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STATE CONSTITUTIONS AND THE ENVIRONMENT

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In recent years, a number of states have adopted new or revised constitutions. Typically these contain conservation or other articles touching environmental values. In this Article Professor Howard reviews the elevation of environmental quality to constitutional stature by the states and, taking the new Virginia Constitution as an example, suggests the effect such constitutional language can have.

IT is inherent in Americans' attitudes toward their constitutional system that when a sufficient number of them care deeply enough about a problem they seek to give it constitutional dimensions. Sometimes new rights or prohibitions take the form of a constitutional amendment, as when the proponents of prohibition succeeded in securing the adoption of the eighteenth amendment. Sometimes constitutional rights accrue through judicial interpretation; a classic example is the recognition given to marital rights of privacy in *Griswold v. Connecticut*.¹

It is not surprising, then, that environmentalists and conservationists now seek to gain constitutional recognition of a right to a decent environment. Since ecology and the environment have become potent political issues, environmentalists have discovered they have a fair meas-

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¹ 381 U.S. 479 (1965).

ure of political clout—the votes against the SST reflected in part this influence. Thus, if constitutional law, whether arising through amendment or judicial interpretation, is in any substantial measure a repository of national values, environmentalists have reason to hope that their concerns will come to be voiced in fundamental law.

A FEDERAL CONSTITUTIONAL RIGHT?

In recent years, various proposals have been made for amendments to the Federal Constitution to guarantee the right to a healthful environment. Among these, perhaps best known is Senator Gaylord Nelson's terse proposal:

Every person has the inalienable right to a decent environment: The United States and every State shall guarantee this right.²

In terms that remind one of the endless arguments over "preferred rights," the "firstness" of the first amendment, and other relatives among the rights of the people, Senator Nelson introduced his amendment with the assertion, "If we have any right that is more important than any other right, it is the right to live in a clean and decent environment"³

Others, especially some observers in academic circles, have looked to the courts to develop from the existing language of the Federal Constitution a right to a decent environment. As one such writer has put it, "We merely need a ringing decision to ratify this existential fact of life."⁴ Lacking explicit language in the Constitution on which to rest such an environmental right, commentators have advanced various bases from which to infer the right, such as due process of law or the ninth amendment.⁵

But judicial decisions recognizing a federal constitutional underpinning for environmental rights are rare. At least one lower federal

² S.J. Res. 169, 91st Cong., 2d Sess. (1970). Other proposals to amend the Federal Constitution have included the rather longer and more detailed proposal by Representative Richard L. Ottinger of New York. H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968).

³ 116 CONG. REC. 85 (1970).

⁴ Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, LAW AND THE ENVIRONMENT 134, 165 (M. Baldwin & J. Page, Jr. eds). See also Roberts, *The Right to a Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 643 (1970).

⁵ Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

court has found that one's health, because necessary to sustain one's life, is protected by the due process clauses of the fifth and fourteenth amendments. However, since the defendant polluter in that case was a private company, the court found no "state action" and hence no application for the constitutional right.⁶

More characteristic of judicial responses to litigants' assertions of a federal constitutional protection for the environment is a decision of the Fourth Circuit Court of Appeals. In *Ely v. Velde*⁷ residents of an historic and architecturally important area of Louisa County, Virginia, sought to block the State from building a new penal facility in the immediate area. The court "declined the invitation to elevate to a constitutional level the concerns voiced by the appellants," and remarked that "[w]hile a growing number of commentators argue in support of a constitutional protection for the environment, this newly advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so." In another characteristic response, a federal district court, when asked to apply the ninth amendment as the basis for environmental rights, ruled that any such application of the ninth amendment would have to be made, if at all, by the Supreme Court.⁸

The obstacles to judicial pronouncement of a right to a decent environment are obvious. Although the Supreme Court has many times shown its willingness to redefine the content of constitutional prescriptions, especially due process and equal protection, cases as openly innovative and activist as *Griswold*—the analogy which proponents of a federally guaranteed environmental right invariably develop⁹—are rare. Moreover, when the Court has been activist in its interpretation of such provisions as the due process and equal protection clauses, it has commonly done so to protect unpopular or politically ineffective minorities, whether racial or otherwise.¹⁰ In contrast the surge of en-

⁶ *Environmental Defense Fund v. Hoerner Waldorf*, 1 ENVIRON. REP. 1640, 1641 (D. Mont. 1970).

⁷ *Ely v. Velde*, F.2d (4th Cir. 1971). The court did rule in favor of the local residents' contention that the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(1)(C), required the preparation of an environmental impact statement before a federal grant from the Law Enforcement Assistance Administration could be used to help build the facility. This ruling reversed the district court's holding on the NEPA point, 321 F. Supp. 1088 (E.D. Va. 1971).

⁸ *United States v. 247.37 Acres of Land*, 3 ENVIRON. REP. 1098, 1102 (S.D. Ohio 1971).

⁹ See articles cited in notes 4 & 5 *supra*.

¹⁰ *NAACP v. Button*, 371 U.S. 415, 429-30 (1963); *Baker v. Carr*, 369 U.S. 186, 258-59 (1962); *United States v. Carolene Prods. Co.* 304 U.S. 144, 152 n.4 (1938).

vironmental legislation in recent years (even though more may be needed) is evidence of the ability of environmentalists and their friends to make their voices heard in the normal political processes.

STATE CONSTITUTIONS

So far, then, there has been little more than talk about a federal constitutional right to a decent environment. But there has been action on another constitutional front—that of state constitutions. After a period of roughly a quarter of a century (ending in 1945), during which no American state adopted a new constitution, the states began to take renewed interest in updating their organic laws.¹¹ This interest reached floodtide during the 1960's; at a single point at the close of that decade, well over half of the states were engaged in some stage of official action (usually the deliberations of a study commission) looking toward revision of their constitutions.¹²

State constitutional conventions, study commissions, and legislatures contemplating constitutional revision have had to consider the extent to which their state's constitution responds to modern problems, including the question of whether a revised constitution ought to enunciate rights which might not have been recognized in an earlier time. Although some have questioned whether, in light of the expanding application of Federal Bill of Rights guarantees to the states via the fourteenth amendment,¹³ there is any viable role for a state bill of rights, most commentators—and, one hopes, most people—have answered "yes." One reason is that, whatever the scope of federal guarantees, a state is free to give its citizens additional assurances and rights beyond those found in federal law. A prime example is the entitlement of a state to give, if it chooses, constitutional recognition to the goal of environmental quality.

A state constitution is not a code of laws. It should be confined to the fundamentals of government, leaving statutory detail to the statute books.¹⁴ Assuming that constitutional draftsmen follow this precept—

¹¹ See generally A. STURM, *THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968* ch. 1 (1970).

¹² See Sturm, *State Constitutions and Constitutional Revision*, 1967-69, in COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES, 1970-1971*, at 3 (R. Weber ed.).

¹³ See, e.g., Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Greenberg, *Civil Liberties*, in SALIENT ISSUES OF CONSTITUTIONAL REVISION (J. Wheeler, Jr. ed. 1961) 7, at 9; Rankin, *The Bill of Rights*, in STATE CONSTITUTIONAL REVISION (W. B. Graves ed. 1960), 159, at 162.

¹⁴ See SALIENT ISSUES OF CONSTITUTIONAL REVISION xi (J. Wheeler, Jr. ed. 1961);

and modern constitution-makers are increasingly likely to do just that¹⁵—much constitutional revision activity is directed at excising unnecessary matter and making a constitution more concise and fundamental. In the face of this trend, therefore, it is all the more telling when constitution-makers add new subject matter, for this act suggests an underlying judgment that the newly treated area is of such a fundamental character that it merits constitutional treatment.

In a number of state constitutions, environmental quality has joined the list of “fundamentals.” Most of this activity has coincided with the rise of popular interest in the environment. As a result, new or added attention to conservation and environmental quality is found in constitutions or amendments thereto adopted in recent years in Florida, Illinois, Michigan, New York, Pennsylvania, Rhode Island, and Virginia.¹⁶

By no means are all the state constitutional provisions bearing on conservation and the environment of recent origin. There are state constitutions, restating ancient rights with origins as early as Magna Carta, which provide that the people shall enjoy the rights of fishery or of free access to the shore.¹⁷ Navigation, too, has been a right of ancient origin which has received traditional protection in state constitutions.¹⁸ Some constitutions have long had provisions creating

Fellman, *What Should a State Constitution Contain?*, in STATE CONSTITUTIONAL REVISION 137 (W. Graves ed. 1960). Deciding what is “fundamental,” however, is an elusive question. See generally Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968).

¹⁵ See, e.g., COMMISSION ON CONSTITUTIONAL REVISION, REPORT ON THE CONSTITUTION OF VIRGINIA (1969), 9-10 [hereinafter cited as COMMISSION REPORT]; MARYLAND CONSTITUTIONAL CONVENTION COMMISSION, REPORT TO THE PEOPLE OF MARYLAND 6 (1967).

¹⁶ FLA. CONST., art. II, § 7 (effective Nov. 5, 1968); ILL. CONST., art. XI, §§ 1-2 (effective July 1, 1971); MICH. CONST., art. 4, § 52 (effective Jan. 1, 1964); N.Y. CONST., art. XIV, § 4 (amendment effective Jan. 1, 1970); PA. CONST., art. I, § 28 (amendment effective 1971); R.I. CONST., art. I, § 17 (amendment adopted Nov. 3, 1970).

¹⁷ E.g., CALIF. CONST., art. I, § 25 (providing that no land owned by the state shall ever be sold or transferred “without reserving in the people the absolute right to fish thereupon”); R.I. CONST., art. I, § 17 (elevating to constitutional status the rights of fishery and privileges of the shore to which the people had been entitled at common law). See also HAWAII CONST., art. X, § 3, making sea water fisheries “free to the public” but subject to the right of the state to regulate.

For a colonial recognition of the right of “free fishing” in the great ponds, bays, coves, and rivers, see the Massachusetts Body of Liberties (1641), in COLONIAL LAWS OF MASSACHUSETTS 37 (W. Whitmore ed. 1889).

