law or a roster maintained as a trust by the New York Secretary of State. It may be useful to consider ways in which amendments may be recorded other than by encumbering article XIV. Constitutional norms should be concise and succinct.

B. *Section 2*

Similarly, one may inquire whether provisions that were added to the constitution only to remain unused, should burden the text of State's most fundamental law. The reservation of up to three percent of the Forest Preserve for dams and reservoirs, known as the Burd Amendment in article XIV, section 2, may be considered obsolete.[89] Since enacted, New York has established legislation for the protection of wetlands[90] and its environmental impact assessment procedures,[91] both of which would greatly restrict any attempt to use section 2. It is unlikely that many sites for dams and reservoirs can be found. Moreover, the state recently added upper reaches of the Hudson River to the "forever wild" Forest Preserve.[92] As a matter of both fact and law, it is doubtful whether the dam sites, once considered to be of interest, can still lawfully be considered since a dam would adversely impact the ecology of adjacent Forest Preserve lands and the ecosystem benefits conferred on private and public lands in the Adirondack Park. It therefore may be worth asking whether it might be prudent to retire these clauses.

The problems of invoking section 2 have been evident for some time. Governor Thomas Dewey opposed proposals for constructing the proposed Higley Mountain Dam.[93] State

89. N.Y. CONST. art. XIV, § 2.

90. Freshwater Wetlands Act, ch. 614, § 1, 1975 N.Y. Sess. Laws (McKinney) (codified as amended at N.Y. ENVTL. CONSERV. LAW art. 24).

91. State Environmental Quality Review Act, ch. 612, § 1, 1975 N.Y. Sess. Laws (McKinney) (codified as amended at N.Y. ENVTL. CONSERV. LAW art. 8).

92. DIV. OF LAND & FORESTS, N.Y. DEP'T OF ENVTL. CONSERVATION, UPPER HUDSON WOODLANDS ATP CONSERVATION EASEMENT: RECREATION MANAGEMENT PLAN FOR FISHING, BOATING AND HUNTING ACCESS 2 (2014).

93. PAUL SCHNEIDER, THE ADIRONDACKS: A HISTORY OF AMERICA'S FIRST

agencies had sought dams to flood the Forest Preserve to supply a steady flow of water for the sales of electricity from generating plants outside the park.[94] Conservationists were alarmed, recalling the example of the dam that created the Great Sacandaga Lake, which had flooded the "great vale," a legendary wetland and hunting ground, and roused sportsmen to oppose new dams.[95] Legislators adopted amendments and submitted them to the voters.[96] After voters defeated the amendment for the proposed Panther Mountain dam, it was revealed that the State Water Power and Control Commission had plans for more than thirty dams and reservoirs across the Adirondacks.[97] Over the years, the need for new water supplies has not been established, and public opposition to costly state construction of public dams has grown.

Voters have demonstrated that the Forest Preserve "forever wild" norms enjoy deep and long support. One may ask whether that support extends to continuing to include the long list of amendments added to article XIV, section 1.[98] Alternative registries of amendments could be established, rather than accumulating acts that elongate and clutter the constitution. For similar reasons, one should consider whether continuing to include article XIV, section 2, in the constitution has any continuing justification.[99] The unused Burd Amendment in section 2 should be "sunset" as no longer deemed useful.

WILDERNESS 292-93 (1997).

94. *Id.*

95. *Id.*

96. *Id.* at 293-94.

97. *Id.* at 293-94.

98. The amendments follow the text after "notwithstanding" of article XIV, section 1. Once an amendment is adopted and the approved derogation from "forever wild" is realized, as when a road was built or lands transferred to allow a rural cemetery expanded in exchange for adding wild river lands to the Forest Preserve, there would seem no reason for the constitution to be used as a historical record of enactments. When acres are added to the Forest Preserve, this fact does not appear in the constitution even though the "forever wild" safeguard applies to them at once.

99. The need for water supplies and dams or reservoirs is a subject already treated at length in statutes, and if Section 2 were removed from the Constitution it could be taken up by the legislature. In the case of the Catskills, the New York City Department of Environmental Protection already has extensive statutory authority over water supplies that depend on the catchment areas of that part of the Forest Preserve.

