# NEW YORK'S CONSTITUTIONAL GUARANTEE OF ENVIRONMENTAL RIGHTS

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*New York is embarking on the interpretation and implementation of potentially transformative constitutional reform, the addition of Article I, § 19 to New York's Bill of Rights, which provides that "Each person shall have the right to clean air and water, and a healthful environment." To ensure the fulsome and effective implementation of Article I, § 19, and give effect to the intent of the legislators and voters who adopted it, it will be important to provide substantive guidance to courts, government actors, and litigants in the interpretation and application of the new constitutional text. In Pennsylvania and other states, early crabbed judicial interpretations sapped similar environmental rights provisions of their value for decades. We can avoid this fate in New York by educating courts about the history and meaning of and mechanisms to operationalize Article I, § 19. This Article is the first effort to memorialize the process and sociopolitical context that produced Article I, § 19. As New York courts seek to honor the intent of legislators and voters when interpreting constitutional text, understanding this history will be central to*

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Together, the authors express deep appreciation to Patrick A. Woods for contributions to this Article made during his time as Deputy Director of the Government Law Center at Albany Law School.

*judicial interpretation. The Article also explains how this history, in conjunction with relevant doctrinal analysis, firmly establishes that Article I, § 19 is self-executing and protects fundamental rights, and offers concrete guidance as to how courts, litigants, and government actors can raise and evaluate claims under Article I, § 19. Effective implementation of Article I, § 19 in New York has national significance. In 2023, nine states contemplated adding environmental rights to their constitutions. Many are looking to New York to understand the potential value of rights-based approaches to protecting the environment in state constitutions.*

## Introduction

In 2021, over two million New Yorkers voted to enshrine environmental rights in the New York State Constitution's Bill of Rights: "Each person shall have the right to clean air and water and a healthful environment." This succinct new Article I, section 19 is analogous to other basic guarantees, such as "no person shall be denied equal protection of the laws," Article I, section 11, that trace their origins to the Magna Carta and the State's first Bill of Rights in 1787.[1] Bills of Rights in state constitutions are often construed with reference to analogous rights contained in the U.S. Bill of Rights, providing the core requisites for the rule of law. New York's Bill of Rights is the first article of the State's Constitution, not the last, and was adopted 12 years before the federal Constitution. While the federal Bill of Rights "demarcate[s] the 'floor' below which no state may go," it is also evident that "neither the federal government nor its courts may construct a 'ceiling' for the states. They are free to design their own, however high."[2] New York was a leading state in the efforts to add a Bill of Rights to the U.S. Constitution in 1791. New York leads again in recognizing each person's environmental liberties 240 years later.

As judges in New York interpret these environmental rights, they are charting new juridical understandings and construing these new guarantees amidst unprecedented environmental insecurity in the face of climate change, persistent ambient pollution, and troubling losses of biological diversity. Yet, while the precise task at hand is new, the role of courts is not. Courts have overseen the progressive protection of New York's environment. New York courts have addressed the State's constitutional provisions governing the "forever wild" Forest Preserve in article XIV since 1894.[3] Courts have adjudicated matters arising under its Conservation Law, codified in 1911 and revamped as the Environmental Conservation Law in 1972.[4] In the 19th century, the Adirondack and Catskill forested mountains were embraced as a region where everyone could enjoy clean and bountiful sources of

1. Robert Emery, *New York's Statutory Bill of Rights: A Constitutional Coelacanth*, 19 Touro L. Rev. 363, 368–70 (2015).

2. Albert M. Rosenblatt, *Always in the Direction of Liberty the Rule of Law and the (Re)emergence of State Constitutional Jurisprudence*, N.Y. Bar J., Jan. 2018, at 25, 28. The 10th amendment to the federal constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

3. N.Y. Const. art. XIV, § 1; *see, e.g.*, Protect the Adirondacks! Inc. v. N.Y.S. Dep't of Env. Conserv., 37 NY.3d 73, 82 (2021).

4. Nicholas A. Robinson, *Updating New York's Constitutional Environmental Rights*, 38 Pace L. Rev. 151, 168–71 (2017).

water,[5] air that is "pure, rarefied and bracing,"[6] and find a place "for health."[7] Unchecked exploitation of timber and minerals then caused erosion, flooding, wildfires and destruction of these values.[8] The remedy was to enact what is now article XIV, section 1, of the New York State Constitution ("the Constitution").[9] The courts have upheld this constitutional safeguard,[10] and the Forest Preserve is today an exemplar of ecological health. With the adoption of the "Green Amendment" of 2021, the Constitution now extends the liberties of clean air and water and a healthful environment to persons throughout all of New York.

Decades were required to restore the environmental health of the Adirondack and Catskill Forest Preserve. Sustaining the guarantees of Article XIV, section 1, remains ongoing.[11] Similarly, securing the liberties of Article I, section 19 to all persons will be an intergenerational challenge. The judiciary's interpretations of the Constitution will be essential to guiding how all the state and local legislative and executive authorities observe each person's environmental rights.[12] Yet, there is

5. Verplanck Colvin recognized the importance in safeguarding the sources of water as early as 1870. *See* Frank Graham, Jr., The Adirondack Park 70–71 (1978).

6. William H.H. Murray, Adventures in the Wilderness 11 (1869).

7. Louis Marshall, the renowned constitutional lawyer instrumental in the adoption of Article XIV in 1894, continued to press the government to secure the Park for health purposes. *See* Louis Marshall, *Letter of Sept. 25, 1908*, *in* Louis Marshall: Champion of Liberty 1014 (Charles Reznikoff ed., 1957).

8. *See* Nicholas A. Robinson, Arthur M. Crocker Lecture: "Forever Wild": New York's Constitutional Mandates to Enhance the Forest Preserve (Feb. 15, 2007), *in* Pace L. Fac. Publ'ns, http://digitalcommons.pace.edu/lawfaculty/284/ [https://perma.cc/KX5Y-BADT].

9. N.Y. Const. art. XIV, § 1 ("The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.").

10. Association for the Protection of the Adirondacks v. McDonald, 253 N.Y. 234, 242 (1930); *Protect the Adirondacks! Inc.*, 37 N.Y.3d at 82.

11. The Adirondack Park Agency, the Division of Lands and Forests of the New York State ("NYS") Department of Environmental Conservation, the NYC Department of Environmental Protection in the Catskills, and the many local governments within the "Blue Line" are stewards of the environment. None of these were created by the Constitution, but conscious of the Constitution the executive and legislative branches of government have taken action to observe their constitutional obligations. *See* Comm. on the N.Y. State Const., N.Y. State Ass'n, Reports & Recommendations Concerning The Conservation Article of the State Constitution (Article VIX) (2016). Article XIV did not require legislative or executive actions to accomplish this expanded stewardship. Constitutional safeguards, like securing the "forever wild" clause, can inspire cognate and supportive measures voluntarily.

12. The environmental rights in Article I, section 19, are held by each person. Courts enforce these rights by checking governmental decisions, whether in statutes or in decisions of administrative agencies, that deny or impair the rights. This is the

little direct precedent in New York caselaw to instruct courts on how to interpret and apply the new environmental rights guarantees in the State's Bill of Rights.

Constitutions in other states, including Hawaii, Montana, and Pennsylvania protect environmental rights as do constitutions in many other nations. Notwithstanding analogous constitutional environmental rights in other jurisdictions, ultimately it will be decisions of first instance by New York courts that give effect to Article I, section 19. These decisions have great importance. Since the Bill of Rights assigns primacy to ensuring each person's right to "clean air, clean water and a healthful environment," it will affect how state agencies and local governments discharge their duties under their organic laws, and in accordance with the NYS Environmental Conservation Law and Public Health Law, and other applicable statutes.

This Article explores the authorities and issues that will shape the emerging jurisprudence of Article I, section 19. The Article begins in Part I by setting out the procedural, legislative, and public history leading up to the adoption of Article I, section 19. This history, which provides the touchstone for judicial interpretation of the amendment, makes clear that legislators and voters intended to enshrine an individual right, shielded from the vicissitudes of shifting political winds and enforceable by courts, that could be invoked to protect the environment, particularly where the substance or implementation of existing environmental laws proves inadequate. Part II then addresses two foundational legal questions about Article I, section 19: Does it give rise to immediate and enforceable obligations (i.e., is it self-executing) and are the rights it enshrines fundamental? Answering these questions in the affirmative, Part III then addresses the meaning of Article I, section 19: What is clean air, clean water, and a healthful environment? While that meaning will necessarily come into focus over time through application in specific cases and contexts, Part III identifies sources and approaches to assist courts and government actors who must discern the right's contours. The Article concludes in Part IV by considering *how*

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negative application of the Bill of Rights. Courts may also find that the Constitution's environmental rights in some contexts could require governmental action to supply clean air or clean water or advance ambient environmental health. This would be the positive application of the rights. This Article restricts its analysis to the judiciary's role to secure each person's rights, by preventing denials of the rights guaranteed, that is the ambit of negative constitutional rights. *See generally* Lawrence Friedman, *Testing the Limits: Judicial Enforcement of Positive State Constitutional Rights*, 53 DUQ. L. REV. 487 (2015); Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459 (2010).

the self-executing, fundamental rights in Article I, section 19 can be operationalized by surveying the possible litigation under the right and the nature of available remedies. Who can bring claims against whom and what remedies can they seek? While Article I, section 19 limits government action that infringes on individuals' environmental rights, when and how that limitation can be enforced depends upon many variables. The Article examines both procedural and substantive issues central to the implementation of Article I, section 19. Our objective is to raise and explore these issues to provide guidance to those who will ultimately define the contours of the "Environmental Rights" in Article I, section 19—the judges, citizens, lawyers, advocates, local and state agencies, local government officials, and the legislators of New York.

## I. The History

Documenting the origin story of Article I, section 19 while memories are fresh and records readily available is crucially important. Judicial interpretation will be necessary to implement the text of Article I, section 19 and define the contours of its value. New York courts seek to interpret constitutional provisions to give effect to the intent of their adopters. In doing so, courts look to the plain language of the relevant constitutional provision[13] as well as history and context to discern a provision's intended meaning: "Since history itself is often the true context of constitutional expression, a court faced with the task of construing a particular constitutional provision should look to the history of the times and examine the state of facts existing when the provision in question was framed and adopted."[14]

13. 20 N.Y. Jur. 2d *Constitutional Law* § 22 (2023) ("Perhaps the most basic of all the rules of constitutional construction (since it is the rule that all other rules are designed to implement) is the principle that a constitution is to be given the effect and meaning contemplated by its framers and by the people who adopted it, to be gathered, if possible, from the plain and ordinary meaning of the words used. No part of the constitution should be so construed as to defeat its purpose or the intent of the people in adopting it.") (internal citations omitted); *see also* Kuhn v. Curran, 294 N.Y. 207, 217 (1945) ("It is the approval of the People of the State which gives force to a provision of the Constitution . . . and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter.").

14. 20 N.Y. Jur. 2d *Constitutional Law* § 37 (2023) (citations omitted); *see also* Harkenrider v. Hochul, 38 N.Y.3d 494, 513 (2022) (looking to the "surrounding context and history" to discern the meaning of a constitutional amendment); W.H.H. Chamberlin, Inc. v. Andrews, 159 Misc. 124 (N.Y. Sup. Ct. 1936) ("In interpreting this amendment, consideration must be given to what the people had in mind when they went to the polls. . . We must also consider the cause or necessity for its adoption."), *aff'd in part*, *rev'd in part*, 271 N.Y. 1 (1936), *aff'd*, 299 U.S. 515 (1936). For a discussion of the relevance of history to discerning the intent of voters and interpreting state constitutions, see Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 Penn St.

How and why Article I, section 19 came to be is thus central to judicial development of the amendment's meaning and application. To discern and preserve the origin story of Article I, section 19, this Part reviews its procedural history; describes key aspects of the sociopolitical context that informed its adoption; and surveys evidence of legislative and voter intent. It begins by describing the procedural history of the adoption of Article I, section 19, explaining the mechanisms through which legislators and voters adopted it. It then presents a snapshot of the sociopolitical context—focusing on issues related to the environment—during the period of Article I, section 19's consideration and adoption. It concludes by examining the legislative record, news articles and other media, and discussions in public fora to shed further light on what legislators and voters intended by adding Article I, section 19 to New York's Bill of Rights. Together, these sources suggest that legislators and voters who supported Article I, section 19 intended to enshrine an individual right, shielded from the vicissitudes of shifting political winds and enforceable by courts, that can be invoked to protect the environment, particularly where the substance or implementation of existing environmental laws proves inadequate.

