REINVIGORATING THE VIRGINIA CONSTITUTION'S ENVIRONMENTAL PROVISION

Tyler Demetriou[*]

Fifty years ago, Virginia enacted a new constitution. The constitution's framers, recognizing that environmental threats would be among the most significant problems facing Virginia in future decades, included Article XI, the state's first comprehensive environmental constitutional provision. Article XI made natural resource conservation a stated policy of the Commonwealth and ensured that Virginia's legislature could implement that policy. The framers intended Article XI as a "mandate"—a self-executing means to ensure that state officials accounted for environmental impacts in all decisions, and a recognition that Virginia's land and waters were held in trust for its citizens.

Fifty years later, those lofty goals have not been achieved. Virginia's Supreme Court swiftly found that Article XI is not self-executing and imposes no specific procedural or substantive requirements upon state actors. These cabined interpretations of Article XI remain good law. But that has not stopped Virginia from enacting legislation to protect the environment, including recent measures to combat climate change and promote environmental justice—issues that were not on the framers' minds when they wrote Article XI.

This Note argues that despite these recent pro-environment developments, Virginians would benefit from stronger constitutional protection for their environment. I suggest arguments that litigants in Virginia courts should make to reinvigorate Article XI, and I briefly explore potential constitutional amendments that might better guarantee environmental protection than Article XI in its current form. Constitutional environmental rights cannot alone solve the drastic environmental threats facing Virginia this century, but stronger constitutional protections could make a substantial difference.

---

[*] University of Virginia School of Law, J.D. expected 2022. I am deeply grateful to Professor A.E. Dick Howard for guiding my research and laying the groundwork for many of the ideas explored in this Note. I would also like to thank Tallulah Tepper for her substantive suggestions and the members of the Virginia Environmental Law Journal—especially Pallavi Javor, Raelissa Glennon-Zukoff, Kevin Breiner, and Maggie Woodward—for their excellent edits. Finally, thank you to Kate and Penny, for everything.

INTRODUCTION

In 1968, Virginia Governor Mills E. Godwin, Jr. appointed a Commission on Constitutional Revision to make recommendations for a new post-Jim Crow state constitution.[1] This commission recognized that

[1] A.E. Dick Howard, *Virginia's 1902 Constitution: The Era of Disenfranchisement*, RICHMOND TIMES-DISPATCH (Dec. 20, 2020), https://richmond.com/opinion/columnists/a-e-dick-howard-column-virginias-1902-constitution-the-era-of-disenfranchisement/article_1c72dd9e-d21c-527b-b0c3-0b2eeb526460.html [https://perma.cc/2EXE-U8H9].

Virginia's new constitution needed an environmental conservation article "in recognition of the growing awareness that among the fundamental problems which will confront the Commonwealth in the coming years will be those of the environment."[2] These "problems" were the pollution and destruction that would result from continued urban sprawl and industrial development.[3] Such problems were not unique to Virginia: pollution of air and waterways nationwide had reached a breaking point by the late 1960s.[4] The Commission's proposal was part of America's broader environmental movement in response to this environmental degradation, highlighted by the first Earth Day in 1970[5] and culminating in Congress's bipartisan passage of all the bedrock federal environmental statutes in the late 1960s and early 1970s.[6] Virginia was one of a number of states to consider an environmental provision for its state constitution in this watershed environmental moment.[7]

Virginia's environmental provision became Article XI of the new Virginia Constitution, ratified by popular vote in 1970 and effective beginning in 1971.[8] Section 1 of Article XI provides that:

> To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

The Commission on Constitutional Revision set out a lofty statement of purpose for Article XI. Article XI was meant to ensure for Virginians

---

[2] COMM'N ON CONST. REVISION, REPORT ON THE CONSTITUTION OF VIRGINIA 321 (1969).

[3] *Id.*

[4] *See, e.g.*, Phillip Shabecoff, *Saving Ourselves*, in A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT 103 (2003).

[5] *Id.*

[6] *See* Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENV'T L.J. 107, 122 (1997).

[7] *See* A.E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 197 (1972). During this time, Congress also considered but ultimately rejected proposals for constitutional amendments that would have recognized a right to a healthy environment. *See* Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENV'T AFF. L. REV. 173, 173–74 (1993).

[8] Howard, *supra* note 7, at 207; Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution, Extra Session 1969, Regular Session 1970, at 765 [hereinafter 1969 House Proceedings and Debates].

"a good life, an opportunity to enjoy the things we have acquired; a place of pleasure, dignity, and permanence which we can pass on to future generations with satisfaction and pride."[9] Professor A.E. Dick Howard, executive director of the Commission, observed that Article XI "is perhaps the best example in the Constitution of 1971 of the manner in which a constitution evolves so as [to] reflect those propositions thought most fundamental to the well-being of the Commonwealth and its citizens."[10] Professor Howard was justified in his optimism that Article XI was responsive to Virginians' burgeoning desire for a clean and healthy environment because the constitution's framers[11] did not consider Article XI an empty promise. Rather, they saw Article XI as a binding, judicially enforceable guarantee that the Virginia government would protect its environment on behalf of its citizens.

Fifty years later, Virginia faces even graver environmental threats than those that inspired Article XI's passage. Climate change is already having catastrophic effects in Virginia that will only worsen in the coming years.[12] Rising temperatures are causing ever-increasing heat-related deaths, illnesses from mosquito- and tick-borne diseases, air pollution from smog, and water shortages.[13] Hampton Roads is experiencing among the fastest rates of sea level rise in the country,[14] and the historic levels of tidal flooding that recently occurred in Northern Virginia will become a regular occurrence.[15] The frequency

---

[9] COMM'N ON CONST. REVISION, *supra* note 2, at 322 (quoting VA. OUTDOOR RECREATION STUDY COMM'N, REPORT 8 (1965)).

[10] A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1139–40 (1974) [hereinafter HOWARD, COMMENTARIES].

[11] This Note considers the Commission on Constitutional Revision and the members of the General Assembly to be the "framers" of the 1971 Constitution. It also considers contemporaneous publications by A.E. Dick Howard, the Commission's executive director, as evidence of the framers' intent.

[12] *See, e.g.*, NRDC, *Climate Change and Health in Virginia* (Apr. 2018), https://assets.nrdc.org/sites/default/files/climate-change-health-impacts-virginia-ib.pdf [https://perma.cc/P7SA-N52C].

[13] Tom Steinfeldt, Chris Coil & Hans-Peter Plag, *Understanding Virginia's Vulnerability to Climate Change*, GEO. CLIMATE CTR. 1, 1–2 (2015), https://www.georgetownclimate.org/files/report/understanding-virginias-vulnerability-to-climate-change.pdf [https://perma.cc/3MMG-A2ME].

[14] CITY OF NORFOLK, COASTAL RESILIENCE STRATEGY 3 (2014), https://www.norfolk.gov/DocumentCenter/View/16292/Coastal-Resilience-Strategy-Report-to-Residents-?bidId= [https://perma.cc/L4VT-2Q3W]; Woods Hole Oceanographic Inst., *Why Is Sea Level Rising Faster in Some Places Along the U.S. East Coast Than Others?* (Dec. 19, 2018), https://www.whoi.edu/press-room/news-release/why-is-sea-level-rising-higher-in-some-places-along-u-s—east-coast-than-others [https://perma.cc/XLT5-GWQH].

[15] *See* Hannah Northey & Jennifer Yachnin, *'Sea-Level Rise Is Definitely a Factor' in East Coast Floods,* GREENWIRE (Oct. 29, 2021), https://www.eenews.net/articles/sea-level-rise-is-definitely-a-factor-in-east-coast-floods/ [https://perma.cc/G9SP-V7DY]; Alexandria Living Magazine Staff, *Photos: Old Town Alexandria Sees Worst Flooding in Years*, ALEXANDRIA

and intensity of extreme weather events in coastal Virginia have increased over the past thirty years.[16] These risks have a disparate impact upon communities of color and low-income communities, who have already suffered disproportionate health and economic impacts from the siting of landfills, fossil fuel infrastructure, and other pollution sources.[17] Furthermore, climate change will likely extirpate a number of plant and wildlife species from Virginia and adversely impact many more.[18]

Virginians need a broad suite of legal and policy tools to protect themselves and their environmental resources. Unfortunately, Article XI—at least as interpreted by Virginia's courts—is not up to the task. The Supreme Court of Virginia defanged Article XI within fifteen years of its passage, and little development of constitutional environmental law in Virginia has occurred since. The Virginia Constitution's fiftieth anniversary should be an opportunity to reconsider and challenge interpretations of Article XI and explore additional ways to ensure Virginia law can combat current and future environmental threats.

This Note explores Article XI and its implications in four parts. Part I briefly recounts Article XI's legislative history and finds that the Virginia Constitution's framers intended for Article XI to provide Virginians with robust protection against environmentally harmful state action. Part II analyzes how Virginia's courts have interpreted Article XI far more narrowly than the framers intended and concludes that Article XI has failed to live up to its promise and purpose. Part III then attempts to diagnose the sources of Article XI's inefficacy, and concludes that its inefficacy is problematic even though it has not prevented the Virginia General Assembly from passing pro-environmental legislation. Finally, Part IV applies lessons learned from Part III to propose and evaluate solutions that could imbue Article XI with the strength that its framers intended.

LIVING MAG. (Oct. 29, 2021), https://alexandrialivingmagazine.com/news/old-town-alexandria-va-flooding-in-years-oct-29-2021/ [https://perma.cc/LKU4-YT4A].

16 VA. ACAD. OF SCI., ENG'G, & MED., THE IMPACT OF CLIMATE CHANGE ON VIRGINIA'S COASTAL AREAS 4 (2021), http://www.vasem.org/wp-content/uploads/2021/08/VASEM_VirginiasCoastalAreasReport_FINAL.pdf [https://perma.cc/T4QQ-TF7K].

17 *See*, COMM'N TO EXAMINE RACIAL EQUITY IN VA. LAW, IDENTIFYING AND ADDRESSING THE VESTIGES OF INEQUITY AND INEQUALITY IN VIRGINIA'S LAWS 66–70 (Nov. 15, 2020), https://www.apsva.us/wp-content/uploads/2021/04/2020-Commission-Report-Inequity-and-Inequality-in-Virginia-Law-1.pdf [https://perma.cc/5CKR-YBYB].