Moreover, the reference to the boundaries of the Forest Preserve as a historical reference to the 1885 Forest Act ("as now fixed by law") may be considered an obsolete reference to the 1885 law. It was relevant in 1894, but if additions to the acreage of the Forest Preserve render it obsolete, it may be deleted. If these changes were considered, the classic language of section 1 could continue simply to read:

> The lands of the state, now owned or hereafter acquired, constituting the Forest Preserve [omitting "as now fixed by law"] 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.

The provisions of article XIV, section 5 have proven to be effective provisions.[100] Indeed, they anticipated by eight decades the procedures for citizen suit found in many environmental statutes, such as Section 1365 of the Federal Clean Water Act.[101] The opportunity to seek judicial enforcement of constitutional rights is a cardinal part of due process of law.

IV. Nature Conservation and State Land Sales to Augment the Forest Preserve

Article XIV, section 3(1) authorizes forest and wildlife conservation as state policies and allows the legislature to acquire lands outside the Forest Preserve for advancing nature conservation.[102] The provision allows the state to hold lands that

100. Article XIV is subject to judicial enforcement via an Article 78 proceeding. See N.Y. C.P.L.R. §§ 7801-7806 (McKinney 2016). *See also* Protect the Adirondacks! Inc. v. N.Y. State Dep't. Envtl. Conservation, 2014 N.Y. Misc. LEXIS 4675 (Sup. Ct. 2014); Editorial Staff, *Court Continues Ban on State Tree Cutting on Forever Wild Lands*, ADIRONDACK ALMANACK (Sept. 7, 2016), http://www.adirondackalmanack.com/2016/09/court-continues-temporary-ban-on-state-tree-cutting.html (tree cutting for snow mobile path in Forest Preserve enjoined); *Papers Filed in Major Forever Wild Lawsuit That Will Shape the Future of the Forest Preserve*, PROTECT THE ADIRONDACKS! (Sept. 1, 2016), http://www.protectadks.org/2016/09/papers-filed-in-major-forever-wild-lawsuit-that-will-shape-the-future-of-the-forest-preserve/.

101. 33 U.S.C. § 1365 (2012).

102. N.Y. CONST. art. XIV, § 3(1).

are not "forever wild" forest preserve.[103] Section 3(2) allows the legislature to allocate parcels of not more than ten contiguous acres for conservation, and as may be appropriate to sell or exchange such parcels as long as the proceeds are applied to the purchase of lands within the Adirondack and Catskill Parks to add to the Forest Preserve.[104]

Section 3(1) is redundant as an expression of the use of the police power and public welfare authority of the state as applied to nature conservation. The environmental conservation law, with its wildlife, lands, and forest provisions, has fully implemented the spirit and letter of article XIV, section 3(1), and it may be questioned whether this clause is needed in the constitution any longer. If there is any question, it could be clarified by including it as part of an environmental bill of rights, although it would be adequate to subsume it in a generic right to the environment.

In any event, section 3(1) and section 3(2) are essentially also set forth in the environmental conservation law, and they could be clarified and updated as a statute. By their terms, they require implementing legislation. The constitution already has a great number of provisions which read like statutes, and which are not of such a fundamental nature that they belong in the constitution. With respect to lands sales and transfers, New York State has added to the Forest Preserve consistently in many ways, and these have never been included in the constitution. Since the state now has many years of experience in applying these provisions, without significant controversy or problems, it may be prudent to consider ways in which article XIV, section 3, could be transferred from the constitution to a statute.