### *A. Procedural History*

The New York State Constitution can be amended in two ways: through a constitutional convention (where delegates hold a convention and propose amendments or a new constitution for voter consideration) or a legislative path (pursuant to which an amendment is passed by two consecutive terms of the Legislature and then considered by voters).[15] Although New York adopted Article I, section 19 through the legislative path, debate and discussion about whether to hold a constitutional convention immediately preceded, overlapped with, and likely prompted use of the legislative process to add Article I, section 19.

As set out in Article XIX of the New York State Constitution, every twenty years New Yorkers vote on whether to hold a constitutional convention. The most recent vote was held in November 2017 when

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L. Rev. 837, 838, 862 (2011) ("Interpretation of more recently adopted and specific provisions—which are often accompanied by a well-developed historical record—should closely hew to the wording as understood by those who adopted them."); *id.* ("[S]tate constitutions tend to consist of frequently and recently amended texts, often accompanied by an extensive and detailed record as to the problem that precipitated a particular provision and the intentions or expectations of its makers as to the manner in which the provision solves that problem. In such cases, the intentions or expectations of voters are readily identifiable . . . [I]n such cases, those intentions or expectations can and should be respected.").

15. N.Y. Const. art. XIX.

New Yorkers voted not to hold a constitutional convention, with 83% voting against.[16] In the lead-up to that vote, to illuminate whether to hold a convention (and, if so, provide guidance about how the Constitution should be amended), civic society engaged in wide-ranging discussion about the merits and the flaws of the then-existing Constitution, including evaluating whether its provisions relating to protection of the environment were adequate and should be augmented by the adoption of an environmental right. Of most direct relevance, the Environmental and Energy Law Section ("EELS") of the New York State Bar Association ("NYSBA") convened a Taskforce on the Environmental Aspects of the New York State Constitution.[17] The Taskforce issued a *Report and Recommendations Concerning Environmental Aspects of the New York State Constitution ("Taskforce Report")*, which was published by the *Pace Law Review* and adopted by the EELS Executive Committee.[18]

At the time of the Taskforce Report's preparation (and during contemplation of the adoption of an environmental right), the only provisions of the New York State Constitution that explicitly addressed the environment appeared in Article XIV's Conservation Chapter. Article XIV includes two primary provisions, specific protections for lands in the forest preserve set forth in section 1 ("The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands."[19]) and the articulation of a general environmental policy to be implemented by the Legislature set forth in section 4:

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.[20]

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16. *New York Proposal 1, Constitutional Convention Question (2017)*, BALLOTPEDIA https://ballotpedia.org/New_York_Proposal_1,_Constitutional_Convention_Question_(2017) [https://perma.cc/BRL6-EVX2] (last visited Jan. 3, 2024).

17. One of the authors of this article, Katrina Fischer Kuh, served as Chair of the Taskforce.

18. N.Y. STATE BAR ASS'N ENV'T & ENERGY L. SECTION, REPORT AND RECOMMENDATIONS CONCERNING ENVIRONMENTAL ASPECTS OF THE NEW YORK STATE CONSTITUTION (Aug. 23, 2017); *see also* N.Y. State Bar Ass'n, *The Task Force on Environmental Aspects of the New York State Constitution*, 38 PACE L. REV. 182 (2017).

19. N.Y. CONST. art. XIV, § 1.

20. N.Y. CONST. art. XIV, § 4. For a discussion of the adoption and meaning of Section 4, see Robinson, *Updating New York's Constitutional Environmental Rights*, *supra* note 4, at 168–76.

The Taskforce Report begins by lauding the enduring protections of Article XIV, section 1 that specifically protect the forest preserve and recommending that no changes be made to those provisions.[21] It then explains that the general environmental policy articulated in Article XIV, section 4, has little beneficial effect as an independent source of environmental protection, primarily because it has not been treated as self-executing, thus rendering the constitutional text largely synonymous with protections set forth in statute.[22]

After analyzing existing environmental protections in the Constitution, the Taskforce Report undertakes a detailed survey of more robust environmental rights provisions in other state constitutions (most notably, Pennsylvania, Hawaii, and Montana); analyzes how such a right might function in New York; and recommends an amendment of the Constitution to include a self-executing environmental right, enforceable by citizens against the State and its subdivisions, in Article I.[23] The Taskforce Report identifies a number of reasons for augmenting then-existing constitutional protections for the environment, including the unprecedented challenges of climate change, protection of the interests of future generations, "increased recognition of connections between pollution and asthma rates, awareness of local air pollution hot spots, and the detection of widespread contamination of drinking water with a range of pollutants (such as pharmaceuticals, PFOAs and 1,4 dioxane)."[24] One notable area of emphasis in the Taskforce Report is the imperative for any constitutional environmental right to be self-executing. The Taskforce Report engages in an extensive analysis of how a self-executing right would intersect with judicial and legislative authority, concludes that a self-executing right would not unduly interfere with legislative policymaking or lead to judicial aggrandizement, and asserts that "[t]o be effective, the environmental right should be self-executing by providing for any person to enforce

21. N.Y. State Bar Ass'n, *supra* note 18, at 185–88 (2017).

22. *Id*. at 190, 194. One notable historical point is that New York added the environmental language in section 4 to its constitution in 1969. This roughly coincided with unsuccessful efforts to obtain explicit protection for the environment by adding new text to or obtaining a new interpretation of the federal Constitution. In 1970, the United States Congress made two attempts to amend the federal Constitution to provide environmental protection. Both amendments failed. S.J. Res. 169, 91st Cong, 2d Sess. (1970); *see* H.R.J. Res. 1321, 90th Cong. 2d. Sess. (1968). The proponents of the amendments then turned to the federal judiciary, unsuccessfully arguing that the Fifth, Ninth, and Fourteenth Amendments implicitly encompass due process rights to environmental protection. Stop H-3 Ass'n v. Dole, 870 F2d. 1419, 1429 (9th Cir. 1989); Ely v. Velde, 321 F. Supp. 1088, 1094 (E.D. Va. 1971), *rev'd on other grounds*, 497 F.2d 252 (4th Cir. 1974).

23. N.Y. State Bar Ass'n, *supra* note 18, at 188–214 (2017).

24. *Id.* at 190.

the right against the State and its subdivisions through appropriate legal proceedings. As discussed at length above, absent such an enforcement mechanism, the right may lay fallow and provide little value."[25]

The Taskforce Report sought to inform public debate about the need for constitutional reform relating to environmental protection. Although voters elected not to hold a convention, the successful effort to amend the Constitution to add Article I, section 19 took shape shortly thereafter, perhaps prompted by the critical examination of then-existing constitutional protections that revealed possibilities for improvement. State legislators first introduced bills to amend the Constitution to add an environmental right in the 2017 legislative session, but this initial effort was unsuccessful. The legislation (Assembly Bill 6279, Senate Bill 5287) passed the Assembly by a vote of 113 to 26[26] but failed to advance to a vote in the Senate.[27] The first passage of Article I, section 19 was in the 2019 legislative session (Assembly Bill 2064, Senate Bill 2072). Second passage of Article I, section 19 occurred in the 2021 legislative session by a vote of 124 to 25 in the Assembly[28] and 48 to 14 in the Senate.[29] As required to amend the Constitution using the legislative path set out in article XIX, the legislation was re-introduced in the next legislative term after the 2020 general election (Assembly Bill 1368, Senate Bill 528) when it passed again by a vote of 124 to 25 in the Assembly[30] and 48 to 14 in the Senate.[31] The proposal to amend the Constitution to adopt Article I, section 19 was put before voters in November 2021 as Ballot Proposition 2:

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25. *Id.* at 191–93, 212.

26. *Assembly Actions 2017-18*, Pace Univ., https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Assembly-Actions-2017-2018.pdf [https://perma.cc/6QE3-ZH4V]. The Assembly vote was "timed to commemorate Earth Day." Lisa W. Foderaro, *Seeking a Constitutional Right to Clean Water in New York*, N.Y. Times, May 27, 2017, at 18.

27. *Senate Actions 2017-18*, Pace Univ., https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Senate-Actions-2017-2018.pdf [https://perma.cc/24VU-SKMG].

28. *Assembly Actions 2019-20*, Pace Univ., https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Assembly-Actions-2019-2020.pdf [https://perma.cc/VF4E-9H6W].

29. *Senate Actions 2019-20*, Pace Univ., https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Senate-Actions-2019-2020.pdf [https://perma.cc/38N4-MXZD].

30. *Assembly Actions 2021-22*, Pace Univ., https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Assembly-Actions-2021-2022.pdf [https://perma.cc/K6BT-J9JX].

31. *Senate Actions 2021-22*, Pace Univ., https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Senate-Actions-2021-2022.pdf [https://perma.cc/GRX6-TPBK].

> Right to Clean Air, Clean Water, and a Healthful Environment. The proposed amendment to Article I of the New York Constitution would establish the right of each person to clean air and water and a healthful environment. Shall the proposed amendment be approved?

With seventy percent of New York voters voting "yes," Article I, section 19 became part of New York's Bill of Rights effective January 1, 2022.[32]

The procedural history of the adoption of Article I, section 19 is thus richer and more informative about its origin and meaning than a casual review, limited to the legislative path through which it was ultimately adopted, might suggest. A nuanced understanding of the procedural history of the adoption of Article I, section 19 considers the interplay between the two pathways—a constitutional convention and legislative path—for amending the Constitution. This interplay suggests that the idea of amending the Constitution to add an environmental right was top of mind in part because, prompted by the constitutional requirement to vote on whether to hold a constitutional convention, civil society in New York undertook a careful analysis of the Constitution in 2016 to 2017, including, as evidenced by the Taskforce Report, its environmental provisions. That analysis critiqued the protectiveness of existing constitutional text in Article XIV, section 4 (largely because it had been treated as non-self-executing by courts), and identified the adoption of a self-executing environmental right in Article I as a feasible and beneficial constitutional reform.

Importantly, New York's period of constitutional reflection culminated just as a "green amendment" advocacy movement was taking shape nationally. This movement, inspired in part by the Pennsylvania Supreme Court's decision in *Robinson Township*,[33] is evidenced by Maya K. van Rossum's publication of the book *The Green Amendment* in 2017[34] and the founding of Green Amendments for the Generations, a nonprofit that advocates for the adoption of state constitutional environmental rights.[35] Green Amendments for the

32. *New York Proposal 2, (2021)*, BALLOTPEDIA https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_(2021) [https://perma.cc/94HQ-QVHX] (last visited Jan. 10, 2024).

33. Robinson Twp. v. Com., 623 Pa. 564 (2013).

34. MAYA K. VAN ROSSUM, THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT (2017).

35. GREEN AMENDMENTS FOR THE GENERATIONS, https://forthegenerations.org/ [https://perma.cc/2C48-P2PA] (last visited Jan. 10, 2025). Green Amendments for the Generations organized multiple educational sessions on constitutional environmental rights for New York civil society, authored or contributed to numerous articles and

Generations provided important support for New York's amendment effort, which was coordinated by Environmental Advocates NY, a state-based environmental advocacy organization.[36]

But what caused the concept of an environmental rights amendment to take root in New York? To better understand why the idea to adopt an Article I environmental right took hold after voters declined to hold a constitutional convention—when many other proposals for constitutional reform surfaced during the civil society debate over whether to hold a convention did not—it is useful to look to the sociopolitical context.[37] New York courts recognize that the "history of the times" is centrally important to discerning what New York legislators and voters intended through constitutional text.[38] Context may be even more important here because the procedure used to amend the Constitution—the legislative path to amendment—does not produce the detailed deliberative record of a constitutional convention.[39] Moreover, the sociopolitical backdrop to the adoption of Article I, section 19 suggests many reasons why the concept of enshrining self-executing environmental rights in Article I, alongside fundamental rights like religious liberty and freedom of speech and shielded from the vicissitudes of public, political, and administrative whim, took hold.

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publications to help New Yorkers better understand the meaning and value of green amendments, and hosts a New York-dedicated Green Amendment website.

36. *Our Work*, Environmental Advocates, https://eany.org/our-work/ [https://perma.cc/B7PX-DE8N] (last visited Jan. 10, 2025).

