STATE CONSTITUTIONS, ENVIRONMENTAL RIGHTS PROVISIONS, AND THE DOCTRINE OF SELF-EXECUTION: A POLITICAL QUESTION?

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> Laws are established, manners are inspired; these proceed from a general spirit, those from a particular institution: now it is as dangerous, nay more so, to subvert the general spirit as to change a particular institution.[1]

I. INTRODUCTION

State courts sometimes rely on the doctrine of self-execution when declining to enforce state constitutional provisions. These courts insist that constitutional provisions be "self-executing" before they will give them force both because the courts do not consider themselves capable of fashioning rules to effectuate ambiguous constitutional provisions, and because they feel a need to exercise judicial restraint. For a constitutional provision to be self-executing, the provision must provide the court with a complete and enforceable rule.[2] Put another way, to be self-executing, the constitutional language must supply "a sufficient rule by means of which the right which [the provision] grants may be enjoyed and protected . . . without the aid of a legislative enactment."[3] If the court cannot enforce the provision as written, it will impute to those who adopted the provision an intent to require enabling legislative action before it will execute the provision's mandate. Courts explain the doctrine either as an attempt to comply with the intent of those adopting the provision as inferred from the suitability of the provision's language for judicial enforcement,[4] or as an application of the principle of judicial restraint in circum-

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1. MONTESQUIEU, THE SPIRIT OF LAWS XIX, ch. 12, at 320 (Thomas Nugent trans., J.V. Prichard rev. ed. 1914) (reprinted 1991).

2. *See generally* part II.B *infra*.

3. State *ex rel.* City of Fulton v. Smith, 194 S.W.2d 302, 304 (Mo. 1946) (quoting 11 AM. JUR. *Constitutional Law* § 74, at 691–92 (1937)) (finding constitutional provision to be self-executing without additional legislative enactment).

4. *See* Haile v. Foote, 409 P.2d 409, 411 (Idaho 1965).

stances of potential conflict with the other branches of government.

Yet, by relying on the doctrine of self-execution, state courts have rendered opinions which appear to thwart the adopters' intent to make those provisions effective. In particular, these courts have refused to enforce provisions in state constitutions that purport to grant a right to a clean environment.[5] Despite the evident intent of those adopting the provisions to establish enforceable rights, some courts have held these constitutional guarantees to be ineffective in the absence of appropriate enabling legislation.[6] Several scholars have criticized the courts' reliance on the doctrine of self-execution when declining to enforce environmental rights provisions,[7] noting the willingness of these and other state courts to enforce other types of constitutional provisions presenting comparable definitional and enforcement challenges.[8]

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5. *See, e.g.*, Robb v. Shockoe Slip Found., 324 S.E.2d 674, 676–77 (Va. 1985) (discussed *infra* part III.B.1); Commonwealth v. National Gettysburg Battlefield Tower, Inc., 302 A.2d 886, 894–95 (Pa. Commw.), *aff'd*, 311 A.2d 588 (Pa. 1973) (discussed *infra* part III.B.2). *See also* NICHOLAS A. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY § 3.07, at 3-25 (1982). Discussing Article 1, § 27 of the Pennsylvania Constitution, Robinson explains: "While strong in expression of a right to a sound environment, these words have been construed as not being self-executing. Their potential force at adoption has not been realized." *Id.* at 3–26 (citations omitted). Other commentators share this view. *See* Oliver A. Pollard, III, Note, *A Promise Unfulfilled: Environmental Provisions In State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351, 351 (1986) (explaining that "[s]tate courts almost uniformly hold that general environmental provisions are ineffective absent additional legislation"); Bruce Ledewitz, *The Challenge of, and Judicial Response to, Environmental Provisions in State Constitutions*, 4 EMERGING ISSUES STATE CONST. 31, 46 (1991).

Other countries have included environmental rights provisions in their national constitutions, albeit with varying results. *See generally* Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1 (1992).

6. *See* cases cited *supra* note 5. State constitutions may contain several articles that may appropriately be classified as environmental in that they are aimed at protecting natural resources, *see* CAL. CONST. art. 10, § 2 (1974) (amended and renumbered art. 14, § 3 (1879)) (requiring water conservation), or provide funding to protect such resources. *See* OKLA. CONST. art. XXVI, § 4 (1956). This Article, however, focuses on broader state provisions that guarantee the preservation of all natural resources or that appear to grant a general right to a certain level of environmental quality. *See* part III.A *infra*.

7. *See, e.g.*, Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063, 1108 (1992); Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 844–60 (1990); Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment*, 1 DUKE ENVTL. L. & POL'Y F. 1, 1 (1991); Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 136 (1990); Pollard, *supra* note 5, at 351.

8. *See, e.g.*, Brooks, *supra* note 7. Professor Brooks asserts the desirability of a federal or state constitutional right to a healthful environment. *Id.* at 1109. While Brooks does not focus on the difficulties involved in the enforcement or the execution of such a

This Article examines the application of the doctrine of self-execution to environmental rights provisions. Part II.A traces the roots of the doctrine of self-execution, and Part II.B surveys the principles that constitute the doctrine. Part II.C considers the supposed limitations of the doctrine in light of the actions of the New Jersey Supreme Court in the *Mount Laurel* cases. In Part III, the Article discusses the potential of existing environmental rights provisions for self-execution.[9] It examines the reasons given by the courts in leading cases from Virginia and Pennsylvania for declining to enforce environmental rights provisions and ultimately finds those reasons unconvincing. Part IV nevertheless maintains that, given the historical and political immaturity of environmental rights, the courts' restraint has a salutory effect: while the doctrine of self-execution should not prevent judicial enforcement of environmental rights, the courts' refusal to enforce such provisions reinforces the processes of participatory democracy by requiring that solutions to environmental problems be developed through continuing public and legislative debate.

II. THE DOCTRINE OF SELF-EXECUTION

A. Origins and Development of the Doctrine of Self-Execution

1. Early Federal Cases

The question of self-execution first arose at the federal level in 1791, when Congress sought to resolve a controversy involving

provision, *id.* at 1072, he notes that many difficult issues are raised by such a right. *Id.* at 1070. He asserts, however, that the problems are surmountable; "[a]fter all, other rights, such as freedom of speech, face similar complications and their limits can only be defined over time." *Id.* at 1071. Others note that the "courts frequently interpret imprecise terms such as due process, equal protection, and cruel and unusual punishment." McLaren, *supra* note 7, at 136. *See also* Ledewitz, *supra* note 5, at 46–47; Pollard, *supra* note 5, at 355.

9. This Article focuses on state constitutional provisions. The debate about a federal constitutional environmental right sometimes focuses on proposals to amend the Constitution so as to provide such a right and sometimes centers on assertions that such a right already exists in the Constitution. *See, e.g.*, Brooks, *supra* note 7; Caldwell, *supra* note 7; William D. Kirchick, *The Continuing Search for a Constitutionally Protected Environment*, 4 ENVTL. AFF. 515 (1975); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 713–14 (1977).

In the federal courts, the assertion of a federal constitutional guarantee has been repeatedly rejected. *See, e.g.*, Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971); Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061, 1064 (N.D. W. Va. 1973); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 535 (S.D. Tex. 1972).

Pennsylvania's attempt to force Virginia to extradite three fugitives. Three Virginians illegally kidnapped a free black man in Pennsylvania and took him to Virginia with the intent of making him a slave. Pennsylvania indicted the kidnappers, but when the governor of Pennsylvania demanded that Virginia surrender the fugitives as required by the extradition clause of the United States Constitution,[10] the governor of Virginia refused the request.[11]

The attorney-general of Virginia argued that the Constitution provided no means for enforcing the provision, and for that reason the provision was unenforceable.[12] The governor of Pennsylvania then turned to President Washington for relief, who presented the problem to Congress.[13] The resulting law, "An Act respecting fugitives from justice, and persons escaping from the service of their masters,"[14] supplied the necessary enforcement process.

Fifty years later, the question of self-execution arose before the U.S. Supreme Court as an ancillary issue in *Prigg v. Pennsylvania*.[15] Prigg, hired by a Maryland slaveowner to recover a fugitive slave, failed to secure the cooperation of the Pennsylvania authorities in recovering the slave, and so he subsequently seized the fugitive slave and her children, taking them back to Maryland against their will. Prigg was later convicted of a felony under state law by Pennsylvania courts. On appeal, the Supreme Court considered the question of whether Article IV of the federal Constitution invalidated the Pennsylvania statute under which Prigg was convicted.[16]

Pennsylvania argued before the Court that the Constitutional provision was not self-executing. Justice Story, writing for the Court, while noting that the extradition clause would require a

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10. U.S. CONST. art. IV, § 2, cl. 2.

11. The situation is described in *Ex parte Bushnell*, 9 Ohio St. 77, 253–54 (1859) (Sutliff, J., dissenting).

12. *See id.* at 254.

13. *See id.* For more historical background to the 1793 Act, see *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 561–62, 666–67 (1842).

14. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

15. 41 U.S. (16 Pet.) 539 (1842).

16. U.S. CONST. art. IV, § 2, cl. 3, states:

> No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

legislatively created enforcement process if extradition were sought through the courts, held that the provision granted an absolute right of self-help to the slaveowner. The Court recognized that the purpose of the provision was "to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape."[17] Insofar as the slaveowner had a right to "seize and possess the slave," the provision "may properly be said to execute itself; and to require no aid from legislation, state or national."[18] Thus the Court held the Pennsylvania act forbidding the abduction of fugitive slaves unconstitutional.

For the Court, the fact that the provision established no implementing process or authority[19] raised several unresolved questions. For example, the phrase "he shall be delivered" implied the possibility of action by one other than the slaveowner or his agent.[20] Thus the Court asked: Delivered by whom and in what mode? What was the slaveowner to do if delivery were refused? What would constitute evidence that a recapture or delivery was legitimate? "These, and many other questions will readily occur . . . and it is obvious that they can receive but one satisfactory answer. They require the aid of legislation . . . ."[21] Without legislation, "it is plain that [the provision] would have, in a great variety of cases, a delusive and empty annunciation."[22]

Thus the Court's analysis in *Prigg* articulated some of the pragmatic and political reasons for the doctrine of self-execution. The recognition of some need for legislative action implies that the Court felt either that it could not or should not provide answers to the questions that its analysis raised. Clearly, the Justices could have provided their own answers, but the Court preferred a leg-

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17. *Prigg*, 41 U.S. (16 Pet.) at 611 (Story, J.).

18. *Id.* at 613.

19. The point was also made by Justice Thompson: "The second branch of the provision, in my judgment, requires legislative regulations pointing out the mode and manner in which the right is to be asserted." *Id.* at 634 (Thompson, J., concurring). Justice Thompson also alluded to an issue that would arise in future cases involving the doctrine of self-execution. While noting the need for legislative enactment to give effect to the second part of the provision, he also noted that the Court had no power "to compel Congress to pass any law on the subject." *Id.* at 634–35.

20. *Id.* at 615.

21. *Id.*

22. *Id.* at 614.

islative resolution because of doubts about its ability to enforce any purely judicial solution.[23]

2. Cases in State Courts

State courts also confronted the issue of self-execution of constitutional provisions at an early stage in the nation's history. One early case, *State v. Sluby*,[24] considered the effect of a federal constitutional provision on a pre-existing state law. In 1790, Nicholas Sluby refused to pay import duties to the state of Maryland on the ground that the recently adopted federal Constitution repealed certain acts of the Maryland state assembly. He argued that Article I of the Constitution imposed on Congress the obligation to provide for uniform duties, and that this requirement nullified existing state laws which imposed differing duties in the various states.[25] While the state conceded that the Constitution gives Congress the power to enact uniform duties, the state argued that the constitutional provision was not self-executing, and did not in and of itself repeal the revenue laws of Maryland until and unless Congress enacted uniform duties.[26] The provision merely gave Congress a power that it could choose to exercise. Apparently accepting this argument, the court found for the state.[27]

In 1895, a New York appellate court declared in *In re Sweeley*[28] that an amendment to the New York state constitution[29] mandating civil service examinations was not self-executing.[30] Sweeley, a Civil War veteran, argued that under a pre-existing statute[31] granting veterans an exemption from civil service requirements, he could not be required to take the examination.[32] At issue

23. As will be developed in part II.B.2 *infra*, of even greater significance was the fact that had the Court attempted to implement such a process itself, it would have needed the legislature's power to appropriate funds and the executive's power of enforcement to succeed, a prospect contrary to the principle of separation of powers. *See infra* text accompanying notes 58–64.

24. 2 H. & McH. 480 (Md. Gen. Ct. 1790), *aff'd, see id.* at 482 (Md. 1792).

25. *Id.* at 480.

26. *Id.* at 481.

27. *Id.* at 482.

28. 33 N.Y.S. 369 (Sup. Ct.), *aff'd sub nom.* People *ex rel.* Sweeley v. Wilson, 42 N.E. 543 (N.Y. 1895).

29. N.Y. CONST. art. 5, § 9 (1894).

30. *Sweeley*, 33 N.Y.S. at 372.

31. 1884 N.Y. Laws ch. 410, § 4 (amending 1883 N.Y. Laws ch. 354, § 5).

32. *Sweeley*, 33 N.Y.S. at 371.

was whether the 1894 amendment repealed the prior statute. Sweeley asserted that the amendment was not self-executing, and therefore that it did not affect the existing veterans' exemption. The court agreed that the provision was not self-executing, stating that the provision "simply lays down principles for future legislation; that it does not prescribe the rules by which it may be enforced, and it is said that the amendment itself recognizes that fact in the last clause, which reads: 'Laws shall be made to provide for the enforcement of this section.'"[33] The court's finding that the provision needed legislation to give it force did not win the case for Sweeley, however, as the court went on to hold that the amendment, though not self-executing, did invalidate any act repugnant to its policy.[34]

These cases illustrate the early importance in American constitutional law of self-execution analysis. The courts proved unable or unwilling to resolve the many practical questions raised by the prospect of judicial enforcement of incomplete constitutional mandates.[35] Moreover, significant political considerations justified the courts' refusal to enforce provisions that they construed to require enabling legislation. Relying on the principle of separation of powers, courts decided that such provisions amounted to nothing more than a "mere general direction to the legislature."[36]

In time, to facilitate the application of the doctrine in particular cases, the courts developed a presumption with respect to the question of self-execution. For the practical and political reasons described above, and because courts understood state constitutions as prescribing basic principles rather than operational details, the courts initially presumed that most constitutional provisions required enabling legislation to be effective.[37] Courts understood

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33. *Id.* at 372.