V. Rights and Duties—Updating the "Conservation Bill of Rights"

Article XIV, section 4, is of a wholly different nature than the Forest Preserve sections in article XIV, sections 1, 2 or 3. It

103. *Id.*

104. N.Y. CONST. art. XIV, § 3(2) (formerly article VII, section 16; renumbered in 1938; and further amended in 1959).

was intended to be a "conservation bill of rights,"[105] but after adoption as an amendment, it has not achieved the fundamental stature of a bill of rights. Section 4 was proposed as an amendment and adopted by a vote of 2,750,675 to 656,763.[106] After its adoption, at the request of Governor Nelson Rockefeller, in 1970-72 the legislature recodified the 1911 conservation law to be re-enacted as the environmental conservation law.[107] The legislature then enacted new legislation, including the Endangered Species Act,[108] the Tidal and Freshwater Wetlands Acts,[109] and the Wild, Scenic and Recreational Rivers System Act,[110] along with the New York's implementing statutes for the Federal Clean Air Act,[111] Clean Water Act,[112] and laws on solid and hazardous wastes.[113]

New Yorkers rose to the challenge to address pollution three years before Earth Day, at the 1967 Constitutional Convention. The delegates debated and put forward a new article VIII, "natural resources and conservation."[114] It was limited to preserving lands of "natural beauty, wilderness character, or geological, ecological or historical significance,"[115] to be preserved for the used and benefit of the People, and to abating air and water pollution and "excessive and unnecessary noise."[116] The text of this proposal had been previously debated in 1965, when the Joint Legislative Committee on Conservation, Natural Resources, and Scenic Beauty had recommended

105. *See* ANNUAL REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON CONSERVATION, NATURAL RESOURCES AND SCENIC BEAUTY at 18 (1967).

106. VOTES CAST, *supra* note 55.

107. Environmental Conservation Law, N.Y. ENVTL. CONSERV. LAW §§ 1-0101–1-0303 (McKinney 2005).

108. Endangered Species Act, N.Y. ENVTL. CONSERV. LAW § 11-0535 (McKinney 2005).

109. Tidal Wetlands Act, N.Y. ENVTL. CONSERV. LAW art. 25 (McKinney 2005); Freshwater Wetlands Act, N.Y. ENVTL. CONSERV. LAW art. 25 (McKinney 2005).

110. Wild, Scenic and Recreational Rivers System Act, N.Y. ENVTL. CONSERV. LAW §§ 15-2701-15-2723.

111. Clear Air Act, 42 U.S.C. §§ 7401-7671q (2012).

112. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2012).

113. Solid Waste Disposable Act, 42 U.S.C. §§ 6901-6992k (2012).

114. ORDERED LIBERTY, *supra* note 4, at 317.

115. *Id.*

116. PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 316 (2d ed. 2012).

stronger constitutional provisions.[117] Contrary propositions were also pending. In 1967, voters had rejected an amendment (independent of the convention's draft) that would have allowed thirty miles of groomed Adirondack ski trails in Essex County on Hoffman, Blue Ridge, and Peaked Hill, by a vote of 1,147,937 for and 3,153,389 against the proposal.[118] After the 1967 Constitution was defeated, an amendment to establish the State Nature and Historical Preserve was approved by voters, who added it as section 4 to article XIV, by 2,750,675 for and 656,763 against the amendment.[119] This provision has not yet been implemented, and judicial enforcement has not yet been sought.

In one sense, the mandates of article XIV, section 4, have been realized through legislative enactments of new environmental laws. The authority to do so was well within the state's police powers and public welfare powers, but section 4 provided an impetus to act. Section 4's provision of constitutional authority may be deemed redundant. Moreover, when enacted on the eve of Earth Day in 1970, New York suffered severe water and air pollution, acute loss of wetlands and species, and widespread contamination of hazardous and toxic waste, so the voters wanted a constitutional mandate to restore and secure their environmental public health and quality of life. New York law allowed citizens recourse to the courts regarding statutory implementation.[120] The federal air and water quality laws authorized "citizen suit" to enforce their provisions.[121]

However, more troubling is the reality that section 4's express mandates have never been fully effectuated. While authorizing the preservation and purchase of lands for their beauty, wilderness character, geological, ecological, or historical significance, and other purposes, section 4 established a "state nature and historical preserve." These provisions remain to be realized after being in the constitution for nearly five decades. In these years, much of the heritage sought to be conserved has

117. *See generally* ANNUAL REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON CONSERVATION, NATURAL RESOURCES AND SCENIC BEAUTY (1967).