37. There is a large scholarly literature that considers how courts should interpret the products of direct democracy, such as ballot initiatives. *See, e.g.*, Michael D. Gilbert, *Interpreting Initiatives*, 97 Minn. L. Rev. 1621, 1653 (2013) (reviewing approaches and concluding that "judges plausibly do—and arguably should—attempt to interpret initiatives consistent with the preferences of the enacting median voter."). Descriptive accounts indicate that courts overwhelmingly "search for the controlling popular intent" and tend to focus on "formal interpretive sources, such as statutory text, language in related legislation, judicial opinions, canons, and, on occasion, ballot pamphlets or voter guides," while citing less commonly to "media and advertising as sources of popular intent even though . . . social science research about voter behavior in ballot campaigns suggests that voters most regularly consult and seek guidance from these sources." Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L.J. 107, 111 (1995). This Article focuses on the interpretive practices of judges in New York.

38. *See* Marshall, *supra* note 7, at 1014 and accompanying text.

39. Courts in New York often look to proceedings of constitutional conventions to interpret text, 20 N.Y. Jur. 2d *Constitutional Law* § 38 (2023) ("The proceedings of the convention in which a constitution was framed may properly be examined and, indeed, are valuable aids in determining the purpose and consequent meaning of a doubtful provision.") (internal citations omitted), and conventions proceedings have been used to interpret environmental rights in the Montana state constitution, Montana Env't Info. Ctr. v. Dep't of Env't Quality, 296 Mont. 207, 225 (1999).

### *B. The History of the Times*

The sociopolitical context in New York at the time of the adoption of Article I, section 19 defined here primarily as the period between 2017, when the first legislative proposal was introduced, and the amendment's endorsement by voters in November 2021 was marked by events so disruptive that they can be evoked by singular terms: Flint. Hoosick Falls. Trump. COVID-19. George Floyd. Hurricane Ida. Each of these laid bare limitation(s) in the environmental/legal status quo. As described in more detail below, events and issues central to understanding the sociopolitical context that produced Article I, section 19 included (1) recognition that, as permitted under then-existing law, many New Yorkers were drinking water containing high levels of emerging contaminants including PFAS and 1,4 dioxane; (2) unprecedented rollbacks of federal environmental protections under the Trump Administration; (3) studies linking high death rates from COVID-19 in New York and elsewhere to air pollution; (4) increasing visibility of and concern about environmental injustice produced by systemic racism; and (5) extreme weather events attributed to climate change, including flash-flooding from Ida that killed eleven New York City residents less than two months before the vote to adopt Article I, section 19.

#### *1. Emerging contaminants in drinking water*

In New York, the national tragedy of deadly drinking water contamination in Flint, Michigan, shared headlines with the discovery of drinking water contamination in Hoosick Falls, New York. It started with a concerned citizen sending his tap water out for testing, which revealed that the drinking water of the Village of Hoosick Falls contained high levels of perfluorooctanoic acid ("PFOA"), one of the Per- and Polyfluoroalkyl Substances ("PFAS"), a toxic class of approximately 12,000 chemicals that persist in the environment and build up in the human body over time.[40] And it snowballed into a growing realization—documented in headline after headline about the discovery of contamination in yet another New York town—that many

40. *Municipal Water Action Timeline*, HOOSICK FALLS, N.Y., https://www.villageofhoosickfalls.com/Water/timeline.html [https://perma.cc/GQ4X-3NVX] (last visited Mar. 1, 2024); *see also* Bronwen B. O'Herin, *The Costs of Clean Water in Hoosick Falls: Private Civil Litigation and the Regulation of Drinking Water Quality*, 93 N.Y.U. L. REV. 1742, 1752 (2018); NAT'L ACADEMIES OF SCIS., ENG'G, & MED., GUIDANCE ON PFAS EXPOSURE, TESTING, & CLINICAL FOLLOW-UP (2022), https://nap.nationalacademies.org/catalog/26156/guidance-on-pfas-exposure-testing-and-clinical-follow-up [https://perma.cc/K38U-YXV7].

New Yorkers are drinking water with concerning levels of emerging contaminants, including PFAS and 1, 4 dioxane.[41]

New Yorkers were shocked and deeply concerned about the contamination. They were also incredulous that then-existing environmental statutes and regulations had not prevented the contamination and did not prohibit its presence in their drinking water. The way that the contamination in Hoosick Falls was discovered and the government response that followed underscored the legal gaps: a private citizen used his own money to test his drinking water after becoming concerned about a rash of neighborhood cancer cases.[42] When he reported his concerns to the Village of Hoosick Falls and suggested that it test the municipal water, the Village contacted the Rensselaer County Department of Health (which in turn contacted the New York State Department of Health ("NYSDOH")); the Health Department advised the Village that testing the municipal water wasn't necessary.[43] The Village nonetheless conducted its own testing and sent the results, which revealed levels of PFOA well above a provisional health advisory set by the EPA in 2009, to numerous state agencies, including the NYSDOH. NYSDOH assured the Village that there was no immediate health hazard and that it was in compliance with relevant laws. The Village's efforts to obtain state or federal financial assistance to treat its water failed; the state Environmental Facilities Corporation explained that the Village was "ineligible for funding because any available funding will first be directed to other communities dealing with regulated chemicals" and PFOA was an unregulated compound.[44] Of course, as even many in the public knew from watching the film *Dark Waters*, released in 2019, a key reason that the PFAS family of chemicals was not regulated was that its manufacturers had covered up

41. *E.g.*, Diane Taylor, *Carcinogen Found in 39 L.I. Water Districts*, LIHERALD.COM (Feb. 28, 2017), https://liherald.com/stories/carcinogen-found-in-39-li-water-districts,88735 [https://perma.cc/9PHS-4G5N]; Hayleigh Colombo & Laura Sparks, *2022 update: Look up PFAS 'forever' Chemicals in New York Drinking Water Systems*, LINCOLN J. STAR (Sept. 7, 2023), https://journalstar.com/news/state-and-regional/pfas-drinking-water-new-york-lookup/article_0473c24f-fc1c-567a-a7eb-0cae89190ab6.html [https://perma.cc/W3H8-NDBG].

42. *Hoosick Falls, New York*, PFAS PROJECT LAB NORTHEASTERN UNIVERSITY, https://pfasproject.com/hoosick-falls-new-york/ [https://perma.cc/EBQ7-Q4EV] (last visited Mar. 12, 2024).

43. *Municipal Water Action Timeline*, *supra* note 40 ("Ultimately, the Village is instructed that it is not necessary to collect water samples based on the concerns raised. In an attempt to address any concerns, the Village Board elects to obtain the water samples anyway.").

44. *Id.*

its toxicity.[45] The situation in Hoosick Falls, which New Yorkers watched unfold across newspaper headlines starting in 2015, thus revealed both gaps and pathologies in then-existing environmental laws.[46]

The legislative response in New York was ultimately aggressive and relatively swift—New York created a Water Quality Rapid Response Team, passed a $2.5 billion Clean Water Infrastructure Act, and regulated some emerging contaminants under state law, including setting a maximum contaminant level for PFOA and PFOS and 1,4 dioxane.[47] Some residents were able to obtain compensation after filing suit against companies responsible for the contamination in Hoosick Falls.[48]

These *ex post* responses did not, however, assuage concerns. Residents expressed surprise and outrage that they should have to go hat in hand to politicians to ask for help to secure access to safe drinking water:

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45. E.I. DuPont de Nemours & Co., 2005 EPA Con Dec LEXIS 95, at 5–9; *see also* Roy Shapira & Luigi Zingales, *Is Pollution Value-Maximizing? The DuPont Case*, Nat'l Bureau of Econ. Rsch., 8–20 (Sept. 2017).

46. One gap is that the Safe Drinking Water Act only covers regulated contaminants; one pathology is that informational mismatches, corporate efforts to bend science, and limited budgets mean that regulators struggle to keep the list of regulated contaminants current. This gap and pathology were, in the case of PFAS, compounded by yet another pathology, difficulties effectively enforcing the Toxic Substances Control Act. Industry violations of that statute prevented prompt assessment of the effects of PFAS, derailing regulatory efforts for decades. *See generally* Steve C. Gold & Wendy E. Wagner, *Regulating Chemicals Learning from PFAS*, 38 Nat. Res. & Env't 18, 18–22 (2024) ("PFAS did not slip through the cracks of an otherwise high-functioning regulatory program. Instead, the PFAS family of chemicals likely represents the norm rather than the exception . . . . Based on the legal design of TSCA, there is no reason to think that PFAS will be the last set of contaminants to impose unexpected and catastrophic harms on health and the environment.").

47. For an overview of New York State's actions, see *Per- And Polyfluoroalkyl Substances (PFAS)*, N.Y. State Dept. of Env't Conservation, https://dec.ny.gov/environmental-protection/site-cleanup/pfas [https://perma.cc/6EXN-RNLE] (last visited Mar. 1, 2024); *Emerging Contaminants in NY's Water*, N.Y. State Dept. of Env't Conservation, https://dec.ny.gov/environmental-protection/water/emerging-contaminants [https://perma.cc/Y7VU-ZCVH] (last visited Mar. 1, 2024); Michael B. Gerrard & Edward McTiernan, *Regulation of Polyfluoroalkyl Chemicals in New York*, N.Y. L. J. (2022). *See also* S.B. No. A03007B, 2017 Gen. Assemb., Part T (N.Y. 2017). For the regulation of PFOA and PFOS as hazardous substances, see N.Y. Comp. Codes R. & Regs. tit. 6, § 597.3 (2017). For revised rulemaking on maximum contaminant levels for PFOA, PFOS and 1,4-dioxane amending N.Y. Comp. Codes R. & Regs. tit. 6, Part 5-1, see 3 N.Y. State Reg. 13 (Jan. 22, 2020).

48. *Update on Status of Settlement for All Classes*, Hoosick Falls PFOA Settlement Website (Sept. 25, 2023), http://www.hoosickfallspfoasettlement.com/ [https://perma.cc/YSZ5-YGHQ]. For an order granting final approval of proposed settlement, see Baker v. Saint-Gobain Performance Plastics Corp., No. 1:16-CV-00917-LEK-DJS, 2022 U.S. Dist. LEXIS 65988* (N.D.N.Y Feb. 4, 2022).

> Five years ago, I was fighting for clean water in Hoosick Falls after it was discovered that our water supply had been contaminated with toxic chemicals. As we were talking with people about our situation, one question kept coming up. "Don't you have a right to clean water?" The answer, shockingly, is no. We need to change that.[49]

Legislators likewise recognized the salience of drinking water contamination to the constitutionalization of environmental rights. The justification for the legislation, included when the text was first introduced, stated that "[r]ecent water contamination and ongoing concerns about air quality have highlighted the importance of clean drinking water and air as well as the need for additional protections."[50] Assemblymember Englebright, speaking in favor of the first Assembly vote for the amendment, explained that the "need [for the amendment] is defined in the newspapers almost every day: New contamination events, new threats to the public health in places like Hoosick Falls and Newburgh and West Hampton."[51] When the legislation to adopt Article I, section 19 was first introduced in 2017, sponsors and proponents hosted a press conference that featured residents of Hoosick Falls sharing their stories.[52] Advocates described New York's Green Amendment as "inspired by cases like the water crisis in Hoosick Falls."[53] Additionally, many letters to the editor and other articles in support of the adoption of Article I, section 19 referenced contamination of drinking water with emerging contaminations as evidence that constitutional protection was needed.[54] Warren County passed a resolution in support of

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49. Michele O'Leary, Perspective, *Vote 'Yes' for State's Green Amendment*, TIMES UNION, June 1, 2021, at A16.

50. S. Doc. No. A6279, MEMORANDUM IN SUPPORT OF LEGISLATION (N.Y. 2017).

51. Transcript of "4-24-18," *Session Proceedings*, N.Y. STATE ASSEMB., at 53 (Apr. 24, 2018), https://www2.assembly.state.ny.us/write/upload/transcripts/2017/4-24-18.html#06279 [https://perma.cc/X5CF-RU9A] (statement of Assemb. Englebright) (speaking in favor of the first Assembly vote for the amendment (which later failed in the Senate)).

52. Foderaro, *supra* note 26.

53. Abe Musselman, *How New Yorkers Won the Right to a "Healthful Environment"*, SIERRA (Nov. 29, 2021), https://www.sierraclub.org/sierra/how-new-yorkers-won-right-healthful-environment [https://perma.cc/N3WC-LL6Y] (quoting Peter Iwanowicz, former executive director of Environmental Advocates NY).