34. Judge Herrick, writing for the majority, stated: "I cannot concede [despite the lack of legislation] that a citizen has any rights which he can enforce contrary to [the constitution's] provisions." *Id. But see* Roesler v. Taylor, 58 N.W. 342 (N.D. 1894) (discussed *infra* in text accompanying notes 126–129).

35. *See, e.g., Sweeley*, 33 N.Y.S. at 371–72; Goldman v. Clark, 1 Nev. 607 (1865). In *Goldman*, the Nevada Supreme Court considered whether a provision of the Nevada state constitution regarding homesteads, NEV. CONST. art. IV, § 30 (1864), repealed by implication the state's Homestead Act. 1861 Nev. Laws ch. XI. The court noted, "[t]he section . . . prescribes what some of the provisions of the Homestead Law shall be. *But it leaves many details to future legislation.*" *Goldman*, 1 Nev. at 610 (emphasis added).

36. Willis v. St. Paul Sanitation Co., 50 N.W. 1110, 1112 (Minn. 1892).

37. In *Rice v. Howard*, 69 P. 77 (Cal. 1902), Judge Temple stated:

the purpose of state constitutions as providing the outlines of a political and economic structure and preventing abuses of power by listing fundamental individual rights.[38] In *O'Neill v. White*,[39] the Supreme Court of Pennsylvania set forth the traditional view:

> A Constitution is primarily a declaration of principles of the fundamental law. Its provisions are usually only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws, yet it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing.[40]

Over time, however, the nature of state constitutions changed. Whether because of dissatisfaction with state legislatures for their failure to enact legislation effectuating constitutionally-guaranteed rights, or because of worries that the vagaries of public opinion would threaten legislatively-guaranteed rights, modern state constitutions contain many more specific directives. These directives include provisions granting rights and imposing obligations directly upon private and public parties as well as statements of fundamental principles.[41] To some extent, state constitutions have become supercodes[42] far more specific than any fundamental charter.[43]

> As to the question whether the provision is self-executing, it is well to note at the outset that the presumption is not precisely as it would have been had such a matter been presented for consideration fifty years ago . . . . Under former conditions it was natural that the court should presume that a constitutional provision was addressed to some officer or department of the government, or that it limited the power of the legislature, or empowered, and perhaps directed, certain legislation, to carry into effect a constitutional policy. Now, the presumption is the reverse.

Id. at 78–79.

38. The constitutions "merely outlined a government, provided for certain departments and some officers and defined their functions, secured some absolute and inalienable rights to the citizens, but left all matters of administration and policy to the departments which it created." *Id.*

39. 22 A.2d 25 (Pa. 1941).

40. *Id.* at 26 (paraphrasing 6 RULING CASE LAW § 52, at 57 (1914)).

41. *See* Rice v. Howard, 69 P. 77, 78–79 (Cal. 1902). *See also* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 201–03 (1983).

42. As the California Supreme Court said in 1902, "these constitutional provisions are but statutes, which the legislature cannot repeal or amend." *Rice*, 69 P. at 79.

43. The elevation of these directives to constitutional status might represent a consensus that the issue in question no longer benefitted by nor needed regular legislative modification. The fact that a supermajority in the legislature or a victory in a complex political process is required to enact such a constitutional provision would suggest that at

The transformation of modern state constitutions from vague declarations of principles to specific codes called into question the presumption against self-execution.[44] The very act of amending the constitution to deal with issues already within the jurisdiction of the legislature[45] compelled the conclusion that those amending the constitution sought to correct a legislative action, or intended courts to act when the legislature would not. To continue the judicial presumption that these provisions require further legislative action would have discounted the people's constitutional power to limit their grant of authority to the legislature.[46] As a result, by 1948 the presumption favored self-execution,[47] and the force of this presumption continues today.[48] As noted in Section B of this Part, however, the presumption is rebuttable.

B. Principles of Self-Execution Analysis

1. Types of Constitutional Provisions

Self-execution analysis classifies constitutional provisions according to their language as non-mandatory, mandatory, or man-

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least in the view of the majority at the time of adoption, the issue was settled enough to be placed in the constitution. The elevation might also suggest, however, that while a broad political consensus may have been reached on the issue in question, there is still a fear that the issue is not permanently resolved, and that the current consensus must be protected from future legislative action.

44. *See, e.g.*, Williams, *supra* note 41, at 199 ("The increasing use of the constitution as an alternative vehicle for lawmaking has resulted in an almost de facto presumption that provisions are self-executing.").

45. *See* 16 AM. JUR. 2D *Constitutional Law* § 142 (1979).

46. See *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960), where the Florida Supreme Court states:

> The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.

Id. at 851.

47. *See* Morgan v. Board of Supervisors, 192 P.2d 236, 240 (Ariz. 1948) (noting presumption "in general that provisions of state constitutions are self-executing") (citing cases and authorities).

48. *See, e.g.*, Appeal of Crescent Precision Products, 516 P.2d 275, 277 (Okla. 1973) ("The presumption is that constitutional provisions are self-executing."); Fenton v. Groveland Community Servs. Dist., 185 Cal. Rptr. 758, 762 (Cal. App. 1982) ("A constitutional provision is presumed to be self-executing.").

datory-prohibitory.[49] Non-mandatory provisions do not order a particular result, impose a duty, or create an obligation.[50] They are not self-executing, but merely state an expression of public sentiment or a public policy for the legislature to effectuate at its discretion—for example, "[T]he legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes."[51]

Mandatory provisions order a particular result, grant a right, or impose a duty or limitation.[52] These provisions may or may not be self-executing depending on whether the mandate is expressed in a form susceptible to judicial enforcement. Mandatory provisions imposing limits or prohibitions on legislative authority, however, are almost always self-executing.[53] An example of such a mandatory-prohibitory provision might be: "The legislature of New Ohio shall pass no laws that abrogate the people's right to a clean environment." These mandatory-prohibitory provisions may always be judicially enforced by declaring any contrary legislation unconstitutional.[54]

Many provisions, however, are neither non-mandatory nor prohibitory. Such provisions mandate a specific goal, but it is unclear whether they provide a complete and enforceable rule. In these situations, a court determines the need for legislative action "from a consideration both of the language used and of the intrinsic nature of the provision itself."[55]

In some instances, the court may determine that the language of a provision is too vague, and therefore infer a need for legislative

49. *See, e.g.*, 16 C.J.S. *Constitutional Law* §§ 46–48 (1984).

50. *See, e.g.*, Stockton Civic Theatre v. Board of Supervisors, 423 P.2d 810, 813 (Cal. 1967).

51. CAL CONST. art. 13, § 1c (1944) (amended and renumbered as art. 13, § 4(b) (1974)), *quoted in Stockton*, 423 P.2d at 813.

52. *See* parts II.B.2 and II.B.3 *infra*.

53. *See* part II.B.3 *infra*.

54. "The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature . . . ." Willis v. St. Paul Sanitation Co., 50 N.W. 1110, 1111 (Minn. 1892). *See also* Robb v. Shockoe Slip Found., 324 S.E.2d 674 (Va. 1985) (discussed in part III.B.1 *infra*).

The fact that a provision is enforceable does not resolve all the problems facing courts and parties that try to enforce it. For instance, in the example provided in the text, the court's definition of "clean environment" will determine the scope of the granted right. "Whoever hath an absolute authority to interpret written or spoken laws; it is he who is truly the lawgiver to all intents and purposes and not the person who wrote or spoke them." Bishop Hoadley, Sermon before George I (1717), *quoted in* LEARNED HAND, THE BILL OF RIGHTS 8 (1962).

55. *Willis*, 50 N.W. at 1111.

action. In such a case, the court will presume that those adopting the provision intended the legislature to define the language, and therefore the court will declare the provision unenforceable to avoid misconstruing their intent.[56] Similarly, if a mandatory provision lacks necessary procedures or administrative officials, the court may infer that the legislature was intended to fill these gaps. Even in cases where the courts clearly have authority to create the needed procedure or appoint the missing official, they will often defer to the legislature to avoid overstepping the limits set by the principle of separation of powers.[57] This Section will explore in more detail below the asserted grounds for judicial restraint in cases involving various mandatory constitutional provisions.

2. *Mandatory Non-Prohibitory Constitutional Provisions*

Mandatory non-prohibitory constitutional provisions appear in several forms. Some order the legislature to grant a right or impose a duty—for example, "The legislature shall enact laws establishing a commission to develop regulations to protect the environment of our State." Others outline government policy—for example, "The laws of our State shall insure a clean and healthy environment for future generations." These provisions generally provide a direction to the legislature but fail to affirmatively prohibit specific acts.[58] The effectiveness of either form ultimately depends on the demands of separation of powers and the character of the legislative power granted in the state's constitution. Justice Cooley offered one view of legislative power:

> In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative

56. *See infra* text accompanying notes 80–87.

57. *See infra* text accompanying notes 67–71.

58. It would be possible and perhaps sensible to imply a prohibition in some of these instances. The second example could be read to imply a prohibition on legislative acts that do not preserve the environment for future generations. This concept is explored further in part II.B.6 *infra*.

> powers, but it is intrusted with the general authority to make laws at discretion.[59]

Under this view, provisions directing a legislature to legislate to protect the environment merely reiterate a power already included in the original grant of legislative authority.[60] As affirmative commands to the legislature to exercise its power in a particular way, these provisions raise the constitutional question underlying the doctrine of self-execution: to what extent does the court have authority to order another branch of government to act?

Enforcing such a provision would require the court to order the legislature to pass laws, which would be constitutionally and politically unacceptable under the principle of separation of powers.[61] If a court were to order the legislature to supply needed legislation to fulfill a constitutional mandate, the legislature could simply refuse to obey.[62] As is the case with the federal Constitution, state constitutions do not provide the judiciary with an affir-

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59. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 126 (7th ed. 1903).

60. As will be developed in part II.B.3 *infra*, state constitutions also may contain provisions limiting the power granted to the legislature. A provision imposing a limitation or prohibition on certain types of legislation may be more likely to be found self-executing than a non-prohibitory provision.

61. Modern state constitutions reflect the familiar principle of separation of powers embodied in the federal Constitution. See, for example, TEX. CONST. art. II, § 1:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, [the legislative, the executive, and the judicial]; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

See also Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 593 (Pa. 1973) ("Under a constitution providing for a balance of powers, such as Pennsylvania's State Constitution, when power is given simply to the Commonwealth, it is power to be shared by the government's three co-equal branches.").

Indeed, the federal doctrine in part has its origin in pre-existing state constitutional language. *See* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1340 (1990) (noting that "[s]everal of the . . . state separation-of-powers provisions antedated the federal constitution").

62. Such a refusal might have been considered less problematic in the past, when there was no history of accommodation among the branches to avoid constitutional crises. Under an early view of republicanism, each branch or department of government was "separate and coequal, each being, as it were, a Leibnizian monad, looking up to the Heaven of the Electorate, but without any mutual dependence." HAND, *supra* note 54, at 4. Aside from responsibility to the electorate, each branch was to follow its own counsel and be subordinate to no other branch.

mative mechanism to enforce its commands to the legislature.[63] Consequently, courts may declare mandatory non-prohibitory provisions ineffective or non-self-executing, construing them as mere exhortations to the legislature.[64]

The courts' failure to enforce the mandatory provisions has political repercussions, as it affects the public's perception of the courts' role in the democratic process.[65] Especially if the provision is new and enjoyed broad public support when adopted, a court's refusal to enforce it is likely to frustrate supporters of the provision. It may appear to them that the will of the majority has been circumvented by a legal technicality. Judicial declaration that a mandatory constitutional provision is not enforceable is especially counterintuitive in the case of "mixed" provisions which are directed in part at the legislature. These provisions, discussed in Part II.B.4, not only grant a right, but also contain a directive for enabling legislation, thereby leaving enforcement and administration to the legislature.[66]

Similarly, if a court finds that the legislature must create an enforcement mechanism to carry out the policy goal expressed by a mandatory constitutional provision, concern for separation of powers might lead the court to declare the provision non-self-executing.[67] Such a provision was at issue in *Spinney v. Griffith*,[68]

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63. This refers solely to affirmative enforcement mechanisms. In the case of prohibitory provisions, the court has the power to declare the legislative act unconstitutional, or to refuse to enforce any law contrary to the constitution. *See* part II.B.3 *infra*.

64. An example is the Florida environmental rights provision, which states that "[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." FLA. CONST. art. II, § 7 (1968). The provision, despite its mandatory tone, is unenforceable as "[t]here are no 'coercive means to compel' performance of the duty [imposed on the state]." HAND, *supra* note 54, at 17 (quoting Kentucky v. Dennison, 65 U.S. (24 How.) 66, 110 (1861) (Taney, C.J.)).

65. One might assume that a majority could command the legislature through traditional means to enact a desired law, making preservation of the right in the state constitution unnecessary. Political majorities are often fluid, however. A majority that approved a constitutional amendment may no longer be unified enough to produce legislative action. Furthermore, losing a contested issue in court that was thought to be already won through adoption of a constitutional provision may lead to cynicism and apathy among voters, further diluting the political strength behind the original amendment.

66. *See* Ledewitz, *supra* note 5, at 55 n.123.

67. Thus the Minnesota Supreme Court said of one state constitutional provision: "[That the provision is not self-executing] is plain from the very nature of the provision. It furnishes no *modus operandi*, and does not provide how or by whom [the action was to be carried out]. It was evidently a mere general direction to the legislature." Willis v. St. Paul Sanitation Co., 50 N.W. 1110, 1112 (Minn. 1892).

68. 32 P. 974 (Cal. 1893).

in which the California Supreme Court considered whether a provision of the California constitution granting a right to a "mechanic's lien" was self-executing. The provision stated that

> [m]echanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor, or furnished material, for the value of such labor done and material furnished; and the Legislature *shall provide by law for the speedy and efficient enforcement of such liens.*[69]

Here the grant of right to a lien coexists with the directive to the general assembly. The intent of the framers was to enact an enforceable lien provision, but the reference to legislative creation of enforcement procedures effectively limited access to the right without such legislation. As the court stated, "[s]o far as substantial benefits are concerned, the naked right, without the interposition of the legislature, is like the earth before the creation, 'without form and void'; or, to put it in the usual form, . . . [it is] not self-executing."[70] The lack of an enforcement mechanism made it impossible for the court to effectuate the mandate. As the court could not order the legislature or executive to act, it was left with no recourse other than to deny the right, declare the provision non-self-executing, and hope that the legislature would respond to the constitutional exhortation.[71]

Yet the need for legislative action to provide an enforcement procedure has not always resulted in a judicial declaration that a provision is not self-executing. Some courts have been willing to rely on pre-existing legislative or administrative schemes to find a provision lacking an enforcement mechanism self-executing.[72] *People ex rel. McClelland v. Roberts*[73] exemplifies this approach. The case involved the application of an amendment to the New York constitution which provided that appointments to the civil service were to be made on the basis of merit as ascertained by

69. CAL. CONST. art. 20, § 15 (1879) (amended 1974) (renumbered as art. 14, § 3 (1976)) (emphasis added).

70. *Spinney*, 32 P. at 975.