¹⁸ Thus, article I, section 24 of the Alabama Constitution, which declares that all navigable waters shall remain “forever public highways, free to the citizens of the state and the United States, without tax, impost or toll,” has been interpreted to prohibit grants of the shore or the beds. See *Pollard v. Files*, 3 Ala. 47 (1841), *rev'd on other grounds*, 43 U.S. (2 How.) 591 (1844). The “public highway” language of

special status for natural oyster beds.¹⁹ And there have been provisions such as the "forever wild" clause of New York's Constitution²⁰ that derived their impetus from the conservation movement in the earlier part of this century. But it is with the popular fervor over environmental quality reaching a peak in the late 1960's and early 1970's that the environment in its broader sense (as opposed to fairly specific aspects of conservation or natural resources) has come into its own in state constitutions.

In recent years a broad range of environmental provisions have been proposed for or included in state constitutions. From these certain basic patterns emerge. The following provisions are characteristic.

Statement of Public Policy

The typical environmental article begins with a statement of public policy. New York's Constitution, for example, declares that the "policy of the state shall be to conserve and protect its natural resources and scenic beauty"²¹ As will be discussed below, such a statement of policy is more than rhetoric; it has a substantive effect on the state's laws.²²

Directive to Legislature to Enact Environmental Legislation

Virtually all of the recently adopted environmental provisions in state constitutions have language that directs the state legislature to enact some form of environmental legislation. Michigan's Constitution, for example, states that the legislature "shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."²³ Illinois' new Constitution establishes environmental protection as public policy and declares that the General

article I, section 28 of the South Carolina Constitution was deemed to impose a "navigation trust" on navigable waters. *See State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41 (1935). Similarly article IX of the Wisconsin Constitution has been interpreted to impose a navigation trust. *See Krenz v. Nichols*, 197 Wis. 394, 222 N.W. 300 (1928).

¹⁹ E.g., VA. CONST. art. XIII, § 175 (1902). *See generally Power, More About Oysters Than You Wanted To Know*, 30 MD. L. REV. 199 (1970).

²⁰ N.Y. CONST., art. XIV, § 1. In 1918 the people of Massachusetts amended their constitution to recognize aesthetic values. Amendment 49 stated a broad conservation policy, and amendment 50 specifically provided that advertising, including that on private property within public view, could be regulated and restricted by law.

²¹ N.Y. CONST., art. XIV, § 4.

²² *See* text at notes 63-68 *infra*.

²³ MICH. CONST., art. 4, § 52.

Assembly "shall provide by law for the implementation and enforcement of this public policy."²⁴

Such provisions make deliberate use of the mandatory "shall" rather than the permissive "may." They intend, in form at least, to impose an obligatory duty on the legislature. Rhode Island's Constitution, by virtue of a 1970 amendment, speaks expressly of a "duty" on the General Assembly: to provide for the conservation of the state's natural resources and to adopt all means "necessary and proper by law to protect the natural environment" through resource planning and regulation.²⁵

The effect of such provisions is tempered by such commonly encountered statements as that found in Cooley's *Constitutional Limitations*:

Sometimes the constitution in terms requires the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only moral force: the legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted.²⁶

A court therefore is likely to hold that it is unable to issue a mandate compelling the legislative branch to act.²⁷ This is not to say that a provision mandating legislative action has no effect at all. Even if a court believes itself unable to force the legislature to act, the court may be able to enforce the constitutional mandate by a negative remedy, such as striking down action actually taken which is in derogation of the constitutional duty.²⁸ But, whatever their competence and authority in the matter, it is apparent that courts have no appetite to confront a legislature which has refused to carry out an affirmative duty imposed by a constitution.

Some constitutional provisions directing the legislature to act use qualifying language which a court might seize upon to declare itself competent to review the legislature's action or inaction. The constitutions of Florida and New York, for example, state that, in implementing

²⁴ ILL. CONST., art. XI, § 1.

²⁵ R.I. CONST., art. I, § 17.

²⁶ 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 165 (8th ed. W. Carrington 1927).

²⁷ E.g., *St. Joseph Bd. of Public Schools v. Patten*, 62 Mo. 444, 448 (1876); *State, ex rel. Walker v. Board of Comm'rs*, 141 Neb. 172, 178-79, 3 N.W.2d 196, 200 (1942); *Southern Ry. v. Commonwealth*, 200 Va. 431, 433, 105 S.E.2d 814, 816 (1958); *Commonwealth v. Stringfellow*, 173 Va. 284, 291, 4 S.E.2d 357, 360 (1939).

²⁸ See *Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636 (1959).

the stated environmental policy, the legislature shall make "adequate" provision for such ends as the abatement of air and water pollution.²⁹ There is no reason in logic why a word such as "adequate" could not furnish at least a minimal standard for judicial review, as have words like "reasonable." But with or without qualifying language, a provision purporting to impose an affirmative duty on a legislature raises questions for a court markedly different from those raised by provisions that limit legislative power. There is good reason to suppose that, in practical effect, a statement that the legislature "shall" enact environmental legislation may be little more than a moral exhortation to the legislators.

Directive to Legislature to Acquire Natural Resources

New York's Constitution, by virtue of an amendment effective in 1970, directs the legislature to provide for the acquisition of lands and waters, as well as the dedication of properties already owned, which—because of their natural beauty; wilderness character; or geological, ecological, or historical significance—shall be preserved and administered for the use and enjoyment of the people.³⁰ The effect of such a directive to the legislature is limited by the same problems of judicial reviewability and enforceability as discussed in the preceding section.

Authority to Legislature to Act

The Conservation article of Virginia's new constitution states that, in the furtherance of the public policy stated therein, the General Assembly "may" undertake the conservation, development, or utilization of natural resources, the acquisition and protection of historical sites and buildings, and the protection of the Commonwealth's atmosphere, lands, and waters from pollution, impairment, and destruction.³¹ A more limited provision of Missouri's Constitution, adopted in 1945, states that the Missouri legislature "may enact laws and make appropriations . . . to preserve places of historic or archaeological interest or scenic beauty. . . ." ³²

²⁹ FLA. CONST., art. II, § 7; N. Y. CONST., art. XIV, § 4.

³⁰ N. Y. CONST., art. XIV, § 4.

³¹ VA. CONST., art. XI, § 2.

³² MO. CONST., art. III, § 48. The same section goes on to say that "for such purposes private property or the use thereof may . . . be subjected to reasonable regulation or control."

Unlike the Federal Constitution, which empowers Congress to act, a state constitution is a limit on legislative power. A state legislature can act unless forbidden to act; it needs no affirmative grant of power to enact particular kinds of legislation.³³ Thus, provisions stating that a legislature "may" act often do nothing more than state the legislative power which that body already had. The only substantive meaning that such a provision is likely to have is to free a legislature from some constitutional limitation or prohibition, or to operate as a limitation or prohibition on legislative power.

State constitutions, in imposing debt limitations on the state's power to incur bonded debt (a common constitutional limitation on legislative power), often will make exceptions for such emergencies as repelling invasions or suppressing insurrections. Sometimes conservation purposes are excepted; Nevada's constitution, for example, permits the legislature, notwithstanding the constitutional debt limitation, to authorize contracts for the protection and preservation of state property or of natural resources, or for obtaining benefits therefrom, as by projects undertaken in cooperation with the United States or with other states.³⁴ Another example is the section of Virginia's constitution which authorizes the Commonwealth to participate for any period of years in funding projects which are the subject of joint undertakings between Virginia and the United States or other states. This provision expressly exempts such undertakings from the requirement, otherwise applicable by virtue of another section of the constitution,³⁵ that no appropriation may be made payable more than two years and six months after the end of the legislative session at which the appropriation is authorized.

Restraints on Disposition of Public Trust

New York's constitution also prescribes that properties acquired or dedicated pursuant to the constitutional authorization "shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular

³³ *Kaysser v. McNaughton*, 6 Cal. 2d 248, 253, 57 P.2d 927, 929 (1936); *Oakland County Taxpayers League v. Board of Supervisors*, 355 Mich. 305, 323, 94 N.W.2d 875, 885 (1959); *Adler v. Deegan*, 251 N.Y. 467, 480-81, 167 N.E. 705, 709-10 (1929) (Pound, J., concurring opinion); *Strawberry Hill Land Corp. v. Starbuck*, 124 Va. 71, 77, 97 S.E. 362, 364 (1918).

³⁴ NEV. CONST., art. IX § 3.

³⁵ VA. CONST., art. X, § 7.

sessions of the legislature.³⁶ Such restraints on disposition of the public trust readily lend themselves to judicial enforcement, because, being restraints on legislative power, they are as susceptible of judicial application as any other constitutional prohibition. Moreover, enforcement is made all the easier where the restraint on legislative power spells out some explicit standard—in this case action by two successive regular sessions of the legislature.

Another variant of the environmental article, which like the New York provision invokes the idea of public trust, was added to the Pennsylvania Constitution in 1971. The article does not spell out specific procedural limitations, but states the public trust as follows: "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."³⁷

Environmental Rights in Individuals or in the People

The nearest counterparts in state constitutions to the federal constitutional amendment proposed by Senator Nelson³⁸ are those which declare an environmental "right." Illinois' new constitution speaks in terms of an individual right: "Each person has the right to a healthful environment."³⁹ Rhode Island's constitution declares a right more nearly public in character: that the people "shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values . . ."⁴⁰ In May 1971 the people of Pennsylvania ratified a constitutional amendment declaring, "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."⁴¹

Precisely what the existence of such a right implies is hard to say. Enunciating a public right, such as access to natural resources, may simply be another way of stating a public trust doctrine. The existence of a public right may, in particular, resolve any doubt about the standing of a citizen to sue to enjoin breaches of the public trust by state

³⁶ N. Y. CONST., art. XIV, § 4.

³⁷ PA. CONST., art. I, § 28.

³⁸ See text at note 2 *supra*.

³⁹ ILL. CONST., art. XI, § 2.

⁴⁰ R.I. CONST., art. I, § 17.