18 *See, e.g.*, VA. DEP'T OF GAME & INLAND FISHERIES, NAT'L WILDLIFE FED'N & VA. CONSERVATION NETWORK, VIRGINIA'S STRATEGY FOR SAFEGUARDING SPECIES OF GREATEST CONSERVATION NEED FROM THE EFFECTS OF CLIMATE CHANGE 1–2 (Nov. 2009), http://bewildvirginia.org/climate-change/virginias-strategy-for-safeguarding-species-of-greatest-conservation-need-from-the-effects-of-climate-change.pdf [https://perma.cc/93V7-KPNB].

I. THE FRAMERS' BROAD INTENT FOR ARTICLE XI

The Commission on Constitutional Revision's first draft of a conservation article merely encouraged the Virginia General Assembly to pass environmental legislation.[19] Environmentalists criticized the Commission's draft, fearing that it merely constituted "hopeful advice" to the General Assembly and would entirely fail to reach the conduct of state courts, agencies, and officials.[20] In response, the Commission rewrote the provision into the broad policy statement that was ultimately enacted.[21]

The Virginia Senate and House of Delegates each considered the Commission's proposed Article XI during a 1969 special legislative session.[22] The Virginia General Assembly's two bodies made only minor revisions to the Commission's proposed language before voting unanimously to adopt it. However, discussions on the General Assembly floor highlighted several key aspects of the legislature's intent for Article XI.

A. Forcing State Government Actors to Consider Environmental Impacts

First, the framers intended to force state actors to consider environmental impacts in all decisions. Article XI, Section 1's policy statements were meant to fulfill this purpose.[23] Section 1 states that "it shall be the *policy* of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings" and "to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth."[24] Senator Abe Brault described these policies as a "mandate" when he introduced Article XI for debate on the Senate floor.[25] State agencies, legislators, and courts would need to account for these environmental policies in

---

19 Howard, *supra* note 7, at 206.

20 HOWARD, COMMENTARIES, *supra* note 10, at 1142–43.

21 *See id.*

22 Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution, Extra Session 1969, Regular Session 1970, at 371–79 [hereinafter 1969 Senate Proceedings and Debates]; 1969 House Proceedings and Debates, *supra* note 8, at 511–15, 546–50, 635.

23 *See* COMM'N ON CONST. REVISION, *supra* note 2, at 321; Howard, *supra* note 7, at 207.

24 VA. CONST. art. XI, § 1 (emphasis added).

25 1969 Senate Proceedings and Debates, *supra* note 22, at 372.

every decision where Virginia law required consideration of the public interest or general welfare.[26]

Article XI, Section 2 would then give the General Assembly the power to pass laws further enabling state agencies or other parties to conserve natural resources and protect against environmental degradation.[27] The framers further bolstered this power by exempting the General Assembly from the 1971 Constitution's general requirement that appropriated funds be spent within a single biennial budget.[28] This would ensure that Virginia could enter the sort of long-term interstate and federal agreements that are common and necessary in environmental regulation, such as coordinating management of the Chesapeake Bay's resources across the several states in the Bay's watershed.[29] Taken together, the framers thought Sections 1 and 2 bound state actors to consider environmental impacts in their decisions while "removing possible legal barriers to effective government programs" so the General Assembly and state agencies could further clarify and advance Article XI's policy goals.[30]

B. Creating a Self-Executing Provision

Second, the framers intended for Article XI to be self-executing. A constitutional provision is generally considered self-executing if it can "provide . . . [a] court with a complete and enforceable rule" for

---

[26] *See* Howard, *supra* note 7, at 211–12 ("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 . . . . 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."); HOWARD, COMMENTARIES, *supra* note 10 at 1146 (citing 1971–72 Ops. Va. Att'y Gen. 471).

[27] COMM'N ON CONST. REVISION, *supra* note 2, at 321–22. Section 2 states as follows: "In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations. Notwithstanding the time limitations of the provisions of Article X, Section 7, of this Constitution, the Commonwealth may participate for any period of years in the cost of projects which shall be the subject of a joint undertaking between the Commonwealth and any agency of the United States or of other states." VA. CONST. art. XI, § 2.

[28] COMM'N ON CONST. REVISION, *supra* note 2, at 321–22; *see also* 1969 Senate Proceedings and Debates, *supra* note 22, at 372–74; 1969 House Proceedings and Debates, *supra* note 8, at 781.

[29] COMM'N ON CONST. REVISION, *supra* note 2, at 321–22.

[30] *Id.* at 322.

protecting the values contained within the provision.[31] Section 1 was meant to constrain government action that conflicted with the policy statement in support of environmental values.[32] As Professor Howard observed, "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' in existence by virtue of section 1."[33] And Sections 1 and 2 would not just restrain state actors: they were also, in the words of Senator Brault, a "mandate" for affirmative government action in support of conservation goals.[34] Thus, the framers understood Article XI as placing both negative and positive obligations on government actors—a distinction that will prove important in Parts II and III *infra*.

C. Expanding the Public Trust

Third, the framers intended for Article XI to recognize that Virginia's lands and waters are held in a public trust for all its citizens. Under the public trust doctrine, a sovereign power may convey upon private parties certain ownership rights to the land within its borders, but merely holds other rights in trust on behalf of all the sovereign's citizens.[35] The sovereign can regulate those rights protected by the public trust but cannot lease or sell them.[36] Historically, the paradigmatic rights protected by the public trust are navigating waterways and fishing.[37] The public trust doctrine is part of the federal common law and nearly every state's common law.[38] As such, the scope of the doctrine has changed over time and varies by jurisdiction.[39]

The Supreme Court of Virginia had a myopic view of the public trust doctrine's scope in the early twentieth century. In the leading case, *Commonwealth v. City of Newport News*, the city was discharging raw

---

[31] Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENV'T L. REV. 333, 333 (1993).

[32] *Id.* at 365–66.

[33] HOWARD, COMMENTARIES, *supra* note 10, at 1145.

[34] 1969 Senate Proceedings and Debates, *supra* note 22, at 372; *see also* HOWARD, COMMENTARIES, *supra* note 10, at 1145.

[35] *See* Joseph L. Sax, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–76 (1970).

[36] *See, e.g.*, Blake v. Marshall, 148 S.E. 789, 794 (Va. 1929).

[37] *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892); *see also* Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 877 (1996).

[38] Erin Ryan, *A Short History of the Public Trust Doctrine and its Intersections with Private Water Law*, 38 VA. ENV'T L.J. 135, 165 (2020).

[39] *See id.* at 165–66.

sewage into navigable waterways.[40] The state sued to enjoin both the existing discharge and construction of a new sewage line, arguing that the discharges violated public fishing and bathing rights that the state had a duty to protect through the public trust.[41] The court rejected this argument, finding that fishing and bathing were private uses that the state had the right to restrict or even eliminate.[42] However, that is not to say that the public trust was an empty obligation in Virginia during this time; the *Newport News* court reaffirmed that the public trust protected navigation rights,[43] and Virginia's 1902 Constitution required the state to hold natural oyster beds in trust.[44]

The framers believed that Article XI expanded Virginia's public trust obligations to include conservation and protection of Virginia's land, air, waters, and other natural and historical resources.[45] This purpose is elucidated by the Senate's consideration of an additional Article XI provision proposed by Senator Howell.[46] Howell's proposed "Section 4" would have stipulated that "[o]pen lands and waters owned by the Commonwealth shall be *held in trust* for the benefit of the people of the Commonwealth and shall not be leased, rented or sold except by Act of the General Assembly."[47] Senator Howell hoped to "establish a constitutional guarantee that the policy as stated in Sections 1 and 2 [would] be applicable to open land and water."[48] The provision would require the General Assembly to pass legislation for every conveyance of open land or water; it could not delegate those transfers to state agencies.[49]

Senator Brault, Article XI's floor sponsor, countered that such a provision would be redundant because Section 1 already recognized a public trust. Specifically, Brault argued that Section 1's declaration that its conservation and protection policies would be "for the benefit, enjoyment, and general welfare of the people of the Commonwealth . . . certainly" implied "holding public lands and waters in trust."[50] Other senators questioned whether Howell's proposal would

---

40 164 S.E. 689, 689–90 (Va. 1932).

41 *Id.* at 691–92.

42 *Id.* at 698–99.

43 *See id.*

44 VA. CONST. of 1902, art. XIII, § 172. The 1971 Constitution adopted the 1902 Constitution's exact language in continuing to recognize a public trust in oyster beds. VA. CONST. art. XI, § 3. Section 3's implications are discussed further in Part IV.A.2 *infra*.

45 *See* Howard, *supra* note 7, at 221–22.

46 1969 Senate Proceedings and Debates, *supra* note 22, at 375–77.

47 *Id.* at 375 (emphasis added).

48 *Id.*

49 *Id.* at 375–76.

50 *Id.* at 377 (quoting VA. CONST. art. XI, § 1).

require an act of the General Assembly for every private boat landing and dock.[51] Howell clarified that the trust guarantee would apply only to lands and waters currently owned by the state and undeveloped.[52]

Howell's closing argument in favor of his proposal was that a constitution "should spell out guarantees," not policies.[53] The fifty-year history of Article XI since its passage suggests his concern was prescient, and Parts III and IV *infra* will revisit it. However, in the moment, the Senate rejected Howell's proposal with 30 nays to just 7 yeas.[54]

Furthermore, while not explicitly discussed in the General Assembly debates, we can infer that if the framers had understood Article XI, Section 1 to establish and expand a public trust, they would also have expected judicial review of controversies implicating that trust. Common law public trust doctrine generally places the sort of negative requirements upon the legislature that courts typically find self-executing.[55] The framers would thus likely have expected Article XI's public trust component to be self-executing independent of the textual and structural justifications discussed in Part I.B *supra*. Professor Howard observed at the time that courts had applied public trust doctrine to create a presumption against state divestiture of public uses on trust property, to shift the burden to government agencies to prove explicit legislative approval for any infringement upon the public trust, and to disallow delegations of certain public trust responsibilities.[56] Virginia courts would have an opportunity to draw upon a wide canon of persuasive authority on public trust doctrine to develop clearly defined and workable rules interpreting Article XI.