71. *But see* part II.C *infra* (discussing activist approach of New Jersey Supreme Court in *Mount Laurel* cases).

72. In addition, some courts have created enforcement and administrative schemes on their own. *See* part II.C *infra*.

73. 42 N.E. 1082 (N.Y. 1896).

competitive examination.[74] McClelland had been appointed to a civil service position by the superintendent of public works without taking an examination. McClelland sued to compel the state comptroller to pay him for services rendered in his capacity as clerk in the office of the collector of canal statistics.[75]

McClelland argued that the amendment implied a requirement for a legislatively-enacted procedure to administer the merit examinations, and therefore was not self-executing.[76] The state comptroller maintained that there was no need for new legislation, as the state's civil service act already included a procedure for testing applicants. McClelland countered that it would be improper to use a pre-existing procedure to flesh out a subsequently adopted constitutional provision. It was his position that only a new legislative act could make the constitutional provision effective, "and, as the civil service law has not been re-enacted . . . or any other legislation supplied, there is now no law or regulation applicable to [McClelland's] appointment save the will of the superintendent himself."[77] The court rejected this argument, holding that the civil service act should be read as constituting a "general system,"[78] and that the act, "framed in general terms, [applies] to new cases, as they arise from time to time, that fall within [its] general scope and policy."[79]

In this case, the court had little difficulty connecting the pre-existing procedure with the subsequent amendment, since the two were clearly related components of the law governing the civil service, and the civil service act was general in its application. In other cases, the parts may not fit together quite so smoothly, thus testing the limits of this approach. This would be the case where the relationship between the granted but unavailable right and the

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74. N.Y. CONST. art. V, § 9 (1894) (renumbered as art. V, § 6). The same provision was at issue in *In re Sweeley*. *See supra* text accompanying notes 28–34.

75. *McClelland*, 42 N.E. at 1082.

76. The opinion described McClelland's argument:

> [McClelland] contends . . . that the new section of the constitution referred to contemplated the enactment of appropriate laws to carry it into effect, and that, since the civil service act of 1883 and its amendments did not, and, when passed, could not, apply to the department of public works, they cannot now be made to operate upon the appointments of public officers formerly beyond the power of legislative regulation . . . .

Id. at 1084.

77. *Id.*

78. *Id.*

79. *Id.*

existing procedure is not as clear, or where the existing procedure was clearly intended to be narrow in its application. At some point, this sort of judicial "shoehorning" would likely test the patience of other branches of government.

Mandatory provisions whose terms are unclear have also been labeled not self-executing. An example of such ambiguity can be found in *Tuttle v. National Bank of the Republic*.[80] In that case, the court held that a provision of the Kansas constitution imposing limited liability on stockholders for corporate debts was not self-executing.[81] The court noted the various ambiguities embedded in the provision:

> In the attempt to give construction to this clause . . . in the absence of legislation, we are at once confronted with a serious difficulty and much ambiguity: What stockholders are liable for dues to corporations? When are they liable? Is it the holder of the stock at the time the indebtedness is created, . . . or at the time suit is instituted . . . ?[82]

Cases in which a court declares a provision non-self-executing on the ground that the court is unable to define its terms are troublesome. These instances are difficult to justify in light of the ubiquity of court opinions in which judicially-created definitions are used to interpret or expand ambiguous constitutional or statutory language. Arguably, it is the proper role of a state supreme court to provide the scope of a constitutional guarantee; it is as interpreter of the state's constitution that a state supreme court is supreme. The *Tuttle* court could have answered its own queries, just as other state supreme courts have interpreted concepts as open-ended as "efficient education"[83] and the right to free speech.[84]

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80. 44 N.E. 984 (Ill. 1896).

81. *Id.* at 985. The provision read: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means *as shall be provided by law* . . . ." KAN. CONST. art. 12, § 2 (1859) (emphasis supplied), *quoted in Tuttle*, 44 N.E. at 985.

82. *Tuttle*, 44 N.E. at 985.

83. *See* Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d. 491, 496 (Tex. 1991) (explaining to the state legislature that their efforts at meeting the constitutional obligation to provide an "efficient" education has merely resulted in "Band-Aid[s]"). See also the line of New Jersey cases defining and enforcing the state constitution's mandate for a "thorough and efficient system of free public schools," N.J. CONST. art. 4, § 7, ¶ 6 (1844) (renumbered as art. 8, § 4, ¶ 1), running from *Riccio v. Mayor of Hoboken*, 54 A. 801 (N.J. Sup. Ct.), *rev'd*, 55 A. 1109 (N.J. 1903), to *City of Camden v. Byrne*, 411 A.2d 462 (N.J. 1980), and *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

84. *See, e.g.* State v. Schmid, 423 A.2d 615 (N.J. 1980), *cert. dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982) (protecting certain forms of free speech on the campus of a private university).

The ability of state courts to define language creatively is also apparent in the contemporary state constitutional law movement.[85] The state supreme courts have recently become more innovative in broadly interpreting constitutional language.[86] Indeed, some courts consider it their obligation to act when the legislature fails to respond to a constitutional call. For example, Chief Justice Hughes of the New Jersey Supreme Court has proclaimed that "[j]ust as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country."[87]

3. Mandatory-Prohibitory Constitutional Provisions

Enforcement of a prohibitory provision does not involve the court in a direct confrontation with the legislature. When the court declares a law unconstitutional, it does not order the legislature to refrain from acting in a manner that the constitution prohibits: rather, the court's declaration that a particular act is unconstitutional precludes enforcement of that act through the courts or the agencies of the executive branch. If a provision involves a prohibition on private action, the courts may grant an appropriate remedy on their own.

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85. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). For a comprehensive bibliography of recent articles on state constitutional law, see Earl M. Maltz et al., *Selected Bibliography on State Constitutional Law, 1980–1989*, 20 RUTGERS L.J. 1093 (1989).

86. The New Jersey Supreme Court, for example, asserts its "right to construe our State constitutional provision in accordance with what we conceive to be its plain meaning." State v. Johnson, 346 A.2d 66, 68 n.2 (N.J. 1975). That court has rejected the interpretational straightjacket of limiting itself to the U.S. Supreme Court's definition of the constitutional protection against search and seizure, even though the language of the New Jersey provision is identical to that of the federal provision. *Id.* at 67. *See* José L. Fernandez, Note, *The New Jersey Supreme Court's Interpretation and Application of the State Constitution*, 15 RUTGERS L.J. 491 (1984).

As the New Jersey Supreme Court has noted, "[o]n numerous occasions our own courts have recognized the New Jersey Constitution to be an alternative and independent source of individual rights." *Schmid*, 423 A.2d at 625 (citing numerous cases).

87. King v. South Jersey Nat'l Bank, 330 A.2d 1, 10 (N.J. 1974) (Hughes, C.J.). This view was later endorsed by the court in *Peper v. Princeton Univ. Bd. of Trustees*, 389 A.2d 465 (N.J. 1978): "Both the majority and the dissent in [*King*] concluded that this Court has the power to enforce rights recognized by the New Jersey Constitution, even in the absence of implementing legislation." *Id.* at 476 (citing cases).

For example, in *Washingtonian Home of Chicago v. City of Chicago*,[88] the Illinois Supreme Court considered a provision of the state constitution that prohibited donations to private corporations by municipalities.[89] The court noted that the provision effectively nullified existing acts conflicting with it despite the lack of legislative action to enforce the provision.[90] The court held that

> [t]his provision of the constitution required no legislation to place it in full force and effect. It was . . . self-executing . . . . "[W]here its provisions are negative or prohibitory in their character, they execute themselves. Where that instrument limits the power of either of the departments of the government, or where it prohibits the performance of any act by an officer or person, none would contend that the power might be exercised or the act performed until prohibited by the general assembly. The constitution undeniably has as much vigor in prohibiting the exercise of power or the performance of an act as the general assembly."[91]

The court explained that the legislature "could add to the prohibition penalties and forfeitures if the constitutional prohibition should be disregarded, but the prohibited act would, nevertheless, be void."[92]

Thus a mandatory-prohibitory provision may be made effective by striking down legislation that is repugnant to the constitutional language. The court can exercise its full judicial enforcement power without overstepping the boundary set by the principle of separation of powers.[93] Of course, a constitution has no power of its own to prohibit the "exercise of power or the performance of an act."[94] The court's declaration of unconstitutionality relies on the other branches of government withholding the exercise of their power rather than risking a constitutional crisis.

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88. 41 N.E. 893 (Ill. 1895).

89. ILL. CONST. of 1870, art. XIV, separate § 2.

90. *Washingtonian Home*, 41 N.E. at 896.

91. *Id.* (quoting Phillips v. Quick, 63 Ill. 445, 448 (1872)).

92. *Washingtonian Home*, 41 N.E. at 896 (quoting *Phillips*, 63 Ill. at 448).

93. It is clear, however, that there is a limit to the enforceability of prohibitory provisions. The limit may be reached when a provision is so open-ended that it transfers to the courts the constitutionally-granted legislative power. A provision which read, "The legislature shall pass no laws that impair the public interest of the citizens of the state," would allow the court to evaluate and hence to redraft every piece of legislation. If confronted with such a provision, the courts would likely impose on themselves some sort of restraint that would preserve the separation of powers.

94. *Washingtonian Home*, 41 N.E. at 896 (quoting *Phillips*, 63 Ill. at 448).

When it strikes a law, the court effectively passes to the executive the responsibility for fulfilling the political covenant which embodies the principle of separation of powers. Obviously, the executive may disregard the unconstitutional finding by the court and enforce the statute anyway.[95] The legislature may also continue to enact legislation that is in clear violation of the court's finding of unconstitutionality.

When the executive refuses to enforce a judicial edict, the court's only recourse is political pressure. When the conflict is with the legislature, however, the court's hands are not tied: if the court declares a legislative act unconstitutional, it may thereafter refuse to impose liability or to provide a judicial remedy under the act. When the court and the executive cooperate in refraining from carrying out an unconstitutional act, they make continuing legislative efforts to enforce the act ineffective and possibly politically embarrassing. Such actions create a constitutional crisis that may erode the power of all three branches by undermining the public's trust in the institutions of government.

4. Mixed Constitutional Provisions

Some provisions include both a clear prohibition and an open call for legislative enabling action. Some courts have held that the non-prohibitory language directed to the legislature does not bar the court from finding a mixed provision to be self-executing. If

95. The courts' reliance on cooperation by the other branches has its limits. In more than one instance, a court's decision has strained the limits of the principle of separation of powers. For a review of unenforced or disregarded Supreme Court decisions from Chief Justice Marshall to Chief Justice Warren, see generally WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS (1962). For example, in 1832, Andrew Jackson refused to carry out the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which reversed the conviction of two missionaries who had challenged a state claim of authority over Indian land. The President is supposed to have said, "Well, John Marshall has made his decision, now let him enforce it." MURPHY, *supra*, at 26. The two missionaries remained in jail until they were pardoned by the state governor. *Id.* President Jackson saw no need to defer to the Court:

> Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others .... The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.

2 MESSAGES AND PAPERS OF THE PRESIDENTS 582 (James Richardson ed. 1896), *quoted in* MURPHY, *supra*, at 27.

the provision is very detailed, resembles a statute, and appears complete and enforceable, language inviting legislative action may not be interpreted as expressing an intent to withhold enforcement until the legislature acts. Instead, the court may interpret the language as an invitation to the legislature to enact "complementary" rather than "enabling" legislation.

In *Gherna v. State*,[96] the Arizona Supreme Court considered a constitutional provision that included clearly mandatory language as well as language calling for legislative action. At issue was whether an Arizona constitutional amendment prohibiting the sale, exchange, or disposal of any kind of intoxicating beverage[97] was self-executing.[98] Section 1 of the provision made these uses of liquor illegal, and decreed that any violator of the provision was "guilty of a misdemeanor and upon conviction shall be imprisoned for not less than ten days nor more than two years and fined not less than twenty-five dollars and costs, not more than three hundred dollars and costs for each offense."[99] This section of the provision, when considered on its own, is a clear example of a self-executing mandatory provision. As the court notes, "[i]t is as complete and full as most criminal statutes that define crimes and prescribe penalties for their commission."[100] Such completeness itself constitutes credible evidence of a self-executory intent. Section 3 of the provision provided that "[t]his amendment shall take effect on and be in force on and after the first day of January, 1915."[101] All the provision lacked was procedures for collecting fines and imposing violations.[102] There appeared to be no need for legislative action: the courts could enforce the mandate by simply applying existing criminal laws.

The rub was the language of Section 2 of the provision: "The legislature shall by appropriate legislation provide for the carrying into effect of this amendment."[103] The court noted that the language of the three sections seemed contradictory: while Section 3 declared the prohibition unconditionally effective as of a particular date, Section 2 implied that legislative action would be required

96. 146 P. 494 (Ariz. 1915).
97. ARIZ. CONST. art. XXIII (1915) (repealed 1932).
98. *Gherna*, 146 P. at 496.
99. ARIZ. CONST. art. XXIII, § 1.
100. *Gherna*, 146 P. at 496–97.
101. ARIZ. CONST. art. XXIII, § 3.
102. *Gherna*, 146 P. at 498–99.
103. ARIZ. CONST. art. XXIII, § 2.

to make the provision effective.[104] Ultimately, the court decided that Section 2 was merely an encouragement to the legislature to enact laws "as an aid to the authorities whose duty it is to enforce the constitutional provision."[105] Because Sections 1 and 3 demonstrated a clear intent to criminalize the consumption of alcoholic beverages, the court concluded that Section 2 was permissive, merely inviting the legislature to "provid[e] a more specific and convenient"[106] enforcement procedure.

While the provision did not state where violators would be tried or imprisoned, the court disposed of both these issues by noting that the existing penal codes would provide for jurisdiction by the superior court and imprisonment in the county jail.[107] As the court noted, "[t]he authors of the prohibition amendment knew [of the procedures provided by the penal code]."[108] Thus *Gherna* illustrates that although a constitutional provision may call for legislative action, it may still be found self-executing if the rule it contains is otherwise complete and the court detects a clear intent that the provision be self-executing.[109]

5. *Provisions Lacking a Remedy*

State courts have also found provisions to be self-executing that are complete but for the lack of a remedy.[110] If, despite the

104. *Gherna*, 146 P. at 497.