54. *E.g.*, John S. Szalasny, Letter to the Editor, *Supervisor Race Is Not the Only Green Referendum*, AMHERST BEE, Sept. 29, 2021 ("With stories of lead pipe contamination in cities like Buffalo, groundwater contamination by manufacturing legacy chemicals and new toxins like the forever chemical PFAS (perfluororalkyl), this constitutional amendment will be a mighty tool to allow affected communities to address the effects of pollution."); Dorothy Pomponio, Opinion, *We Need a Stronger Approach to Environmental Health in NY*, STAR-GAZETTE, Sept. 26, 2021, at A6 (citing the failure of modern environmental law to prevent PFAS contamination as a reason for constitutional reform); Fred LeBrun, Perspective, *Let's Land this Bill of Rights,* TIMES

Article I, section 19 that referenced the threats from drinking water contamination with emerging contaminants.[55] Indeed, Hoosick Falls was so omnipresent that even opponents of the effort to amend the Constitution to add environmental rights felt the need to talk about why drinking water contamination did *not* warrant its passage.[56]

The experience in Hoosick Falls vividly illustrated that environmental laws sometimes fail. When they do, the only available recourse is often difficult to obtain and deeply unsatisfying.

### *2. Federal environmental rollbacks under the Trump Administration*

If Hoosick Falls surfaced pathologies and gaps in environmental laws, the election of President Trump highlighted the precariousness of even those imperfect laws. At least on the federal level, even those imperfect laws were likely to get weaker. Beginning in 2017, the Trump Administration moved quickly, loudly, and aggressively to contract the scope and stringency of federal environmental policy, including by reshaping federal agencies and administrative processes involved with environmental protection and natural resource management.[57] This underscored the vulnerability of statutory protections for the environment to political winds and, in turn, highlighted the role of state environmental policy and the relative permanence of constitutional environmental protections. Public discussions about a state constitutional environmental right explicitly referenced these themes. Speaking in favor of the amendment, Assemblymember Lavine lamented that "the

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UNION, May 9, 2021, at D1, D3 ("Consider how the hellacious environmental debacle in Hoosick Falls could have been altered if clean air and water was an established basic right, not just legally protected, sort of.").

55. Warren Cnty., Bd. Supervisors, Res. 370 (2020), https://www.warrencountyny.gov/MMA [https://perma.cc/JJ6E-FS2M]; Michael Goot, *Warren County Passes Resolution in Support of Adding 'Green Amendment' to State Constitution*, THE POST-STAR, Oct. 19, 2020 ("The resolution says that there are threats to the state's water, air and natural resources including climate change, contaminants such as PFOA in drinking water supplies, and poor to failing air quality.").

56. Foderaro, *supra* note 26 (quoting the Business Council's director of government affairs explaining that residents of Hoosick Falls don't need a constitutional right because they have other means of "legal recourse").

57. Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*., N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html [https://perma.cc/7TNH-5QHB] (listing the nearly 100 federal environmental rules that the Trump Administration "reversed, revoked or otherwise rolled back"); Doug Williams, *Teaching Environmental Law After Trump*, 66 ST. LOUIS U. L. J. 469, 471–72 (2022) ("[T]he Trump Administration reduced funding for EPA and introduced procedural reforms and policies that could have a lasting impact on the Agency's ability to address environmental issues.").

United States Government is so now led by a radical climate change denier who believes that climate change is a hoax perpetrated by China" and that "we have successive EPA administrators whose careers have been spent attacking environmental protection, and exhorted that "New York must, again, have the responsibility of leading the way and by voting for this [amendment] we will—we will take that step."[58]

Senator Carlucci framed the relevant political background and the role of state constitutional environmental protections in a similar fashion:

> We need to step up, protect [the environment], and the best place to do that is in our State Constitution. Particularly in a time when the federal government unfortunately is withdrawing us from the Paris agreement, is slashing funding to the EPA, this is a way for us to stand up, protect these rights, and make sure that New York is showing us a way forward, showing other states a way forward on how to protect our environment.[59]

Advocates for the adoption of Article I, section 19 likewise referenced the "assault on the environment by the Trump administration" as a motivating purpose.[60] Against the backdrop of a contraction in statutory environmental protection under the Trump Administration, Article I, section 19 could readily be understood as a bulwark from both a federalism perspective (state resistance to federal hostility) and a source of law perspective (constitutional resistance to shifting political winds).[61]

### *3. The pandemic*

The COVID-19 pandemic is the most notable feature of the sociopolitical context from early 2020 onward. Communities in New

58. Transcript of "4-30-19 Session Part 2", *Session Proceedings*, N.Y. STATE ASSEMB., at 50–51 (Apr. 30, 2019, 2:29 PM), https://www2.assembly.state.ny.us/write/upload/transcripts/2019/4-30-19.html#02064 [https://perma.cc/YE4R-UBD4] (statement of Assemb. Lavine).

59. Transcript of "The Stenographic Record, 4-30-19," *Session Proceedings*, N.Y. STATE SEN., at 3194 (Apr. 30, 2019, 3:31 PM), https://bpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/1/400/files/2022/11/Senate-Transcript-4.30.2019.pdf [https://perma.cc/9LCS-GJ43] (statement of Sen. Carlucci).

60. Foderaro, *supra* note 26.

61. For example, an editorial published by Citizen Editorial Board in The Citizen connected Article I, section 19 to the idea of permanence in the face of shifting political winds: "Lawmakers agree that clean air and water should be "fundamental rights" and adding that to the state constitution gives it a lot more muscle than putting it in some form of environmental law that could easily change down the road depending upon the direction of the political winds in Albany." The Citizen Editorial Board, Editorial, *Our View: Approve Proposal for Clean Air, Water in New York*, THE CITIZEN, Oct. 28, 2021.

York were among the first in the United States to experience widespread transmission of the disease when infection was particularly deadly, before treatments and vaccines. Between February 29 and June 1, 2020, in New York City alone, 18,600 people with laboratory-confirmed COVID-19 died, including "approximately 30% of hospitalized patients with laboratory-confirmed COVID-19."[62] Hospitals and morgues were overwhelmed.[63] To attempt to discern the social and psychological impacts of the pandemic in New York, let alone connect them to the adoption of Article I, section 19, would careen into speculation. There are, however, specific intersections between the pandemic and environmental considerations related to the constitutionalization of environmental rights—some raised explicitly in the public and legislative history—that warrant brief reference.

Pandemic realities (from shelter-in-place to admonitions not to socialize except outdoors) prompted New Yorkers to embrace the outdoors, creating a premium on access to outdoor space. This premium was reflected in everything from the increasing relative value of homes with private outdoor space[64] to crowding in parks and recreation areas.[65] Scientists drew connections between environmental degradation, habitat

62. *COVID-19 Outbreak—New York City, February 29–June 1, 2020*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 20, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6946a2.htm [https://perma.cc/Q5QE-5MCK] (last visited Mar. 1, 2024).

63. *See, e.g.*, Gina Cherelus, Opinion, *'Dead Inside': The Morgue Trucks of New York City*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/05/27/opinion/coronavirus-morgue-trucks-nyc.html [https://perma.cc/AWV3-BJSQ]; J. David Goodman & William K. Rashbaum, *Review Bumps New York City Deaths Past 10,000*, N.Y. TIMES (April 15, 2020), https://www.nytimes.com/2020/04/14/nyregion/new-york-coronavirus-deaths.html [https://perma.cc/G8FD-BKAX]; Alexandra E. Petri, Opinion, *Someone Has Died. That's When Their Job Begins.*, N.Y. TIMES (Apr. 29, 2020), https://www.nytimes.com/2020/04/16/opinion/coronavirus-funeral-directors.html [https://perma.cc/UMW5-5HZG].

64. Caroline Fiske, *Why The Value of Outdoor Spaces Has Increased by 20%*, OFF THE MRKT (Sept. 2, 2020), https://www.offthemrkt.com/blogs/why-the-value-of-outdoor-spaces-has-increased-by-20 [https://perma.cc/2BZU-8XVE].

65. *See, e.g.*, Press Release, *New York State Announces Historic 78 Million Visits to State Parks in 2020*, N.Y. STATE OFF. OF PARKS REC. & HIST. PRESERV. (Jan. 26, 2021), https://parks.ny.gov/newsroom/press-releases/release.aspx?r=1623 [https://perma.cc/K839-FV9D] ("New York State Parks saw estimated visitation grow from the previous record of 77.1 million visits in 2019 to 78 million in 2020. The increase was driven by unprecedented visitation in the spring and fall, as New Yorkers turned to nearby State parks, trails and historic sites to escape the pandemic."); Joseph Goldstein & Corey Kilgannon, *Balmy Weekend Presents a Challenge: New Yorkers Rushing to Parks*, N.Y. TIMES (May 2, 2020), https://www.nytimes.com/2020/05/02/nyregion/weather-parks-nyc-nj-coronavirus.html [https://perma.cc/N87W-48V6]; Anne Barnard & Nate Schweber, *Cooped-Up Children Lose Refuge as N.Y.C. Playgrounds Are Closed*, N.Y. TIMES (Apr. 15, 2020), https://www.nytimes.com/2020/04/01/nyregion/coronavirus-nyc-playgrounds-closed.html [https://perma.cc/C95A-VE8L]; Lisa Prevost, *Restricting Beach Access to Residents Only*, N.Y.

loss, and disease spillover, suggesting environmental protection as path to avoid future pandemics.[66] Most notably, media reported widely on studies indicating that deaths from COVID-19 were higher in areas with poor air quality, including parts of New York.[67] This fact was repeatedly raised as evidence of the need for constitutional environmental rights. For example, an editorial in support of the adoption of Article I, section 19 authored by a doctor focused on the health harms of pollution and noted that "[w]e know that breathing polluted air increases the risk of severe COVID-19 disease."[68] Most powerfully, air pollution and death from COVID-19 also mapped onto race and socioeconomic disadvantage, providing testament to the devastating present-day effects of systemic racism.[69]

### *4. Environmental (in)justice*

After police officers in Minnesota murdered George Floyd in May of 2020, thousands marched and protested in New York City. New York City imposed a curfew for the first time since 1943 and the omnipresent ambulance sirens of the pandemic were replaced by the omnipresent whirring of police helicopters. The conversations that followed about race, justice, and systemic racism brought new urgency to efforts to rectify environmental injustice:

> The Environmental Justice Movement is much stronger in 2021 because of new and invigorated rallying calls for racial justice with the rise of Black Lives Matter, after the police killings of George Floyd, Breonna Taylor, and countless other Black people, and the

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Times (Aug. 6, 2020), https://www.nytimes.com/2020/08/06/realestate/connecticut-long-island-beach-restrictions.html [https://perma.cc/8FRG-3YUJ].

66. *E.g.*, Catrin Einhorn, *Animal Viruses Are Jumping to Humans. Forest Loss Makes It Easier*., N.Y. Times (Apr. 9, 2020), https://www.nytimes.com/2020/04/09/climate/animals-humans-virus-covid.html [https://perma.cc/3CKE-UM4U] (reporting on a study from Stanford University linking deforestation to disease spillover).

67. *E.g.*, Lisa Friedman, *New Research Links Air Pollution to Higher Coronavirus Death Rates*, N.Y. Times (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/climate/air-pollution-coronavirus-covid.html [https://perma.cc/2BHU-ENAZ] ("[I]f Manhattan had lowered its average particulate matter level by just a single unit, or one microgram per cubic meter, over the past 20 years, the borough would most likely have seen 248 fewer Covid-19 deaths by this point in the outbreak.").

68. Steven J. Goldstein, Perspective, *Pediatricians Say Vote 'yes' on Proposition 2*, Times Union, Oct. 21, 2021, at A13.

69. Lois Parshley, *The Deadly Mix of Covid-19, Air Pollution, and Inequality, Explained*, Vox (Apr. 11, 2020), https://www.vox.com/2020/4/11/21217040/coronavirus-in-us-air-pollution-asthma-black-americans [https://perma.cc/3GF4-C74G]; Lisa Friedman, *Race, Pollution and the Coronavirus*, N.Y. Times (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/climate/coronavirus-pollution-race.html [https://perma.cc/27W5-Y76Z].

> intergenerational protests during the Summer of 2020. The protests were about justice: criminal justice, environmental justice, health justice, economic justice, energy justice, food and water justice, transportation justice—all viewed through an overarching racial justice lens.[70]

Environmental injustice has been newly rendered publicly visible through tools such as the Environmental Protection Agency's EJSCREEN, which since 2015 has allowed users to overlay demographic information and information about ambient environmental quality. The newfound ability to readily "see" environmental injustice made clear that existing environmental laws had—as with respect to emerging contaminants— failed, in this case by perpetuating unacceptable environmental conditions in historically disadvantaged communities.