D. Establishing Standing in Environmental Cases

Finally, at least some framers understood Article XI to give standing to private citizens to challenge state agencies and officials' actions that contravene Section 1's policy statements or violate the public trust.[57] In his contemporaneous writings on Article XI, Professor Howard favorably cited an Illinois Supreme Court case recognizing that "[i]f the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public . . . must have the right and standing to enforce

---

[51] *Id.* at 376–77.
[52] *Id.* at 376.
[53] *Id.* at 378.
[54] *Id.*
[55] Howard, *supra* note 7, at 223.
[56] *See id.* at 223–24.
[57] *See id.* at 228; HOWARD, COMMENTARIES, *supra* note 10, at 1143.

it."[58] Professor Howard understood Section 1's policy statements to mean that judges hearing environmental cases should broadly interpret standing questions such as whether the plaintiff was "aggrieved" by agency action or suffered "injury in fact."[59] Virginians should not need to wait for their government to act on its own to protect the environment.

E. But Not Creating Environmental Rights Enforceable Against Private Actors

However, the 1971 Constitution's framers did *not* intend Article XI to confer a constitutional right to a clean environment that would allow private citizens to sue polluters and other private parties to prevent degradation.[60] This was not a unanimous position: Delegate Clive DuVal proposed a draft Section 1 which 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] While Virginia's conservation article did not ultimately include such rights-based language, a few other states' environmental constitutional provisions do.[62] This distinction has proven critical in judicial review of the scope of environmental provisions in state constitutions, as further discussed in Part IV.B *infra*.

II. VIRGINIA COURTS' NARROW INTERPRETATION OF ARTICLE XI

The framers' hopes for an impactful conservation article were swiftly punctured in Virginia's courts. Virginia's Supreme Court found that Article XI does not impose specific procedural or substantive requirements upon state actors. Instead, the court determined that Article XI is a mere policy statement encouraging the Virginia General Assembly to pass environmental legislation. This cabined interpretation of Article XI remains good law decades later despite directly conflicting with the framers' intent. With a few narrow exceptions, state courts

---

[58] *See* Howard, *supra* note 7, at 226 (quoting Paepcke v. Public Bldg. Comm'n, 263 N.E.2d 11, 18 (Ill. 1970)).

[59] *Id.* at 226–28.

[60] *Id.* at 207.

[61] *See* HOWARD, COMMENTARIES, *supra* note 10, at 1143 (quoting draft submitted by Delegate DuVal at hearings on March 4, 1969).

[62] MONT. CONST. art. II, § 3 (adopted 1889) ("right to a clean and healthful environment"); PA. CONST. art. I, § 27 (adopted 1971) ("right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment"); R.I. CONST. art. I, § 17 (adopted 1986) ("rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values"); N.Y. CONST. art. I, § 19 (adopted 2021) ("right to clean air and water, and a healthful environment").

have kept Virginians from leveraging Article XI for greater environmental protection.

A. Article XI Does Not Impose Specific Procedural Requirements

The Supreme Court of Virginia first referenced Article XI in *Rappahannock League for Environmental Protection, Inc. v. Virginia Electric & Power Co.,* a 1976 case in which a local environmental organization challenged utility companies' applications for certificates of public necessity for new power lines.[63] The court invoked Article XI and the Utility Facilities Act in setting the framework for which issues it would need to consider in the case: public convenience and necessity, environmental impact, and adequacy of existing rights-of-way.[64] The court found that the utility companies satisfied the requirements, in part through the companies' "thorough" environmental impact study.[65] However, the Utility Facilities Act itself required each of the three issues the court evaluated, so Article XI may not have been doing any work in the court's analysis.[66]

The court first squarely addressed Article XI's substance two years later in *Rudder v. Wise County Redevelopment and Housing Authority*.[67] In *Rudder*, the county housing authority sought to condemn the Rudders' property for a highway and flood control project.[68] The Rudders argued that Article XI required the county to conduct a "full and adequate" environmental impact study before moving forward with the project.[69] The federal Department of Housing and Urban Development (HUD) had prepared an Environmental Impact Statement pursuant to the National Environmental Policy Act (NEPA), but the Rudders believed that HUD had not adequately evaluated various environmental factors and that the county housing authority needed to prepare its own statement.[70] The court rejected those arguments, finding that "[n]o such statement is required by [Article XI], by any Virginia statute, or by [*Rappahannock League*]."[71]

---

63 222 S.E.2d 802, 803 (1976).

64 *Id.* at 804.

65 *Id.* at 805.

66 *See id.* at 803–04. This may be because the appellants did not invoke Article XI in briefing beyond a passing reference that the constitution's environmental mandate should be considered. *See* Brief for Appellants at 30–32, Rappahannock League for Env't Prot., Inc. v. Va. Elec. & Power Co., 222 S.E.2d 802 (Va. 1976).

67 249 S.E. 2d 177 (Va. 1978).

68 *Id.* at 177–78.

69 *Id.* at 180.

70 *Id.*

71 *Id.* The court did not discuss Virginia's statutory environmental impact report (EIR) requirement, which was enacted in 1973 as discussed in Part IV *infra*. It is unclear why a state

Seven years later, in *Robb v. Shockoe Slip Foundation*,[72] the Supreme Court of Virginia reaffirmed *Rudder*. In *Shockoe Slip*, a nonprofit organization sought to enjoin the state's plan to destroy state-owned buildings on Richmond's East Main Street.[73] The buildings' location was part of a future site plan for new state buildings that the Governor, Virginia Public Buildings Commission, and Art and Architectural Review Council had all approved.[74] The state awarded contracts to demolish the older buildings in 1981, and because the project's cost came in below $100,000, it did not trigger the state statutory requirement to conduct an Environmental Impact Report (EIR).[75] The Virginia Historic Landmarks Commission had evaluated buildings in the area but had not designated the buildings at issue as historic monuments.[76]

A Richmond Circuit Court judge granted the plaintiff's injunction against the demolition project.[77] The trial judge found that "no environmental studies or environmental considerations were weighed with respect to the demolition."[78] The judge recognized that the statutory threshold for an EIR was not met because the project was under $100,000, but determined that the existence of a statutory requirement "is a far cry from saying that if the State complies with this Code Section it has automatically complied with all the constitutional mandates of Article XI."[79] A formal EIR may not be required for projects under $100,000, but Article XI was still a backstop requiring *some* consideration of environmental factors for *all* state projects.[80] These factors included the value of the building as a historic site and the booming development pressure that had recently occurred in the Shockoe Slip area.[81] Because the state failed to "reasonably weigh[] all the factors that it is required to weigh and to consider under Article XI of the Constitution," the judge enjoined the demolition until the "defendants have documented their decision-making process in a manner which reflects that they have taken into account the

EIR was not required, but it is possible that the state's contribution to the project was under $100,000 and, thus, no report was necessary.

72 324 S.E.2d 674 (Va. 1985).

73 *Id.* at 675.

74 *Id.*

75 *Id.* (citing what was at the time VA. CODE §§ 10–17.107–08).

76 *Id.* at 675–76.

77 Shockoe Slip Found. v. Dalton, No. G7109-2, slip op. at 4 (Va. Cir. June 2, 1982).

78 *Id.* at 1.

79 *Id.* at 2.

80 *See id.* at 2–3 ("The constitutional mandate applies to all projects.")

81 *See id.* at 3.

Commonwealth's constitutionally stated public policy of preserving, utilizing, and developing its historical buildings."[82]

In *Robb v. Shockoe Slip Foundation,* the Supreme Court of Virginia reversed the circuit court's decision on appeal. The court found that the procedural requirements that the trial judge had read Article XI to impose were equivalent to requiring an environmental impact study, which *Rudder* precluded.[83] *Shockoe Slip* thus reaffirmed *Rudder*'s holding that Article XI, Section 1 does not impose specific procedural requirements beyond Virginia statutory law.[84]

B. Article XI is Not Self-Executing

The Supreme Court of Virginia further held in *Shockoe Slip* that Article XI, Sections 1 and 2 are not self-executing and do not provide an independent basis for judicial review.[85] The court first laid out the rules for when a Virginia constitutional provision is self-executing. Constitutional provisions that expressly declare themselves to be self-executing are, of course, self-executing.[86] But "[e]ven without [the] benefit of such a declaration, constitutional provisions in bills of rights and those merely declaratory of common law are usually considered self-executing."[87] Finally, the court recognized that provisions that specifically prohibit particular conduct are also self-executing.[88]

The court found none of those triggers for self-execution present in Article XI, Section 1. It observed that Section 1 has no express declaration of self-execution, is not housed in the Bill of Rights, and does not merely declare common law doctrine.[89] It also found that Section 1 "is not prohibitory or negative in character. Rather, it confines itself to an affirmative declaration of . . . very broad public policy."[90] As such, the court was concerned that Section 1 "lays down no rules by means of which the principles it posits may be given the force of law."[91] Instead, in the court's mind, it left open questions that "beg[ged] statutory definition": whether its policies were absolute, what circumstances might justify an exception to those policies, who has

---

[82] *Id.* at 3–4.

[83] 324 S.E.2d 674, 677 (Va. 1985).

[84] *See id.*

[85] *See id.* at 676–77.

[86] *Id.* at 676 (citing VA. CONST. art. I, § 8 ("The provisions of this section shall be self-executing.")).

[87] *Id.*

[88] *See id.* (citing Robertson v. Staunton, 51 S.E. 178, 179 (Va. 1905), and several other cases).

[89] *See id.*

[90] *Id.* (internal quotations omitted).