⁴¹ PA. CONST., art. I, § 28.

agencies or officials. The implications of stating an individual right to a decent environment are rather more speculative but could be more far-reaching. Potentially a constitutional statement of such a right could be the basis for an individual's right to go into court and challenge virtually any governmental act—and conceivably any private act—which degrades the environment. The drafters of the Illinois provision seem to have had such an effect in mind when they described the expression of the constitutional right to a healthful environment as providing "the vehicle for the individual to prosecute a violator."⁴²

The right to a decent environment can have other implications. It might result in a broader definition of what constitutes a nuisance, private or public. Moreover, the existence of a constitutional right could alter the balancing technique which courts use in nuisance cases to weigh the social and economic benefits of the defendant's activity against the harm which that activity is doing to the plaintiff.⁴³ It is one thing to balance the value of the complained-of activity against private harm; it is quite another to make that balancing judgment when a constitutional right is involved, as a host of Supreme Court cases demonstrates.⁴⁴

Citizens' Suits

Many legislative proposals have sought to allow citizens to sue polluters or otherwise to bring environmental suits in the absence of some traditional interest such as property. Federal statutes give the citizen a limited right to sue;⁴⁵ proposals such as the Hart-McGovern bill would enlarge that right.⁴⁶ Several states, the most notable being Michigan, have enacted citizens' suit statutes.⁴⁷ Some states have gone

⁴² 6TH ILLINOIS CONSTITUTIONAL CONVENTION, GENERAL GOV'T COMM. PROPOSAL No. 16 5 (July 1, 1970). The statement of the right, however, is coupled with an explicit declaration of the individual's standing to enforce the right, as discussed in the text of this article. Hence it is not clear what legal effect the Illinois drafters might have thought the statement of right, standing by itself, would have.

⁴³ For an example of a case in which the court used a "balancing" approach and, because of the defendant's contribution to the area's economy, refused an injunction, see *Boomer v. Atlantic Cement Co.*, 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967), *aff'd* 30 A.D.2d 480, 294 N.Y.S.2d 452 (1968).

⁴⁴ Consider, for example, how the Court will weigh the substantiality of a state's interest which impinges on free speech even when that impingement is "indirect" or "incidental." See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁴⁵ E.g., Clean Air Act § 304, 72 U.S.C. § 1857h-2 (1970).

⁴⁶ S. 1032, 92d Cong., 1st Sess. (1971).

⁴⁷ E.g., Mich. Environmental Protection Act of 1970, MICH. ANN. LAWS ch. 691.1201

even farther and have written provisions for citizens' suits into their constitutions. Illinois' constitution, after declaring each person's right to a healthful environment, states that "[e]ach person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation . . . by law."⁴⁸ New York's constitution permits a violation of the conservation article to be restrained on the suit of any citizen, with the consent of the Supreme Court, in Appellate Division and on notice to the Attorney General.⁴⁹

Tax Advantages to Encourage Conservation

Over several decades, states have experimented with a number of legal devices, sometimes constitutional, sometimes statutory, to encourage the conservation of agricultural, forest, or open space land in private ownership. In addition to such tools as eminent domain, planning, zoning, and the acquisition of scenic easements and development rights, states have experimented with the use of various tax incentives to encourage private property owners to use their property in a manner consistent with such public interests as balanced land use patterns and the preservation of open space land.⁵⁰

Since state constitutions often require some form of equality in the assessment and taxation of real property—e.g., that all realty be assessed at fair market value—tax devices for conservation purposes often require constitutional underpinnings. Thus, during the conservation movement in the earlier part of this century, Massachusetts amended its constitution to authorize the legislature to provide such method of taxation for "wild or forest lands" as will develop and conserve forest resources.⁵¹

As people have become more accustomed to the use of the tax structure to pursue a wide range of objectives quite unrelated to traditional purposes of revenue, states have experimented more broadly

et seq. (Additional Supp. 1971); Minn. Environmental Rights Act, MINN. STAT. ANN. § 116B.01 (1971); Conn. Environmental Protection Act of 1971, P.A. 96 (1971).

⁴⁸ ILL. CONST., art. XI, § 2.

⁴⁹ N.Y. CONST., art. XIV, § 5.

⁵⁰ Illustrative of the rather ample literature on legal techniques for preserving open space are Eveleth, *An Appraisal of Techniques To Preserve Open Space*, 9 VILL. L. REV. 559 (1964); Krasnowiecki & Paul, *The Preservation of Open Spaces in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961); Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622 (1962).

⁵¹ MASS. CONST., amend. 41.

with tax devices to encourage conservation. Typical of such constitutional devices is the provision in the Virginia Constitution of 1971 which authorizes the General Assembly to define and classify agricultural, horticultural, forest, and open space land, to provide for the assessment of such land on the basis of its actual use, and to permit localities to allow relief from or deferral of taxes which otherwise would be payable on such land.⁵²

Experience with tax relief for agricultural and open space land has been chequered. The central problem has been how to give relief which encourages the preservation, in the public interest, of open space land without creating lucrative windfalls for developers and speculators. Scandalous abuses of use assessment schemes have been documented in some states.⁵³ Consequently, commentators have often been critical of tax devices as a means of preserving open space.⁵⁴ Such criticisms are not necessarily sufficient to refute the need for a constitutional provision permitting the legislature to enact a use assessment system; they are, however, a cautionary note reminding legislators of the great difficulties states have had in framing workable legislation.

THE VIRGINIA CONSTITUTION

Until the adoption of the Constitution of 1971, Virginia's Constitution had no article dealing with conservation or the environment. In the Constitution of 1902, the only explicit protection of natural resources appeared in a section which forbade the lease, rental, or sale of the natural oyster beds in Virginia waters; these were to be held in trust for the benefit of the people of the Commonwealth.⁵⁵

In 1969 the Commission on Constitutional Revision proposed that a conservation article be added to the Constitution "in recognition of the growing awareness that among the fundamental problems which will

⁵² VA. CONST., art. X, § 2.

⁵³ A study of preferential assessments in Montgomery County, Maryland, in early 1971, revealed, for example, that a 194-acre tract of land zoned for high-rise residential, commercial, and industrial purposes and obviously slated for development was reckoned to be worth about \$13 million on the open market but was assessed as farmland and carried on the tax books as being worth \$38,000. *Washington Post*, March 1, 1971, at C1.

⁵⁴ E.g., J. DELAFONS, *LAND-USE CONTROLS IN THE UNITED STATES* 80-81 (2d ed. 1969); C. LITTLE, *CHALLENGE OF THE LAND* 73 (1968).

⁵⁵ VA. CONST. of 1902, art VII, § 175. The Constitution of 1870, art. X, § 2, prohibited the State from taxing Virginia citizens for the privilege of taking oysters from natural beds.

confront the Commonwealth in coming years will be those of the environment.”⁵⁶ As framed by the Commission, the conservation article (except for the natural oyster clause, which was carried over intact from the 1902 Constitution) was addressed solely to the General Assembly. Section 1 stated that the Assembly “shall make provision for the conservation, development, and utilization of the natural resources of the Commonwealth.” Section 2, in permissive language, authorized the Assembly to undertake the development or utilization of Virginia’s lands or natural resources, by the creation of public authorities, or by leases or contracts with federal agencies, other states, units of government in Virginia, or private persons or corporations.⁵⁷

Conservationists and environmentalists were quick to recognize the limits to the protection afforded by the Commission’s proposal. Neither of the first two sections of article XI would have reached the conduct of courts, agencies, or officials. To the extent that section 1 might be thought to enunciate policy, it was addressed solely to the Legislature. In this regard the preceding discussion of the problems of enforcing affirmative mandates placed by a constitution upon a legislative body⁵⁸ indicates that, despite section 1’s use of mandatory language, the section might have amounted to nothing more than hopeful advice to the General Assembly. By its own terms, section 2 did not purport to place any duty on the Assembly; it merely bestowed the authority to act.

At a joint hearing before the General Laws Committees of the Senate and House of Delegates during the 1969 special session of the General Assembly, various conservation groups voiced their criticisms that the Commission’s language did not go far enough to give adequate protection to the environment.⁵⁹ In response to these and other criticisms and recommendations, the committees rewrote sections 1 and 2, expanding them to essentially their present form.⁶⁰ With clarifying and other minor amendments, the committee proposal was adopted by

⁵⁶ COMMISSION REPORT, *supra* note 12, at 321.

⁵⁷ *Id.* at 322-23. Section 2 also freed the Assembly from constitutional limitations on participating for any period of years in the cost of joint undertakings with the Federal Government or with any other state. Section 3 dealt with natural oyster beds. *Id.* at 323.

⁵⁸ See text at notes 31-35 *supra*.

⁵⁹ Hearings on S.J. Res. 17 before the General Laws Committees of the Senate and House of Delegates of Virginia, Special Sess. (March 4, 1969).

⁶⁰ See *Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution, Extra Session 1969, Regular Session 1970*, at 372 [hereinafter cited as *Senate Debates*].

the General Assembly and became article XI of the Constitution as approved by the people of Virginia in November 1970.

In discussing the approach embodied in the Virginia Constitution's conservation article, it would be well first to note what the article does not do. Some of the emerging patterns of environmental provisions discussed above do occur in the Virginia Constitution; others do not.

To begin with, Virginia's conservation article is not couched in terms of a constitutional right to a decent environment. At the public hearing before the General Laws Committees of the two houses, Delegate Clive DuVal proposed a draft of section 1 that would have declared that the "people have a right to clean air and water and to the use and enjoyment for recreation of adequate public lands, waters, and other natural resources."⁶¹ This language was not adopted by the committees.

Second, there is no language conferring upon citizens a constitutional right to sue polluters or others to prevent degradation of the environment. For such suits legislation would be necessary.⁶² However, as discussed below, section 1's statement of public policy bears on questions of standing of citizens to challenge actions of state agencies and officials which are incompatible with such public policy, and the content which section 1 gives to the public trust or to the *jus publicum* in Virginia carries with it standing for a citizen to sue to protect the public trust.

Third, in contrast to the Revision Commission's proposal and to the environmental provisions of a number of state constitutions, the Virginia conservation article does not purport to direct the General Assembly to enact environmental legislation. Instead, in addition to authorizing certain action by the Assembly, the article turns its attention to a much broader concern: a constitutional statement of public policy which serves to bind state agencies and officials, as well as courts, and which gives meaning and substance to Virginia's public trust in its lands, waters, and other natural resources.