105. *Id.* at 498.

106. *Id.*

107. *Id.* at 498–99. *Cf. supra* text accompanying notes 72–79 (discussing "shoehorning" of constitutional provisions into existing procedures).

108. *Gherna*, 146 P. at 499.

109. The Pennsylvania Home Rule Amendment of 1968 provides an example of such a mixed provision that was drafted to welcome further legislative action but also to be self-executing even in the absence of such action. The provision reads:

> Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum. The General Assembly shall provide the procedure by which a home rule charter may be framed and its adoption, amendment or repeal presented to the electors. If the General Assembly does not so provide, a home rule charter . . . may be presented to the electors by initiative or by the governing body of the municipality. A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.

PA. CONST. art. 9, § 2. The provision mixes a mandatory, non-self-executing exhortation to the General Assembly with an apparently self-executing grant to the electors. In addition, the drafters provided a deadline of four years for passage of enabling legislation by the legislature before the electors could proceed by initiative. *Id.* § 14.

110. *See* Willis v. St. Paul Sanitation Co., 50 N.W. 1110, 1112 (Minn. 1892) (finding

absence of a remedy, a provision directly vests a right on a party, the court may declare the provision to be self-executing and fashion a remedy itself.[111] In *Broderick v. Weinsier*,[112] a New York court rejected the argument that the lack of a remedy makes a provision non-self-executing:

> "[I]n the present case it was not necessary that the constitution should have expressly given a remedy by which a creditor of the corporation might enforce the liability of a stockholder. If it in fact created such a liability of the latter in favor of the former, there would not be the least trouble in framing a proper complaint in an action to enforce it."[113]

Thus, if a provision creates a right that can be enforced through traditional judicial means, it may be found self-executing despite the lack of a stated remedy or enforcing procedure. Hence a court may enforce a provision such as that at issue in *Broderick* against a private or public entity. All that is needed for enforcement is for the court to fashion an appropriate damage award or equitable remedy. If the enforcement of a provision required an affirmative remedy against the legislature, however, the separation of powers problems noted previously would arise.[114] Thus while a right may prompt a remedy, not all remedies are enforceable through the courts.

The questions of enforceability of a constitutional right raised by the doctrine of self-execution prompt a comparison to the doc-

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constitutional provision imposing limited liability on corporate stockholders self-executing). The court quotes Lord Holt: "If a man has a right, he must have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." *Id.* at 1112.

111. One example is *Bernheimer v. Converse*, 206 U.S. 516, 529 (1907), where the U.S. Supreme Court considered the constitutionality of a Minnesota statute implementing the stockholders' liability provision of that state's constitution. The Court declared that while the language of the Minnesota provision made it "proper if not necessary that a statute should be passed to make more effectual the liability thus secured by the constitution," in the absence of legislation, "a remedy might have been worked out in the courts of equity in the [s]tate." *Id.* at 529.

112. 293 N.Y.S. 889 (Sup. Ct. 1937), *rev'd on other grounds*, 1 N.Y.S.2d 813 (App. Div.), *aff'd*, 16 N.E.2d 387 (N.Y. 1938).

113. *Id.* at 901–02 (quoting Willis v. St. Paul Sanitation Co., 50 N.W. 1110, 1113 (Minn. 1892)).

114. *See* parts II.B.2 and II.B.3 *supra* (discussing separation of powers issues).

trine developed in *Bivens v. Six Unknown Named Agents*.[115] The inquiry posed by *Bivens* cases[116]—whether a violation of a constitutional guarantee gives rise to a suit for damages—appears related to the doctrine of self-execution's question of whether a particular constitutional provision may be judicially enforced. The fact that both doctrines involve the relation between the courts and the legislature adds to the temptation to equate the two. There is, however, a basic distinction between the doctrines: the *Bivens* doctrine presupposes the existence of an enforceable right, whereas in self-execution cases the issue is whether an enforceable right exists at all. For example, the prohibitory character of the Fourth Amendment makes it self-executing regardless of the existence of a damages remedy.[117] Courts apply the *Bivens* doctrine to determine whether a damages remedy exists as well. In contrast, even if a constitutional provision fails to provide a cause of action for damages, it may be found self-executing if it is capable of judicial enforcement either through equitable relief or as a limitation on legislative authority.[118]

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115. 403 U.S. 388 (1971). In *Bivens*, a plaintiff asserted a damage claim against six federal narcotics agents for violating his Fourth Amendment rights through an illegal search. U.S. CONST. amend IV. At issue was whether the Fourth Amendment provided a private damages remedy for a violation of its constitutional guarantee. The court held that a violation of the Fourth Amendment "by a federal agent acting under color of his authority gives rise to a cause of action for damages." *Bivens*, 403 U.S. at 389. *Bivens* also established that the right to a damage remedy may be limited when there are special factors counselling hesitation, or when Congress provides an alternative remedy which is equally effective as a damages award. *Bivens*, 403 U.S. at 396.

116. *See* Kortarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986), *vacated*, 487 U.S. 1212 (1988) (Ninth Amendment); Briggs v. Goodwin, 712 F.2d 1444 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (Fourth Amendment); Carlson v. Green, 671 F.2d 505 (9th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982) (Eighth Amendment); Turpin v. Mailet, 579 F.2d 152 (2d Cir.), *cert. denied sub nom.* West Haven v. Turpin, 439 U.S. 974 (1978) (Fourteenth Amendment); Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975) (First Amendment). *See also* Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251 (1988).

117. The Court states: "[A]s our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power . . . . It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority." *Bivens*, 403 U.S. at 392. *Cf.* Porten v. University of San Francisco, 134 Cal. Rptr. 839, 840 (App. 1976) (holding that provision in state constitution guaranteeing individual right to privacy is self-executing and confers judicial right of action).

118. Chief Justice Burger made this point in his *Bivens* dissent when he noted that there are remedies for an illegal search other than damages, such as exclusion of improperly obtained evidence from trial. *Bivens*, 403 U.S. at 414 (Burger, C.J., dissenting).

6. The Effect of Non-Self-Executing Provisions on Pre-Existing Conflicting Legislation

In *In re Sweeley*,[119] a New York court was asked to decide what effect a non-self-executing provision lacking an enforcement procedure should have on pre-existing laws which conflict with the constitutional language. The court concluded that "[s]o far as any affirmative effect is to be given to the amendment in question, it will be assumed that it needs legislation to give it life."[120] But the court also determined that the unenforceable provision was not a "dead letter."[121] The provision repealed pre-existing legislation upon which Sweeley had relied to claim an exemption from the civil service examination required for appointment as a police officer. In effect, the court interpreted the constitutional provision as applying retroactively.[122] Thus, Sweeley could not avail himself of a pre-existing veterans' exemption from civil service requirements which conflicted with the provision's unenforced constitutional mandate. The court concluded that "while, from lack of legislation, its principles cannot be affirmatively enforced, neither, on the other hand, can those principles be lawfully violated, or any statute violating them be enforced."[123]

This approach appears to safeguard the people's voice as expressed in the state's constitution, yet raises some troublesome questions. How does this approach affect statutes enacted subsequent to the provision's adoption that conflict with a non-self-executing constitutional provision? Did the *Sweeley* court effectively amend the provision to make it prohibitory by reading into it a statement to the effect that "The legislature shall pass no laws in violation of this provision"? The *Sweeley* court avoided this issue by addressing only pre-existing legislation. If the *Sweeley* approach were applied to legislation enacted subsequent to the adoption of a constitutional provision, however, it would have far-reaching implications.

The implications of extending the *Sweeley* approach could be especially broad in the environmental rights arena, where consti-

119. 33 N.Y.S. 369 (Sup. Ct.), *aff'd sub nom.*, People *ex rel.* Sweeley v. Wilson, 42 N.E. 543 (N.Y. 1895). *See also supra* text accompanying notes 28–34 (discussing *Sweeley*).

120. *Sweeley*, 33 N.Y.S. at 372.

121. *Id.*

122. *Id.*

123. *Id.* at 373.

tutional provisions tend to be general: for example, "The natural resources of the State shall be conserved." A court applying the analysis of the *Sweeley* opinion could interpret the provision to include prohibitory language, thus permitting the court to declare a potentially large number of statutes unconstitutional for conflicting with the provision's mandate. Such statutes could include budgetary acts that fail to provide for resource conservation, or that finance construction that the court finds harmful to natural resources. The environmental rights provisions' broad scope would allow courts to reach all statutes and regulations affecting the environment, making such judicial inquiries quite intrusive.[124] This approach would clearly contradict the principle that a non-self-executing provision is a "nullity"[125] until the legislature acts.

The traditional result is reached in *Roesler v. Taylor*.[126] There the court considered the effect of a constitutional provision granting a limited exemption from execution on debts "as shall be fixed by law" on a pre-existing statute which granted a $1,500 exemption. The plaintiffs asserted that while the provision was not self-executing, it nevertheless repealed the pre-existing statutory grant of exemption.[127] The court concluded, however, that "the constitutional provision itself is powerless to repeal the pre-existing laws, because it is without force or effect until supplemented by the legislative action . . . it . . . requires."[128] The *Roesler* court described another practical problem inherent in retroactive application of a provision found to be non-self-executing:

> If [the] constitutional provision repealed the pre-existing exemption laws, the citizens of this state [would then be] left, from the time of the adoption of the constitution until such indefinite time in the future as some legislature might see proper to fulfill the moral obligation imposed by the constitution, without any exemption laws whatever.[129]

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124. As a Pennsylvania court noted in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 895 (Pa. Commw.), *aff'd*, 311 A.2d 588 (Pa. 1973), "[i]t is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment . . . . [I]t becomes difficult to imagine any activity . . . which would not unconstitutionally harm . . . [those] values." This issue is discussed further *infra* at text accompanying notes 219–222.

125. Roesler v. Taylor, 58 N.W. 342, 342 (N.D. 1894).

126. 58 N.W. 342 (N.D. 1894).

127. *Id.* at 343.

128. *Id.*

129. *Id.* A related issue would seem to be resolved by the *Roesler* court's approach.

It may be possible to reconcile the *Sweeley* court's conclusion that a non-self-executing provision may have an effect on pre-existing legislation with the practical concerns noted by the *Roesler* court. A court could determine a provision's effect on pre-existing laws by considering how closely related the subject matter of the statute in question is to that of the provision. If a provision concerns a particularly narrow issue, it may be reasonable to imply an intent to overrule pre-existing conflicting laws dealing with that issue. If, however, the conflict comes about because the scope of a constitutional provision is so general that it may be construed to reach many subjects, it would be improper to impute to the framers the intent to void all related pre-existing statutes.[130] It is more likely that the framers of the provision intended the terms of the provision to be defined by the legislature.

C. The Limits of Self-Execution Analysis: The Mount Laurel Cases

When a state court declines to enforce a constitutional provision on the ground that it is not self-executing, it restricts its own role in the governing process. A more activist approach to the interpretation of constitutional provisions might include defining vague terms, providing requisite procedures, and even appointing necessary officials.[131] In *Southern Burlington County NAACP*

If a provision is not self-executing, it cannot act to bar future legislative action. To bar future legislative action, a provision would have to be a clear prohibition or limitation on the legislature. Otherwise, the courts would be interfering with the plenary legislative power granted to the legislature by the people. *See supra* text accompanying notes 59–60.

130. This approach would be consistent with courts' disdain for repeal by implication. As one court has stated:

> It is, however, a fundamental principle that the law does not favor repeals by implication. Thus, we have said that a repeal by implication does not occur unless the language of the later statute plainly shows that the legislature intended to repeal the earlier statute. Generally, therefore, a later statute will not be held to repeal an earlier statute by implication unless there is some express reference to the earlier statute.

State v. Harris, 607 A.2d 552, 555 (Md. 1992) (citations omitted).

131. The approach of the New Jersey courts has been among the most activist in the country. *See* Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729, 734 (1987). These authors note that while New Jersey courts have held that the provision of the state constitution granting the right to organize and bargain collectively in the private sector is self-executing, the courts of Florida

v. Township of Mount Laurel,[132] the New Jersey Supreme Court took such an activist approach. In that case the court held that exclusionary zoning practices violated a constitutional zoning provision,[133] and the court required communities to implement regulations to zone for the general welfare.[134] Judicial enforcement of the duty to zone for the general welfare would appear problematic: there was no officer, mechanism, or procedure to review and modify municipal zoning plans. Without appropriate enabling legislation, the provision's guarantee appeared illusory. After waiting in vain for the legislature to act, the court created its own administrative mechanism to enforce the constitutional provision.[135]

The *Mount Laurel* court recognized that implementation of the constitutional protection was properly the responsibility of the legislature.[136] Nevertheless, the court stated that it must "uphold the constitutional obligation that underlies the *Mount Laurel* doc-

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and Missouri have rejected the same interpretation of similar provisions in their state constitutions. *Id.*

132. 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*).

133. N.J. CONST. art. 4, § 6, ¶ 2 ("The Legislature may enact general laws under which municipalities . . . may adopt zoning ordinances . . . and the exercise of such authority shall be deemed to be within the police power of the State.").

134. *Mount Laurel II*, 456 A.2d at 413–16.

135. *Id.* at 417. The right at issue in the *Mount Laurel* cases is not expressly granted by the state constitution, but rather inferred by the court from the constitutional language. *Id.* at 415. The political ramifications attendant to adoption of a constitutional provision by popular mandate do not apply. Nonetheless the court was still subject to the limitations imposed by the principle of separation of powers. For an in-depth analysis of the political, doctrinal, and judicial implications of the *Mount Laurel* decisions, see G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513 (1984). *See also Mount Laurel II Symposium*, 14 SETON HALL L. REV. 829 (1984).

136. *Mount Laurel II*, 456 A.2d at 417. The court even recognized that the legislature might act to relieve the court of its self-appointed role, *id.*, which the legislature ultimately did. N.J. STAT. ANN. §§ 52:27D-301–29 (West 1986) (New Jersey Fair Housing Act) (enacted 1985). As the court explained in a later decision,

> [t]he constitutional obligation itself, as we made clear in *Mount Laurel I*, was implicit in the police power exercised in all zoning decisions, and inherent in our Constitution's guarantees of "substantive due process and equal protection of the laws."
>
> Nowhere in the *Mount Laurel II* opinion is there any suggestion that there was some deadline after which legislation would not be acceptable; nowhere is there the slightest suggestion that legislation, in order to be acceptable, would have to result in ordinances or lower income housing by a certain date. What the opinion did contain, however, was the strongest possible entreaty to the Legislature, seeking legislation on this subject.