Supporters explicitly linked the constitutionalization of environmental rights to efforts to end systemic racism and regularly identified the potential for Article I, section 19 to rectify environmental injustice as a rationale for its adoption. A press release issued by Environmental Advocates in 2021, lauding the second passage of the amendment by the Senate, included a quote from Senator Jose Serrano connecting Article I, section 19 to environmental justice and pollution-induced susceptibility to COVID-19: "Every community deserves the right to clean water, land, and air, and I am heartened that today we voted to correct the omission of this most basic right in our State Constitution. As the current pandemic has shown, high environmental risk factors, like those in the communities I represent, can lead to devastating and wide-reaching health disparities."[71] Advocate Maya K. van Rossum explicitly connected the 2020 protests to the push for the amendment and environmental justice, writing in the *Times Union* that "Green Amendments are powerful tools to help prevent environmental racism and injustices," and that "[f]ollowing the murders of George Floyd, Daunte Wright, Breonna Taylor and many more Black

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70. Robert D. Bullard, *Introduction: Environmental Justice–Once a Footnote–Now a Headline*, 45 HARV. ENV'T L. REV. 243, 248 (2021). *See also* Clifford J. Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469, 469 (2020) ("In 2020, we have seen that 'all people' are not affected equally by COVID-19, with disproportionate impacts on Blacks, Latinos, and indigenous communities. In 2020, we have also seen unabated racism and racial violence, such as the police killings of George Floyd and Breonna Taylor. In 2020, we have seen diverse communities, such as Flint, Michigan, continuing to lack necessities such as safe drinking water. And with every next catastrophic fire, flood, hurricane, or drought, we see further evidence of the uneven impacts of climate change.").

71. *NYS Senate Passes an 'Environmental Bill of Rights."*, ENV'T ADVOCS. OF N.Y. (Jan. 13, 2021), https://eany.org/press_release/nys-senate-passes-an-environmental-bill-of-rights/ [https://perma.cc/46FG-2FSM].

Americans, people have begun to acknowledge the widespread failures in policing, educational opportunity, health care and policy that all work to disadvantage Black Americans, Indigenous peoples, and other communities of color."[72]

In the lead-up to the adoption of Article I, section 19, there was a confluence of (1) concern about racial injustice; (2) new data tools making it easier for anyone to "see" the correlation between ambient environmental conditions and demographic factors, most notably race; and (3) recognition of the startling disparities in pandemic death rates for communities of color with higher air pollution. Together, these presented a disturbing critique of the environmental status quo, which helped to produce (or, at minimum, perpetuated) these disparities. Then, immediately before the vote on the amendment and, as discussed below, post-Ida flooding drowned over a dozen people in New York City, many in illegal basement apartments, illustrating a new and deadly manifestation of environmental injustice, climate injustice.[73]

*5. Extreme weather events*

During the period 2017-2022, advances in attribution science allowed scientists to more quickly and confidently connect extreme weather events to climate change.[74] New Yorkers were not only experiencing more extreme weather events (such as tropical storms Elsa, Fred and Henri—all in 2021[75]), but they were being informed that

72. Maya K. van Rossum, Perspective, *For a Healthy New York, Add Green Amendment*, Times Union, May 28, 2021, at A10.

73. Diana Ybarra, *Hurricane Ida Exposed the Deadly Cost of New York's Structural Racism*, Fordham Univ. Env't L. Rev. (Sept. 12, 2021), https://fordhamlawelr.org/?p=1505 [https://perma.cc/4ZJP-87FK]; Aili Hou, *Impacts of Ida expose underlying environmental health disparities faced by marginalized communities*, Colum. Spectator (Sept. 30, 2021), https://www.columbiaspectator.com/city-news/2021/09/30/impacts-of-ida-expose-underlying-environmental-health-disparities-faced-by-marginalized-communities/ [https://perma.cc/EMV7-J7HJ] ("While Ida caused widespread damage across New York City as a whole, low-income populations and communities of color—who are already disproportionately impacted by climate change and its resulting environmental issues—suffered the most from the hurricane's aftermath.").

74. *See generally* Michael Burger, Jessica Wentz & Radley Horton, *The Law and Science of Climate Change Attribution,* 45 Colum. J. Envtl. L. 57, 61–62, 90–91 (2020) (reviewing advances in approaches to extreme event attribution and observing that "for many variables and locations, extreme event studies can generate reasonably reliable results.").

75. *Tropical Storm Elsa Brings Flooding Threat to New York Area*, N.Y. Times (July 7, 2021), https://www.nytimes.com/2021/07/07/us/tropical-storm-elsa-florida.html [https://perma.cc/W959-YVRZ]; Associated Press, *Tropical Depression Fred Threatens Mudslides in New York*, N.Y. Post (Aug. 18, 2021, 2:36 PM), https://nypost.com/2021/08/18/tropical-depression-fred-threatens-mudslides-in-new-york/ [https://perma.cc/G9VM-5WDK]; Andy Newman & Ellen Barry, *Tropical Storm Henri Brings Power Outages*

climate change was causing or worsening them.[76] Most dramatically, less than two months before the vote on the amendment, the remnants of Hurricane Ida "transformed familiar scenes of life in New York into otherworldly and waterlogged chaos,"[77] causing the National Weather Service to issue its first Flash Flood Warning for Manhattan, damaging 33,500 buildings, and drowning over a dozen people in New York City, many in flooded basement apartments.[78]

Climate-driven extreme weather events were explicitly referenced in the discussions about the proposed amendment. In the session of the New York State Assembly on April 30, 2019, Assemblymember Englebright spoke in favor of the amendment, characterizing a vote for the adoption of Article I, section 19 as an "expression of optimism . . . in a time when our State is assaulted by climate change, by storms that should come once in a century that arrive every three or four years, by the invasion of the southern pine beetle, by all of the ravages of change. . ."[79] An op-ed in support of the amendment similarly opined, "these are different times. We are already well into experiencing the effects of climate change. . . . Climate change . . . [is] addressed by

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*and Record Rain to Northeast*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/08/22/nyregion/tropical-storm-henri.html [https://perma.cc/8PTS-M6MR].

76. Katie Rogers et al., *'This is code red.' Biden visits areas of New York and New Jersey hit hard by Ida.*, N.Y. TIMES (Sept. 7, 2021), https://www.nytimes.com/2021/09/07/us/biden-visit-new-york-new-jersey-ida.html#:~:text=%27This%20is%20code%20red.,"And%20that%27s%20not%20hyperbole.. [https://perma.cc/D43B-B4MF]; Henry Fountain & John Schwartz, *How Climate Change Is Linked to Extreme Weather Patterns*, N.Y. TIMES, (Aug. 5, 2021), https://www.nytimes.com/2021/07/16/climate/europe-floods-climate-change.html [https://perma.cc/6Y6M-V66A]; Anne Barnard et al., *How New York Can Fight Extreme Weather, at a Price*, N.Y. TIMES(Sept. 27, 2021), https://www.nytimes.com/2021/09/20/nyregion/nyc-flooding-infrastructure.html [https://perma.cc/E2AC-LLE4].

77. Michael Levenson & Anne Barnard, *Scenes from New York City as Ida paralyzes region*, N.Y. TIMES (Sept. 2, 2021), https://www.nytimes.com/2021/09/02/nyregion/flash-floods-new-york.html [https://perma.cc/5237-R84Y].

78. Jesus Jiménez, *New York City Faces the First 'Flash Flood Emergency' in Its History.*, N.Y. TIMES (Nov. 12, 2021), https://www.nytimes.com/2021/09/02/nyregion/new-york-city-faces-the-first-flash-flood-emergency-in-its-history.html?smid=url-share [https://perma.cc/9FQT-X2XD]; Mihir Zaveri et al., *The Storm's Toll Highlighted New York City's Shadow World of Basement Apartments*, N.Y. TIMES (Oct. 13, 2021), https://www.nytimes.com/2021/09/02/nyregion/nyc-basement-apartments-flooding.html [https://perma.cc/VU8Z-MZMK]; CITY OF N.Y. MAYOR'S OFF. OF MGMT & BUDGET, CDBG-DR ACTION PLAN FOR THE REMNANTS OF HURRICANE IDA, SUBSTANTIAL AMENDMENT 1, at 2 (Aug. 8, 2023), https://www.nyc.gov/assets/cdbgdr/documents/amendments/Ida_Amendments/2_NYC_Hurricane_Ida_Action_Plan_SA1_HUD_Approved_(8.8.23).pdf [https://perma.cc/V7FE-L3GZ].

79. Transcript of "4-30-19 Session Part 2," *Session Proceedings*, N.Y. STATE ASSEMB., at 49 (Apr. 30, 2019, 2:29 PM), https://www2.assembly.state.ny.us/write/upload/transcripts/2019/4-30-19.html#02064 [https://perma.cc/3Q9W-QVX3] (statement of Assemb. Steven Englebright).

the proposed amendment."[80] Moreover, in an op-ed published shortly before the vote, another supporter of the amendment observed that voters would cast their ballots just "two months since the city was battered by the remnants of Hurricane Ida" which "left 11 people dead, flooded basement apartments in the East Elmhurst section of Queens and other places, and submerged vehicles on the Kingsbridge stretch of the Major Deegan Expressway" and that "voters can protect the state's environment and possibly help prevent future storms like Ida by voting 'yes' on the second proposal that appears on the flip side of their Nov. 2 election ballots."[81]

### *C. Other Indicia of Legislator and Voter Intent*

Other potentially useful evidence for understanding what legislators and voters understood Article I, section 19 to mean and expected it to do includes the legislative history of the adoption of the amendment legislation and characterizations of the amendment in public media and other fora.[82] Neither of these sources offers clarity concerning the myriad of detailed legal questions about the application of Article I, section 19, including those explored later in this Article. Legislative and public commentary was often muddled or vague (and even sometimes contradictory) on questions relating to the amendment's precise legal meaning and application.[83] Some broad themes can, however, be adduced that may prove helpful in interpreting Article I, section 19. First, the record reflects a widespread sentiment that the amendment explicitly articulated rights so basic and fundamental that it affirmed rights that were already understood and many persons believed (whether accurately or inaccurately) to exist. What was surprising to most was not the idea that New Yorkers possess environmental rights, but the realization that this was not (yet) formally legally recognized. Second, while there was

80. LeBrun, *supra* note 54, at D1.

81. Ethan Stark-Miller, *A Vote for the Right to a Much Cleaner Environment*, Riverdale Press (Oct. 31, 2021), https://www.riverdalepress.com/stories/a-vote-for-the-right-to-a-much-cleaner-environment,76434 [https://perma.cc/8H4G-X6U2].

82. For this article, we compiled and reviewed news articles referencing Article I, section 19 during 2017-2022 and reviewed the legislative record, including floor statements and debates. The analysis that follows summarizes high-level takeaways from this review, while also including illustrative quotations, sometimes in text but more often in footnotes, for interested readers.

83. *E.g.*, Scott Fein et al., New York State Environmental Rights Amendment: Standards of Review 5 (Government Law Center at Albany Law School, 2024), https://www.albanylaw.edu/government-law-center/environmental-amendment-standards-review [https://perma.cc/HVX8-N9X7] ("As is often the case with a prolonged legislative history, there were conflicting views held by legislators, even among those who supported the legislation.").

consensus that the precise contours and mechanisms of implementation of Article I, section 19 would require judicial elaboration and would come into focus over time, there was also a clear expectation that it would affect meaningful change.