118. VOTES CAST, *supra* note 55.

119. *Id.* at 38.

120. *See* N.Y. C.P.L.R. § 7801 (McKinney 1963).

121. *See* 33 U.S.C. § 1365 (2012); 42 U.S.C. § 7604 (2012).

been lost.[122] How long can the governor or legislature avoid their duties under section 4? It is plausible that a suit to compel the governor to observe section 4 could be brought under section 5 of article XIV. However, given the neglect of section 4 by both the legislators, governors, and the public, it doubtless would be clearer to require the establishment of the "nature and historical preserve" under a new constitutional right to the environment. Observance of such constitutional mandate could be guaranteed by affording the public access to justice via citizen suits.

Without the opportunity for the public to enforce its provisions, section 4 must be deemed a less than wholly effective constitutional provision.[123] It diminishes a constitution to set forth basic rights that are not amenable of judicial enforcement. Making the rights enforceable does not detract from the historical importance that the "conservation bill of rights" served by empowering Governor Nelson Rockefeller and the legislature to recodify, between 1970 and 1972, the conservation law of 1911 into the environmental conservation of 1972.[124] While the addition of the 1969 amendment ushered in a new generation of environmental laws,[125] more is needed in 2017 when the deterioration of environmental quality and rising problems of climate change give rise to the need for a clear, self-executing environmental right.[126]

Other states have enacted constitutional environmental rights provisions that are enforced and are more akin to the clear "forever wild" norms of article XIV, section 1. For example, Pennsylvania's environmental rights provision reads as follows in article I, section 27 of its constitution:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment.

122. The Hudson River Greenway is an example of how such heritage can be preserved regionally; other parts of New York have not had the benefit of such Greenway legislation. *See Overview & Mission*, HUDSON RIVER VALLEY GREENWAY, http://www.hudsongreenway.ny.gov/AbouttheGreenway/OverviewandMission.aspx (last visited Aug. 27, 2017).

123. *See* William R. Ginsburg, *The Environment*, *in* THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK 221-23 (Gerald Benjamin ed., 1994).

124. *See supra*, footnote 43 and accompanying text.

125. *See* N.Y. ENVIRONMENTAL LAW HANDBOOK, *supra* note 33, at 1-4.

126. Robinson, *supra* note 3.

> 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 the people.[127]

Comparable provisions are found in states such as Montana, Hawaii and elsewhere.[128] Times have changed since voters added Section 4 in 1969.[129] To protect public health then, the "conservation bill of rights" was essential. But it falls short of the kind of environmental right adopted in other constitutions. It falls short of the simple declaration that New York itself crafted in 1894 when the destruction of forests was justifiably deemed to be a crisis worthy of a strict new constitutional mandate. The contemporary analog may be deemed to be the gathering crises of sea level rise, extreme storm events, and shifts in weather patterns, all associated with climate change. In 2012, "Supreme Storm Sandy" awoke New York to these new environmental threats.

New York today benefits from the investments prior generations made in the Forest Preserve. This great natural heritage provides ecological resilience and biological diversity and safeguards a vast watershed. In the Forest Preserve, not only are forested mountains the source of water for most of the state's residents, but this vast wild forest provides photosynthesis that removes significant amounts of carbon dioxide from the atmosphere.[130] By sequestering this carbon, the Forest Preserve averts accumulation of greenhouse gases in the

127. PA. CONST. art. I, § 27. *See* Robinson Twp. v. Commonwealth, 52 A.3d 463 (Pa. Commw. Ct. 2012), *aff'd in part*, *rev'd in part*, 147 A.3d 536 (Pa. 2016)*; see also* Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).

128. *See e.g.*, James R. May, *Environmental Rights in State Constitutions*, PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305 (2011); Audrey Wall, *State Constitutions and Environmental Bill of Rights*, THE COUNCIL OF ST. GOV'TS (Sept. 1, 2015, 12:00 AM), http://knowledgecenter.csg.org/kc/content/state-constitutions-and-environmental-bills-rights. For examples in 174 nations, see DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT (2012).