[91] *Id.*

standing, what the remedies might be, and whether the policy binds only state actors.[92] Given these concerns and the absence of any self-execution triggers, the court held that Article XI is not self-executing.[93]

This holding directly contradicted the framers' understanding that Article XI would be self-executing against state officials.[94] But despite that contradiction, the *Shockoe Slip* court invoked the framers' intent to justify its holding. The court did not do so by referring to the General Assembly debates or writings of the Commission on Constitutional Revision and its members. Rather, the court inferred from the language of Article XI, Section 2 that the framers recognized Section 1 was inoperative without legislative action.[95] Although Section 2 only says that the General Assembly "may" undertake the protection of historical sites, the court claimed that if this language were permissive only, it would be meaningless because Article IV, Section 14 of the Virginia Constitution broadly grants the General Assembly authority to pass legislation on all subjects.[96] Thus, "the only purpose for adding [Section 2] to Article XI was to instruct the General Assembly to enact statutes whereby the public policy declared in Section 1 could be executed."[97] *Shockoe Slip*'s holding that Article XI is not self-executing remains good law today and has not been seriously challenged.[98]

C. Article XI Since Shockoe Slip

Little development of Article XI doctrine has occurred since *Shockoe Slip*. Arguments based on Article XI have rarely been raised in Virginia courts, and when they have, they are usually cursorily dismissed.[99]

But Article XI, Section 1's policy statement has been invoked in a few limited contexts. The Supreme Court of Virginia has held that

---

[92] *See id.* at 676–77. A federal district court had anticipated this concern over a decade prior. *See* James River & Kanawha Canal Parks, Inc. v. Richmond Metro. Auth., 359 F. Supp. 611, 623 (E.D. Va. 1973), *aff'd*, 481 F.2d 1280 (4th Cir. 1973) (dismissing the plaintiff's Article XI claim and stating that whether Article XI creates substantive rights enforceable by private individuals is a "difficult question of constitutional law and one on which the state courts have not ruled").

[93] *Id.* at 677.

[94] *See* Part I.B *supra*.

[95] *See Shockoe Slip*, 324 S.E.2d at 677.

[96] *Id.*

[97] *Id.*

[98] *See, e.g.*, Chesapeake Bay Found., Inc. v. Commonwealth *ex rel*. Va. State Water Control Bd., 90 Va. Cir. 392, 396 (July 9, 2015) (finding the question of Art. XI, sec. 1 self-execution "well-settled").

[99] *See, e.g.*, Wills v. Va. Marine Res. Comm'n, 717 S.E.2d 803, 805–06 (Va. Ct. App. 2011) (denying standing for citizens attempting to challenge permit to locate pound nets in the Chesapeake Bay, where petitioners had invoked public trust doctrine and Art. XI); *Chesapeake Bay Found*., 90 Va. Cir. at 392.

conservation servitudes on historic buildings that predated the Virginia Conservation Easement Act of 1988 were still valid, in part based on Article XI's historic preservation policy.[100] The court has also grounded the State Corporation Commission's duty to fix just and reasonable public utility rates in Article XI in addition to various statutes regulating utilities.[101]

And, perhaps most importantly given the solutions explored in Part IV *infra*, Virginia courts have started referencing Article XI as bearing on Virginia's public trust doctrine in at least one context. The 1971 Constitution's framers understood Article XI to broaden the public trust to include conservation and protection of Virginia's environment and natural resources.[102] A Virginia Court of Appeals relied on a similar theory (without referencing the legislative history) in 2005 in *Evelyn v. Commonwealth*.[103] In *Evelyn*, a riparian landowner applied for a permit to build a private pier on a river. The Virginia Marine Resource Commission (VMRC) denied his application because it included an unapproved roof structure.[104] The landowner challenged the denial, arguing that his statutory right as a riparian owner to build a pier without a permit extended to building a roof over that pier.[105] The court rejected this argument, pointing to a different portion of the statute explicitly referencing that in considering permits for use of state-owned bottomlands, the VMRC must consider Article XI, Section 1 and exercise authority "consistent with the public trust doctrine."[106] The court opined that state actors must consider the public trust—as recognized in Section 1 and advanced by the statutory governance of bottomlands enacted under Section 2 in furtherance of Section 1—when "interpreting and applying *all* legislative enactments."[107]

The court did not (and did not need to) consider whether public trust doctrine grants rights absent legislation in this case, but it approvingly invoked the public trust doctrine in a way rarely seen in Virginia courts. A few other cases have referenced Article XI specific to this same VMRC statute in evaluating challenges to permit denials.[108] These cases do not go as far as the framers' understanding that Virginia's public

---

100 *See* United States v. Blackman, 613 S.E.2d 442 (Va. 2005).

101 *See* Po River Water and Sewer Co. v. Indian Acres Club of Thornburg, Inc., 495 S.E.2d 478, 481 (Va. 1998).

102 *See* Part I.C *supra*.

103 621 S.E.2d 130 (Va. Ct. App. 2005).

104 *See id.* at 132–33.

105 *See id.*

106 *Id.* at 135–36 (referencing VA. CODE § 28.2-1205(A)).

107 *Id.* at 137 n.3 (emphasis added).

108 *See, e.g.*, Palmer v. Va. Marine Res. Comm'n, 628 S.E.2d 84, 89–90 (Va. 2006).

trust doctrine encompasses all the policies enumerated in Section 1. But if Virginia courts are willing to expand the public trust doctrine by grounding it in Article XI, they might give real teeth to the provision (as further discussed in Part IV.A.2 *infra*).

However, outside of this VMRC context, little development of common law public trust doctrine has occurred in Virginia. For example, the Supreme Court of Virginia upheld a conviction for trespassing where the defendant fished on a river bottom in which the English crown had granted the riparian landowner exclusive fishing rights.[109] The court was silent on the alleged trespasser's argument that Article XI recognized a public trust that includes fishing rights.[110] This case illustrates Virginia courts' general reluctance or disinterest in developing a robust public trust doctrine in the way that other states have.[111] Even in the VMRC context, one state appellate court has held that only the agency—not the courts—has authority under the applicable statute to evaluate whether a permit decision is in the public trust.[112] Ultimately, Virginia's courts have rarely taken opportunities to empower Article XI, whether a statute exists in furtherance of Article XI, or a litigant seeks further environmental protection and conservation through Article XI itself.

III. ARTICLE XI'S LIMITATIONS (AND DO THEY MATTER?)

Article XI's framers meant for the provision to establish procedural requirements and public trust protections that Virginians could enforce in courts. Virginia's courts have watered down the provision such that, outside a few narrow exceptions, it is a mere policy statement enabling and encouraging the Virginia General Assembly to pass environmental legislation that it could likely pass even absent Article XI. Part IV will explore several ways in which Article XI might be restored to something closer to the framers' vision. But first, it is worth identifying the source of Article XI's inefficacy and questioning whether sufficient protection for Virginia's environment actually requires a stronger Article XI.

---

109 *See* Kraft v. Burr, 476 S.E.2d 715, 715–19 (Va. 1996).

110 *See* Brief of Appellant at 20–22, Kraft v. Burr, 476 S.E.2d 715 (Va. 1996) (No. 951678). The dissent acknowledged the public trust argument without reference to Article XI, but opined that the appeal need not reach the question of whether fishing rights are part of Virginia's public trust. *See* Kraft, 476 S.E.2d at 720 (Koontz, J., dissenting).

111 *See, e.g.*, Thompson, Jr., *supra* note 37, at 878.

112 *See* Boone v. Harrison, 660 S.E.2d 704, 712 (Va. Ct. App. 2008).

A. Why Is Article XI Ineffective?

Most commentators have blamed Virginia's courts for Article XI's ineffectiveness. One author observed that "[b]ecause of restrictive judicial interpretation, [Article XI] has proven useless to ordinary citizens attempting to preserve an increasingly fragile environment."[113] Others have argued that *Shockoe Slip* is an example of attempted judicial restraint gone wrong.[114] State officials have suggested that *Shockoe Slip* "made Article XI meaningless and reversed, or at least distorted, the relationship between the state legislature and the state constitution."[115] Still others have argued that the *Shockoe Slip* court overstated the degree to which the self-executing environmental provision is unworkably vague.[116] Nuisance and public trust doctrine are judge-made law for which courts have developed substantive standards for centuries; they balance competing interests and allocate resources in ways similar to the trial court's opinion that was overruled in *Shockoe Slip*.[117] And many vague provisions exist in the federal Constitution (e.g., the Fourth Amendment and the Fourteenth Amendment Due Process and Equal Protection Clauses), yet federal courts have had no problem finding those provisions self-executing and developing substantive standards to refine them.[118] Based on its failure to engage with these concerns and counters, *Shockoe Slip* has been characterized as "[o]verly concise [and] poorly reasoned."[119]

However, purportedly self-executing environmental constitutional provisions admittedly raise tough questions. Any constitutional conservation provision is likely to have definitional problems: How clean is "clean air"? How pure is "pure water"? What criteria should be used to assess those thresholds?[120] Courts may lack the technical and scientific capacity to substantively define these terms and criteria and

---

113 W. Scott Magargee, Note, *Protecting the Environment: Creating a Citizen Standing-to-Sue Statute in Virginia*, 26 U. RICHMOND L. REV. 235, 235 (1991).

114 *See* Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 848–54 (1990); Oliver A. Pollard, III, Note, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RES. L. 351, 368, 374 (1986) ("When judicial restraint defers court enforcement of constitutional protections, it ceases to be a virtue.").

115 Butler, *supra* note 114, at 850 (interviewing state officials).

116 *See* Pollard, *supra* note 114, at 377–79 (1986).

117 *See id.* at 378–79.

118 *See* Luis José Torres Asencio, *Greening Constitutions: A Case for Judicial Enforcement of Constitutional Rights to Environmental Protection*, 52 REVISTA JURIDICA UNIV. INTERAMERICANA P.R. 277, 301–03 (2018).

119 *See* Butler, *supra* note 114, at 906.