The sense that Article I, section 19 gave formal legal recognition to rights that were already widely understood to exist—and that the Constitution's text was simply catching up—comes across in comments by members of the public, editorials, and commentary by legislators. As reported in the *Times Union*, "Fourteen-year-old Hoosick Falls resident Mikayla Baker made her stance clear. 'I think one of the highest priorities of New York state should be to have a healthy environment,' Baker said. 'It's ridiculous that we should even have to ask for the right of clean water and clean air.'"[84] The Editorial Board of *The Citizen* observed that "[i]t may seem like a given that people have the right to clean air and water, but a proposed amendment to the New York Constitution would put that in writing for the first time,"[85] and an editorial in the *Amherst Bee* began by observing that "[i]t might come as a surprise to learn that the right to clean air and water and a healthful environment is not already guaranteed under state law."[86] Advocates working across the state to promote the adoption of Article I, section 19 reported that many did not know that these rights were not already explicitly protected.[87] Similarly, in a press release issued by Environmental Advocates NY after the Senate's second passage of the amendment, advocates and lawmakers emphasized the simplicity and obviousness of recognizing environmental rights, repeatedly characterizing the Constitution's failure to articulate such rights an "omission" and describing the idea that New Yorkers have a right to a healthy environment as a "basic truth," a "self-evident truth," and "elementary."[88]

84. Joshua Solomon, *Ballot Proposal 2: A 'Green Amendment' with Capital Region Roots*, Times Union (Oct. 25, 2021), https://www.timesunion.com/state/article/Ballot-Proposal-2-A-Green-Amendment-with-16556496.php [https://perma.cc/5F9J-N86X]. *See also* O'Leary, *supra* note 49, at A16 ("Five years ago, I was fighting for clean water in Hoosick Falls after it was discovered that our water supply had been contaminated with toxic chemicals. As we were talking with people about our situation, one question kept coming up. "Don't you have a right to clean water?" The answer, shockingly, is no. We need to change that.").

85. Citizen Editorial Board, *supra* note 61.

86. Karen McMahon, Editorial, *Green Amendment is on the ballot in November*, Amherst Bee (June 2, 2021), https://www.amherstbee.com/articles/green-amendment-is-on-the-ballot-in-november/ [https://perma.cc/47Z2-DUZV].

87. Stark-Miller, *supra* note 81 ("After traveling around the state and promoting the second ballot proposal for the past four years, Iwanowicz says he's come across many who didn't know this wasn't already in the state's bill of rights. And now they're enthusiastic to vote for it.").

88. Env't Advocs. *supra* note 71.

For many, the existence of individual environmental rights was obvious and their formal legal recognition was overdue and simply confirmed by the amendment. Proponents and opponents of the amendment alike recognized that its specific contours and implementation would develop over time, through judicial interpretation and practice.[89] For proponents, this was a virtue: "[L]ike our federal Bill of Rights, there is strength and resiliency over time in such a direct and seemingly simple assertion. Each generation can and will set new limits, qualifications and direction as to what it will actually mean in practice through legislation, popular practice, and ultimately the courts. That's a plus, not a minus."[90] Proponents characterized the amendment as significant and expressed the view that it would advance broad goals—rectify environmental justice;[91] improve environmental

89. Andrew Bing, Perspective, *Green Amendment Should Fail*, Times Union, Oct. 30, 2021, at A7 ("Just how broadly the amendment, if adopted, will be construed will ultimately be up to the courts."); Patrick Gallivan, Editorial, *NY Voters to Decide on Proposals to Amend State Constitution*, West Seneca Bee (Oct. 28, 2021), https://www.lancasterbee.com/articles/ny-voters-to-decide-on-proposals-to-amend-state-constitution/ [https://perma.cc/XC7H-5TJ9] (characterizing the amendment as "open to interpretation" and flagging the likelihood of litigation over its meaning); Rick Karlin, *Sizing Up a 'Green Amendment'*, Times Union, May 18, 2021, at B9 (noting that researchers at the Rockefeller Institute analyzing the issue observed that "if it passes, the net result probably won't be clear for years because such an amendment will likely be shaped through a series of court cases."); Rick Karlin, *Big Zero for Environmentalists*, Times Union, June 15, 2021, at A3 ("Such a constitutional amendment would likely take time to play out in the courts and other avenues where it would be interpreted. But it could have a lasting effect on environmental policy.").

90. LeBrun, *supra* note 54, at D1.

91. *E.g.,* Goldstein, *supra* note 68, at A13 ("All New Yorkers will benefit from Proposition 2, not just select groups, adding to our commitment to environmental justice for everyone."); Dominick Calsolaro, Perspective, *On Nov. 2, Affirm That a Clean Environment Is a Human Right*, Times Union, Oct. 22, 2021, at A8; The Citizen Editorial Board, *supra* note 61 (observing in an editorial supporting Proposal 2 that the amendment "addresses what has been referred to as 'environmental racism' wherein toxic air and water problems have historically failed to be addressed in minority communities and more impoverished areas of the state."); Blair Horner, Opinion, *Vote 'Yes' to Aid Democracy and the State's Environment*, Rochester Democrat & Chronicle, Oct. 24, 2021, at B11 ("Many other communities across the state suffer from threats posed by multiple pollution sources, particularly in communities of color and/or low-income areas . . . . Elevating the right to clean air and water and a healthful environment to a constitutional protection will help ensure that New Yorkers—regardless of location, means or political clout—have a basis in which to protect themselves, their families, and communities."); LeBrun, *supra* note 54, at D1; Dominick Calsolaro, Perspective, *Green Amendment Good for Health of the Environment*, Times Union, Apr. 4, 2021, at D3 ("Once this amendment is approved by the voters: No longer will the burden of living next to pollution-spewing facilities fall mostly on the backs of low-income residents and people of color."); Rick Karlin, *Deciding to Come Clean Amendment Plan Under Debate*, Times Union, Mar. 21, 2021, at A1 ("Having the right to a healthy environment in the state constitution could also 'course correct' the history of putting

public health;[92] provide citizens with more voice and stronger levers to challenge government action and improve government decision making;[93] tilt the scales in favor of environmental and human health over industrial interests[94]—while typically not delving into the legal mechanisms for deploying the amendment in service of those goals.[95] Yet, even if the mechanisms were hazy, proponents of the amendment clearly understood it to be a vehicle for effecting real change, motivated by a conviction that the existing framework of environmental law in New York had serious limitations, as demonstrated most notably through the widespread contamination of drinking water with emerging contaminants and the stubborn persistence of environmental justice sacrifice zones.[96]

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polluting industries near or in disadvantaged communities, added Eddie Bautista, executive director of the New York City Environmental Justice Alliance.").

92. *E.g.,* Goldstein, *supra* note 68, at A13 ("Children are our future. We know that polluted air and water have profound effects on pregnancy, brain development and long-term health. Air pollution causes chronic lung disease and premature death."); Denis Slattery, *Power in Every Voter's Hands Ballot Proposals Could Alter Shape of N.Y. Gov't*, DAILY NEWS, Oct. 24, 2021, at 6 (reporting that Peter Iwanowicz stated at a rally for Proposition 2 that "[n]o one should have their health impacted simply because of where they live."); Maitefa Angaza, *Vote Tuesday, Nov. 2!*, OUR TIME PRESS (Oct. 31, 2021), https://ourtimepress.com/vote-tuesday-nov-2/ [https://perma.cc/2YE6-Y86M] (referencing "emergency levels" of asthma in New York City as a reason to vote in favor of Proposition 2); Pomponio, *supra* note 54, at A6 ("Without an uncontaminated non-toxic environment, the health of our children will be the battleground of the future."); *On Nov. 2*, *supra* note 91, at D3 (exhorting support for Proposition 2 in part because "corporate profiteers turn a blind eye to the effects their business operations have," including for disadvantaged communities, in particular "extremely high rates of asthma and certain cancers, low birth weights and an inordinate number of child and maternal deaths in areas where there are stressors like high levels of air and drinking water pollution.").

93. *On Nov. 2*, *supra* note 91, at A8 ("It will reverse the longstanding tradition of government agencies and departments approving corporate projects over the health and safety of citizens."); Joel Rabinowitz, Letter to the Editor, *Vote to Strengthen Environmental Rights*, THE CITIZEN, Oct. 20, 2021, at A4 ("One of the outcomes of the amendment would be that all state and local government bodies would have to consider environmental rights in their decision making."); The Citizen Editorial Board, *supra* note 61 ("The amendment requires the DEC to review project for any threats to air and water, so problems can be prevented from happening in the first place.").

94. *On Nov. 2*, *supra* note 91, at A8 ("Simply put, instead of siding with those who profit from actions that hurt our environment, legislative bodies and regulatory agencies will have to put people first and consider the proposed project's affect on a healthy environment.").

95. Legal commentators offered more detailed analyses of the legal pathways for Article I, section 19's implementation that, on the whole, understood that the amendment would create an individual right enforceable against the government as a limitation on government action.

96. *E.g.*, Pomponio, *supra* note 54, at A6 ("Despite legislative attempts to deal with serious environmental threats over the past 60 years, the EPA's efforts have sometimes failed the public miserably . . . .We need a stronger approach to be protected.").

For opponents, the amendment's broad language and the need for judicial interpretation raised the specter that its implementation would prompt expensive and time-consuming litigation[97] (in the colorful words of State GOP chairman Nick Langworthy, serving as a "backdoor boondoggle for trial lawyers"[98]); produce uncertain and potentially unintended consequences;[99] and displace legislative and agency policymaking in environmental matters with judicial fiat.[100]

97. Tom Precious, *NYers to Vote on Major, Minor Changes to State Constitution*, THE CITIZEN, Oct. 22, 2021, at A3 ("Opponents, including some business groups, say the ballot change's wording is so vague as to guarantee one certain outcome: lots of lawsuits on many different environmental matters for decades to come."); Slattery, *supra* note 92, at 6 ("Republican opponents argue that while the line sounds innocuous it could open the door to a rash of lawsuits since there is no baseline standard or legal definition of clean or healthful."); *The Business Council Opposes Proposition 2–Environmental Rights Amendment*, THE BUSINESS COUNCIL (Oct. 27, 2021), https://www.bcnys.org/news/business-council-opposes-proposition-2-environmental-rights-amendment [https://perma.cc/PA3E-XZFW] (characterizing Article I, section 19 as "a proposal with no meaningful definitions or parameters, which would result in tremendous uncertainty as to how it will be applied, left to be sorted out through years of litigation."); Will Bredderman, *Albany's Environmental Bills Get a Thumbs-Down from Business Interests*, CRAIN'S N.Y. BUS. (May 6, 2019, 12:00 AM), https://www.crainsnewyork.com/politics/albanys-environmental-bills-get-thumbs-down-business-interests [https://perma.cc/DST7-W2Q3] (quoting a representative from the Greater New York Business Council as warning that the amendment "would entangle entrepreneurs and private citizens alike in endless legal complications."); Karlin, *supra* note 91, at A1 (quoting the executive director of the Lawsuit Reform Alliance as predicting that Article I, section 19 would lead to an "'explosion of litigation'"); Gallivan, *supra* note 89 ("The effort to ensure these as fundamental rights is laudable, but the language is vague and difficult to define and enforce. The lack of details leaves the amendment open to interpretation and may result in costly and time-consuming legal challenges.").

98. Solomon, *supra* note 84.

99. Marsha R. Devine, Letter to the Editor, *Read and Consider Propositions Before Voting*, CHRON. EXPRESS, Oct. 22, 2021 ("While on its face, this is commendable, the term 'healthful environment' is ambiguous at best, and creates a loophole big enough to justify trillion dollar programs, or to create another huge bureaucracy. What is really meant by 'healthful environment?'"); *Business Council*, *supra* note 97 (characterizing Article I, section 19 as "a proposal with no meaningful definitions or parameters, which would result in tremendous uncertainty as to how it will be applied, left to be sorted out through years of litigation."); Vera Chinese, *Mixed views on green change; Amendment will go before voters in Nov. Election*, NEWSDAY, Oct. 17, 2021, at A10 ("[O]pponents argue the amendment's vague wording could lead to costly lawsuits and stall infrastructure like affordable housing, and wind and solar projects."); Bredderman, *supra* note 97 ("Suarez said the amendment could lead to swarms of NIMBYists filing lawsuits claiming that construction projects they dislike violate their right to a healthful environment. It even could block or delay the installation of solar panels or wind-power arrays and discourage necessary development.").