Hills Dev. v. Bernandsville, 510 A.2d 621, 642 (N.J. 1986) (citing *Mount Laurel II*, 456 A.2d at 417–18).

trine. That is our duty. We may not build houses, but we do enforce the Constitution."[137] The court acted to enforce the constitutional mandate in spite of its recognition that a legislative solution might be more appropriate: "Although the complexity and political sensitivity of the issue now before us make it especially appropriate for legislative resolution, we have no choice, absent that resolution, but to exercise our traditional constitutional duty to end an abuse of the zoning power."[138]

The *Mount Laurel* court's creation of a complex mechanism to enforce the provision demonstrates the extent to which the court abandoned its traditional posture of deference to the legislature.[139] The resemblance of the court's ruling to a piece of detailed legislation accentuates the court's appropriation of legislative and executive powers in enforcing this constitutional provision. The court used a pre-existing State Development Guide Plan as the basis for housing share allocations.[140] A new panel of judges, selected by the Chief Justice, was instructed to use the Guide to define the scope of the new constitutional obligation.[141] The court ordered each municipality to prepare a "fair-share" housing plan and sug-

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137. *Mount Laurel II*, 456 A.2d at 417. The court noted several legislative initiatives to which it had deferred in the past, *id.*, but noted that it did not have to wait for the legislature to act: "In New Jersey, it has traditionally been the judiciary, and not the Legislature, that has remedied substantive abuses of the zoning power by municipalities." *Id.* at 417 n.7.

138. *Id.* The court softened its assertion of power by stating:

> We note that there has been some legislative initiative in this field . . . . Our deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions.
>
> The judicial role, however, which could decrease as a result of legislative and executive action, necessarily will expand to the extent that we remain virtually alone in this field. In the absence of adequate legislative and executive help, we must give meaning to the constitutional doctrine in the cases before us through our own devices, even if they are relatively less suitable. That is the basic explanation of our decisions today.

Id. at 417–18.

139. *But cf.* Spinney v. Griffith, 32 P. 974 (Cal. 1893) (finding a constitutional provision non-self-executing for lack of enforcement mechanism) (discussed *supra* at text accompanying notes 67–71).

140. *Mount Laurel II*, 456 A.2d at 418, 423–24.

141. *Id.* at 419. Three appointed judges, one per region, were assigned to hear and, through the judgments of trial courts in some instances, to administer all of the cases in each region. The trial courts were authorized to revise any ordinance and require affirmative planning and zoning devices in cases where the municipality did not fulfill its zoning obligation. *Id.* at 418.

gested that "affirmative governmental devices" be used to encourage compliance by municipalities.[142]

The actions of the New Jersey Supreme Court in the *Mount Laurel* cases demonstrate that judicial enforcement of a constitutional provision is not necessarily precluded simply because a provision appears to be non-self-executing on its face. The courts have the capacity to create necessary definitions or procedures to enforce a constitutional provision. On the other hand, this capacity is limited. For example, the New Jersey Supreme Court would probably not have had the necessary personnel and funding to carry out a *Mount Laurel* approach on several fronts. But perhaps the greatest obstacle to an activist court seeking to enforce a constitutional provision in the face of legislative inaction may prove to be the political consequences of such enforcement. Indeed, the political cost of the decision in the *Mount Laurel II* case was evident when New Jersey's Chief Justice was subsequently reappointed by only a one-vote margin in the state senate.[143]

III. The Application of Self-Execution Analysis to Environmental Rights Provisions

A. Environmental Rights Provisions in State Constitutions

The environmental provisions[144] of state constitutions share some common approaches to environmental protection but differ in their specific formulations.

One type of provision is neither mandatory nor prohibitory, but merely expresses a public sentiment. The first sentence of the environmental provision of Florida's state constitution is such a

142. *Id.* at 419. The court also suggested inclusionary zoning techniques such as mandatory set-asides and incentive zoning, whereby low and moderate income units would be either mandated or encouraged by relaxations of ordinance restrictions. *Id.* at 445. The court even provided definitions of low and moderate income. *Id.* at 421 n.8.

143. *See* Howard Kurtz, *New Jersey's Ground-Breaking Supreme Court*, Wash. Post, Dec. 28, 1988, at A4 (discussing *Mount Laurel* cases and other controversial rulings by the New Jersey Supreme Court).

144. Whether a particular provision is an "environmental" provision may be an open question, as the term may include provisions ranging from those regulating the use of a natural resource to those indirectly affecting the health of individuals or the quality of the environment. For an extensive listing of state constitutional provisions that may qualify as "environmental" provisions, see McLaren, *supra* note 7, at 129–30 nn.25–30.

provision: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty."[145] The state constitution of Georgia also includes a provision of this type: "[T]he General Assembly shall have the power to provide by law for . . . [r]estrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas of this state."[146] Neither provision prohibits an action or grants a right that could be enforced by the courts. Such invitations to the legislature have traditionally been found not to be self-executing.[147]

A second type of provision is mandatory but not prohibitory, and directs the legislature to enact laws protecting the physical environment against further deterioration and restoring previously damaged areas. The Hawaiian constitution contains such a provision: "For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources . . . ."[148] Similarly, Louisiana's constitution provides:

> The natural resources of the state, including air and 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.[149]

Despite the use of "shall," the provisions are not self-executing and at best are mere statements of policy. To attempt judicial enforcement would place the court in the untenable position of ordering the legislature to pass laws to protect natural resources.[150]

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145. FLA. CONST. art. 2, § 7 (1968). For a discussion of the enforcement problems posed by the Florida provision, see Martha L. Harrell, Note, *A Proposal for Revision of the Florida Constitution: Environmental Rights for Florida Citizens*, 5 FLA. ST. U. L. REV. 809 (1977). Harrell notes that the provision "offers little substantive protection for the environment. While the mandatory 'shall' of Florida's provision may impose a moral obligation on the Florida Legislature, such an obligation is virtually unenforceable." *Id.* at 810.

146. GA. CONST. art. III, § VI, ¶ II (1976).

147. *See* part II.B.1 *supra*.

148. HAW. CONST. art. XI, § 1 (1978).

149. LA. CONST. art. IX, § 1 (1974).

150. In *Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n*, 452 So. 2d 1152 (La. 1984), the Louisiana Supreme Court noted that any protection embodied in the Louisiana provision was not an exclusive goal, but required a cost-benefit analysis. *Id.* at 1157. *See also supra* text accompanying notes 61–64.

The court might also refuse to enforce such a provision because the language is ambiguous. The court would have to define terms such as "natural beauty," or order the legislature to provide the definition, though judicial provision of such definitions may be possible in some circumstances.[151]

Some of these mandatory, non-prohibitory provisions attempt to combine a directive to the legislature with a grant of an affirmatively enforceable right to citizens. For example, the Illinois Constitution provides that "[e]ach 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."[152] The grant of a right to the state citizens is distinct from the direction to the legislature to enact enabling statutes. Moreover, the proceedings of the constitutional convention which drafted the Illinois provisions include definitions of some terms, perhaps indicating an intent that the provision be self-executing. For example, the committee of the constitutional convention which proposed the Illinois provision noted in its proposal that it used the term "healthful" "to describe that quality of physical environment which a reasonable man would select for

151. A court might also interpret the provision as prohibitory, barring as unconstitutional any state action potentially harmful to environmental quality. Interpreting an apparently non-prohibitory provision as a prohibition would allow the court to use judicial review to enforce the provision, thereby avoiding the problems inherent in ordering the legislature to act. Yet the fact that almost any state action affects "natural beauty" or environmental quality in some way would likely make the court's review too intrusive to survive politically. A related question, namely the extent of a court's ability to enforce a mandatory-prohibitory environmental rights provision, is elaborated *infra* at text accompanying notes 219–222.

152. ILL. CONST. art. XI, § 2 (1971). Section 1 provides under the title "Public Policy—Legislative responsibility": "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy." The Massachusetts Constitution includes this similar provision:

> The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air, and other natural resources is hereby declared to be a public purpose.
>
> The general court shall have the power to enact legislation necessary or expedient to protect such rights.

MASS. CONST. art. XLIX (1979).

himself were a free choice available."[153] The provision, adopted at a time when concerns about the environment were widely expressed,[154] appears to combine a judicially enforceable private right of action with a public policy directive to the legislature. The language of Section 2 of the provision, however, clearly expresses the drafters' intent that the Illinois legislature enact enabling legislation. If enforcement is subject to the will of the legislature, the right granted may be illusory.[155]

As of this writing, no state constitution includes a mandatory-prohibitory environmental rights provision. The reason for this omission is an open question, but it is noteworthy that the significance of prohibitory language in self-execution analysis was well-known when the environmental rights provisions were adopted.[156]

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153. General Government Committee Proposal No. 16, at 6 (July 1, 1970), *reprinted in* 6 SIXTH ILLINOIS CONSTITUTIONAL CONVENTION: RECORD OF PROCEEDINGS 693, 701 (1972), *quoted in* Robert A. Helman & Wayne W. Whelan, *Constitutional Commentary, in* ILL. CONST. art. XI, § 2 comment, at 276 (Smith-Hurd 1971).

154. Not only was the first Earth Day celebrated in 1970, but an avalanche of federal congressional proposals for environmental legislation were introduced that year.

> In 1970 alone Congress passed Amendments to the Clean Air Act, ... [t]he Occupational Safety and Health Act, . . . and the Resource Recovery Act. In that same year the President, by Executive Order, reactivated . . . . [t]he Rivers and Harbors Act and established the nation's first federal permit system for control of water pollution . . . [and] created the Environmental Protection Agency.

Prologue, ENVIRONMENTAL QUALITY—1979: TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 1. *See also* ENVIRONMENTAL QUALITY: THE TWENTIETH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 4 (1990).

155. While the part of the Illinois provision which affirmatively grants a right has not been held to be self-executing, several decisions have relied on the provision's mandate. *See, e.g.*, Tri-County Landfill Co. v. Illinois Pollution Control Bd., 353 N.E.2d 316 (Ill. App. 1976) (relying in part on provision to bar defense of estoppel by landfill operator who violated state environmental act); Parsons v. Walker, 328 N.E.2d 920 (Ill. App. 1975) (granting standing to citizen group to bring suit under provision to enjoin construction of reservoir); Scattering Fork Drainage Dist. v. Ogilvie, 311 N.E.2d 203 (Ill. App. 1974) (basing dismissal of injunction granted under provision against construction project allegedly harmful to river on absence of supporting facts detailing harm, rather than on non-self-executing nature of provision).

The court in *Gherna v. State*, 146 P. 494 (Ariz. 1915), noted, however, that a request for legislative action in an otherwise complete provision does not necessarily mean that the provision is not self-executing absent such action. *Id.* at 498. The command to the legislature may be merely "permissive," encouraging complementary rather than enabling legislation. *See supra* text accompanying notes 96–108 (discussing *Gherna*).

156. The self-executing character of prohibitory language was noted fully 75 years before 1970, the year in which the Illinois provision was adopted. *See supra* text accompanying notes 88–94 (discussing *Washingtonian Home of Chicago v. City of Chicago*, 41 N.E. 893 (Ill. 1895)). The Illinois provision was among the first environmental provisions adopted. *See* General Government Committee Proposal No. 16, *supra* note 153, at 13–14,

Nevertheless, as will be discussed below, even an environmental rights provision expressed as a prohibition may present problems for interpretation and execution.[157]

B. State Courts' Application of Self-Execution Analysis to Environmental Rights Provisions

The environmental rights provisions in the constitutions of Virginia and Pennsylvania are the only such provisions which have been tested in their respective state supreme courts. Environmental provisions in many other states, which state courts of last resort have yet to review, have been described by scholars and other courts as unenforceable without complementary legislation.[158]

1. Virginia

Section 1 of Article XI of the Virginia Constitution provides:

> 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.[159]

In *Robb v. Shockoe Slip Foundation*,[160] the Virginia Supreme Court reversed a lower court decision that had enjoined the governor from demolishing several state-owned buildings. The lower court had held that such demolition would violate the environ-

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reprinted in 6 SIXTH ILLINOIS CONSTITUTIONAL CONVENTION: RECORD OF PROCEEDINGS, *supra* note 153, at 708–09.

157. *See infra* text accompanying notes 219–222.

158. As the Supreme Court of Pennsylvania stated in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 594 (Pa. 1973): "The Commonwealth also argues that the Pennsylvania environmental protection amendment is self-executing by comparing it with similar constitutional amendments enacted in Massachusetts, Illinois, New York, and Virginia, all of which are obviously not self-executing." *See also* Harrell, *supra* note 145 (discussing environmental rights provision of Florida state constitution).

159. VA. CONST. art. XI, § 1 (1971).

160. 324 S.E.2d 674 (Va. 1985).

mental protection provision of the state constitution. The Virginia Supreme Court held that the constitutional clause was not self-executing and dissolved the injunction issued below. The court reasoned: "[The provision] is not prohibitory or negative in character. Rather, it confines itself to an affirmative declaration of what the chancellor described as 'very broad public policy.'"[161] Noting that the provision does not indicate an intent that it be self-executing,[162] the court observed that the lack of an enforcement procedure, when combined with vague language, "invites crucial questions of both substance and procedure . . . . Such questions beg statutory definition, and we believe those who drafted and adopted [the provision] recognized that fact."[163] For the court, the provision's language suggested several questions:

> Is the policy of conserving historical sites absolute? If not, what facts or circumstances justify an exception? Does the policy apply only to the state and to state-owned sites, or does it extend to private developers and to privately-owned sites? Who has standing to enforce the policy? Is the Governor of the Commonwealth an essential party-defendant? Is the remedy solely administrative, solely judicial, or a mixture of the two? If the remedy is judicial, which court has jurisdiction over the subject matter and over the parties?[164]

The provision was found to be non-self-executing because it was not prohibitory and it failed to provide needed definitions or an enforcement mechanism.