120 *See, e.g.*, Thompson, Jr., *supra* note 37, at 895–99; Torres Asencio, *supra* note 118, at 299–300.

fashion remedies;[121] indeed, these same concerns motivated the U.S. Supreme Court's decision to find that NEPA does not impose substantive requirements on federal agencies.[122] Broad environmental policy mandates also make judges uneasy about judicial restraint and separation of powers concerns.[123] And some have argued that, while other constitutional rights (freedom of speech and religion) can be ambiguous, they are grounded in a historical common understanding that does not exist for the more recent and (purportedly) less universally agreed upon environmental movement.[124]

But beyond the general limitations of any environmental constitutional provision, several commentators have also blamed the specific language of Article XI, Section 1 for its inefficacy. Observers have found the language "vague and confusing"[125] and "largely ornamental."[126] A couple of Article XI's framers presciently raised such concerns. Senator Howell had argued that the constitution "should spell out guarantees" by including explicit public trust language, rather than the vaguer policy statement ultimately adopted that was meant to implicitly recognize a public trust.[127] Professor Howard contemporaneously identified two additional shortcomings. First, Section 1 does not inform agencies how to balance between conflicting concerns such as environmental harms versus economic benefits.[128] Section 1 can even contradict itself; for instance, state environmental officials have noted that conflicts frequently arise between "conservation" and "utilization" of natural resources, both of which are part of the Section 1 policy statement.[129] Second, Article XI does not provide specific procedural mechanisms or substantive rights, which left

---

121 Richard J. Tobin, *Some Observations on the Use of State Constitutions to Protect the Environment*, 3 B.C. ENV'T AFF. L. REV. 473 (1974); *see also* Thompson, Jr., *supra* note 37, at 897 ("[C]ourts in truth simply have felt uncomfortable becoming involved in environmental issues without legislative guidance. The administrative burden of creating a judicial system of environmental rights and obligations could be immense."); Pollard, *supra* note 114, at 372; *but see* Torres Asencio, *supra* note 118, at 306–07 (arguing that this concern is overstated because courts can still establish broad constitutional principles of environmental protection under conservation articles while leaving the technical details to legislatures and agencies).

122 *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980).

123 *See* Tobin, *supra* note 121, at 484; Butler, *supra* note 114, at 848–54.

124 *See* Tobin, *supra* note 121, at 478; JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 236 (1971).

125 Butler, *supra* note 114, at 851.

126 MAYA K. VAN ROSSUM, THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT 51 (2017). Van Rossum goes on to state that Virginia "employs lovely language about environmental protection in its constitution, but then undermines that language by declaring environmental protection a mere prerogative of the state instead of a right of the people." *Id.*

127 1969 Senate Proceedings and Debates, *supra* note 22, at 378.

128 *See* HOWARD, COMMENTARIES, *supra* note 10, at 1147.

129 *See* Butler, *supra* note 114, at 849–50 (interviewing state officials).

it entirely up to Virginia courts to fashion remedies for cases brought under Article XI.[130]

More generally, if the framers had used "rights" language instead of "policy" language, Article XI would likely have provided stronger protection for Virginia's environment. While Professor Howard makes a compelling argument that the structure of Sections 1 and 2 combine to make Section 1 self-executing, Article XI's language is less obviously amenable to self-execution than, say, a right to a clean environment housed in the state Bill of Rights, which the Supreme Court of Virginia would likely find to be categorically self-executing.[131] Courts in Pennsylvania and Montana, whose environmental constitutional provisions have such rights-based language, have found those provisions self-executing and substantive.[132]

Finally, climate change and environmental justice are two issues at the forefront of the current environmental movement that were not on the framers' minds when Article XI was drafted fifty years ago. This is no fault of the framers; public awareness of each issue did not begin to grow until the 1980s.[133] And Section 1's broad policy statement could reasonably be read to encompass both climate change ("protect [the] atmosphere . . . from pollution, impairment, or destruction") and environmental justice ("for the benefit, enjoyment, and general welfare of the people of the Commonwealth"—assuming that means an equitable benefit for *all* Virginians). But an environmental provision written today might more explicitly reference a right to a "stable climate"[134] and "equitable" environmental protection and access to use and enjoy natural resources.

B. Does Article XI Need to be Reinvigorated?

Despite limitations in Article XI's language and its interpretation by courts, one might question whether reinvigorating Article XI is

---

130 *See* HOWARD, COMMENTARIES, *supra* note 10, at 1148.

131 *See* Robb v. Shockoe Slip Found., 324 S.E.2d 674, 676 (Va. 1985); Gray v. Va. Sec. of Trans., 662 S.E. 2d 66, 72 (Va. 2008) ("Article I, § 5 is contained in the Bill of Rights, and such constitutional provisions are generally considered to be self-executing.").

132 *See* Part IV.B *infra*.

133 *See* Richard Black, *A Brief History of Climate Change*, BBC NEWS (Sept. 20, 2013), https://www.bbc.com/news/science-environment-15874560 [https://perma.cc/7ESX-RK4J]; Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NRDC (Mar. 17, 2016), https://www.nrdc.org/stories/environmental-justice-movement [https://perma.cc/GE8X-XJ4X].

134 A push for new "green amendments" in several states (but not yet Virginia) has done just that. *See* Maxine Joselow, *Environmental Rights Push Could Boost Youth Climate Cases*, E&E NEWS (Mar. 3, 2021), https://www.eenews.net/articles/environmental-rights-push-could-boost-youth-climate-cases/ [https://perma.cc/C5Y6-WJ2J] (discussed further in Part IV.B *infra*).

necessary. In the years during and immediately following Article XI's drafting, Congress passed major federal environmental statutes that cover many of the environmental concerns that Article XI, Section 1 sought to address. Those federal statutes involve cooperative federalism schemes that impose environmental protection responsibilities upon the states.[135] While these federal statutes are imperfect and poorly suited for combatting climate change, they have resulted in significant progress toward cleaning up localized air and water pollution.[136]

Furthermore, at the state level, Article XI, Section 2 has done effective work by enabling Virginia's legislature to enact environmental protection laws. In 1972, soon after the new constitution was enacted, the General Assembly created a new Council on the Environment[137] and granted it a NEPA-like power to impose environmental requirements on state action through Environmental Impact Reports (EIRs).[138] The Council was created "in furtherance of Article XI of the Constitution of Virginia."[139] In 1992, Virginia created a new Department of Environmental Quality (DEQ), likewise created "to assist in the effective implementation of the Constitution of Virginia," that took over management of EIRs.[140] State agencies preparing EIRs must identify and evaluate environmental impacts of a proposed state activity and consider alternative actions and mitigation measures for environmental impacts.[141] DEQ then reviews the EIR and makes a recommendation on whether to proceed with the proposed project.[142] These requirements are only required for "major" state projects, measured by various context-dependent dollar thresholds.[143] But for many of the largest state projects, at least, these procedural protections advance the Article XI's framers'

---

135 These cooperative federalism regulatory schemes include the Clean Air Act (1970), Clean Water Act (1972), and Resource Conservation and Recovery Act (1976). Additional purely top-down federal environmental regulatory regimes restrict states from degrading their environments as well, such as NEPA (1969) and the Endangered Species Act (1973).

136 *See* EPA, *Progress Cleaning the Air and Improving People's Health*, https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health [https://perma.cc/URM2-WME3] (last visited Oct. 31, 2021); Am. Rivers, *How the Clean Water Act Protects Your Rivers*, https://www.americanrivers.org/rivers/discover-your-river/the-importance-of-the-cwa-to-protecting-your-rivers-clean-water/ [https://perma.cc/3AUU-Z3NT] (last visited Oct. 31, 2021).

137 VA. CODE §§ 10-177 et seq. (1973).

138 *Id.* at § 10-17.108.

139 *Id.* at § 10-178.

140 VA. CODE §§ 10.1-1183, 1188–1192 (2021).

141 *See id.* at § 10.1-1188.

142 *See id.*

143 *See id.* The current threshold is $500,000 or more for any project. EIRs are also not required for actions of industrial development authorities, housing development or redevelopment authorities, projects of the Virginia Port Authority under $5 million, and state-assisted highway projects for local governments costing $2 million or less. *Id.*

goal of forcing state government actors to consider environmental impacts.[144] EIRs can be challenged through Virginia's Administrative Process Act,[145] which eliminates some of the need that Professor Howard identified for Section 1 to independently provide for judicial review of agencies' decision-making processes.[146]

Furthermore, Virginia's General Assembly has passed legislation addressing climate change and environmental justice during the past couple of years. In 2020, the General Assembly expanded DEQ's mission to include "address[ing] climate change by developing and implementing policy and regulatory approaches to reducing climate pollution and promoting climate resilience in the Commonwealth and by ensuring that climate impacts and climate resilience are taken into account across all programs and permitting processes."[147] It also passed the Virginia Clean Economy Act of 2020 under Virginia's Energy Plan, which sets an aggressive target of zero-carbon energy generation by 2045 and includes plans for the retirement of most coal plants by 2024, easier rooftop solar installation, and expansion of larger-scale solar and offshore wind projects.[148] On the issue of environmental justice, the General Assembly further expanded DEQ's mission to include "further[ing] environmental justice and enhanc[ing] public participation in the regulatory and permitting processes."[149] It also permanently codified the Virginia Council on Environmental Justice, an advisory body required to submit an annual report on statewide environmental justice issues and efforts to the governor and General Assembly.[150] Virginia has been able to make at least some progress on the most pressing current environmental issues without a strong constitutional protection. And while none of the 2020 legislation specifically invoked Article XI, the power Section 2 grants to the General Assembly underlies this legislation and suggests that Article XI might be stronger than it appears.

But despite the recent legislation strengthening environmental protection in Virginia, there are still compelling reasons to bolster Article XI. First, Virginia laws only provide environmental protection in certain contexts. For instance, DEQ only has authority over "major" state actions. Article XI could force at least *some* consideration of

---

144 *See* Butler, *supra* note 114, at 851–58 ("Virginia already has a statutory and administrative framework that begins to bridge the gap between regulation and article XI.")

145 VA. CODE §§ 2.2-4000 et seq. (2021).

146 *See* Howard, *supra* note 7, at 216–18.

147 VA. CODE § 10.1-1183(B)(2).

148 VA. CODE §§ 56-576 et seq.

149 VA. CODE § 10.1-1183(B)(4).

150 VA. CODE §§ 2.2-2699.8–12.

environmental factors in the many state and local projects that fall below the statutory threshold.[151] This is precisely what the Shockoe Slip Foundation argued—and the trial court judge accepted—in *Shockoe Slip*. Even for major agency actions, the Supreme Court of Virginia has held that courts may only enforce procedural and not substantive requirements in challenges to EIRs.[152] And while the General Assembly took significant substantive action to combat climate change in 2020, its environmental justice measures lack clear substantive requirements or enforcement mechanisms. Therefore, a new reading of, or amendment to, Article XI might further ensure environmental equity.