Execution

A preliminary concern in evaluating the effect of the conservation article is determining in what respects the article is self-executing. A constitutional provision is self-executing if the duty it imposes may

⁶¹ Ms. draft submitted by Del. DuVal at hearings before the General Laws Committees of the Senate and House of Delegates of Virginia, Special Sess. (1969).

⁶² See, e.g., statutes cited *supra* note 40.

be enforced without further legislation. As a formal statement of the public policy of the Commonwealth, section 1 of article XI requires no implementing legislation. As public policy it became effective when the Constitution became operative on July 1, 1971. Section 1's self-executing quality is recognized by section 2 which, in authorizing the Assembly to act, says that legislation is to be "in the furtherance of such policy"—policy already in existence by virtue of section 1.⁶³ An enunciation of public policy, unlike a rule of conduct laid down by legislation, is not aimed at the private citizen and imposes no duty on him. Rather, it is a mandate for and a restraint on governmental activity. Section 1 of article XI is, thus, self-executing not with regard to the public at large but with regard to those entities which are constitutionally bound by public policy, namely the government, its courts, and its agencies.⁶⁴ In addition, article XI is not self-executing with respect to obligating the General Assembly to enact environmental legislation.⁶⁵

⁶³ The relation between sections 1 and 2—one the substantive, self-executing provision, the other permissive—is a common pattern in constitutional provisions. It is the pattern found, for example, in a number of the amendments to the Federal Constitution, amendments which have a self-executing section and a section empowering Congress to enforce the article "by appropriate legislation." See, e.g., U.S. CONST. amend. XIII, §§ 1 & 2, amend. XIV, §§ 1 & 5, amend. XV, §§ 1 & 2, amend. XIX (first and second clauses), amend. XXIII, §§ 1 & 2, amend. XXIV, §§ 1 & 2.

⁶⁴ To read section 1 as having no operative effect in the absence of legislation would be inconsistent with the aim of the drafters of the 1971 Constitution to eliminate inoperative provisions from the Constitution. (For examples of sections of the 1902 Constitution deleted on the grounds that they had no legal effect, see COMMISSION REPORT, *supra* note 12, at 159, 280). Even section 2, which seems to be permissive only, has substantive effect in two regards: (1) the Assembly's exercise of its legislative authority must be "in furtherance of" the public policy laid down in section 1, and (2) section 2 specifies circumstances in which the Assembly is free of the time limitations on appropriations imposed by article X, section 7, of the Constitution.

Moreover, article XI is to be read in light of the general principle that, unlike the Federal Constitution (which grants power to Congress), state constitutions are documents of limitation. That is, a state legislature enjoys all legislative power which is not denied it by federal law or the state constitution. *Mumpower v. Housing Authority*, 176 Va. 426, 11 S.E.2d 732 (1940); *Strawberry Hill Land Co. v. Starbuck*, 124 Va. 71, 77, 80, 97 S.E. 362, 364, 365 (1918). Typically even a constitutional provision which appears to be wholly permissive or declaratory of legislative power operates in conjunction with some other provision which is mandatory or prohibitory. The fundamental concept of a state constitution as a document of limitation underscores the importance of understanding the operation of article XI as limiting the power of government.

⁶⁵ It was to this point that Delegate Fidler was speaking in the House debates on article XI when he said that the committee draft was "not a self-executing provision at all; it has to be implemented by action of the General Assembly." In the next sentence Delegate Fidler made the context of his remark clear by pointing to the

Senator Brault, the floor sponsor of Article XI, at the 1969 special session, referred repeatedly to section 1 as a "mandate."⁶⁶ And Senator Brault, in opposing an amendment by Senator Howell to add explicit public trust language to article XI, said that the committee's draft of section 1 already accomplished a public trust.⁶⁷ The creation of a public trust, of course, has self-executing features enforceable in the courts.⁶⁸

Mandate to Agencies and Officers

Every agency, officer, political subdivision, and instrumentality of the Commonwealth operates under such limitations and guidelines as may be laid down by law, including provisions of the constitution as well as statutory law. Section 1 of Virginia's conservation article makes clear the Commonwealth's public policy toward the environment: to conserve, develop, and utilize natural resources, public lands, and historical sites and buildings, and to protect the atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of Virginia. This statement of public policy becomes a mandate directing state agencies, officers, subdivisions, and instrumentalities to consider the impact of proposed actions upon the Commonwealth's atmosphere, lands, waters, and other resources.

Illustrations of "public policy" acting as the standard for administrative conduct or judicial review are many. Familiar, of course, is the well understood concept of a court's refusal to enforce a contract found to be contrary to public policy.⁶⁹ More closely analogous to the effect on agency action of constitutional statements of public policy are the many instances when public policy as stated in an agency's own enabling act or in some other statute or constitution is taken to lay down a standard for agency actions.

It is common, especially where major or far-reaching objectives are

permissive language of section 2, language which, unlike the Commission's draft of section 1, does not purport to impose an affirmative duty of the Assembly to enact implementing legislation, but only to authorize it. *House Debates*, April 3, 1969, at 27 (reporter's unofficial transcription).

⁶⁶ *Senate Debates*, *supra* note 60, at 372, 373.

⁶⁷ *Id.* at 377. For a fuller discussion of this exchange, see text at notes 110-13 *infra*.

⁶⁸ On the applications of the public trust doctrine, see text at notes 128-32 *infra*.

⁶⁹ See, e.g., *Wallihan v. Hughes*, 196 Va. 117, 82 S.E.2d 553 (1954). Constitutions and statutes are a common, but by no means the exclusive, source of public policy in contracts cases. Corbin, *CONTRACTS* (One Volume Ed.) § 1375 at 1164 (1952).

at stake, for Congress to create the standards for agency action by means of a declaration of policy in the statute being enacted. Thus the standards for the delegation of power to the Interstate Commerce Commission in the Interstate Commerce Act of 1940 are contained in the "National Transportation Policy" which precedes it.⁷⁰ Even though such a statement of policy by its nature cannot be an explicit set of rules to govern each case, courts recognize the statement to be a self-executing standard by which the Commission is to be guided.⁷¹ Similarly the National Environmental Policy Act of 1969 begins with a statement of "policy" which is meant to be operative upon federal agencies.⁷²

In addition to the policy laid down in its own enabling legislation, it is well accepted that an agency must, in the proper situation, look to other statements of policy that bear on the matter at hand. As the Fifth Circuit Court of Appeals remarked in measuring the responsibility of the Corps of Engineers to consider conservation policies of other statutes before issuing a dredge and fill permit, "Governmental agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometimes effectuate and other times not thwart other valid statutory governmental policies."⁷³

Similarly, the Supreme Court has held that the ICC is not free to confine its attention solely to the National Transportation Policy, the Commission's immediate and specific guide, but must take into account also the policies of the antitrust laws. It does not matter that the Commission "has no power to enforce the Sherman Act as such"; where the Commission, in carrying out its own mandate, is faced with overlapping or even inconsistent policies embedded in other legislation "enacted at different times and with different problems in view," it cannot ignore the latter but must reconcile the different statutes.⁷⁴

Similarly the Federal Power Commission, though again not entrusted with the enforcement of the antitrust laws, must give the declared antitrust policy full weight in the Commission's decisions:

Thus, if it appears that Texas Eastern's project would tend to produce monopolization of a petroleum products market, the Commission can-

⁷⁰ 54 Stat. 899, 49 U.S.C. preceeding § 1 (1970).

⁷¹ See *Shaffer Transp. Co. v. United States*, 355 U.S. 83 (1957).

⁷² Section 101, 42 U.S.C. § 4331 (1970).

⁷³ *Zabel v. Tabb*, 430 F.2d 199, 209 (5th Cir. 1970).

⁷⁴ *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944).

not ignore that fact merely because it is an antitrust factor and such factors have been placed within the ken of the Attorney General. That he is specially competent as to the antitrust laws does not make all other officers or agencies of the Government incompetent Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right to consider a congressional expression of fundamental national policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity.⁷⁵

The Supreme Court of Virginia has also applied the principle that an agency may be obliged to consider public policy that is not explicitly dealt with in the statutes conferring powers or duties on that agency. For example, although the statute giving the State Corporation Commission the power to approve or disapprove forms for insurance policies⁷⁶ makes no reference to the State's antitrust laws, the Supreme Court of Virginia has upheld the Commission in disapproving a Blue Cross drug plan on the ground that it involved a violation of the antitrust laws.⁷⁷ In that case there was sufficient basis for the Commission's action in the statute's quite unspecific language that the Commission could disapprove forms which did "not comply with the requirements of the laws of this State."

It is most clear that a Virginia agency must observe the mandate of section 1 where the relevant enabling legislation requires the agency to consider the "public interest," "public convenience and necessity," or some like standard before acting.⁷⁸ By its own terms, section 1 lays down public policy for the "general welfare of the people of the Com-

⁷⁵ *City of Pittsburgh v. FPC*, 237 F.2d 741, 754 (D.C. Cir. 1956). See also *National Broadcasting Co. v. United States*, 319 U.S. 190, 223-24 (1943) (FCC-antitrust). The consideration of antitrust policy in regulatory agency decision-making is accepted to the extent that Richard Posner, professor of law at the University of Chicago, has recently suggested that the Antitrust Division of the Justice Department allocate more of its resources to arguing before agencies against those industry practices which violate antitrust policy. See Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500, 530 (1971).

⁷⁶ VA. CODE ANN. § 38.1-342.1 (1970).

⁷⁷ *Blue Cross v. Commonwealth ex rel. State Corp. Comm'n*, 211 Va. 180, 176 S.E.2d 439 (1970).