At least one scholar has criticized the court's decision.[165] Shockoe Slip Foundation argued that Section 2 of Article XI, a separate constitutional provision inviting the legislature to enact legislation to implement the policy articulated by Section 1,[166] was merely permissive, and therefore the former provision was intended to be self-executing.[167] The Foundation further argued that

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161. *Id.* at 676.
162. *Id.*
163. *Id.* at 676–77.
164. *Id.*
165. Butler, *supra* note 7.
166. VA. CONST. art. XI, § 2 (1971).
167. As in *Gherna v. State*, 146 P. 494 (Ariz. 1915), such language merely indicated the drafters' intent to permit complementary legislation. *Compare Shockoe*, 324 S.E.2d at 677 *with Gherna*, 146 P. at 497–98 (discussed *supra* text accompanying notes 96–109).

the necessary definitions and procedural machinery already existed.[168] Professor Butler agrees, claiming that

> [t]he vagueness of article XI, however, is not as serious a barrier to regulation as many model state officials believe . . . . Virginia already has a statutory and administrative framework that begins to bridge the gap between regulation and article XI . . . . The Virginia Environmental Quality Act . . . provides part of this statutory and administrative framework.[169]

She argues that it would have been possible to carry out the policy of Article XI by relying on the Virginia Environmental Quality Act.[170] Early versions of the Act were to be enacted "[i]n furtherance of Article XI of the Constitution of Virginia."[171] According to Butler, the version of the Act eventually enacted—albeit without reference to Article XI—could have provided a procedural mechanism for judicial enforcement of the constitutional provision.[172]

One approach the Virginia Supreme Court could have taken is that of the New York Court of Appeals in *People ex rel. McClelland v. Roberts*.[173] The *McClelland* court enforced a constitutional provision in the absence of specific enabling legislation by relying on a pre-existing statute which addressed the same issue.[174] The Virginia Environmental Quality Act was enacted prior to the adoption of the constitutional provision and was amended in 1972 after the constitutional provision was to become effective. Should the Virginia court have relied on the system created by the Act to enforce the constitutional mandate, or does the lack of any reference to the constitutional provision in the 1972 amendments to the Act support an argument for judicial restraint?[175] Why should the

168. *Shockoe*, 324 S.E.2d at 677.

169. Butler, *supra* note 7, at 851.

170. VA. CODE ANN. §§ 10.1-1200 to -1221 (Michie 1989).

171. Act of April 10, 1972, ch. 774, § 10-177, 1972 Va. Acts 1133. *See* Butler, *supra* note 7, at 852.

172. Butler, *supra* note 7, at 852. The Act provided for the creation of an administrative agency, the Council On the Environment. VA. CODE ANN. §§ 10.1-1201 (Michie 1989). The Council was given the authority to coordinate and, if necessary, to create administrative practices and systems in the state, *id.* § 10.1-1204(1)–(2), and to review the compliance of other state agencies by requiring them to submit environmental impact statements. *Id.* §§ 10.1-1208 to -1209.

173. 42 N.E. 1082 (N.Y. 1896) (discussed *supra* text accompanying notes 72–79).

174. *Id.* at 1084.

175. The Act had included references to the provision in its draft stages, but lacked such references when enacted. *See supra* note 171. If the court were to ignore the final version's deletion of references to the constitutional provision, the court could be accused of redrafting the amended Act to include language that the legislature had rejected.

court adapt a legislative scheme which the legislature may not have intended to be used to carry out the purposes of the constitutional provision? As a compromise, the court might simply have required a direct reference to the provision in the Act, or a more detailed description of procedures and definitions in the constitutional provision. Requiring such detailed language, however, has its own costs. Too much detail in a state constitution could ultimately restrict legislative flexibility, making constitutional protection of the environment a burden rather than a benefit.[176]

2. Pennsylvania

Section 27 of Article I of Pennsylvania's state constitution was adopted by referendum on May 18, 1971 as part of a larger movement of pro-environmental legislation.[177] The author intended the provision to "grant individual citizens the standing to challenge impairment of their environmental rights in court the same as they can challenge impairment of political rights."[178] The courts could then develop a body of common law for the protection of the environment.[179] The provision reads:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[180]

In *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,[181] the Pennsylvania Commonwealth Court declared that Sec-

176. As unforeseen developments occur, the legislature may find itself unable to respond until a constitutional amendment removes some constitutional obstruction. The point is made by Justice Linde of the Oregon Supreme Court: "[A] shorter, leaner constitution [is] more adaptable for the long run without constant amendments." Hans A. Linde, *Future Directions in State Constitutional Reform*, 67 OR. L. REV. 65, 70 (1988).

177. The period preceding the adoption of the provision is described by the provision's author as "a revolution which saw the legislature enact more comprehensive environmental legislation in the short period of six years, 1966–1972, than in all previous Pennsylvania history." Franklin L. Kury, *The Pennsylvania Environmental Protection Amendment*, 57 PA. BAR ASS'N Q. 85, 86 (1986). *See also supra* note 154 (citing authorities).

178. Kury, *The Pennsylvania Environmental Protection Amendment*, *supra* note 177, at 89.

179. *Id.*

180. PA. CONST. art. I, § 27 (1971).

181. 302 A.2d 886 (Pa. Commw.), *aff'd*, 311 A.2d 588 (Pa. 1973).

tion 27 was self-executing.[182] The case involved an appeal of the Commonwealth's suit to permanently enjoin the building of an observation tower next to Gettysburg National Military Park. The state argued that the tower would harm "natural, scenic, historic and esthetic values" of the state in contravention of the protection guaranteed by Section 27. The Commonwealth Court granted the injunction, finding that the serious definitional difficulties presented by the provision were surmountable.[183] Judge Mercer dissented in part, finding the terms of the provision too vague.[184] Judge Rogers, writing for the majority, responded: "Courts, which have attacked with gusto such indistinct concepts as due process, equal protection, unreasonable search and seizure, and cruel and unusual punishment, will surely not hesitate before such comparatively certain measures as clean air, pure water and natural, scenic, historic and esthetic values."[185] Even though it declared itself able to resolve these difficulties, the Commonwealth Court noted the narrow inquiry permitted by the applicable standard of review, and upheld the trial court's finding that "the tower would not injure the values protected by the constitution and . . . that the Commonwealth had not borne its burden of proof."[186]

On appeal, the Pennsylvania Supreme Court affirmed the denial of the injunction, but reversed the finding that the provision was self-executing.[187] In a fragmented decision,[188] the plurality expressed concern that granting the state the power to enforce the constitutional provision might lead to violations of the Equal Protection clause and the Due Process clause of the Fourteenth Amendment.[189] Because the power to enforce and define the pro-

182. *Gettysburg*, 302 A.2d at 888.

183. *Id.* at 894–95.

184. Taking issue with the majority's finding that § 27 was self-executing, Judge Mercer asked, "[w]hat is pure water? Must water be pure in all areas of human, animal, agricultural, industrial or commercial use? . . . Must all water, however used, be first distilled and then treated to remove all matters leaving only two atoms of hydrogen and one atom of oxygen joined together? What is pure water?" *Id.* at 896 (Mercer, J., dissenting in part and concurring in part). He also explored the definitions of "natural, scenic, historic and esthetic values of the environment," ultimately asking: "Beauty is in the eye of the beholder—what eye is to determine what is 'scenic'?" *Id.*

185. *Id.* at 892.

186. *Id.*

187. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588 (Pa. 1973). The court found that § 27 "merely state[s] the general principle of law that the Commonwealth is trustee of Pennsylvania's public natural resources with power to protect the 'natural, scenic, historic, and esthetic values' of its environment." *Id.* at 594–95.

188. The five-two decision included a two-judge plurality opinion as well as two concurrences and one dissent. *Id.* at 588.

189. *Id.* at 593.

vision would be solely vested in the governor, enforcement of the provision could be abused.[190] The plurality concluded that the provision would remain dormant until the legislature enacted "supplemental legislation . . . to define the values which the amendment seeks to protect and to establish procedures by which the use of private property can be fairly regulated to protect those values."[191]

The plurality recognized that a portion of the provision seemed to grant the Commonwealth a right that could be protected by the courts in an equity action, and "[a]s such, the first part of Section 27, if read alone, could be read to be self-executing."[192] The court added, however, that "the remaining provisions of Section 27, rather than limiting the powers of government, expand these powers."[193]

In sum, the court found Section 27 deficient in a number of ways. The provision lacked sufficient definition of its terms as well as an enforcement procedure.[194] It upset the separation of powers by giving the governor the power to enforce a right which had not been legislatively defined.[195] The court was concerned that if it enforced the provision without benefit of legislative definition, other rights guaranteed by the federal and state constitution might be impermissibly compromised.[196] The court found that Section 27 was not self-executing because it was not a limitation, but "merely a general reaffirmation of past law."[197]

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190. The plurality stated:

> Under a constitution providing for a balance of powers, such as Pennsylvania's State Constitution, when power is given simply to the Commonwealth, it is power to be shared by the government's three co-equal branches. The governor cannot decide, alone, how or when he shall exercise the powers of a trustee. It is not for him alone to determine when the 'natural, scenic, historic, and esthetic values of the environment' are sufficiently threatened as to justify the bringing of an action . . . . To hold that the Governor needs no legislative authority to exercise the as yet undefined powers of a trustee to protect such undefined values would mean that individuals could be singled out for interference by the awesome power of the state with no advance warning that their conduct would lead to such consequences.

Id.

191. *Id.* at 595.
192. *Id.* at 592.
193. *Id.*
194. *Id.* at 593.
195. *Id.*
196. *Id.*
197. *Id.* at 592.

Despite its finding that the provision was not self-executing, the supreme court's decision did not preclude an appellate court from finding in a later case that the provision was self-executing in some instances or from developing a test for its application.[198] Ironically, however, the test the appellate court adopted eviscerated the provision, as the test simply mandated that any alteration of the state's environment comply with existing state law:

> The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[199]

The court read Section 27 as creating a modified public trust which merely maintained the current level of environmental degradation. As a result, the test provided no new protection to the environment, a result hardly reconcilable with the intent of the framers of Section 27.[200]

C. A Critique of the Courts' Application of the Doctrine of Self-Execution to Environmental Rights Provisions

The Virginia and Pennsylvania decisions exemplify traditional applications of the doctrine of self-execution to constitutional provisions. The citizens of these states may have found these decisions counterintuitive and frustrating. For example, the voters of

198. Payne v. Kassab, 312 A.2d 86 (Pa. Commw. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

199. 312 A.2d at 94.

200. *See* Kury, *The Pennsylvania Environmental Protection Amendment*, *supra* note 177, at 89. Looking back at the judicial history of the Pennsylvania provision, its author admits the limitations imposed by the *Payne* test. Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123 (1990). He acknowledges that a review of cases in which Pennsylvania courts considered the provision "shows a consistent reluctance by the courts to enforce the Amendment." *Id.* at 129. Nevertheless, Kury considers the test "an important vehicle for implementing the Amendment." *Id.* at 130. He bases this conclusion in part on the "solid basis" that the amendment provides for subsequently enacted environmental statutes and the administration of those acts. *See id.* at 131–32.

Pennsylvania probably thought that they had enacted a measure of environmental protection not previously available.[201] Perhaps the political problems which the court predicted would arise from enforcing the provision should not have prevented its enforcement, given the widespread popular support the amendment had enjoyed.[202] In light of other courts' willingness to go much further in enforcing constitutional provisions,[203] the Virginia and Pennsylvania courts' timidity in interpreting the environmental rights provisions of their respective state constitutions demands examination.

Both the Virginia and Pennsylvania courts pointed to the ambiguity of the provisions' terms as an obstacle to judicial enforcement.[204] Yet the ability of courts to construe a vague term in a constitutional provision is well documented.[205] Writing in response to the *Shockoe* decision, Pollard notes that courts have confidently defined the meaning of such terms as equal protection, due process, and cruel and unusual punishment, terms as vague as those which have prompted courts and others to determine that environmental rights provisions are too ambiguous to be self-executing.[206] Pollard speculates that the courts' reservations may spring from a lack of neutral standards with which to interpret the provisions.[207] He explains that without such standards, courts may "fear that their interpretations may be unprincipled and illegitimate, and thus improperly activist."[208] But ultimately Pollard concludes that "[t]here is no reason why definition of the values contained in environmental provisions in state constitutions and standards for

201. *See generally* Kury, *The Pennsylvania Environmental Protection Amendment*, *supra* note 177.

202. As the Chief Justice noted in dissent, "the amendment received 1,021,342 votes: more than any candidate seeking state-wide office." Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 596 n.1 (Pa. 1973) (Jones, C.J., dissenting).

203. *See* part II.C *supra* (discussing Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983)).

204. *See Shockoe*, 324 S.E.2d at 676–77 (discussed in part III.B.1 *supra*); *Gettysburg*, 311 A.2d at 595 (discussed in part III.B.2 *supra*).

205. *See* Brooks, *supra* note 7, at 1071; McLaren, *supra* note 7, at 136 (noting that "courts frequently interpret imprecise terms such as due process, equal protection, and cruel and unusual punishment").

206. Pollard, *supra* note 5, at 377 (1986) (citing A.E. Dick Howard, *State Constitutions and The Environment*, 58 VA. L. REV. 193, 216 (1972)).

207. Pollard, *supra* note 5, at 376–79.

208. *Id.* at 376. As a basis for such standards, Pollard proposes that the courts interpret the constitutional provisions as "a negative limitation on governmental action," or that the courts rely on the common law of nuisance or the "public trust" doctrine. *Id.* at 377–79.

protecting these values cannot be judge-made as well."[209] It is proper for a state supreme court to interpret the state's constitution. Courts have often interpreted broad constitutional provisions in light of new developments.[210]

The courts' disparate treatment of prohibitory and non-prohibitory provisions further calls into question the courts' reluctance to provide the definitions necessary to enforce the environmental rights provisions.[211] The Virginia and Pennsylvania courts ruled that the provisions were not self-executing because, among other things, they were not formulated as a limit on governmental power; that is to say, they were not prohibitory provisions.[212] In the Virginia case, the court intimated that a prohibitory tone would have made the provision effective despite the need for further definitions by the legislature.[213] If true, this would imply that a provision that is found not to be self-executing for lack of definitions might well be self-executing if it were expressed as a limitation on legislative power.[214] But the same definitional difficulties which precluded enforcement of the non-prohibitory provision would remain when enforcing a prohibitory version of the same provision. The court would still have to define the ambiguous terms in order to determine legislative compliance with the constitutional prohibition. It is inconsistent to hold a provision to be non-self-executing because the language requires legislative definition, while postulating that the same provision would be self-executing if expressed as a prohibition.

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209. *Id.* at 379. "The reluctance of many courts to interpret the environmental provisions forcefully is somewhat surprising, given the history of the provisions and the pattern of judicial activism that at least some of the courts have displayed in other areas of the law." Butler, *supra* note 7, at 847. *Accord* Brooks, *supra* note 7, at 1071.

210. In *State ex rel. State Ry. Comm'n v. Ramsey*, 37 N.W.2d 502 (Neb. 1949), the Nebraska Supreme Court noted that "[a] Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men." *Id.* at 506.

211. As noted *supra*, the courts base their differing treatment of prohibitory and non-prohibitory provisions on the difficulties involved in judicially enforcing incomplete non-prohibitory provisions due to the constraints of the principle of separation of powers. *See supra* text accompanying notes 61–64.