Second, a powerful constitutional declaration of environmental policy might be important independent of any statutory environmental protection. The framers recognized the importance of enshrining values into the 1971 Constitution; Professor Howard opined that a constitution is "the ultimate repository of a people's considered judgment about basic matters of public policy."[153] Other commentators believe that a constitution "serves a symbolic or legitimating function" that should "affect the decisions of conscientious regulators and gradually influence public opinion in its favor."[154] One might argue that Article XI has already done so by enabling the General Assembly to act in furtherance of Section 1's policies and the General Assembly subsequently so acting[155] (albeit slowly, in response to climate change and environmental injustice, and perhaps only temporarily if Republicans regain a majority in the Virginia Senate while maintaining control of the governor's office and House of Delegates). But the Virginia Constitution's framers did not intend to leave conservation and environmental protection entirely to the legislature. They saw Article XI as a self-executing "mandate" for, and restraint upon, *all* government

---

151 *See* Howard, *supra* note 7, at 218 ("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.").

152 Murray v. Green, 396 S.E.2d 653 (Va. 1990). This ruling is consistent with the Supreme Court's interpretation of the federal NEPA in Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

153 Howard, *supra* note 7, at 229.

154 Butler, *supra* note 114, at 857–58; *see also* Thompson, Jr., *supra* note 37, at 903 (envisioning a model for constitutions where their purpose is to "embody and promote general policy views of the polity" and advance goals of dialogue, community identity, and public pressure rather than self-enforcing constraint).

155 *See, e.g.*, Jeffrey S. Sutton, *Courts as Change Agents: Do We Want More – Or Less?*, 127 HARV. L. REV. 1419, 1440 (reviewing EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013) (arguing that environmental constitutional provisions have "allowed environmentalists to use the mantle of the state constitutions and the aspirational commitments in them to shape policy debates in the state legislatures, where these debates may belong").

action.[156] It is difficult to imagine that Virginians would not have benefitted from greater environmental protection over the past fifty years had the framers' vision come to fruition. It is worth exploring ways to achieve that vision on behalf of Virginians for the next fifty years and beyond.

IV. RECOMMENDATIONS FOR STRENGTHENING THE VIRGINIA CONSTITUTION'S ENVIRONMENTAL PROTECTIONS

This Part recommends two categories of solutions for addressing Article XI's limitations. First, in the short-term, litigants should encourage Virginia's courts to reinterpret its Article XI precedents and embrace the public trust doctrine. Second, over the longer-term, environmental advocates should rally around a constitutional amendment that guarantees environmental rights, including rights that would expressly extend to covering climate change and environmental justice, and includes a private cause of action to enforce those rights. None of these recommendations are easy to achieve or guaranteed to work. But they are worth trying given the symbolic and practical value of having robust constitutional protection for the environment.

A. Reinterpreting Article XI

One could convincingly argue that the Supreme Court of Virginia's decisions in *Shockoe Slip* and *Rudder* should be reversed. *Shockoe Slip* clearly contradicts the legislative debates and framers' writings about Article XI, which the court's opinion ignored despite being raised extensively in briefing.[157] The court's disinterest in the framers' intent is in tension with (admittedly old) precedent suggesting that constitutional interpretation is meant to "discover the intention of the framers of the Constitution, and to promote the objects for the attainment of which that instrument was ordained."[158] The court could also adopt Professor Howard's theory that Section 2 recognizes Section 1's self-executing quality through its language stating that "legislation is to be 'in the furtherance of such policy' in existence by virtue of section 1."[159] This argument is bolstered by (more admittedly old) precedent stating that a constitutional provision "should never be construed as dependent for its

---

156 *See* 1969 Senate Proceedings and Debates, *supra* note 22, at 372; Howard, *supra* note 7, at 208.

157 Brief for Appellee at 8–12, 25, Robb v. Shockoe Slip Found., 324 S.E.2d 674 (Va. 1985) (No. 821539).

158 Va. & S.W. Ry. Co. v. Clowers' Admin., 47 S.E. 1003, 1004 (Va. 1904); *see also* Pollard, *supra* note 114, at 359–60.

159 HOWARD, COMMENTARIES, *supra* note 10, at 1145 (quoting Va. Const. art. XI, § 2).

efficacy and operation upon legislative will,"[160] contrary to *Shockoe Slip*'s holding. And challengers to *Shockoe Slip* could plausibly reframe Section 1 as having negative features that lend themselves to self-execution: the provision can be read to protect individuals against state intrusions on their use and enjoyment of a clean and healthy environment.[161]

However, the court seems unlikely to consider an outright reversal of its Article XI precedents. Finding Article XI, Section 1 to be self-executing would still raise concerns about judicial overreach into questions arguably better left to the democratically accountable legislature;[162] a legislature that, again, has acted extensively on environmental issues in the past couple of years. Furthermore, the court is hostile to arguments based on legislative history, even for constitutional provisions. Since the second half of the twentieth century, the court has consistently held that "[i]n construing constitutional provisions, the Court is 'not permitted to speculate on what the framers of [a] section might have meant to say, but are, of necessity, controlled by what they did say.'"[163] The court will look to the original meaning of the language included within the provision itself,[164] but *Shockoe Slip* is not grounded in construing any particular term from Section 1 that might support this sort of textualist argument. Regardless, the *Shockoe Slip* court's understanding of the individual words in Article XI in 1986 is unlikely to vary much from the framers' understanding of the words fifteen years prior.

But while outright reversals of *Shockoe Slip* and *Rudder* are unlikely, litigants could argue for more modest glosses on Article XI that strengthen its protections while keeping precedent intact. Favorable rulings under these theories would immediately expand environmental protection under the current Virginia Constitution.

---

160 Swift & Co. v. Newport News, 52 S.E. 821, 824 (Va. 1906).

161 *See* Torres Asencio, *supra* note 118, at 287–91.

162 *See* Fernandez, *supra* note 31, at 376–77.

163 Blount v. Clarke, 782 S.E.2d 152, 155 (Va. 2016) (quoting Harrison v. Day, 106 S.E.2d 636, 644 (Va. 1959)) (considering the meaning of art. V, § 12 of the Virginia Constitution).

164 *See, e.g.*, Edwards v. Vesilind, 790 S.E.2d 469, 476 (Va. 2016) (assessing the original understanding of legislative privilege under the Virginia Speech or Debate Clause); AGCS Marine Ins. Co. v. Arlington Cnty., 800 S.E.2d 159, 170 (Va. 2017) (rejecting an argument in an inverse condemnation case for being "inconsistent with the history and text of Article I, Section 11 of the Constitution of Virginia" and evaluating the early nineteenth century understanding of eminent domain since the takings provision was first added to the Constitution in 1830)).

1. Circumventing Shockoe Slip and Rudder

First, challengers could argue that state projects too small to trigger Virginia's EIR review still require some level of procedural review. This would not directly contradict *Rudder* or *Shockoe Slip* because the court in each case found that the party challenging the state action was asking for the equivalent of an EIR.[165] In the federal NEPA context, even projects that are not significant enough to merit full procedural review through an Environmental Impact Statement still must prepare an Environmental Assessment. An Environmental Assessment establishes a record with a shorter description of the environmental factors at issue and a high-level assessment of available alternatives.[166] Virginia courts could impose a similarly limited procedural requirement upon smaller projects that do not necessitate an EIR.[167] They could also perhaps require an oral or written hearing for smaller projects. These sorts of procedural remedies would implicate the Supreme Court of Virginia's concern about judge-made remedies, but other state high courts have found that their constitutions' broad conservation policy provisions require state actors to consider environmental impacts even absent legislation.[168] Additional watered-down procedural requirements might not change agencies' decisions, but they might give challengers an opportunity to delay projects by litigating to enforce process, as happens with NEPA at the federal level.

Second, parties in cases involving a statute or regulation mentioning "public policy" or "public interest" should argue that Article XI requires that an agency acting under that law must consider conservation and environmental protection.[169] Professor Howard advanced this theory soon after Article XI's enactment and argued that it would extend to laws governing local zoning decisions and licensing public utilities and infrastructure projects.[170] The Supreme Court of Virginia has already recognized this implication of Article XI in the context of the State Corporation Commission's duty to fix just and reasonable public utility

---

165 Rudder v. Wise Cnty. Redevelopment and Hous. Auth., 249 S.E. 2d 177 (Va. 1978); Robb v. Shockoe Slip Found., 324 S.E.2d 674, 677 (Va. 1985).

166 *See, e.g.*, Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).

167 *See* Pollard, *supra* note 114, at 377 (suggesting post-Shockoe Slip that Virginia courts impose this type of requirement).

168 *See, e.g.*, Save Ourselves, Inc. v. La. Env't Control Comm'n, 452 So. 2d 1152, 1156–57 (La. 1984) (requiring the agency to show in a record that it considered environmental implications of its action); Seadade Indus., Inc. v. Fla. Power and Light Co., 245 So. 2d 209 (Fla. 1971).

169 *See* Howard, *supra* note 7, at 211–12.

170 *See id.* at 212.

rates.[171] Professor Howard further argued that, because all agencies are created in the public interest, all must weigh environmental factors in their decisions.[172] This "public interest" theory would also come into play in eminent domain cases where the state has to defend itself against takings or due process claims.[173] Such a reading would weigh in favor of pro-environmental outcomes whether the state action promoted Section 1's values (condemning land to create a nature preserve, issuing a development moratorium in coastal wetlands to combat sea level rise) or contravened those values (approving permits for utility companies to condemn land on a natural gas pipeline route, approving permits to site a landfill in a low-income minority community). Similarly, parties seeking to advance environmental protection could argue that courts should liberally construe ambiguities in statutes and regulations in favor of the environmental values in Article XI.[174]

Finally, petitioners could argue that Article XI gives them standing to challenge state action impacting the environment. Virginia's statutory standing law is restrictive in environmental cases, with narrow definitions of what counts as "aggrieved" under the environmental statutes.[175] Professor Howard argued for a broad interpretation of standing questions such as whether the plaintiff was "aggrieved" or suffered "injury in fact" where agency action threatens the environment.[176] Courts are well-suited to define the contours of standing because it is a judicial question; standing does not raise the same judicial restraint justifications against defining, say, the substantive meaning of a "clean" or "healthy" environment.[177] Such a reading of Section 1 could give it real bite. Even if statutory law exclusively defines the substance of environmental protections enacted in furtherance of Article XI, an Article XI interpretation that expands standing would make it easier for citizens to enforce those substantive statutory requirements.