⁷⁸ See, e.g., VA. CODE ANN. § 5.1-98 (Supp. 1971) (licensing aircarriers); *id.* § 10-21.1 (1964) (discontinuance of state parks); *id.* § 15.1-486 (Supp. 1971) (zoning by city or county boards); Utility Facilities Act, *id.* § 56-265.3 (1969) (licensing development of public utility services); *id.* § 56-281.1 (1969) (licensing motor vehicle carrier operation on interstate highway system); § 62.1-88 (1968) (licensing construction of hydroelectric dams).

monwealth." An agency's action cannot therefore be in the "public interest" if no attention has been given, where relevant, to environmental consequences of the action.⁷⁹

Not all statutes, however, use explicit language such as "public interest" or a like standard as an admonitory cue for agency action.⁸⁰ But it is implicit in the character of public agencies that they are to act in the public interest and, in particular, that their acts are to be compatible with public policy as ordained by the Constitution. Even the State Corporation Commission, the only regulatory body created by the Constitution itself, is directed to exercise its powers "[s]ubject to the provisions of this Constitution."⁸¹

An agency must consider a range of public interests broader than the segment of the public which the agency serves or regulates. The U.S. Court of Appeals for the District of Columbia, in holding that environmental impact was to be considered as an element of "public interest" in licensing proceedings before the Civil Aeronautics Board considering a proposed helicopter service, stated, "No agency entrusted with determinations of public convenience and necessity is an island Its decisions affect not only its primary interest groups but also the general public at large."⁸² In a similar vein, the Supreme Court of Virginia

⁷⁹ For example, section 1 is to be read into the statute which authorizes the Governor to direct the discontinuance of any state parks when, in his judgment, the public interest so requires. VA. CODE ANN. § 10-21.1 (1964). Similarly, when a locality exercises the power given it to zone property to promote the health, safety, and general welfare of the public, VA. CODE ANN. §§ 15.1-486, -489 (Supp. 1970), that general welfare must be taken to include, not only such objectives as economic development, but also the environmental postulate of section 1.

⁸⁰ These may be divided into two classes; those in which no guidelines for agency determination are given—e.g., VA. CODE ANN. § 2.1-6 (Supp. 1971) (authorizing state departments to grant rights of way to public service companies with approval of the Governor); *id.* §§ 33.1-12(1), -18 (1970) (location of highway routes); *id.* § 37.1-11 (1970) (selection of sites for state hospitals); *id.* § 45.1-166 (1967) (licensing of strip-mining operations)—and those in which various factors for consideration are set out, but neither environmental interests nor "the public interest" are mentioned. See, e.g., *id.* § 2.1-64.8 (1966): The Virginia Industrial Building Authority is required to consider business prosperity and economic welfare of the state as criteria for making industrial loans. *Id.* § 5.1-8 (1966): The State Corporation Commission, in licensing the operation of commercial airports, is only required to consider safety factors.

⁸¹ VA. CONST., art. IX, § 2.

⁸² *Palisades Citizens' Ass'n, Inc. v. CAB*, 420 F.2d 188, 191 (D.C. Cir. 1969). *But see* *New Hampshire v. AEC*, 406 F.2d 170, 173 (1st Cir. 1969), which held that the standards of public health and safety in the Atomic Energy Act, although not limited by the Act itself, were limited by its legislative history only to considerations of radiation hazards; thus, environmental concerns could not be considered in the licensing of nuclear power plants. The enactment of the National Environmental

ruled that the State Corporation Commission, in considering an application by a common carrier, could not restrict its attention to the interests of that portion of the public living only along the route sought to be served. "The convenience and necessity of the entire public affected by the proposed [project] should be considered."⁸³

Section 1 does not tell an agency how to choose between conflicting factors such as economic development versus environmental impact. But it does require that, along with whatever factors (economic or otherwise) which by statute bear on an agency's decision, the agency must examine and weigh environmental consequences. Moreover, the agency must do so conscious of the fact that it is no ordinary statute, but the Commonwealth's fundamental law, which declares public policy as to natural resources and environmental amenities.

As section 1 first became effective in July 1971, there is no body of Virginia case law laying down guidelines for agencies, officials, and other bodies to follow in honoring the section's mandate.⁸⁴ Useful precedents may be found, however, in cases, most of which interpret federal statutes, where courts have fashioned rules for an agency to follow in taking environmental impact into account in the performance of its duty.

To begin with, section 1 places an *affirmative* duty on an agency to inquire into the environmental consequences of proposed actions. In *Scenic Hudson Preservation Conference v. FPC*,⁸⁵ plaintiffs challenged

Policy Act of 1969 has, of course, enlarged the environmental impact which the AEC must take into consideration. See *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, F.2d (D.C. Cir. 1971).

⁸³ *Jessup v. Commonwealth*, 174 Va. 133, 138, 5 S.E.2d 482, 484 (1939).

⁸⁴ After this law review article had been written, the Attorney General of Virginia rendered an opinion that the State's Water Control Law is to be construed and applied in light of article XI. The City of Richmond had proposed to use part of the historic James River and Kanawha Canal as a basin for retention and treatment of storm water overflows. Members of the public objected and sought a public hearing. The State Water Control Board enquired whether the scope of such a heading should be restricted to water quality or could extend to the historical values involved. The relevant statute, Va. Code Ann. §§ 62.1-44.2, 62.1-44.5, spoke of protecting water quality and reasonable uses of state waters but did not make express reference to preserving historic sites. The Attorney General ruled that the statute must be read in light of article XI and that therefore the question of what was a "reasonable and beneficial public use" of state waters included the "conservation, utilization and development of the Canal as an historical site." Opinion of Atty. Gen. Andrew P. Miller to A. H. Paessler, Exec. Secy, State Water Control Board, January 11, 1972.

⁸⁵ 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom.* *Consolidated Edison Co. v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966).

a Federal Power Commission order granting a license to the Consolidated Edison Company for construction of a pumped storage reservoir power project at Storm King Mountain on the Hudson River, an area of great natural beauty. Plaintiffs complained that the Commission had rejected their request to submit evidence on the feasibility of a gas turbine project which would make the Storm King plan unnecessary and that the Commission had failed to consider the feasibility of underground transmission lines. The Federal Power Act, in language far less specific than section 1, requires the FPC to determine whether a proposed project is "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes."⁸⁶ The United States Court of Appeals held that "recreational purposes" includes environmental and aesthetic considerations, and the Court reversed the Commission's licensing order because of the Commission's failure to delve into alternatives such as those posed by plaintiffs. Said the Court, "The Commission has an affirmative duty to inquire into and consider all relevant facts."⁸⁷

In light of article XI's statement of public policy, the decision-maker is not entitled to weigh alternatives solely in economic terms, though cost will of course be a major factor. Environmental impact must be taken into account. Suggestive is a New Jersey decision involving the effort of a gas transmission company to condemn for pipeline purposes privately owned land maintained as a wildlife preserve. The Supreme Court of New Jersey ruled that existence of an alternative route which would avoid damage to the wildlife preserve was, along with the cost of various routes, material to deciding whether the condemnor's decision should be held to be arbitrary. "The public service," observed the court, ". . . cannot be evaluated adequately only in dollars and cents." The court added that although it might not have the authority to command the alternative, this did not preclude rejection of the original proposal.⁸⁸

Among the alternatives to be considered is that no project at all be undertaken. The United States Supreme Court made this clear in *Udall*

⁸⁶ Federal Power Act § 10(a); 16 U.S.C. § 803(a) (1964).

⁸⁷ 354 F.2d at 620.

⁸⁸ *Texas E. Transp. Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 273, 225 A.2d 130, 137 (1966).

v. FPC,⁸⁹ which involved a challenge to the Commission's licensing of an electric power project on the Snake River. As the Court put it, "We cannot assume that the [Federal Power] Act commands the immediate construction of as many projects as possible."⁹⁰

Moreover, fidelity to section 1's mandate requires evaluation of the long-range, as well as short-range, environmental effects of a project. This concept is illustrated by *Citizens' Committee for the Hudson Valley v. Volpe*,⁹¹ involving the Department of Transportation Act, which contains a conservation statement similar to that in article XI, section 1.⁹² In that case plaintiffs challenged the issuance by the Army Corps of Engineers of a permit to New York State to fill a portion of the Hudson River as part of a highway project. Plaintiffs argued that the fill would constitute a "causeway" and therefore under the Act require the Corps to get the consent of the Secretary of Transportation before issuing the permit. The court ruled that the fill was not a causeway; however, the court observed that a subsequent stage in the work would involve a causeway farther along the highway. If the Secretary's approval for the causeway was not sought until the fill had been undertaken, millions of dollars would have been spent and the Secretary would be faced with a *fait accompli*. Such a "piecemeal approach," the court believed, would frustrate the purpose of the Act to conserve natural resources.⁹³

The impact of section 1's statement of a public policy toward environmental quality is not confined to requiring an agency to do more than it might otherwise do; such a constitutional declaration gives additional backing to the actions of agencies whose statutory mandate it is to police the environment, such as the Water Control Board and the Air Pollution Control Board. The special place that the Constitution now gives to environmental quality among the values which guide public action will be relevant in defending an agency's action against the charge, say by one who is ordered to conform to anti-pollution stand-

⁸⁹ 387 U.S. 428 (1967).

⁹⁰ 387 U.S. at 449.

⁹¹ 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970).

⁹² It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.
49 U.S.C. § 1651(b)(2) (1970).

⁹³ 302 F. Supp. at 1090. Similarly, the *Scenic Hudson* court required that "[t]he totality of a project's immediate and long-range effects" be considered in a licensing proceeding. 354 F.2d at 620.

ards promulgated by an agency, that the agency has acted too vigorously or imposed standards which are too stringent. For example, a court reviewing a challenge to standards promulgated by the Water Control Board on the ground that the standards are "unreasonable, arbitrary, capricious, and not in the public interest,"⁹⁴ must consider article XI's declaration of public policy as bearing heavily upon the question of reasonableness.⁹⁵

While duties of decision-makers to take environmental consequences into effect may be drawn in general terms from article XI, the constitutional provision is not on the order of an environmental statute; such as the National Environmental Policy Act of 1969. That statute mandates specific procedures to be followed, notably the requirement that a federal agency proposing a major action with significant environmental impact must issue an environmental impact statement under section 102 (2) (C) of the Act, must obtain comments from other agencies, and must make its impact statement and the comments public.⁹⁶ By contrast, article XI simply declares public policy; it does not specify particular procedural mechanisms by which that policy is to be achieved. As is so common with the judicial enforcement of constitutional provisions, a court faced with an article XI case would have to fashion a remedy appropriate to that particular case. As indicated above, the thrust of such a remedy would be to disclose and articulate the process which resulted in the governmental decision, including the efforts for ascertainment and measurement of environmental impact and the assessment of alternatives. If it is thought desirable to require as a matter of course specific procedural mechanisms, such as an environmental impact statement, legislation would be necessary,⁹⁷ since the remedy to be implied under article XI will turn on the court's view of the circumstances and so may vary from one situation to another.