129. VOTES CAST, *supra* note 55.

130. *See* JERRY JENKINS, CLIMATE CHANGE IN THE ADIRONDACKS: THE PATH TO SUSTAINABILITY 130 (2010).

atmosphere.[131] The vitality of the forests is impacted by distant sources of air pollution, and the impact of "acid rain" is still being experienced.[132] Temperature rise will adversely affect the spruce-fir forests of the Forest Preserve and alpine tundra in the Adirondacks.[133] While logging is no longer a major industry in the Adirondacks and Catskills, recreation and tourism are, and climate change can impact this economic activity.[134]

In the wake of "Superstorm Sandy," the New York State Legislature initially mandated state agencies and local governments to begin to consider how they might address the negative impacts of climate change. The legislature enacted the Community Risk and Resiliency Act in 2014.[135] It may be worth considering whether or not the state's constitution should address climate change as today's principal environmental challenge. Other states have begun to do so.[136] It would be prudent to consider how a mandate for environmental stewardship can enhance resilience and reduce the risk of disasters. Today the provisions of article XIV, sections 3 and 4, appear dated and remain as an echo of the challenges of the nineteenth and twentieth centuries. New environmental crises are at hand, as set forth in studies by the New York Academy of

131. *Id.*

132. *See generally* JERRY JENKINS ET AL., ACID RAIN IN THE ADIRONDACKS: AN ENVIRONMENTAL HISTORY (2007).

133. Lisa W. Foderaro, *Savoring Bogs and Moose, Fearing They'll Vanish as the Adirondacks Warm*, N.Y. TIMES (Dec. 1, 2011), http://www.nytimes.com/2011/12/02/nyregion/fearing-climate-changes-effects-on-the-adirondacks.html?mcubz=1.

134. *See* Ian Brown, Marisa Tedesco & Neil Woodworth, *The Looming Threat: Climate Change in the Adirondack and Catskills in the 21st Century*, 71 ADIRONDACK MAGAZINE 1, 14-17 (2007).

135. Community Risk and Resiliency Act, N.Y. ENVTL. CONSERV. LAW § 3-0319 (McKinney 2017).

136. N.J. CONST. art. VIII, § 6(a) directs how revenues are to be made available for flood and storm damage. Constitutions can mandate preparedness, disaster risk reduction, and other measures to promote resilience.

Sciences,[137] and the U.S. National Academy of Sciences,[138] and of the Intergovernmental Panel on Climate Change.[139] The changes afoot are existential. The time has come to inquire how best to frame provisions for constitutional duties to avert climate change and to vest citizens with environmental rights, which to be effective, should be least as enforceable as the citizen suit provisions of the Clean Water Act[140] or the "forever wild" citizen enforcement procedures of article XIV.[141]

Article XIV, section 4 should be replaced with a concise environmental right or, in the alternative, with several concise rights set forth as an "environmental bill of rights" for the twenty-first century, just as the "conservation bill of rights" in section 4 provided for the twentieth century. Although the evidence is disregarded by the federal government, by President Trump, and many in Congress, states are not bound by this folly. California is acting on climate change. In New York's case, the opportunity has presented itself for enacting a constitutional amendment. New York needs a Department of Ecological Adaptation, as a successor to our Department of Environmental Conservation. Such prudent steps could be mandated through an environmental right.

VI. Antecedents Recognizing Constitutional "Environmental Rights"

New York's constitutional rights and requirements for due process of law have their origin in Great Charter of Liberties, known as the Magna Carta of 1215.[142] The earliest

137. *See* 1336 ANNALS OF THE N.Y. ACAD. OF SCIS., BUILDING THE KNOWLEDGE BASE FOR CLIMATE RESILIENCY: NEW YORK CITY PANEL ON CLIMATE CHANGE 2015 REPORT (2015); 1244 ANNALS OF THE N.Y. ACAD. OF SCIS., RESPONDING TO CLIMATE CHANGE IN NEW YORK STATE: THE CLIMAID INTEGRATED ASSESSMENT FOR EFFECTIVE CLIMATE CHANGE ADAPTATION FINAL REPORT (2011).