---

171 *See* Po River Water and Sewer Co. v. Indian Acres Club of Thornburg, Inc., 495 S.E.2d 478, 481 (Va. 1998).

172 Howard, *supra* note 7, at 213–14.

173 *See* Butler, *supra* note 114, at 858.

174 *See id.* at 855, 898 (citing State v. Eluska, 724 P.2d 514, 515 n.6 (Alaska 1986); City of Miramar v. Bain, 429 So. 2d 40, 42 (Fla. Dist. Ct. App. 1983)).

175 *See* Magargee, *supra* note 113, at 241–43 (citing Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals, 344 S.E.2d 899 (Va. 1986); Env't Def. Fund v. Va. St. Water Control Bd., 404 S.E.2d 728 (Va. 1991)).

176 *Id.* at. 252–54.

177 *See* Torres Asencio, *supra* note 118 at 301–02 (2018).

2. Reading public trust doctrine into Article XI

Judicial glosses that circumvent *Shockoe Slip* and *Rudder* would help litigants who seek to achieve environmental protection in Virginia's courts. But such glosses would provide mostly procedural protections, doing relatively little to expand agencies' affirmative substantive obligations to consider Article XI's environmental mandate. However, courts could read the public trust doctrine into Article XI, Section 1 without overturning precedent. Expanding the public trust doctrine in Virginia could affect significant substantive change and alleviate courts' concerns about judicial overreach and lack of environmental expertise.

As discussed in Part I.C *supra*, the debates between Senators Howell and Brault over Article XI's language indicate that the framers intended for Article XI to establish a public trust. But again, Virginia courts look only to the language of constitutional provisions without speculation upon the framers' intent.[178] One can certainly make a textualist argument that Section 1 does not contain public trust language, particularly when contrasted with the explicit trust language about oyster beds in Section 3.[179] Indeed, the State made this exact argument in its briefing in *Shockoe Slip*.[180] But Section 3 proves that Virginia recognizes the existence of a public trust generally, and its Supreme Court has held for a century that a public trust protects navigation rights.[181] The Supreme Court of Virginia has shown little interest in developing the public trust doctrine beyond that,[182] but at least one state appellate court has accepted that Section 1 expands the scope of the public trust.[183] Furthermore, Louisiana has a constitutional conservation article very similar to Virginia's, and its Supreme Court found that its conservation article recognizes a public trust.[184]

---

178 *See, e.g.*, Blount v. Clarke, 782 S.E.2d 152, 155 (Va. 2016) (citing Harrison v. Day, 106 S.E.2d 636, 644 (Va. 1959)).

179 Article XI, § 3 states as follows: "The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented, or sold but *shall be held in trust* for the benefit of the people of the Commonwealth, subject to such regulations and restriction as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals by surveys or otherwise." (emphasis added).

180 Reply Brief for Appellant at 13–14, Robb v. Shockoe Slip Found., 324 S.E.2d 674 (Va. 1985) (No. 821539) (finding that the Howell-Brault exchange "can hardly overcome the fact that Article XI, § 3 has clear public trust language, but there is none in § 1 of the same Article. If a public trust were intended, it could easily have been expressed.").

181 Commonwealth v. City of Newport News, 164 S.E. 689, 689–90 (Va. 1932).

182 *See, e.g.*, Kraft v. Burr, 476 S.E.2d 715, 715–19 (Va. 1996) (remaining silent as to whether the public trust had been expanded to fishing rights).

183 Evelyn v. Commonwealth, 621 S.E.2d 130, 137 n.3 (Va. Ct. App. 2005). *See also* notes 103–07 *supra* and accompanying text.

184 Save Ourselves, Inc. v. La. Env't Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) (citing LA. CONST. art. IX, § 1, which states: "The natural resources of the state, including air and

The Supreme Court of Virginia could find that Section 1 recognizes and expands a public trust without overruling *Shockoe Slip* or *Rudder*. The *Shockoe Slip* court recognized that even when a constitutional provision does not declare itself to be self-executing, "constitutional provisions . . . merely declaratory of common law are usually considered self-executing."[185] The public trust doctrine is judge-made common law. One commentator recently argued that any public trust components of Section 1 would thus be self-executing.[186] *Shockoe Slip* found that Section 1 "is not declaratory of common law"[187] but provided no analysis backing that conclusory statement; the opinion is silent as to the public trust doctrine. So, while a court squarely confronting the public trust question might come out the same way, *Shockoe Slip* does not seem to preclude an alternate reading.[188]

Virginia's courts would need to define the scope of uses of trust lands and waters protected under the doctrine, but Article XI and state court precedent already provide guidance. Navigation is historically recognized.[189] Access to oyster beds is included by Article XI, Section 3, dating back to its original enactment in 1902. Hunting and fishing are likely incorporated by Article XI, Section 4—enacted as a constitutional amendment by Virginia voters in 2000—which provides that "[t]he people have a right to hunt, fish, and harvest game."[190] Use for recreational purposes is expressly listed in Article XI, Section 1. While these uses could expand over time as the courts further develop common law public trust doctrine, they cannot contract, as they are constitutionally guaranteed. Breathable air, drinkable water, and a stable climate could also plausibly fit within Section 1's language.[191] And the

---

water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy."). *See also* Kacy Manahan, Comment, *The Constitutional Public Trust Doctrine*, 49 ENV'T L. 263, 295 (2019) (discussing the case and its possible application to Virginia).

185 324 S.E.2d 674, 676 (Va. 1985).

186 Manahan, *supra* note 184, at 294.

187 324 S.E.2d at 676.

188 *But see* Sharon M. Kelly, Note, *The Public Trust and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia*, 75 VA. L. REV. 895, 911 n. 108 (1989) (expressing skepticism that Section 1 expanded the public trust "in light of [Shockoe Slip's] determination that [Article XI] imposed no new restrictions on the legislature").

189 Commonwealth v. Newport News, 164 S.E. 689, 698–99 (Va. 1932).

190 JOHN DINAN, THE VIRGINIA STATE CONSTITUTION 251 (2d ed. 2014). For a comprehensive history and analysis of Section 4, *see generally* Stephen P. Halbrook, *The Constitutional Right to Hunt: New Recognition of an Old Liberty in Virginia*, 19 WM. & MARY BILL RTS. J. 197 (2010).

191 *See, e.g.*, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020) (holding that the federal government's failure to regulate greenhouse gas emissions violated the federal public trust, albeit being reversed on appeal).

assurance that the public trust is held on behalf of *all* citizens should encompass and advance environmental justice efforts.

Perhaps the Supreme Court of Virginia's decades-long silence on public trust doctrine reflects its disapproval. But a finding that Section 1 is self-executing only as an expansion of preexisting public trust doctrine, rather than as an entirely new substantive right to sue the state government, would ground Section 1 in well-established law and set clear boundaries on its scope.[192] Public trust doctrine varies by jurisdiction but has several consistent principles. First, the trust relationship precludes the legislature from entirely disregarding its trust responsibilities.[193] The trust also requires administrative agencies and state officials to consider their actions' impacts on trust resources.[194] Other states' courts have established tests for determining whether the government violated the trust in disposing of trust resources.[195] A number of these courts have also found that the public trust imposes specific procedural requirements, including providing hearings and establishing a record showing that the state considered environmental factors in its decision.[196] Finally, courts have invoked the public trust to shift the burden to government agencies to prove explicit legislative approval for any infringement upon the public trust and to disallow delegations of certain public trust responsibilities.[197] These precedents from other jurisdictions could provide Virginia's courts with a solid foundation for building out common law public trust doctrine in ways that bolster the power of Virginia environmental law.[198]

---

[192] *See* HOWARD, COMMENTARIES, *supra* note 10, at 1155–56; Butler, *supra* note 114, at 898–904.

[193] *See, e.g.*, Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

[194] *See, e.g.*, Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cnty., 658 P.2d 709 (Cal. 1983) (the "Mono Lake" case).

[195] *See, e.g.*, Kootenai Env't Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1091–92 (Idaho 1983) (establishing a test that first evaluates whether the property conveyance still furthers a use protected by the public trust and then evaluates whether any impairment on such use is substantial).

[196] *See, e.g.*, *id.*; Save Ourselves, Inc. v. La. Env't Control Comm'n, 452 So. 2d 1152, 1156–57 (La. 1984); *see also* Pollard, *supra* note 114, at 379 (citing WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 172 (1977) for the proposition that the public trust merely requires "fair procedures, decisions that are justified, and results that are consistent with protection and perpetuation of the resource").

[197] *See* Howard, *supra* note 7, at 223–24.

[198] For further exploration of public trust doctrine in state constitutions and courts, *see generally* Manahan, *supra* note 184; Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PA. ST. ENV'T L. REV. 1 (2007); Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169 (1997); William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385 (1997).

B. Amending the Virginia Constitution

The legal theories for reinterpreting Article XI might lose in Virginia courts, or might not go far enough to protect Virginia's citizens and their environment. There are now decades of data points from other states who enacted environmental provisions around the same time as Virginia (or earlier).[199] Some of those provisions have quite different language from Virginia's, and courts in a few such states have invoked them to provide citizens with significant environmental protections and recourse against environmental harms. A constitutional amendment changing the language or structure of Article XI might better advance the 1971 Constitution's framers' environmental policy goals. An amendment could also more directly address environmental problems that have arisen in the fifty years since Article XI's enactment.

Virginia's amendment process is lengthy. It requires majority approval in each house of the General Assembly by representatives from two different election cycles, then requires a majority of Virginia's voters to enact the amendment into law.[200] Significant changes that adopt environmental rights language or address climate change directly will invite inevitable cultural and political backlash that might detract from advancing environmental goals. As such, environmental and citizens' groups' resources might ultimately find their time better devoted to advancing further statutory and regulatory environmental protections.

But again, constitutions "serve[] a symbolic or legitimating function"[201] and "reflect those propositions thought most fundamental"[202] to the citizens from whom they arise. If the Virginia Constitution does not sufficiently reflect and protect Virginians' environmental values, we should amend it.

Drafting a proposed constitutional amendment exceeds the scope of this Note, and is work far better suited for collaboration amongst the many citizen groups and organizations fighting to protect Virginia's people and natural resources. Therefore, the following sections seek only to briefly highlight three components for a hypothetical constitutional amendment that could potentially strengthen environmental protection and better respond to future environmental threats than Article XI in its current form.