Judicial Review

By requiring agencies to consider environmental factors, section 1 of

⁹⁴ VA. CODE ANN. § 62.1-44.24(2) (Supp. 1971).

⁹⁵ VA. CODE ANN. § 62.1-44.2 (Supp. 1971) declares that it shall be the policy of the Commonwealth to "reduce existing pollution, in order to provide for the health, safety, and welfare of the citizens of the Commonwealth." Article XI should go a long way toward undermining the judicial interpretation, heavily weighted toward economic factors, of the equivalent language in the former version of the Water Control Law in *American Cyanimid Co. v. Commonwealth*, 187 Va. 831, 839-40, 48 S.E. 279, 284 (1948).

⁹⁶ 42 U.S.C. § 4332(1)(C).

⁹⁷ See, e.g., 1972 Va. Acts ch.652, enacting VA. CODE § 56-46.1 (procedures for SCC transmission line approval).

article XI provides a significant basis for judicial review of agency actions.⁹⁸ This is not to say that section 1 creates for courts new power to substitute their judgment for that of the agency,⁹⁹ nor does section 1 affect the presumption of reasonableness and validity which attaches to an agency's exercise of discretion.¹⁰⁰ Rather, the section adds environmental factors to the judicially-enforceable checklist of considerations that agencies must include in their decision-making processes.¹⁰¹ Thus, an agency's action taken without consideration of the relevant environmental impact may be reversed and remanded.¹⁰² However, if the court makes the initial determination that the agency has in fact considered environmental impact, then the scope of the court's power of review is the same as it was before article XI was adopted.

To insure that courts can accurately determine what factors agencies have considered, agencies must provide adequate records of their determination proceedings. Courts, in enforcing statutorily required environmental considerations, have encouraged the provision of such records by presuming that relevant factors not reflected in the record were not considered by the agency.¹⁰³

Section 1 also bears on the burden of proof in reviewing agency actions. In Virginia, a consequence of the presumption of the validity of an agency decision is that the burden of showing grounds for the court to overturn such a decision is placed upon the one who challenges

⁹⁸ Courts have always had the power to overturn agency actions which are arbitrary, capricious, or in violation of constitutional provisions. Virginia Administrative Procedure Act, VA. CODE ANN. §§ 9-6.9(b) (1964) (rules), -6.13(g) (1964) (contested cases). This proposition also appears in case law independent of the Administrative Procedure Act. See, e.g., Virginia Mfrs. Ass'n v. Workmen's Comp. Insp. R. Bur., 205 Va. 535, 138 S.E.2d 12 (1964); City of Norfolk v. Virginia Elec. & Power Co., 197 Va. 505, 90 S.E.2d 140 (1955).

⁹⁹ The general rule is that such matters are unreviewable unless some abuse of discretion can be found. Board of Zoning Appeals v. Fowler, 201 Va. 942, 114 S.E.2d 753 (1960); Board of Zoning Appeals v. Combs, 200 Va. 471, 106 S.E.2d 755 (1959).

¹⁰⁰ See Atlantic Greyhound Corp. v. Commonwealth, 196 Va. 183, 83 S.E.2d 379 (1954), dealing with the rule of presumptive correctness of agency determination as applied to the State Corporation Commission by Const. of 1902, § 156(f).

¹⁰¹ Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. *These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of relevant factors.*

Scenic Hudson Pres. Conf. v. FPC, 354 F.2d 608, 621 (2d Cir. 1965), quoting Michigan Consol. Gas Co. v. FPC, 283 F.2d 204, 226 (D.C. Cir. 1960) (emphasis supplied).

¹⁰² VA. CODE ANN. §§ 9-6.9(b), -6.13(g) (1964). Cf. Texas E. Transp. Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 225 A.2d 130 (1966).

¹⁰³ Udall v. FPC, 387 U.S. 428, 439, 449-50 (1967); Scenic Hudson Preservation Conf.

it.¹⁰⁴ In applying this rule, however, the Supreme Court of Virginia looks to the record of the agency proceedings to see whether the presumption is warranted in a particular case.¹⁰⁵ When the record reveals the arbitrary nature of an agency decision, the court will not hesitate to overrule that decision.¹⁰⁶ In cases where the record fails to disclose evidence that an agency considered the constitutionally required environmental policy, the court should rule that the challenger has met the initial burden of showing arbitrary or unconstitutional action. The agency, of course, could rebut by presentation of further evidence at trial. Such shifting of the burden of going forward with the evidence would not undercut the presumptive validity of agency actions where the relevant factors have been considered; it would simply give effect to section 1 by requiring the agency to make out an adequate record for purposes of review.

Public Trust and Restraints on Governmental Action

The potential extent of negative enforcement of article XI is most readily understood in terms of the well-established doctrine of public trust. Down through the years in England and America courts have developed a body of public trust law founded on the proposition that there are some kinds of property, such as navigable waters, which the state holds in trust for the people generally and therefore there are some rights, such as rights of navigation, which even the Legislature cannot destroy or give away.¹⁰⁷ The leading case is *Illinois Central*

v. FPC, 354 F.2d 608, 612 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). Cf. VA. CODE ANN. § 9-6.2 (1950), which provides that for an order in a contested case to be valid, it must be "reduced to writing and contain the explicit findings of fact and conclusions of law upon which the decision of the agency is based. . . ."

¹⁰⁴ *Richmond, F. & P. R.R. v. Commonwealth*, 203 Va. 294, 124 S.E.2d 206 (1962); *Board of Zoning Appeals v. Combs*, 200 Va. 471, 106 S.E.2d 755 (1959).

¹⁰⁵ *Board of Zoning Appeals v. Fowler*, 201 Va. 942, 114 S.E.2d 753 (1960); *Hopkins v. O'Meara*, 197 Va. 202, 89 S.E.2d 1 (1955).

¹⁰⁶ E.g., *Tidewater Util. Corp. v. Norfolk*, 208 Va. 705, 160 S.E.2d 799 (1968); *C & C, Inc. v. Semple*, 207 Va. 438, 150 S.E.2d 536 (1966).

¹⁰⁷ See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Bernard S. Cohen, "The Constitution, The Public Trust Doctrine, And The Environment," 1970 UTAH L. REV. 388. Illustrative of the kinds of state property or natural resources which may be encompassed by the public trust doctrine are tidelands, navigable waters, and parklands. And suggestive of the variety of public interests which may be conceived as being at stake is a law review note cataloguing ten categories of interests in tidal areas alone which at one time or another have been claimed to be protected under the public trust. These include navigation, free passage, commerce, fishing, sand and stones, seaweed

R.R. v. Illinois,¹⁰⁸ in which the Supreme Court upheld the repeal by the Illinois Legislature of an earlier grant made to the Illinois Central Railroad of approximately 1,000 acres of submerged land in Chicago harbor, extending a mile into Lake Michigan. The Court reasoned that the State held the underwater property in trust for the people of Illinois and so could not, consistent with that trust, abdicate control of the entire harbor to a private interest in negation of the public use of that property.

Although section 1 does not use the specific words "public trust,"¹⁰⁹ it nevertheless establishes such a trust. During the 1969 special session, Senator Howell proposed that language be added to the conservation article stating that the "open lands and waters" owned by the Commonwealth were to be held in trust for the benefit of the people of the Commonwealth and could not be leased, rented, or sold except by act of the General Assembly.¹¹⁰ Senator Brault, the floor sponsor of the conservation article in the Senate, opposed the amendment on the ground that the committee's version of section 1 made the amendment proposed by Senator Howell unnecessary. Quoting the language of section 1, Senator Brault concluded, "[t]hat is certainly holding public lands and waters in trust."¹¹¹ After objections by other senators,¹¹² the Howell amendment was rejected.¹¹³

and shells, bathing and recreation, conservation and aesthetics, and the "public interest." See Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 *YALE L.J.* 762, 777-87 (1970).

¹⁰⁸ 146 U.S. 387 (1892).

¹⁰⁹ The only explicit public trust language appears in section 3. See note 55 *supra* and accompanying text.

¹¹⁰ *Senate Debates*, p. 375.

¹¹¹ We are certainly in agreement with what the amendment proposed by Senator Howell says. But we think that Section 1 of the proposed Article XI says just exactly that, "it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands," and so on. And then it goes on, "for the benefit, enjoyment, and general welfare of the people of the Commonwealth." That is certainly holding public lands and waters in trust. We do not believe that the public lands and waters of the Commonwealth can be disposed of except by an act of the General Assembly, so we do not believe that this proposal of Senator Howell accomplishes anything.

Id., p. 377 (Brault).

Likewise the House General Laws Committee, in reporting that committee's version of Article XI to the floor of the House, described in the comparable language of "benefit" the public trust enunciated by section 1: "The final clause of Section 1 is intended to make clear that the conservation, development or utilization of the natural resources, public lands, and historical sites of the Commonwealth, and the protection of its atmosphere, lands, and waters must be for the benefit of the people of the Commonwealth." Report of House General Laws Committee Setting Forth Committee

The public trust doctrine as it exists in Virginia is concerned with the power of the Legislature or other governmental bodies to alienate certain rights of the public. At English common law, there were two aspects of the King's ownership of the lands and waters of the realm. The King as proprietor could convey his domain as could any private owner. The King as sovereign, however, was bound to use his lands and waters consistently with the public interest. Thus where rivers, tidal waters, or their beds were concerned, this interest included public rights of navigation, travel, and fishing. Although the King as proprietor could convey a river bed, the public could not be deprived of the right to fish in or navigate upon the waters. These rights the King held in trust for the people. His interests as proprietor were deemed the *jus privatum*, his sovereign interests the *jus publicum*. Although the King could convey the *jus privatum*, the *jus publicum* could never be alienated.¹¹⁴

Virginia's version of the public trust doctrine is based on this same distinction.¹¹⁵ The leading case defining the inalienable rights incident to the *jus publicum* is *Commonwealth v. Newport News*.¹¹⁶ In that case the City of Newport News, pursuant to legislation enacted by the General Assembly, was discharging raw sewage into a tributary of Hampton Roads. The Commonwealth brought suit to halt this discharge and to enjoin construction of yet another sewage line by the city, charging that the pollution had destroyed the rights of fishing and bathing in the affected waters. The Commonwealth invoked the public trust doctrine, but the court ruled that the rights of fishing and bathing advanced by the Commonwealth were not protected by the public trust doctrine and therefore no injunction lay.