100. Foderaro, *supra* note 26 ([C]ritics, including the Business Council of New York State, argue that it is so broad that judges could have too much leeway and set environmental policy through their decisions."); *NY Farm Bureau President & Madrid Dairy Farmer Says Vote No on 'Green Amendment' on November State Ballot*, NORTH COUNTRY NOW (Oct. 28, 2021, 9:14 AM), https://www.northcountrynow.com/stories/

Opening up this can of worms, and potentially creating a drag on the economy and threat to agricultural interests in the process,[101] made little sense to opponents. They tended to characterize the existing framework of environmental law in New York as functional and effective.[102]

Ultimately, of course, it was the proponents who resoundingly—with the support of over 70% of voters—carried the day. New York's government officials, environmental bar, and judges must now interpret and apply Article I, section 19. Because of the legislative process through which the amendment was adopted, those interpreting and applying it do not have the benefit of the fulsome analysis and debate that a constitutional convention would have produced. They do, however, have a clear message from legislators and voters that the amendment was intended to meaningfully change the status quo to address shortcomings perceived as serious and urgent. How Article I, section 19 can be legally operationalized to honor this intent remains to be seen. However, the history of the adoption of Article I, section 19 offers some important guidance in the interpretive endeavor. For example, as discussed in greater detail *infra*, properly understood, the amendment's history, in conjunction with its constitutional placement and context, should foreclose any suggestion that Article I, section 19 is not self-executing. The amendment was conceived and adopted to go beyond preexisting statutory and constitutional protections. And such

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ny-farm-bureau-president-madrid-dairy-farmer-says-vote-no-on-green-amendment-on-november,3520 [https://perma.cc/ZB9K-4KVN] ("Voting yes will give the courts greater control to decide what is a 'healthful environment,' and in turn, diminish the public's voice and the traditional legislative and regulatory processes that set public policy,' Fisher [President, New York State Farm Bureau] said."); Bing, *supra* note 89, at A7 ("Deciding how best to protect the environment involves the careful balancing of many competing health, economic and other interests of New York's residents, businesses and everyone else affected. Balancing the costs and the benefits of regulation, and determining who should bear the costs and receive the benefits, is what legislatures do . . . . The proposed amendment would upend this democratic process and hand substantial environmental policymaking and budgeting authority to the courts.").

101. Foderaro, *supra* note 26 ("Mr. Suarez and other business leaders fear that the provision would undermine economic development in the state by holding projects to an unreasonable—and unattainable—level of environmental stewardship."); *see also* Solomon, *supra* note 84 (quoting the State GOP Chairman as describing the amendment as a "barrier to business").

102. *Business Council*, *supra* note 97 ("[G]iven the existing body of federal and New York State environmental laws and enforcement mechanisms, this amendment is simply unnecessary" because "New York has broad, stringent environmental standards, and in many instances, its regulatory programs are broader, and its standards are more strict than those applied under federal law" and "New York's existing legal framework for environmental protection has proven to be effective at providing a high level of environmental protection, and the state legislature has shown its ability to act quickly to address new issues of concern.").

constitutional protections for the environment were recognized to have had little effect in large measure because they had been interpreted by courts to require prior legislative action (i.e., not to be self-executing). The balance of this Article explores some of the specific legal questions raised in implementation of the Article I, section 19.

## II. Is Article I, § 19 Self-Executing? And Does It Enshrine Fundamental Rights?

Two foundational legal questions about Article I, section 19 are (1) does it give rise to immediate and enforceable obligations (i.e., is it self-executing), and (2) are the rights it enshrines fundamental? For the reasons that follow, we think it clear that Article I, section 19 is self-executing and enshrines fundamental rights.

The primary authority of New York's Bill of Rights is evident from its stature as the first article in the Constitution. Securing the liberties of individuals is a premise for State government in New York, based upon the obligation of all those serving in government to observe the "law of the land," the hallmark legacy of the *Magna Carta* (1215). The Bill of Rights enshrines the rule of law, which buttresses all constitutional rights and laws. The guarantees in the Bill of Rights provide substantive rights but also have a procedural dimension: where there is a right, there is remedy.[103]

The New York Bill of Rights contains two types of rights. Some are fundamental, like the guarantees of freedom of speech, assembly, and religion. These are self-executing and do not need the enactment of further legislation before a court can enforce them. Other provisions establish rights as policies, and these aspirational provisions do require the enactment of further legislation before they can be implemented, such as § 9 on gambling.[104] Some rights found elsewhere in the Constitution also set policy and in effect mandate and authorize legislative action, such as the "Conservation Bill of Rights" in article XIV or education rights or rights to shelter.[105]

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103. *See generally* Daniel Barstow Magraw et al., Magna Carta & the Rule of Law 53–54, 65–68 (Am. Bar Ass'n, 2014) (detailing the role of remedies in the Magna Carta and its American progeny).

104. *See* White v. Cuomo, 192 N.E.3d 300, 307–08 (N.Y. 2022).

105. N.Y. Const. art. XIV; N.Y. Const. art. XVII, § 1. State constitutional guarantees of positive rights under Article XVII ("air, care and support" for the needy) and Article XI (system of "free common schools") also provide mandates for further legislative action. Cathy M. Johnson & Thomas L. Gais, *Positive Rights in the New York State Constitution: Social Welfare and Education*, *in* Making a Modern Constitution: The Prospects for Constitutional Reform in New York (Rose Mary Bailly & Scott N. Fein eds., N.Y. State Bar Ass'n 2016).

Even when fundamental and self-executing, questions arise about securing observance of rights. New York courts have construed the State's Bill of Rights independently of how federal courts or courts in other states have done so. Indeed, they consider how a right may best be understood to provide guidance for future conduct, or predictability, and also to clarify how a right may apply in specifying a "bright line." For example, the Search and Seizure provisions of Article I, section 12 are self-executing.[106] To secure observance of the right, courts have developed further tests, such as exclusionary rules of evidence. In *People v. Griminger*,[107] the Court of Appeals addressed the test for reviewing the sufficiency of an affidavit submitted in support of a search warrant. The court held that the fundamental right in Article I, section 12 in New York is best secured by applying a "bright line" test, which "better served the highly desirable aims of predictability and precision in judicial review of search and search cases."[108] The legislative record indicates that a "bright line" exists in Article I, section 19 when a person consumes drinking water from an aquifer that the government knows is contaminated and the government has failed to protect the person from using the unpure water.

New York courts are clear that fundamental rights are self-executing, such as for due process or for the prohibition of cruel and unusual punishment. The claimant of such a right must allege and prove facts that establish that their liberty guaranteed by the Bill of Rights has been denied by a governmental authority. Thus, when the rights are fundamental, there is a presumption that they are self-executing. To better understand this, it is instructive to consider separately the question of (1) whether § 19 is self-executing and (2) whether the environmental rights are fundamental.

### *A. Is Article 1, § 19 Self-Executing?*

Constitutional rights that are not self-executing lie dormant until the Legislature enacts implementing measures, such as appropriating funds to underwrite the provision's implementation. While provisions that are not self-executing are hardly a dead letter, they have primarily moral force and lack legal force until the Legislature acts. The judiciary

106. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." N.Y. CONST. art. I, § 12.

107. People v Griminger, 524 N.E.2d 409 (N.Y. 1988).

108. *Id.* at 412 (citing People v. Johnson, 488 N.E.2d 439, 445 (N.Y 1985)).

cannot compel the Legislature to enact implementing legislation but often encourages it to do so.[109] As explained above, since 1970, Article XIV, section 4 of the New York State Constitution has announced the "policy of the state . . . to conserve and protect its natural resources and scenic beauty" and given direction to the "legislature, in implementing this policy."[110] This constitutional text has proven largely inert because courts interpreted it to authorize and support legislative action, but not to require or limit it. That Article XIV, section 4 was not interpreted to be self-executing was explicitly cited as a reason why New York needed new, self-executing constitutional protections that would bind government without the need for implementing legislation.[111]

State courts, other than those in New York, often consider a range of factors when evaluating whether the text of a constitutional provision should be deemed self-executing. Courts may look to whether the provision is sufficiently detailed to guide public policy, the intent of the drafters, what the text provides, and whether the provision requires a significant expenditure of public funds.[112] New York courts have chosen a simpler analytical approach, concluding that constitutional provisions are presumptively self-executing absent *express language* requiring additional legislative action to trigger their implementation.[113]

Constitutional language authorizing legislative action before implementation can be found in various provisions of New York's Constitution, many of which have been found not to be self-executing. For example, the courts have concluded that Article XI, section I of the New York State Constitution is not self-executing because the provision expressly provides that "*the Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated*."[114] Similarly, Article XVII, section 1 provides that "[t]he aid, care and support of the needy are

109. N.Y. CONST. art. XIV, § 4; *see generally* Barton H. Thompson Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996).

110. N.Y. CONST. art. XIV, § 4.

111. *See supra* pp. 368–371.

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

113. *See* Brown v. State, 674 N.E.2d 1129, 1137 (N.Y. 1996); People v. Carroll, 148 N.E.2d 875, 877 (N.Y. 1958) (observing that "the process in this case would have to start with the presumption that the provision is self-executing" and "it is now presumed the constitutional provisions are self-executing); People v. Turza, 751 N.Y.S.2d 351, 354–55 (Sup. Ct. 2002). *See generally* Gail Donoghue & Jonathan I. Edelstein, *Life After* Brown*: The Future of State Constitutional Tort Actions in New York*, 42 N. Y. L. SCH. L. REV. 447 (1998).

114. N.Y. CONST. art. XI, § 1 (emphasis added).

public concerns and shall be provided by the state and by such of its subdivisions, and *in such manner and by such means, as the Legislature may from time to time determine*."[115] In contrast, Article I, section 19 contains no reference to legislative or executive action as a predicate to implementation and, consequently, is presumptively self-executing.

The history of Article I, section 19's adoption further supports the conclusion that it is self-executing. As described in detail in Part I, there is overwhelming evidence that legislators and the voting public understood, and those who supported the amendment intended, that it would go beyond existing statutory law and empower citizens directly, rather than simply inviting future legislative action. Thus, Article I, section 19 stands on the same interpretive footing as other self-executing New York State constitutional provisions, including those pertaining to equal protection,[116] prohibition against unreasonable search and seizure,[117] freedom of speech and the press,[118] criminal waiver of trial provisions,[119] and cruel and unusual punishment.[120] Importantly, the precise meaning and scope of these fundamental constitutional protections as applied in specific contexts is not (and cannot be) spelled out in constitutional text. It necessarily emerges through judicial, legislative, and executive application to facts on the ground—which will also be true for Article I, section 19, as discussed *infra* Part III. That this is so does not rob these provisions of their self-executing status. "The fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing."[121]

Self-executing constitutional provisions are sometimes criticized as having the potential to improperly shift the development of policy from the legislative and executive branches of government to the judiciary even though the legislative and executive branches may be better institutionally suited to develop public policy and more responsive to popular opinion.[122] As discussed in Part I, opponents of the amendment raised precisely this concern.[123]

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115. N.Y. Const. art. XVII, § 1 (emphasis added).
116. N.Y. Const. art. I, § 11; *see, e.g.*, Foss v. City of Rochester, 480 N.E.2d 717 (N.Y. 1985).
117. N.Y. Const. art. I, § 12.
118. N.Y. Const. art. I, § 8.
119. *Carroll*, 148 N.E.2d at 877.
120. Boggs v. State, 25 N.Y.S.3d 545 (Ct. Cl. 2015).
121. *Carroll*, 148 N.E.2d at 879 (citing 16 C.J.S. *Constitutional Law* § 48); *see also* 11 Am. Juris. *Constitutional Law* § 75 (Jurisprudence Publishers, Inc. 1937).
122. 11 Am. Juris. *Constitutional Law* §§ 192–200.
123. *See, e.g.*, *Business Council*, *supra* note 97.

Such a concern is understandable, but there are several considerations that counter this perception.[124] At the outset, the New York Legislature proposed and approved on two separate occasions the language of the amendment before it was placed on the ballot for public approval. The legislature could have chosen either a self-executing or non-self-executing construct. That is, the Legislature decided whether to retain or forgo the authority to implement the proposed amendment when it chose the provision's language. Thus, rather than usurping the Legislature's discretion, the selection of a self-executing provision reflects the will of the Legislature and voting public to enact an amendment effective immediately.

Furthermore, an amendment being self-executing does not prohibit further legislative involvement after the provision's ratification. The Legislature may not violate the amendment's guarantees. But the Legislature can and should ensure the protection of the right set forth in the amendment, such as by enacting legislation to further the purposes of the provision or its enforcement. The principal limitation is that the legislative action may not weaken or be inconsistent with the protection provided in the amendment.[125] Subject to this limitation, New York courts will look to subsequent legislative actions and understandings in implementing a constitutional provision.[126] Thus, even when a constitutional provision is self-executing, what results is not judicial fiat, but inter-branch conversation between the judiciary, executive, and legislature.

It bears note that New York courts have not usurped the legislative prerogative even when self-executing constitutional provisions are at issue. Judicial decisions are often narrow, courts may decline to hear a case on procedural grounds, or may employ a constitutional standard of judicial review that sustains the state's conduct if it is found

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124. *See generally* Jeffry Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459 (2010).