---

199 For a comprehensive survey of all 46 states with some form of environmental or natural resource provision in their constitution, *see generally* Bret Adams et al., *Environmental and Natural Resource Provisions in State Constitutions*, 22 J. LAND RES. & ENV'T L. 73 (2002).

200 VA. CONST. art. XII.

201 Butler, *supra* note 114, at 857.

202 HOWARD, COMMENTARIES, *supra* note 10, at 1139–40.

1. Adding an environmental right to Virginia's Declaration of Rights

The 1971 Constitution's framers did not intend for Article XI to confer a constitutional right to a clean environment that would allow citizens to sue private actors (as opposed to just the state government) to prevent environmental harms.[203] Conversely, Montana,[204] Pennsylvania,[205] Rhode Island[206], and New York's[207] constitutions nest explicit environmental rights provisions in their state bills of rights.

This rights-based language has led to significant substantive review in Pennsylvania and Montana's state courts. Pennsylvania's constitution guarantees a right to "clean air, pure water, and preservation . . . of the environment."[208] Pennsylvania's provision also expressly designates the state as trustee of the state's resources on behalf of all its individuals.[209] In a landmark 2013 decision, *Robinson Township*, the Pennsylvania Supreme Court held that these constitutional environmental rights are self-executing, overturning prior precedent.[210] In doing so, the court invalidated a state law that preempted localities' authority to decide whether to permit natural gas extraction.[211] The Pennsylvania Supreme Court reaffirmed *Robinson Township* four years later when it struck down statutes granting royalties for natural gas extraction, finding that the statutes ignored the state's "constitutionally imposed fiduciary duty" to manage the environmental public trust to accomplish its purpose of "preventing and remedying the degradation, diminution and depletion of our natural resources."[212] The Pennsylvania Supreme Court has given real substantive meaning to its constitution's rights-based conservation language in a way that courts in states with policy statement provisions (like Virginia) have not.

Montana has likewise given teeth to the environmental right in its constitution's bill of rights. In a 1999 case, a private citizen challenged

---

203 *See* Howard, *supra* note 7, at 207.

204 MONT. CONST. art. II, § 3 (adopted in 1889) ("right to a clean and healthful environment").

205 PA. CONST. art. I, § 27 (adopted in 1971) ("right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment").

206 R.I. CONST. art. I, § 17 (adopted in 1986) ("rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values").

207 N.Y. CONST. art. I, § 19 (adopted in 2021) ("right to clean air and water, and a healthful environment").

208 PA. CONST. art. I, § 27.

209 *Id.*

210 Robinson Twp. v. Commonwealth, 83 A.3d 901, 974–75 (Pa. 2013).

211 *Id.* at 1000. For a detailed discussion of the case, *see generally* Sara Cutuli, *State Constitutional Law—Environmental Rights Amendment—Judicial Environmentalism Holds Pennsylvania Statute in Violation of the State's Constitution, Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2012)*, 68 RUTGERS U. L. REV. 1573 (2016).

212 Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 938 (Pa. 2017).

the constitutionality of a statute exempting certain discharges from the state's water quality and review requirements.[213] The Montana Supreme Court found that the individual had standing to sue under Montana's bill of rights, which ensures an "inalienable right[] . . . to a clean and healthful environment."[214] The court then struck down the statutory exemption as arbitrary and in violation of environmental rights because it risked allowing discharge of toxins into the state's waterbodies.[215] In doing so, the court imposed strict scrutiny of the statute upon the petitioner's showing of environmental harm.[216] The Montana Supreme Court later extended strict scrutiny to private party actions infringing upon rights to a clean environment.[217] One commentator has espoused Montana's approach as a model for state environmental jurisprudence: its Supreme Court set a strong rule up front and has since "beg[u]n to develop a body of constitutional environmental case law" which has allowed it to "move towards less deferential modes of judicial enforcement."[218] By grappling with these cases in the context of rights-based language, the Montana Supreme Court has overcome any hesitancy to set rules in environmental cases—a task that the *Shockoe Slip* court claimed was out of its depth.

It is no coincidence that Pennsylvania and Montana, whose constitutions include rights-based language instead of policy-based language, have been at the forefront of substantive judicial environmental protection.[219] If Virginia passed a constitutional amendment that added an environmental right to the state bill of rights, Virginia's courts would find it self-executing.[220] And while it would still have the definitional problems of what constitutes a right to a "clean" or "healthful" environment that exist in any environmental article, Virginia could at least draw on the experiences of Pennsylvania and Montana in establishing the framework for a new environmental right.[221]

---

213 Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1237–41 (Mont. 1999).

214 *Id.* at 1243–44.

215 *Id.* at 1249.

216 *Id.*

217 Cape-France Enter. v. Est. of Peed, 29 P.3d 1011 (Mont. 2001).

218 Torres Asencio, *supra* note 118, at 307.

219 *See id.* at 326–29 (holding Montana up as a model); VAN ROSSUM, *supra* note 126, at 62–63 (praising Pennsylvania and Montana's provisions as the best conservation articles currently in existence in the United States).

220 *See* Gray v. Va. Sec. of Trans., 662 S.E. 2d 66, 71 (Va. 2008) (distinguishing Shockoe Slip for rights found in the Declaration of Rights); *see also* VAN ROSSUM, *supra* note 126, at 232 (advocating generally for locating environmental rights in states' bills of rights to solve the self-execution problem).

221 For a detailed (albeit outdated) discussion of how states with environmental rights provisions have attempted to answer these questions, *see* Mary Ellen Cusack, Comment, *Judicial*

2. Adding language to account for climate change and environmental justice

Pennsylvania and Montana's environmental rights amendments come from an era before widespread understanding of climate change. In the past few years, a movement to enact new "green amendments" into state constitutions has begun. Such amendments would contain similar rights-based language to Pennsylvania and Montana (e.g., "state residents have a fundamental right to clean air, clean water, and a healthy environment") but would add an additional fundamental right to a "stable climate system."[222] Activists have introduced "green amendments" in at least eleven states, but not yet Virginia.[223] None have been enacted to date.

A conservation provision might better promote environmental justice if it guarantees "every individual" the environmental rights espoused, rather than "the people" collectively, as Article XI and most states' environmental provisions do.[224] Furthermore, an environmental amendment could expressly provide that the state guarantees each individual's environmental rights or protections regardless of race, gender, national origin, and any other bases deemed important.

3. Adding an explicit citizen suit provision to make Article XI self-executing against the government and private parties

Finally, adding an explicit citizen suit provision to make Article XI self-executing against the government and private parties could provide environmental protection beyond the current Article XI. Even if Article XI were determined to be self-executing, it would only be as against state actors.[225] Illinois[226] and Hawaii[227] have environmental provisions in

Interpretation of State Constitutional Rights to a Healthful Environment, 20 B.C. ENV'T AFF. L. REV. 173, 191–96 (1993).

222 Joselow, *supra* note 134; *see also* VAN ROSSUM, *supra* note 126, at 232.

223 *See* Joselow, *supra* note 134. The states include Hawaii, Kentucky, Oregon, New York, New Jersey, New Mexico, Vermont, Washington, and West Virginia.

224 New York's recent constitutional amendment guarantees environmental rights to "[e]ach person." N.Y. CONST. art. I, § 19 (2021).

225 *See* Part I.E *supra*.

226 ILL. CONST. art. XI, § 2: ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").

227 HAW. CONST. art. XI, § 9: ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.").

their state constitutions that allow suits against both state actors and private parties. Some have argued that these states' provisions are powerful[228] and that similar language should be adopted in Virginia.[229]

CONCLUSION

In 2020, Virginia passed a sweeping Clean Economy Act and incorporated climate change and environmental justice as key policies for the Commonwealth. In 2021, the fiftieth anniversary of the 1971 Constitution, the General Assembly considered further legislation that would create an environmental justice interagency working group and force localities to consider environmental justice in their long-term planning.[230] Despite Article XI's limitations, Virginia may continue to pass legislation to respond to pressing environmental issues.

However, that does not mean we should accept a merely ornamental Article XI. Article XI's existence proves that conservation and environmental protection are "propositions thought most fundamental to the well-being of the Commonwealth and its citizens."[231] Virginians should not settle for exclusively legislative action when judicial reinterpretations of Article XI and—absent sufficient judicial action—a new constitutional amendment could better protect their fundamental environmental values. Embracing the public trust doctrine and expanding it to encapsulate Section 1's policy statements is particularly promising: it can be done relatively quickly by courts, it would significantly expand and refine Virginians' environmental rights, and it comes with rules and precedents that judges should feel comfortable applying. Reinterpreting Article XI in a way that would force consideration of environmental values in laws invoking the "public interest" and expand standing could also go a long way, especially in conjunction with Virginia's recently expanded environmental laws and regulations. And while a new rights-based environmental amendment might not be a panacea for environmental protection, it could make valuable progress, as seen in Pennsylvania and Montana. A "green" amendment expressly addressing climate change and environmental justice could go even further.

---

228 *See* Gallagher, *supra* note 6, at 137–41 (discussing Hawaii's citizen suit provision).

229 *See generally* Magargee, *supra* note 113.

230 Mel Leonor, *Better, More Community Input is Needed to Address Environmental Injustice, Commission Finds*, RICHMOND TIMES DISPATCH (Feb. 26, 2021), https://richmond.com/news/state-and-regional/better-more-community-input-is-needed-to-address-environmental-injustice-commission-finds/article_c07b3db2-8e66-5432-8303-d605925b22cf.html [https://perma.cc/NDW8-LYUQ].

231 HOWARD, COMMENTARIES, *supra* note 10, at 1139–40.

Virginia's constitutional jurisprudence has not kept up with the pace and scope of environmental threats facing the commonwealth and its people. The fiftieth anniversary of Article XI's adoption marks a perfect time to reconsider that jurisprudence and explore new amendments that can meet the challenge if Article XI cannot in its current form. If we act now, we might still ensure for Virginians "a place of pleasure, dignity, and permanence which we can pass on to future generations with satisfaction and pride," as the constitution's framers intended.[232]

[232] COMM'N ON CONST. REVISION, *supra* note 2, at 322 (quoting Va. Outdoor Recreation Study Comm'n, Report 8 (1965)).