138. NAT'L ACAD. OF SCIS. & THE ROYAL SOC'Y, CLIMATE CHANGE: EVIDENCE AND CAUSES (2014).

139. *See* FIFTH ASSESSMENT REPORT, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2014), http://www.ipcc.ch/report/ar5/.

140. 33 U.S.C. § 1365 (2012).

141. N.Y. CONST. art. XIV, § 5.

142. Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, *in* MAGNA CARTA AND THE RULE OF LAW 311 (Daniel Barstow

environmental rights grew out of Magna Carta, with King Henry III conceding the liberties of the forest, in the Forest Charter of 1217.[143] The Forest Charter provided that:

> These liberties of the forest . . . and free customs traditionally had . . . both within and without the Royal Forests, are granted to . . . all in our realm . . . to everyone. Everyone is also obliged to observe the liberties and customs granted in the Forest Charter.[144]

The Crown conceded then that the government had the duty to respect the environmental rights of commoners and all persons, and later governments elaborated and confirmed this.[145]

Today, Pennsylvania, along with six other states, and 174 nations provide a right to the environment in their constitutions.[146] Courts apply the right to the environment in the specific context of requests to do so by citizens. Hawaii's Supreme Court has construed the Public Trust Doctrine to prevent the sovereign from undermining the levels of protection achieved.[147] This duty to progressively advance levels of protection is also recognized internationally both in human rights law and in international environmental law, as the Principle of Non-Regression.

The pattern of providing constitutional environmental rights in other states has been salutary.[148] Recognizing these rights is widely accepted, and environmental constitutional rights are a norm worldwide.[149] The lack of debate about an environment at the federal level of government is because the United States Constitution has limited scope, is often construed

Magraw et al. eds., 2014).

143. *Id.*

144. *Id.* at 343 (restating and summarizing the Forest Charter).

145. *Id.* at 343-44.

146. *See, e.g.*, May, *supra* note 128; BOYD, *supra* note 128.

147. *See* Kauai Springs, Inc. v. Planning Comm'n of Kaua'i, 133 Haw. 141 (2014); Jesse Souki, *Hawaii Supreme Court Provides Clearer Guidance on Public Trust Doctrine and Water*, HAW. LAND USE L. & POL'Y (Feb. 28, 2014), http://www.hilanduselaw.com/2014/02/hawaii-supreme-court-provides-clearer.html.

148. *See* Wall, *supra* note 128.

149. *See* May, *supra* note 128.

retrospectively through a search for "original intent," the consequence is that environmental rights are the province of the states.[150] State common law recognizes both the Public Trust Doctrine and the public nuisance doctrine, as authorities to protect ambient environmental values. The right to the environment extends these common law doctrines in light of what the ecology and environmental sciences understand today as the science of the earth. After several states amended their constitutions to provide for environmental rights after Earth Day in 1969, state supreme courts have enforced their provisions.[151] Internationally, 193 national constitutions set forth a right to the environment and many have been enforced by their supreme courts, e.g., landmark rulings in The Philippines and India.[152]

In *Silent Spring*, Rachael Carson observed, "[i]f the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of such problem."[153] New York's "conservation bill of rights" is far short of either what Dr. Rachel Carson sought, or of the right to the environment as other states and nations provide. New York would do well to adopt an environmental right akin to what Pennsylvania has.

VII. Amending New York's Constitution to Establish an Environmental Rights

A Task Force of the Section on Environmental and Energy Law of the New York State Bar Association undertook a six-month study of the issues of how a convention could address both the Constitution's "forever wild" Forest Preserve and add an

150. The Property Clause of the Constitution allows environmental and natural resources laws for the public lands. U.S. CONST. art. IV, § 2. The Commerce Clause has allowed statutes regulating pollution to manage interstate commerce. U.S. CONST. art. I, § 8, cl. 3.

151. PA. CONST. art. I, § 27 (enforced 2015 & 2017); MONT. CONST. art. II, § 3 (enforced 1999); HAW. CONST. art. XI, § 9 (enforced 2000).

152. *See* BOYD, *supra* note 128.