212. *See Shockoe*, 324 S.E.2d at 676; *Gettysburg*, 311 A.2d at 592.

213. *See Shockoe* 324 S.E.2d at 676.

214. The converse—i.e., that prohibitory provisions would not be self-executing if they were expressed in non-prohibitory language—would not always be true. Some provisions which are mandatory but not prohibitory are self-executing. *See generally* part II.B.2 *supra*.

Such an inconsistency reveals a contradiction in the accepted doctrine of self-execution. Ambiguity in a provision is considered evidence of the intent of those adopting the provision for requisite legislative enabling action.[215] When a provision is expressed as a prohibition, however, an intent to limit legislative authority will be inferred. The court must provide the necessary definitions in such cases, since the legislature could avoid the very restraints that the provision imposed if the legislature defined the terms of the prohibition.[216] Since the terms to be defined in either instance are likely to be the same, the difficulty in providing the definitions cannot be the real obstacle to self-execution in the case of the non-prohibitory provision.

Another reason put forth by the Pennsylvania court to justify its reluctance to enforce the state's environmental rights provision is the potential for conflict between established and newly-adopted constitutional rights. This tension is acutely felt in the environmental arena, as the environmental provisions often create a "negative right": that is, they oblige individuals to refrain from acting in certain ways. The right to a particular level of environmental quality would infringe on the exercise of other rights, such as the rights of landowners to develop their property. Yet these concerns certainly are not unique to environmental provisions. For example, the right of equal access to rented housing gives rise to the state's power to prosecute landlords for discrimination and allows private suits against landlords for discrimination, thereby impeding the exercise of the landlord's property rights.[217]

The courts have demonstrated their ability to define ambiguous terms and to reconcile conflicting interests. Scholars have also suggested ways to surmount the special obstacles to enforcement posed by environmental rights provisions.[218] Yet courts continue

215. *See supra* text accompanying notes 80–82 (discussing Tuttle v. National Bank of the Republic, 44 N.E. 984 (Ill. 1896)).

216. Allowing legislative definition would be inappropriate for another reason: it would disregard the constitutional power of the people to limit their original grant of legislative power.

217. Similarly, state power to infringe on property rights is limited by Congress's Commerce power. U.S. CONST. art. I, § 8. There is no prohibition on simply taking property rights from an individual, but such a taking must be accompanied by compensation. U.S. CONST. amend. V, cl. 5. The issue is especially problematic in situations where property rights are limited to protect environmental values. *See, e.g.*, U.S. v. Riverside Bayview Homes, 474 U.S. 121 (1985); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293–97 (1981).

218. *See, e.g.*, Butler, *supra* note 7, at 854–60; Richard J. Tobin, *Some Observations*

to refuse to take up the challenge of enforcing such provisions. The distinctive treatment of environmental provisions suggests that other concerns are motivating the courts' refusal to enforce environmental rights provisions in state constitutions. These concerns are explored in Part IV.

IV. STATE COURTS' APPLICATION OF SELF-EXECUTION ANALYSIS TO ENVIRONMENTAL RIGHTS PROVISIONS: A DEMOCRATIC JUSTIFICATION

Would the courts ever find an environmental rights provision to be self-executing? If a provision read, "The legislature shall enact no laws that interfere with the citizens' right to a clean environment," the doctrine of self-execution would seem to require that a court considering the provision should enforce it. As a mandatory-prohibitory provision, it clearly restricts the power of the legislature to enact contrary legislation.[219] The court would rely on its traditional powers of constitutional interpretation and judicial review to enforce such a mandate. Indeed, the supreme courts of Virginia and Pennsylvania have implied that they would enforce such a provision.[220]

In attempting to enforce such a provision, though, a court would face considerable difficulties in defining the term "environment."[221] Most state actions affect the environment in some way,

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on the Use of State Constitutions to Protect the Environment, 3 ENVTL. AFF. 473, 482–85 (1974).

219. *See, e.g.*, Washingtonian Home of Chicago v. City of Chicago, 41 N.E. 893 (Ill. 1895) (discussed *supra* text accompanying notes 88–94).

220. *See Shockoe*, 324 S.E.2d at 676 (discussed in part III.B.1 *supra*); *Gettysburg*, 311 A.2d at 592 (discussed in part III.B.2 *supra*).

221. See, for example, the Second Circuit's expansive reading of the scope of the term "environment" under the National Environmental Policy Act ("NEPA"), Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), *cert. denied sub nom.*, Hanly v. Kleindienst, 409 U.S. 990 (1972):

> [NEPA] contains no exhaustive list of so-called "environmental considerations," but without question its aims extend beyond sewage and garbage and even beyond water and air pollution. The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban "environment" . . . .

Id. at 647 (citations omitted). *See also* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) (exploring NEPA's reach into the mental health of citizens possibly exposed to radiation from a nuclear accident).

whether directly or indirectly. Because the scope of the constitutional guarantee—and hence the potential scope of the court's review of state action—would depend solely on the court's definition of "environment," judicial enforcement of such a provision would pit the court against the legislature in a never-ending battle.[222] No state supreme court would willingly put itself in such a position. Instead, the court is likely to insist either on legislative action or on more detailed guidance from the provision itself.

This political reality shows that the doctrine of self-execution does not pose the only barrier to enforcement of environmental rights provisions. Examining in more detail the principles which underlie the doctrine of self-execution reveals several additional obstacles which may contribute to the courts' reluctance to enforce environmental rights provisions. Specifically, this Article contends that environmental rights lack the political maturity required for judicial definition, and that the courts' restraint is therefore justified.

A. The Need for Legitimacy

The doctrine of self-execution is a judicial tool for interpreting constitutional provisions. Given that the judiciary "has no influence over either the sword or the purse,"[223] the court's edicts will only have authority if the public and the other branches of government accept the legitimacy of the court's interpretation.[224] The

222. One might compare the position of a state court enforcing such a provision with the position of the Supreme Court when the Court reviews a state action for violations of the Fourteenth Amendment guarantees of substantive due process. U.S. v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938).

223. THE FEDERALIST No. 78 (Alexander Hamilton) (discussing U.S. CONST. art. III).

224. *See generally supra* text accompanying notes 61–64 (discussing limitations on judicial enforcement power). In turn, public acceptance of judicial decisions helps to insure the support of the other branches of government.

> The Court can hand down opinion after opinion—scholarly, thoughtful, realistic—but unless it parallels public feeling, or unless the "political" branches and particularly the executive are willing to undertake its enforcement, a court decree becomes a meaningless piece of paper. The Court, of course, has no police officials of its own, and its independence is therefore of a limited kind . . . . If one decree is ignored the Court loses some of its immense prestige . . . .

PHILLIPPA STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION 3–4 (1974).

legal rights enforced by the court must therefore correspond to generally accepted values which have developed through time. As Dean Wellington explains, "it is the special role of courts, when confronted with . . . a sharp clash of interests, to examine the views the community expressed in calmer moments, and to infer from those expressions that recur principles of general application . . . . [T]he courts . . . deliberately search the past for elements worth preserving."[225] The individual "elements" that make up such "principles of general application" need not be universally accepted, for conflicting conceptions of social values often coexist within a single legal right. Nevertheless, these principles establish limits on the exercise of a court's discretion in defining a right. The contemporary social understanding of the principles underlying a right guides the courts as they define and enforce the right in each new case.

As long as a court anchors new interpretations of a constitutional right in the current understanding of the principles underlying the right, it will not erode the social consensus supporting the court's authority to enforce the right. While a new interpretation of the right may differ from previously held conceptions of that right, the interpretation cannot be wholly unfamiliar to the societal psyche. If a court did define a right in a manner entirely foreign to common understanding, the court would undermine the social consensus which supports enforcement of that right.

Not all rights are equally well-grounded in social consensus. Such long-established rights as due process and freedom of speech, for example, have a far more secure historical foundation than recently developed rights such as the right to a clean environment.[226] As Judge Learned Hand explained, the idea that due process and free speech "were rights arising out of 'Natural Laws'

225. Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 493 (1982) [hereinafter Wellington, *Nature of Judicial Review*]. *See also* Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 235–54 (1973) [hereinafter Wellington, *Common Law Rules*]. As Dean Wellington notes, the idea that courts "seek to discover and use the moral ideals of the community as a source of legal principles" is not without controversy. Wellington, *Nature of Judicial Review*, *supra*, at 494. *See also* Wellington, *Common Law Rules*, *supra*, at 241–54.

226. *Cf.* Goldberg & Williams, *supra* note 131, at 732–34. The authors contrast the recently recognized right to organize and bargain collectively in the private sector with "*judicially* declared right[s], derived from an established, general constitutional principle such as due process or freedom of speech." *Id.* (emphasis in original).

[and] 'inherent' in the structure of any society" was "widely accepted at the end of the eighteenth century, and behind [this idea] lay a long history, going back to at least the beginning of our era."[227]

The concept of due process, for example, dates back at least to the Magna Carta of 1215, which provided that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land."[228] This formulation depends on the existence of a customary law independent of sovereign-made rules or statutes.[229] In the time immediately prior to American independence, England came to rely less on customary law, initially embracing sovereign-made law, and then the enactment of laws by Parliament.[230] While such lawmaking reflected changes in English economic and social relations, laws such as the tax acts were imposed on the American colonies without the protection of a high court or Parliament as a limit on the King's discretionary lawmaking power.[231] The result was a rebirth of customary or "natural" law in America. In the colonies, opposition to English rule "made wide resorts to the rhetoric of rights; first common-law rights . . . and then 'natural' rights."[232] Accordingly, after American independence and the subsequent adoption of state and federal constitutions, the newly-instituted American courts relied on this legal tradition to provide their

227. HAND, *supra* note 54, at 2.

228. Magna Carta, ch. 39 (1215), *quoted in* Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* DUE PROCESS 3–4 (J. Roland Pennock & John W. Chapman eds. 1977).

229. *See* J. Roland Pennock, *Introduction* to DUE PROCESS, *supra* note 228, at xv–xvi.

230. *See* Raoul de la Grasserie, *The Evolution of Civil Law*, *in* EVOLUTION OF LAW: FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT 587 (Albert Kocourek & John H. Wigmore eds., Layton B. Register trans. 1918) (excerpt from RAOUL DE LA GRASSERIE, LES PRINCIPES SOCIOLOGIQUES DU DROIT CIVIL (1906)). The statement that customary law was replaced by codified statutory law must be qualified. Since codes themselves are modified by judicial scrutiny and interpretation based on the judge's understanding of societal values and mores, a form of customary law is still involved. Thus de la Grasserie quotes Gabriel Tarde: "Judge declared law, when grafted upon statutory law, is the addition to legislative law of a sort of new customary law, which is a substitute for the custom of antiquity. The custom of the judges has taken the place of the custom of the judged." *Id.* at 586.

231. The royal governors of the different American colonies were responsible only to the British crown and "theoretically had despotic powers." JOHN D. STEVENS, SHAPING THE FIRST AMENDMENT: THE DEVELOPMENT OF FREE EXPRESSION 29 (1982).

232. Pennock, *supra* note 229, at xvi–xvii.

decisions with the legitimacy historically accorded to natural law jurisprudence.

The concept of free speech became embedded in the American political consciousness through a similar process of historical development. In early England, speech was regularly suppressed by the Crown.[233] Until 1695, a pre-publication license requirement prevented the publication of any book attacking the royal family.[234] Later, the laws of sedition and libel supplanted the license requirement, and enabled the Crown to prosecute only after publication.[235] The British exported this practice to the colonies.[236] The famous sedition case of John Peter Zenger, who was accused of defaming the governor of New York, established the principle that truth suffices as a defense to a charge of seditious libel.[237] Perhaps even more important than the decision itself were the subsequent commentaries on the case, which identified free speech as an integral component of democratic freedom. James Alexander, author of an influential report on the trial, explained that "[f]reedom of speech is a *principal Pillar* in a free Government: when this Support is taken away, the Constitution is dissolved, and Tyranny is erected on its ruins."[238] The Zenger case instilled in the American political mind the "philosophy that freedom both of thought and speech, was an inborn human right."[239] Courts which act to protect free speech today may rely on the historically established consensus supporting the right.

The environmental rights granted in state constitutions lack any comparable historical foundation.[240] Though many voices have been raised in alarm during the last century over the depletion of

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233. NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA 57–58 (1980).

234. *Id.* at 63.

235. *Id.* at 59–60.

236. *Id.* at 61–62.

237. *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION 126–75 (1960). Narratives of the trial are considered among the "most widely known source(s) of libertarian thought in England and America during the eighteenth century." *Id.* at 133 (footnote omitted). *See also* HENTOFF, *supra* note 233, at 63–64 ("[t]he most renowned and resounding battle over freedom of the press in prerevolutionary America was conducted by John Peter Zenger in the city of New York in 1735").

238. James Alexander, PHILADELPHIA GAZETTE, Nov. 17, 1737, *quoted in* LEVY, *supra* note 237, at 135.

239. HENTOFF, *supra* note 233, at 68.

240. For example, Professor Brooks notes that "[e]nvironmentalists have just begun to prepare histories of this nation's environmental commitments." Brooks, *supra* note 7, at 1099.

natural resources and the contamination of the planet, only in the late 1960s and early 1970s did environmental damage become a subject of wide popular concern.[241] The flurry of environmental legislation that began at that time continues to this day, accompanied by ongoing political, social, and economic debate on the issue. Disagreement persists even on basic questions: What is a suitable environment? How is its existence to be guaranteed? Can continued growth and development coexist with an unpolluted environment?[242] Should natural resources be used in a regulated manner, be preserved, or be restored to their original condition?[243] Professor Brooks, discussing the possibility of a federal constitutional environmental right, notes that these kinds of "ethical arguments . . . are only now entering the fabric of our society. As a consequence, the [Supreme] Court does not have readily available an official history or an accepted ethos."[244]

The debate about acceptable environmental risk illustrates the difficulties society faces in reaching a consensus on environmental issues. Society must decide how much risk is acceptable from the use of pesticides, fertilizers, and other products, taking account of the benefits that accrue from their use. It is not clear that society will properly take into account the scientific data available when it makes such decisions.[245] One problem in risk assessment is the

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241. *See supra* note 154.

242. At least three answers to this question have been proposed. Some believe that population growth and economic development must be stopped or reversed. Others advocate a change of approach to take into account environmental concerns rather than simply limiting "progress." Still others, so-called "techno-optimists", believe that technology will produce solutions for the problems it creates. For one version of this debate, see James E. Krier, *The Political Economy of Barry Commoner*, 20 ENVTL. L. 11, 20–25 (1990).