The court expressly recognized as valid in Virginia the traditional

Intent in Reporting Out Proposed New Article XI on Conservation (April 3, 1969), p. 3.

¹¹² Some senators objected to the burden which would be placed upon the General Assembly if that body were obliged to act every time public waters were interfered with in any way, for example, by a riparian owner's construction of a pier. *Id.* at 376 (Echols), 377 (Campbell), 377-78 (Fears).

¹¹³ *Id.* at 378.

¹¹⁴ See Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Waters* in 1 WATERS AND WATER RIGHTS § 35.2 at 180-83 (R. Clarke, ed. 1967); Illinois Cent. Ry. v. Illinois, 146 U.S. 387 (1892).

¹¹⁵ The British Common law continues to be in effect in the Commonwealth where not repugnant to the constitution, and except as altered by the General Assembly. VA. CODE ANN. § 1-10 (1950).

¹¹⁶ 158 Va. 521, 164 S.E. 689 (1932).

distinction between *jus publicum* and *jus privatum*. While the State could dispose of the *jus privatum* in any way it saw fit,

The *jus publicum* and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the State. Therefore by reason of the object and purposes for which it was ordained, the Constitution impliedly denies to the legislature the power to relinquish, surrender, or destroy, or substantially impair the *jus publicum*¹¹⁷

But the court held that the right of the public to use the tidal waters for fishing and bathing was an incident of the *jus privatum*. It based its holding on the view that the rights asserted were essentially private in nature, enjoyed individually rather than collectively.¹¹⁸

The breadth of the *jus publicum* changes with time and with the evolving values which society places on certain activities. Fishing, once an important right at British common law as well as in much American public trust decisional law,¹¹⁹ was not viewed by the Virginia court in 1934 as having that fundamental "public" character. By contrast, the same court believed "there is much more reason" for holding the right of navigation to be grounded in the *jus publicum* because of the relation it bears to the right to move freely from place to place.¹²⁰ There are other instances in Virginia case law in which certain rights or uses have been elevated to the status of *jus publicum* and the power of the Legislature to curtail such uses has been limited by the court. For example, in an era when the water-driven mill was important to the economy of Virginia, the court overturned a state statute which would have required several mills to cease operation because of their effect upon navigation of small rivers.¹²¹ The *Newport News* court followed the lead of several earlier Virginia decisions¹²² in declaring the right of sewage disposal an incident of the *jus publicum*.¹²³

Section 1 of article XI, by proclaiming Virginia's public policy on the environment, makes the protection of the Commonwealth's natural

¹¹⁷ *Id.* at 546, 164 S.E. at 697.

¹¹⁸ *Id.* at 551, 164 S.E. at 698.

¹¹⁹ *E.g.*, *Illinois Cent. Ry. v. Illinois*, 146 U.S. 387 (1892).

¹²⁰ 158 Va. at 550, 164 S.E. at 698.

¹²¹ *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245 (1828).

¹²² *E.g.*, *Darling v. Newport News*, 123 Va. 14, 96 S.E. 307 (1918); *Hampton v. Watson*, 119 Va. 95, 89 S.E. 81 (1916).

¹²³ 158 Va. at 554, 164 S.E.2d at 699.

resources, public lands, and historical sites part of the *jus publicum* in Virginia. The language of the section underscores the public nature of the environmental objectives involved. Under the doctrine of *Newport News*, the legislature is bound to observe the public's interest in those rights found to be part of the *jus publicum*:

The legislature may not by the transfer, in whole or in part, of the proprietary rights of the State in its lands and waters relinquish, surrender, alienate, destroy, or substantially impair the exercise of the *jus publicum*. Or, to state it differently, the legislature may not make a grant of a proprietary right in or authorize, or permit the use of, the public domain, including the tidal waters and their bottoms, except subject to the *jus publicum*.¹²⁴

There is a more direct way to state the relation between the court's reasoning in *Newport News* and the public trust effected by the Virginia Constitution. In *Newport News* the Court said:

Both clarity of thinking and correctness of conclusion will be promoted by coming directly to the real question, which is, has the State Legislature the power to take away, destroy, or substantially impair the use by the people of tidal waters or their bottoms for the purpose under consideration? This question must in turn be determined by these two questions: (1) Does the State Constitution expressly or impliedly give or guarantee to the people the right to use them for such purposes? If so, it impliedly denies to the Legislature the power to take away, destroy, or substantially impair such right. (2) Does the State Constitution expressly or impliedly deny to the Legislature the power to take away, destroy, or substantially impair the use thereof by the people for such purposes, If so, it impliedly gives and guarantees to the people the right to use them for such purposes. The whole question resolves itself into a question of the construction of the State Constitution.¹²⁵

The 1971 Virginia Constitution answers these questions in favor of the people. As Senator Brault made clear on the floor of the Senate, section 1's language is to be read as effecting a public trust in Virginia's natural resources and public lands. Moreover, section 2 reinforces the public trust created in section 1 by providing that the General Assem-

¹²⁴ *Id.* at 547, 164 S.E. at 697.

¹²⁵ *Id.* at 544-45, 164 S.E. at 696.

bly's legislation touching conservation and development of natural resources shall be "in the furtherance of such policy." Thus the power conferred upon the Assembly is to be construed as authorizing measures which promote, rather than thwart, such public policy. As the U.S. Supreme Court observed in the *National Prohibition Cases*, the second section of the Eighteenth Amendment (giving Congress and the states concurrent power "to enforce this article by appropriate legislation") "does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means."¹²⁶

There is a body of American case law to which the Virginia courts can look in applying the public trust aspects of article XI. Courts have not used the doctrine to impose a general prohibition on the disposition of trust properties; rather, courts have fashioned devices such as restrictive interpretation of grants affecting such properties. This is not the place to attempt a full exposition of the public trust doctrine;¹²⁷ a few illustrations will suffice to suggest the uses to which the doctrine has been put in other states.

(1) In the leading public trust case, *Illinois Central R.R. v. Illinois*,¹²⁸ the court held that a state may not divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power, as the legislature in that case had done by abdicating its authority over navigation.

(2) Courts applying the doctrine look with skepticism on governmental action which reallocates public resources to more restricted uses, yields state authority over those resources, or subjects public uses to private interests or profits.¹²⁹ Although a court is not likely to place an outright ban on legislative power to dispose of the public trust, it may devise a presumption that a state does not ordinarily intend to divest normal public uses of public trust property.

(3) A court may put the burden on a government agency to show

¹²⁶ 253 U.S. 350, 386-87 (1920).

¹²⁷ For a full discussion, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970), on which the illustrative applications of the public trust doctrine discussed in the text are based.

¹²⁸ 146 U.S. 387 (1892).

¹²⁹ *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966) (invalidation of state lease of parkland to skilift corporation). Cf. the rule, which obtains in Virginia as in other jurisdictions, that when private property is being condemned, the question whether the use for which it is taken is a "public use" is a judicial question. See *Inlet Auth. v. Bastian*, 206 Va. 906, 909, 147 S.E.2d 131, 134 (1966) and cases there cited.

specific, overt legislative approval for any invasion of the public trust.¹³⁰

(4) A court may require that enabling legislation specify the particular public trust land and show an awareness of the public use.¹³¹

(5) Courts may use the doctrine to disallow the delegation by the legislature of certain types of power to other bodies.¹³²

Courts show an obvious reluctance to limit the legislature's ultimate power to act in derogation of the public trust, though the cases reveal judicial willingness to use such devices as the strict construction of statutes dealing with the public trust. Moreover, courts are properly reluctant to substitute their own judgment for a legislative determination on the proper balance between the public uses encompassed by the public trust and other public interests. But the devices, such as those described above, employed in the public trust cases can be useful in shifting decisions affecting the public trust to more visible and responsible forums, notably the legislature itself, and in requiring that actions taken touching the public trust be taken in such a way as to focus critical attention upon the implications for the public trust.

Standing

One critical question is left unanswered by article XI: what is the role of private citizens in enforcing the constitutionally guaranteed environmental protection? The Commonwealth's courts in adjudicating suits to enforce the guarantee, will have to rule on the threshold question of whether or not various plaintiffs have standing to sue to enforce the public rights and administrative duties implicit in article XI.

In Virginia citizens have several methods by which to seek judicial review of actions taken by a public body. The enabling legislation of some administrative agencies sets out the procedures and requirements

¹³⁰ *Sacco v. Department of Pub. Works*, 352 Mass. 670, 227 N.E.2d 478 (1967).

Devices such as requiring a showing of specific legislative intent to dispose of or otherwise to affect public trust property have familiar analogies, for example, in the rule requiring a clear showing of legislative intent before one public service corporation will be allowed to condemn property held by another such corporation. See *Great Falls Power Co. v. Great Falls & Old Dominion R.R.*, 104 Va. 416, 52 S.E. 172 (1905). There is authority for the same rule's being applied when one state agency or authority attempts to take land of another such agency or authority. See *Commonwealth v. Massachusetts Tpke Auth.*, 346 Mass. 250, 253-254, 191 N.E.2d 481, 484 (1963) (intention must be "unequivocally expressed").

¹³¹ *Robbins v. Department of Pub. Works*, 355 Mass. 328, 244 N.E.2d 577 (1969).

¹³² *Muench v. Public Service Comm'n*, 261 Wis. 492, 53 N.W.2d 514, *rehearing*, 261 Wis. 515c, 55 N.W.2d 40 (1952).

for obtaining review.¹³³ In other instances, one may resort to the General Administrative Agencies Act.¹³⁴ Generally under these statutes a citizen challenging an agency's action must show that he is "aggrieved" by that action.

Virginia cases reveal that the concept of being "aggrieved" is dynamic, responding to the continued evolution of notions of standing. At one time or another Virginia courts, typically in the context of taxpayers' suits, have equated "aggrieved" with a finding of an injury "peculiar" to the petitioner,¹³⁵ or with a "direct injury."¹³⁶ More recent cases take a more generous view of the question of standing. For example, a taxpayer may sue to prevent unauthorized government expenditure¹³⁷ even though the individual taxpayer's proportionate monetary stake in the expenditure might be very small.