153. RACHEL CARSON, SILENT SPRING 12-13 (1962).

environmental right.[154] The carefully researched positions in the Task Force report merit study and are reproduced following this article.

The debate over the constitutional convention in 2017 has spawned a wide range of views. Some Adirondack conservation groups have expressed opposition to a new convention for fear that a convention would tamper with article XIV, section 1, the "forever wild" guarantees. They do not wish to run the risk of diluting landmark rulings such as *Association for the Protection of the Adirondacks v. McDonald*.[155] On March 2, 2016, National Public Radio's North Country Public Radio aired a story reporting concerns among Adirondack conservation organizations about whether a convention might weaken "forever wild" Forest Preserve mandates.[156]

Such concerns about safeguarding article XIV have arisen in the past. In 1997, the Association of the Bar of the City of New York had praised article XIV ("forever wild") noting that "[o]n balance, we conclude that the risk of elimination or dilution of the 'forever wild' provisions far outweighs the nominal or speculative against that could be achieved at a constitutional convention."[157] The report also raised seven questions about adding any new provision on "environmental justice," then considered to be an extension of civil rights.[158] It did not mention the provision of any possible "environmental rights" provisions.[159] Notwithstanding these concerns, there is ample

154. TASK FORCE ON ENVTL. ASPECTS OF THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, REPORT AND RECOMMENDATIONS CONCERNING ENVIRONMENTAL ASPECTS OF THE NEW YORK STATE CONSTITUTION (2017). The Executive Committee of the Environmental Law Section of the New York State Bar Association authorized the Taskforce at the Annual Meeting in New York City on January 27, 2017, appointing Professor Katrina Kuh as its chair. The Taskforce Report was completed in August 2017.

155. Ass'n for the Prot. of the Adirondacks v. MacDonald, 239 N.Y.S. 31 (App. Div. 1930), *aff'd*, 170 N.E. 902 (N.Y. 1930).

156. Brian Mann, *Would a State Constitutional Convention Threaten NY's "Forever Wild" Land?*, N. COUNTRY PUB. RADIO BLOG (July 6, 2017), https://www.northcountrypublicradio.org/news/story/34255/20170706/would-a-state-constitutional-convention-threaten-ny-s-forever-wild-land.

157. TASK FORCE ON THE N.Y. STATE CONSTITUTIONAL CONVENTION, N.Y.C. BAR ASS'N, REPORT OF THE TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION 627-28 (1997).

158. *Id.*

159. *Id.*

reason for New York State today to consider bringing its constitution into line with those of other jurisdictions by including a right to the environment. Impending threats of climate change and on-going environmental problems justify action.

The success of the classic "forever wild" mandate in article XIV, section one, is surely due to its fundamental clarity.[160] It states a basic norm. The rest of article XIV was appended by later amendments, added piecemeal, and reads more like a statute than a constitutional right. When drafting a new constitutional right to the environment, the precedent is clear since 1894. The 1894 Constitutional Convention, led by the renowned constitutional lawyer Louis Marshall, got it right when it unanimously adopted this straightforward right:

> 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, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.[161]

Much of what was added to article XIV after section 1, such as section 4, is now detailed in statutes, e.g., the Tidal and Freshwater Wetlands Acts, articles 24 and 25 of the Environmental Conservation Law.[162] Beyond section 1, which courts have interpreted and for which there is no reason to alter the text, the other environmental provisions in article XIV provisions have not been construed by courts and deserve to be scrutinized by a convention. Where they are expressions of a basic right to the environment, the article can be "streamlined" by placing them into the environmental conservation law.

In their place of statute-like prescriptions, New York should consider adopting a right to the environment such as that of Pennsylvania, article I, section 27:

160. N.Y. CONST. art. XIV, § 1.

161. *Id.*

162. N.Y. CONST. art. XIV, § 4; Tidal Wetlands Act, N.Y. ENVTL. CONSERV. LAW art. 25 (McKinney 2005); Freshwater Wetlands Act, N.Y. ENVTL. CONSERV. LAW art. 25 (McKinney 2005).