243. *See* Douglas O. Linder, *New Direction for Preservation Law: Creating an Environment Worth Experiencing*, 20 ENVTL. L. 49 (1990) (discussing differing views on proper use of natural resources).

244. Brooks, *supra* note 7, at 1099.

245. Consider, for example, the public anxiety which arose when the risks due to the use of pesticides and other chemicals in food production became widely known. The pesticide scare was the focus of the March 27, 1989, issue of *Time*, which included articles such as Anastasia Toufexis, *Dining With Invisible Danger*, TIME, Mar. 27, 1989, at 28 ("Remember the good old days when Americans did not know too much about what they were eating and drinking? . . . Those days are long gone.").

Such problems also arise with regard to the use and disposal of plastics and toxic substances. *See, e.g.*, Ann M. Thayer, *Solid Waste Concerns Spur Plastic Recycling Efforts*, CHEM. & ENGINEERING NEWS, Jan. 30, 1989, at 7. "Much of the public believes that plastics cannot be recycled or safely incinerated and, because they do not decompose, that they should be removed entirely from the waste stream." *Id.* at 8. The author argues that the question of whether plastics are a real culprit in the waste disposal problem is irrelevant, since the public perception is that they are. *Id.*

uncertainty of scientific knowledge about risks. The public, moreover, may respond to the scientific discourse in a subjective and emotional manner: while some members of the public react with alarm to the statistically minimal risks posed by low-level radiation from high voltage electrical power lines, many people persist in high-risk behaviors such as smoking, drinking, and driving too fast. The debate about risk is carried on in legislatures, in courts, and in the news media. No societal consensus yet exists on the level of acceptable risk and on the level of benefit justifying exposure to the risk. The continuing discourse on risk may someday achieve widely accepted answers to these questions, but the process of coming to agreement will take time.

The absence of consensus on environmental issues leaves the courts open to accusations of elitism and judicial "legislating" when they attempt to enforce environmental rights provisions. Without a public consensus on the important issues involved, it would be difficult for a court to enforce an environmental right in any meaningful way without risking a loss of legitimacy in the eyes of a significant segment of the population. The court would have to answer many unresolved questions before it could enforce the right, and insofar as these questions remain highly controversial, the court's rulings might be derided or disregarded. Judicial legitimacy cannot long survive a court decision publicly perceived as based simply on the judges' personal views of the issues.[246] As one scholar has noted of the U.S. Supreme Court, "[i]f the public should ever become convinced that the Court is merely another legislature, that judicial review is only a euphemism for an additional layer in the legislative process, the Court's future as a constitutional tribunal would be cast in grave doubt."[247]

So while the lack of historical guidelines theoretically gives the courts free rein to construe environmental rights provisions

246. *See* Wellington, *Nature of Judicial Review*, *supra* note 225, at 493–94 (describing judges' role as "disinterested generalists"); Wellington, *Common Law Rules*, *supra* note 225, at 248 (discussing judges' need for "historical perspective"). The public's periodic rediscovery that at times the courts act according to personal or political biases has long been a source of attacks against the courts. Ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the power of the U.S. Supreme Court to review acts of the executive and legislative branches has provoked attacks that the Court has appointed itself as a superlegislature. *See, e.g.*, Jackson H. Ralston, *Judicial Control Over Legislatures as to Constitutional Questions*, 54 AM. L. REV. 1 (1920).

247. Robert McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 67 (1962).

broadly, by exercising restraint in such instances, the courts safeguard their legitimacy in the eyes of the public. The doctrine of self-execution allows courts to avoid resolving questions more properly resolved in the legislature.

B. A Doctrine of Avoidance

As argued above, the reasons offered by the supreme courts of Virginia and Pennsylvania for their refusal to enforce the environmental rights provisions of their respective state constitutions are unconvincing.[248] But in light of the lack of consensus on central issues of environmental policy, the courts' need for legitimacy supports those decisions.[249] By exercising restraint, the Pennsylvania and Virginia courts avoided the political entanglements which might have ensued from enforcement of the provisions. This strategy of avoidance is attractive not only because the environmental rights provisions require the courts to define ambiguous terms, but also because enforcement of the provisions might give rise to serious conflicts with the other branches of government.

The state courts' application of the doctrine of self-execution bears an unmistakable likeness to the courts' approach in so-called "political question" cases. Political question cases arise both in federal and state forums. The effect of declaring a particular issue or controversy a "political question" is to remove it from the scope of concern of the court.[250] When confronted with such cases, state

248. *See* part III.C *supra*.

249. *See* part IV.A *supra*.

250. For a review of recent "political question" cases and other cases involving the principle of separation of powers, see James M. McGoldrick, Jr., *The Separation of Powers Doctrine: Straining Out Gnats, Swallowing Camels?*, 18 PEPP. L. REV. 95, 100–04 (1990). The author notes that the political question doctrine has been used to "avoid difficult issues such as whether the advice and consent of the senate [sic] is required to cancel treaties as it is to enter them." *Id.* at 101 n.24. The doctrine has also been used to avoid the question of who will decide if the United States will go to war. *Id.* at 98. Another commentator writes:

> The term "political question" itself, would seem to be what may be called an "open sesame" word. When Ali Baba approached the great iron portal which was his particular problem, all he had to say was "open sesame"; the problem was solved, and the consequences aspired to, attained. In the same manner, when a court labels a particular problem a "political question" (the magic word), though no great door swings open to reveal unlimited treasure, the court is instantly relieved of all control over the problem; the question, so far as it concerns the particular case, is removed from the jurisdiction of the court,

courts have not developed their own analysis of the doctrine, but have consistently relied on the analysis of the Supreme Court in *Baker v. Carr*.[251] In *Baker*, the Supreme Court described the characteristics of a political question as follows:

> Prominent on the surface of any [such] case . . . is . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[252]

The Court noted that each of these variations is rooted in concerns about the separation of powers.[253]

The political question doctrine exemplifies the judicial use of doctrinal labels to dispose of cases that are highly controversial, present conflicts with other branches, or otherwise do not lend themselves to judicial resolution. Both the doctrine of self-execution and the political question doctrine suffer from seemingly tau-

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> and, ordinarily, no matter how the political departments decide the question, the court will abide by that decision.

CHARLES GORDON POST, THE SUPREME COURT AND POLITICAL QUESTIONS 11 (1936) (reprinted 1969).

251. 369 U.S. 186 (1962). For an example of a state court's application of *Baker v. Carr*, see *State v. Ohrenstein*, 549 N.Y.S.2d 962 (App. Div. 1989):

> While the contours of what constitutes such a "political question" are necessarily flexible, and not always easy of definition, the United States Supreme Court in *Baker v. Carr* set forth relevant criteria to enable a court to make a determination as to whether a "political question" can be said to exist in a particular situation.

Ohrenstein, 549 N.Y.S.2d at 971 (citation omitted). *See also* Trustees of Office of Haw. Affairs v. Yamasaki, 737 P.2d 446, 447 (Haw.), *cert. denied*, 484 U.S. 898 (1987); Gilbert v. Gladden, 432 A.2d 1351, 1354 (N.J. 1981); State *ex rel.* Meshel v. Keip, 423 N.E.2d 60, 63 (Ohio 1981); Zemprelli v. Daniels, 436 A.2d 1165, 1169 (Pa. 1981).

252. *Baker*, 369 U.S. at 217.

253. *Id.*

tological definitions.[254] And as with cases involving the doctrine of self-execution, the reasoning offered by courts applying the political question doctrine has often failed to satisfy scholars.[255]

Yet courts do not rely on these doctrines merely to avoid controversy, but also in response to the need to preserve the separation of powers and the institutional legitimacy of the courts. As in cases involving the doctrine of self-execution, the court labels a question "political" when a clear rule is required for judicial enforcement of the right at issue,[256] when action is required of the legislature or of the public prior to judicial enforcement,[257] or when judicial enforcement would violate the principle of separation of powers.[258] As Professor Tribe notes, the political question doctrine "ultimately . . . turns as much on the Court's conception of judicial competence as on the constitutional text," and largely reflects "the efforts of federal courts to define their own limitations."[259] Similar concerns motivate courts applying self-execution analysis.

C. A Democratic Result?

A court's determination that a constitutional provision is not self-executing may appear to discount the intent of those who

254. When applying either doctrine, the court announces that it is restrained from acting; yet it is the court itself that affirmatively determines that the restraint exists. *See* John P. Roche, *Judicial Self-Restraint*, 49 AM. POL. SCI. REV. 762, 768 (1955) (analogizing the Supreme Court's definition of "political question" to a statement that "violins are small cellos, and cellos are large violins").

255. *Compare* POST, *supra* note 250, at 11; STRUM, *supra* note 224, at 3–4 (criticizing use of "political question" doctrine) *with* Pollard, *supra* note 5, at 376–79; Butler, *supra* note 7, at 847 (criticizing courts' findings that environmental rights provisions are not self-executing).

256. *Compare* POST, *supra* note 250, at 12 (citing Oliver P. Field, *The Doctrine of Political Questions in Federal Courts*, 8 MINN. L. REV. 485, 511 (1924)) ("[T]he court must have some rule to follow before it can operate. Where no rules exist the court is powerless to act.") *with* part II.B *supra* (discussing doctrine of self-execution and its requirement that constitutional provisions provide clear rule as prerequisite to judicial enforcement).

257. *Compare* POST, *supra* note 250, at 12 (noting view that "determination [of political questions] rests with the electorate") *with supra* text accompanying notes 61–64 (discussing courts' refusal to enforce provisions on ground that legislative action is required).

258. *Compare* POST, *supra* note 250, at 12 ("[T]he exercise of legislative, executive and judicial powers, must not be concentrated in one body . . . .") *with supra* text accompanying notes 67–71 (noting courts' refusal to enforce constitutional provisions in absence of legislatively created enforcement mechanism).

259. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 79 (1st ed. 1978), *quoted in Zemprelli*, 436 A.2d at 1169.

adopted the provision.[260] Such a decision will likely provoke frustration among the supporters of a recently adopted provision. On the other hand, a decision that a constitutional provision is self-executing may prove equally unpopular if the court's own interpretation of the provision differs greatly from the public expectation. If dissatisfied with the court's interpretation, the public could "overrule" the court by further amending the constitution, or perhaps by electing judges who would rule differently. This approach would seem to respect the intent of the citizens who adopted the provision. By enforcing the provision, the court avoids imposing on the provision's supporters the onus of waging new political battles to obtain a measure of environmental protection which seemed won when the provision was adopted.

Nevertheless, judicial enforcement of such provisions may actually impair the processes of participatory democracy. The state supreme court's constitutional rulings are usually final absent constitutional amendment.[261] Furthermore, it is far more difficult, both procedurally and politically, to amend a constitution than to enact, revise, or repeal a statute.[262] By applying the doctrine of self-execution to environmental rights, the court avoids making decisions which might undermine its legitimacy, and allows the legislature to tailor the scope of environmental protection to changing circumstances. As one commentator notes, avoiding a constitutional ruling

> relieves the judges of the front-line burdens of defining and implementing environmental quality objectives through constitutional pronouncements not directly susceptible to modification through the political process; if constitutionally based adjudications about environmental resources proved seriously out of line with evolving societal preferences, the representative political bodies would have no recourse.[263]

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260. *See* Goldberg & Williams, *supra* note 131, at 736 (asserting importance of recognizing intent of those who adopted provision of New Jersey state constitution granting private sector employees right to collective bargaining).

261. The apparent finality of constitutional rulings and the effect of this finality on majoritarian values is explored in Wellington, *Nature of Judicial Review*, *supra* note 225, at 486–97. While supreme courts can and do reverse themselves from time to time, this process is not under the control of the public.

262. *Id.* at 487.

263. Stewart, *supra* note 9, at 719.

While constitutional provisions could be tailored to be judicially enforceable, such provisions would probably be statute-like in their detail,[264] and therefore inflexible.[265] Recent framers of state constitutional law have attempted to correct the dangerous practice of weighing down the state constitution with numerous highly particularized provisions.[266] Thus Justice Linde recently admonished that only those issues on which society is generally in agreement should be enacted into constitutions: "New rights probably should be placed in the [state] constitution and thereby removed from normal legislative debate only after they are widely recognized to deserve this status, and then in terms whose meaning is understood, even if not in every detail."[267] In the absence of societal consensus on an issue, resolution must come from the legislature.

Although allowing legislative determination of the scope of environmental protection preserves the democratic process, this alternative presents its own dangers. A political minority is sometimes able to block legislative action supported by the majority. For example, a wealthy minority may be able to "buy" support in the legislature, or a particular event may trigger a sudden wave of support for a minority position. Furthermore, as Judge Posner notes, a well-organized interest group may effectively block legislative action for a long period of time.

> There is the matter of interest group politics, whereby a compact group will often be able to use the political process to transfer wealth to itself from a larger, more diffuse group—consumers or taxpayers, for example—whose members are, as a practical matter, helpless to protect themselves against this mulcting. So the fact that women are an electoral majority does not guarantee that the political process will reflect their preferences. A large and amorphous majority may be at the mercy [of a compact, highly organized group] . . . .[268]

While it is true that a political minority may be able to frustrate the will of the majority, in a well-functioning democracy, such

264. *See, e.g.*, ARIZ. CONST. art. XXIII (1915) (repealed 1932) (discussed *supra* at text accompanying notes 96–109).

265. Linde, *supra* note 176, at 70.

266. *Id.*

267. *Id.* at 68.

268. Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 646 (1991).

anomalies will hopefully be of a temporary character. To use Judge Posner's example, the interests of women may be better represented in the future if women begin to translate their electoral majority into an elected majority in legislatures and in Congress.

V. CONCLUSION

Disappointed voters may accuse courts of elitist disregard of the will of the people when the courts refuse to enforce environmental rights provisions in state constitutions. Yet, given the absence of a clear societal consensus on many of the central issues involved in environmental protection, the courts are prudent to avoid making decisions which might be perceived to be based solely on the judges' personal views of the issues. A recent study of Montesquieu's *The Spirit of the Laws* notes the French philosopher's understanding that "governments survive only as long as they remain in conformity with the underlying spirit of the nation."[269] The idea of a right to a clean environment has appeared far too recently to have entered into the nation's "spirit." By applying the doctrine of self-execution when considering cases involving environmental rights provisions, the courts avoid making decisions that may be perceived as illegitimate. A court's finding that a provision is not self-executing encourages other branches of government to deal with particular environmental problems, resulting eventually in a more democratic treatment of issues affecting the environment. By refusing to elevate their personal views of environmental matters to constitutional status, the courts allow much needed legislative and public debate on these issues to continue.

269. Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 10 (1990) (citing quotation that appears at beginning of this Article).