Notions of standing vary with the context of the case.¹³⁸ Thus, in answering standing questions, courts should consider the purposes of article XI and the interests meant to be protected. Recent court decisions dealing with standing under statutes similar to the Virginia statutes discussed above have held that groups exhibiting a greater concern for environmental protection than the general citizenry are "aggrieved" within the meaning of the statutory language where they seek to challenge agency action on environmental grounds.¹³⁹ Where courts have discerned from the language of a statute a public interest in environmental protection, they have reasoned that this interest may best be served by allowing review by "those who by their activities and conduct have exhibited a special interest in such areas."¹⁴⁰

¹³³ See, e.g., of special concern to the environmentalist, VA. CODE ANN. § 62.1-44.29 (Supp. 1970) (review of actions of State Water Pollution Control Board); VA. CODE ANN. § 12-63 (1964) (appeals from actions of State Corporation Commission).

¹³⁴ VA. CODE ANN. § 9-6.1 *et seq.* (1964).

¹³⁵ Nicholas v. Lawrence, 161 Va. 589, 171 S.E. 673 (1933).

¹³⁶ Virginia Ass'n of Ins. Agents v. Commonwealth, 201 Va. 249, 110 S.E.2d 223 (1959).

¹³⁷ Gordon v. Board of Supervisors, 207 Va. 827, 153 S.E.2d 270 (1967).

¹³⁸ See, e.g., Flast v. Cohen, 392 U.S. 83 (1968).

¹³⁹ E.g., Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083, 1092 (S.D.N.Y. 1969), *aff'd*, 425 F.2d (2d Cir. 1970); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971). The term "aggrieved" has been interpreted to include "nonprofit conservation and other eleemosynary associations." White Lake Improvement Ass'n v. City of Whitehall, 22 Mich. App. 262, 177 N.W.2d 473, 480 n.23 (1970). See generally Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458, 470-71 n.67 (1970).

¹⁴⁰ Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1970).

A more direct approach is the "injury in fact" test articulated by the United States Supreme Court. The Court has granted standing to plaintiffs who could allege that the challenged action has caused "injury in fact, economic or otherwise," and that the interest sought to be protected is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."¹⁴¹ Article XI of the Virginia Constitution creates such a "zone of interest" embracing the citizens' interest in environmental protection and historic preservation.¹⁴² As the Supreme Court of Illinois said in a suit grounded upon a public trust argument:

If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them they must wait upon governmental action is often an effectual denial of the right for all time.¹⁴³

Where public interests are at stake, it is natural to interpret language such as "person aggrieved" to give standing to those who would vindicate those public interests.¹⁴⁴ Thus the United States Supreme Court construed "person aggrieved" in the Communications Act to include a competitor of the party seeking a radio license even though the Act was not aimed at controlling competition.¹⁴⁵ The Court reasoned that competitors would be the most likely to have sufficient interest to bring errors of law to the attention of the appellate court. More recently, Judge (now Chief Justice) Burger held that a listener group which had suffered no economic or competitive injury had standing to challenge

¹⁴¹ *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152, 153 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

¹⁴² A federal court in Virginia has held that the policy statements of the National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331 (1970), and the National Historic Sites Act, 16 U.S.C. § 470 (1968), statements similar to the language of Virginia's Article XI, have created such a "zone of interest" where suits against federal agencies are concerned. *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971) *rev'd on other grounds* 523 F.2d 1041 (4th Cir. 1971). See also Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 248 (1970).

¹⁴³ *Paepeke v. Public Bldg Comm'n*, 46 Ill.2d 330, 341, 263 N.E.2d 11, 18 (1970).

¹⁴⁴ This entails rejecting the "non sequitur that where all are the intended beneficiaries of an interest, none has standing to protect it." Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 248 (1970).

¹⁴⁵ *FCC v. Sanders Radio Station*, 309 U.S. 470 (1940).

the renewal of a license by the FCC.¹⁴⁶ In each such case the rationale was, as Judge Burger put it, "to vindicate the broad public interest relating to a licensee's performance of the public trust inherent in every license."¹⁴⁷

Relevant statutes governing review of agency actions vary in their specific language. In addition to those which use the language of person "aggrieved," there are statutes which require that a person seeking review be a "party" to agency action¹⁴⁸ or an "owner."¹⁴⁹ But in every case the statutory language is to be read in light of the public interest declared in article XI so that rules of standing will be fashioned and applied in such a way as to vindicate that interest.

A challenge to agency rule-making, as distinguished from adversary proceedings, would likewise bring into play the public policy declared in article XI. For example, where the challenge is brought under Virginia's General Administrative Agencies Act, the standing question of who is a "person who might be adversely affected" by the enforcement of the rule must be resolved in light of article XI's mandate.¹⁵⁰

Another avenue of access to the courts is through a writ of mandamus.¹⁵¹ Many states allow plaintiffs suing merely as citizens, without sufficient title or interest to prevail in their own right, to secure relief through similar writs.¹⁵² Virginia has never specifically allowed such actions.¹⁵³ In mandamus cases the Supreme Court of Virginia regularly states three requirements which a plaintiff must meet: there must be a "clear legal right" in the plaintiff to the action sought, there must be a "clear duty" in the public body to take that action, and the act to be performed must be "ministerial," that is, not within the discretion of the public body.¹⁵⁴ The controlling factor in such cases is characteristically

¹⁴⁶ *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 944 (D.C. Cir. 1966).

¹⁴⁷ 359 F.2d at 1006.

¹⁴⁸ E.g., VA. CODE ANN. § 12-63 (1964).

¹⁴⁹ E.g., *Id.* §§ 10-17.23:1, 62.1-44.29 (Supp. 1971) (state air and water pollution control laws).

¹⁵⁰ VA. CODE ANN. § 9-69 (1952).

¹⁵¹ *Id.* §§ 8-704 through 8-714 (1957). Yet another vehicle is the Declaratory Judgment Act. VA. CODE ANN. §§ 8-578 *et seq.* (1957).

¹⁵² See Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1276-77 nn. 44, 45 (1961).

¹⁵³ Professor Jaffe seems undecided about Virginia's status where citizen mandamus is concerned; Virginia does not appear on either of his lists. *Ibid.*

¹⁵⁴ See, e.g., *Stroobants v. Fugate*, 209 Va. 275, 163 S.E.2d 192 (1968); *Legum v. Harris*, 205 Va. 99, 135 S.E.2d 125 (1964); *Richmond-Greyhound Lines v. Davis*,

the factor of agency discretion. For example, in *Board of Education v. Carwile*,¹⁵⁵ plaintiff sought to compel the Board to remove certain names from its list of those eligible to be superintendent of schools. The court did not indicate that plaintiff had any interest in the matter other than as representative of the public. Instead, the court focused exclusively on the Board's discretion to set qualifications of local school superintendents. Finding such discretion, the court denied the writ.¹⁵⁶ In effect the court seems to be saying that where agency discretion is present, the clear legal right and corresponding duty do not exist. By parity of reasoning, where discretion does not exist, the other two factors are present.

Under article XI, it is no longer within the discretion of a public body to act without considering the effect of that action upon natural or historical resources. In other words, article XI creates a "clear legal right" in the public to have its natural and historical resources protected as well as a corresponding duty for government bodies.

Conferring standing on members of the public to challenge agency actions as conflicting with the interests protected by article XI does not absolve agencies and officers of their decision-making duty and responsibility. The availability of judicial review does not, for example, undercut the doctrine of primary jurisdiction and the requirement of the exhaustion of administrative remedies.¹⁵⁷ Agencies and officers will continue to exercise their expertise, and courts will respect that expertise. Nevertheless, article XI of Virginia's constitution provides the means to insure that, as government agencies make decisions, they give full due to the public interest accorded constitutional status by that article.

* * * * *

A theme Thomas Jefferson often developed, and one which he explicitly applied to the revision of constitutions, was: "The earth belongs always to the living generation."¹⁵⁸ He meant, of course, that while the

200 Va. 147, 104 S.E.2d 813 (1958). The cases also note that mandamus is an extraordinary writ, granted only when no other remedy is available.

¹⁵⁵ 169 Va. 663, 194 S.E. 855 (1938).

¹⁵⁶ Similarly, see *Richmond Greyhound Lines v. Davis*, 200 Va. 147, 104 S.E.2d 813 (1958).

¹⁵⁷ See, e.g., *Sierra Club v. Hardin*, 2 ER 1385 (D. Alaska 1971); *Audubon Society v. Johnson*, 1 ER 1709 (S.D. Texas 1970); *White Lake Improvement Ass'n v. Whitehall*, 22 Mich. App. 262, 177 N.W.2d 473 (1970).

¹⁵⁸ Letter to James Madison, Sept. 6, 1789, in 15 *Jefferson Papers* 395-96 (Boyd ed.). For Madison's development of the idea, see his letter to Jefferson, Feb. 4, 1790, in 16 *id.* at 146-54.

present generation of men may venerate the wisdom of their forebears they must adapt that heritage to the needs of their own time. Had Jefferson lived in this time of environmental concern, he might have amended his adage to say, "The earth belongs always to the living generation—and to generations unborn." This would recognize the fiduciary obligation which those who today inhabit the earth owe to those who will come after.

From this perspective, it is fitting that revisors of state constitutions—documents less evanescent than statutes and therefore more likely to reflect evolving fundamental values—so often place environmental quality alongside the precepts of the original framers. Virginia's new Constitution is an example of this trend, and what has been said in this article about Virginia's Constitution has broader application.

The constitution and laws of each state will, of course, have their own peculiarities; but they have much in common. The preceding discussion of the Virginia Constitution suggests that those who pursue legal solutions to environmental problems might make better and fuller use of their state constitutions—a sometimes overlooked, but potentially significant, weapon in the environmental armory.

A constitution, whether state or national, is the ultimate repository of a people's considered judgment about basic matters of public policy. When the framers of a constitution elevate environmental quality to the stature of a constitutional postulate, then officials, courts, and citizens alike should repair to that standard.