> 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 the people.[163]

In light of the experience with environmental rights around the nation and other countries, a convention could draft an even clearer declaration of the right to the environment. Even the Forest Charter of 1217 provides examples. Scholars have urged New York to emulate Pennsylvania in the past.[164]

Public perceptions of the environment have changed since 1894 or 1967 or anytime previously. Climate change introduces existential concerns about what government should do to safeguard New York. In 2014, New York State enacted the Community Risk and Resiliency Act[165] to prepare the state for rising sea levels and other impacts of climate change. The State has begun to implement this Act.[166] As an empirical fact, across New York governments have not yet prepared to cope with climate change impacts that are already evident. Scientists predict more change is to come.[167] Given the scientific consensus, it is reasonable that delegates to a constitutional convention would wish to consider more than just reaffirming "forever wild." Citizens in this century will depend upon being protected by the right to the environment.

What might a right to the environment entail? Logically, to implement this right government can be expected to advance measures for risk reduction, building resilience, disaster

163. PA. CONST. art. I, § 27.

164. The late Professor William R. Ginsberg called for enacting a self-executing environmental rights provision, like that of Pennsylvania's Constitution. *See* William R. Ginsberg, *The Environment*, *in* NEW YORK STATE CONSTITUTION: A BRIEFING BOOK 221, 228-29 (Gerald Benjamin ed., 1994).

165. *See generally* Community Risk and Resiliency Act, N.Y. ENVTL. CONSERV. LAW § 3-0319 (McKinney 2017).

166. *See* N.Y. COMP. CODES R. & REGS. tit. 6 § 490.1-490.4 (2017) (recent DEC regulations).

167. *See, e.g.*, Will Steffen et al., *The Anthropocene: Conceptual and Historical Perspectives*, 369 PHIL. TRANSACTIONS ROYAL SOC'Y 842 (2011).

preparedness, and migration away from areas that geologists and hydrologist agree will, in fact, be underwater. The next constitution of New York cannot (and perhaps should not) prescribe legislatively on such issues, but the convention can constitutionally mandate clearly and simply that *resilience is to be enhanced*.[168] A corollary to a right to the environment is the principle of resilience. All government should prepare for the unknown, the "rainy day," and ensure a margin of safety. The duty to enhance resilience is a short and clear norm, which a court could apply in whatever factual contexts may arise.

Possibly New York's voters will reject the call for a convention. In times of uncertainty, keeping the present constitution, however flawed, may seem preferable to the unknown. Although citizens can always vote against a convention's new constitutional provisions should they oppose them, they may not wish to run the risk. The public distrusts legislative corruption in Albany.[169] There is a concern that if voters in New York are asked to convene a convention simply to sweep the New York State Legislature's Augean stables clean of corruption, too many voters will stay home.[170] That is a discouraging task and can dirty those who undertake it. The call for a convention needs to address more than the negative. If the constitution can also address high-minded concerns over education, or housing equity, or enhanced access to justice, then there are goals worth the effort.

Protection of the environment and preparing for climate change offer voters a positive reason to support a convention in the past, New York voters have repeatedly demonstrated a concern for the environment. The convention should be invited to protect the nature and public health of New York again.

Whatever the outcome of the November 7, 2017, ballot issue

168. *See, e.g.*, STOCKHOLM RESILIENCE CENTER, http://www.stockholmresilience.org (last visited Sept. 1, 2017).

169. *See* CITIZENS UNION, ALBANY CORRUPTION TRACKER, http://www.citizensunion.org/albany_corruption_tracker (last visited Sept. 1, 2017) (reporting that since 2000, thirty-three legislators have left office due to criminal investigations or ethics matters).

170. For Hercules' fifth labor, Eurystheus ordered Hercules to clean up King Augeas' stables. Hercules knew this would mean getting dirty and smelly, but the task was made worse because Eurystheus obliged Hercules to clean up after the cattle of Augeas in a single day.

on the constitutional convention, there is a compelling case for amending the New York Constitution to provide for a right to the environment. If not enacted via a convention, the option exists for the legislature to adopt an environmental right to submit to the voters. Either way, New York deserves to recognize the to the environment.