125. *See generally* N.Y. State Bar Ass'n Env't & Energy L. Section, *Report and Recommendations Concerning Environmental Aspects of the NY Constitution,* 38 PACE L. REV. 182 (2017). The courts have made clear that the interpretation of constitutional amendments enacted by the voters is different than permissible statutory interpretation holding that our Constitution is "an instrument framed deliberately and with care and adopted by the people as the organic law of the State" and, when interpreting it, "we may not allow for interstitial and interpretive gloss by other branches of government that substantially alters the specified law-making regimen." *Harkenrider*, 38 N.Y.3d at 511 (quoting Matter of King v Cuomo, 81 NY2d 247, 253 (1993)).

126. 20 N.Y. JUR. 2d *Constitutional Law* § 22 (2024) ("To determine intent and properly interpret constitutional language, a court may . . . observe the conduct of the Legislature as it exercised its authority under the provision.") (internal citations omitted).

reasonable.[127] In the context of the facts of each breach of a fundamental right, courts assess the alternatives that a governmental authority has to restore a person's basic rights.

### *B. Does § 19 Enshrine Fundamental Rights?*

Fundamental rights are constitutional safeguards that have been recognized by the courts to be of such importance as to require a high degree of protection from governmental encroachment. There are several factors that suggest that Article I, section 19 should be deemed to enshrine fundamental rights, including its origin, purpose, and legislative history.

At its inception, the drafters of the New York State Constitution expressed concern that the absence of a bill of rights in our constitution may fail to safeguard the public from government excess. In 1881, it was agreed that a bill of rights should be ratified incorporating amendments expressly referencing individual rights and placing them in Article I, the Constitution's introductory provision. The politically fraught history of amending the New York Constitution has allowed the Bill of Rights to contain both fundamental norms and provisions that are more like a statute or a policy than an individual's basic rights. Nonetheless, this hybrid nature of Article I in the Constitution has not confused New York courts. The courts have had no difficulty applying fundamental rights and distinguishing when a constitutional guarantee vests in an individual, or is stated in terms that declare a policy, which the Legislature then must implement.

Basic rights differ from policies stated elsewhere in the Constitution, or in statutory entitlements and provisions. The Bill of Rights opens declaring that no one may be deprived of their rights "unless by the law of the land,"[128] which is a fundamental norm. The fundamental rights in Article I are then followed by "provisions having

127. N.Y. State Bar Ass'n Env't & Energy L. Section, *supra* note 125. For example, as interpreted by the New York State Court of Appeals, while the state offers "all students the opportunity for a sound basic education," courts must still "defer to the Legislature in matters of policymaking, particularly in a matter so vital to educational financing." Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893, 901, 925 (2003).

128. N.Y. Const. art. I, § 1: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the Legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law."

little or nothing to do with the rights."[129] Another example is the second portion of Article I, section 9(1), on the right of peaceable assembly.[130] The courts have had no difficulty understanding the historical context of the most basic rights, and why they appear in the Bill of Rights. These rights include, for instance, the rights to property (Article I, section 6), free speech (Article I, section 8), and freedom of religion (Article I, section 3) which are fundamental. The succinct and clear exposition of the clause on Environmental Rights (Article I, section 19) is indicative of its fundamental character.

The "Environmental Rights" in Article I, section 19, are not merely policies. Unlike lengthy policy or politically fraught texts, the declaration of each person's rights is clear, concise, and crisply guaranteed. It is not conditional or constrained. It also is unlike the "Conservation Bill of Rights" found in article XIV. The article XIV policies are broad State policies that rely upon the Legislature and governor to implement.[131] These policies became a basis for the many environmental statutes that New York's legislature adopted in the 1970s and 1980s.[132] When the Legislature placed New York's "Environmental Rights" in the Bill of Rights, it manifestly intended to vest environmental rights in each person.[133] New York's Bill of Rights secures a person's rights independently of acts of the executive and legislative branches of government.[134]

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129. Peter J. Galie & Christopher Bopst, *Cleaning the NY Constitution Part I–Institutions and Rights*, *in* New York's Broken Constitution 33, 37 (2016).

130. N.Y. Const. art. I, § 9, cl. 1: "No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the Legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the Legislature may prescribe, and except pari-mutual betting on horse races as may be prescribed by the Legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section."

131. Comm. on the N.Y. State Const., *supra* note 11.

132. New York Environmental Law (Nicholas A. Robinson ed., N.Y. State Bar Assoc. 1992).

133. This role for the Bill of Rights can be traced to the *Petition of Right* (1628) of Sir Edward Coke, which was well known in New York to those who drafted the NY Constitution through William Blackstone's *Commentaries on the Laws of England* (1765), which were widely read in New York and the other American colonies. *See* Lesley Rosenthal, *The Rule of Law* and other essays, *in* 90 N.Y. State Bar J. 10 (Jan. 2018).

134. Brian Z. Tamanaha, On The Rule of Law–History, Politics, Theory 140 (2004). Of the rule of law, not man, Tamanaha observes: "A society that adopts the view that the government is limited by law and that the law should satisfy the qualities

Moreover, some New York courts consider it "strong evidence that the right was regarded as fundamental" when the Legislature has chosen to add that right to Article I.[135] This view, that Article I, section 19's placement was intended to signify the importance of the right, was also shared by the New York State Bar Association in its Task Force Report recommending the "incorporation of an environmental right in Article I, as opposed to Article XIV, because such right is appropriately viewed as on par with the other important rights protected in Article I."[136]

### *C. Why are these questions important?*

Determining that the rights in Article I, section 19 are self-executing is important because it situates those rights in a specific—as well as strong and insulated—place within New York's constitutional structure of government. The rights being self-executing means that the government must automatically respect the rights and also that the judiciary possesses the final authority to interpret the scope of the rights. In other words, the Legislature cannot pass a law that contravenes New Yorkers' environmental rights as defined by the courts. The designation of a constitutional provision as self-executing limits to one branch the right of interpretation, the judiciary, and then only the authority to ensure its application accords with other provisions of law. Thus, gubernatorial or legislative political shifts in the future should have limited impact on the scope and durability of Article I, section 19. Absent a future constitutional amendment, Article I, section 19's safeguards, as self-executing, are quite simply indelible.

Determining that the rights in Article I, section 19 are fundamental is important to their implementation within the context of specific disputes because it may shape the standard of review that courts adopt when confronted with a denial of a person's right.[137] One of the legal

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of formal legality, is also necessarily, in those contexts in which the law applies, embracing the rule of law, not persons. Whether this can successfully be accomplished without descending to rule by judges depends upon whether the particular society is able to maintain the necessary balance, a crucial element of which is self-restraint by all sides."

135. Hernandez v. State of N.Y., 173 A.D.3d 105, 113 (App. Div. 3rd Dept. 2019).

136. N.Y. State Bar Ass'n Env't & Energy L. Section, *supra* note 125, n. 9; *see id.* at 113.

137. Substantive Due Process claims may also emerge in tandem with claims of Environmental Rights and impact the standard of review. In Article I, Section 6, New York's Bill of Rights provides that "No person shall be deprived of life, liberty, or property without due process of law." Due process of law applies to deprivations of the environmental aspects of life, and liberty and property. When read *in pari materia* with Article I, Section 19, one can imagine government acts or omissions that implicate both Due Process rights and Environmental Rights. When the State, by act or omission to

consideration most likely to determine the long-term effectiveness of Article I, section 19 is the selection of an applicable judicial standard of review. The standard of review is a framework the courts use to determine whether a governmental action that is alleged to violate a constitutional right will be struck down.

Fundamental rights do not always trigger strict scrutiny. While some do, others are deemed to be adequately protected by a reasonableness or rational basis standard. Neither the United States Supreme Court nor New York State Courts have precisely described a single doctrine that would guide a court in its selection of a standard of review for a newly enacted fundamental right.

When a governmental action has been challenged as unconstitutional, a court generally selects one of three levels of judicial scrutiny to adjudicate the claim. The levels are based on considerations regarding whether the constitutional protection is fundamental and deserving of strong judicial protection and whether the litigants are a constitutionally protected class.[138] The three standards of review applied to constitutional litigation are described below.

(i) *Strict Scrutiny*: This is the most rigorous standard. The standard requires that the government action at issue serves a compelling state interest and is necessary to achieve that goal.[139] The standard is difficult for the government to meet because it requires the government to demonstrate that the action is the least restrictive way it could have served the governmental interest, and that the government's action is only as extensive as is necessary. For that reason, strict scrutiny is often described as "strict in name, fatal in fact." Strict scrutiny is typically required when the government's conduct involves laws targeting protected classes such as race, citizenship status, national origin, and religion. It will also be applied in certain circumstances where the constitutional rights alleged to be violated are recognized as "fundamental."

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act, deprives a person of the air or water that sustains life itself, there is a violation of Section 19, but also a violation of the guarantee not to deprive a person of life without due process of law. New York Court have not yet had occasion to apply the substantive "life, liberty and property rights" aspects of the due process guarantees. For a discussion of the analogous situation, without a Green Amendment, for these rights in the federal Constitution's due process clause, see Robin Kundis Craig, *Due Process Challenges*, *in* PRINCIPLES OF CONST. ENV'L L., 227, 243 (James R. May ed., 2011).

138. The concept of levels of judicial scrutiny was first introduced by federal law by the United States Supreme Court's decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). New York Courts have since applied these standards in a wide range of constitutional cases.

139. Alevy v. Downstate Medical Center, 39 N.Y.2d. 326, 333 (1976).

(ii) *Intermediate Scrutiny*: The next most rigorous standard requires the government to demonstrate that the challenged activity serves an important state interest, and that the governmental action is substantially related to serving that interest. An action that can pass intermediate scrutiny is "not necessarily the single best disposition but one whose scope is in proportion to the interest served."[140]

(iii) *Rational Basis*: The least rigorous standard simply requires that the government show that the challenged action is rationally related to achieving a legitimate state interest. This standard is typically applied when the law does not target anyone based on race, gender or other similar protected classifications and the provision being violated is not considered a fundamental right. In most cases where a court applies rational basis review, the government's action will be upheld.[141]

Whether a right is fundamental plays a large role in the selection of the standard of review. As discussed above, the presumption of Article I, section 19 setting forth fundamental rights derives from both the placement in the Constitution's Bill of Rights and the history of the debates that lead to its adoption.

Even if Article I, section 19 creates fundamental rights, however, that is not necessarily the end of the analysis. The New York Court of Appeals has never held that a government action will be subject to strict scrutiny *solely* because of where it resides in the New York State Constitution or due to its perceived fundamental nature. Examples of provisions New York courts have deemed to merit strict scrutiny include the right to vote, the right to a jury trial, the right to bail, the right to a grand jury, some aspects of freedom of speech, and equal protection of protected classes of persons. Conversely, rights that seemed to warrant a less rigorous standard of judicial review include the right to commercial speech, freedom of religion in certain circumstances, just compensation for taking private property, the right to assemble or petition, and matters relating to search and seizure.

The regulatory context within which Article I, section 19 was enacted will also likely bear on the selection of the applicable constitutional standard of review. Since New York adopted constitutional provisions mandating nature conservation in the late 19th century, it has enacted

140. Vugo, Inc. v. City of N.Y., 931 F.3d 42, 52 (2d Cir. 2019) (citing Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989)).

141. *See, e.g.*, Henry v. Milonas, 91 N.Y.2d 264, 267 (1998). Where competing remedial public policies contend, such as in review of sustainable energy projects, some have argued that judicial review should only be based upon rational basis analysis. *See infra* note 146.

many state and local environmental and land use laws. Some rigorously safeguard the environment and others arguably less so, reflecting a balance chosen between competing policies of environmental protection and promoting the growth of industry, transportation, or other sectors. How might these existing laws and regulations be reconciled with Article I, section 19 and would this influence the judicial standard of review applied to adjudicate claims?

Courts may be resistant to arguments that treat these new constitutional amendments as not affecting any meaningful change. There is abundant evidence that those who adopted Article I, section 19 sought to change the status quo, not entrench it. It is reasonable to foresee that Article I, section 19 may be considered for prospective matters, new and renewed permits, permit modifications, permit violations, and new regulations, among other circumstances.[142] Election of the rational basis test, the least stringent standard, would both be at odds with the fundamental nature of Article I, section 19 and most likely render its impact illusory. The rational basis standard of judicial review is quite similar to the existing state law standard of review for challenges of government action as unlawful using an Article 78 proceeding, the most common vehicle for such challenges. That standard allows nullification of most government action only if the action is found to have no reasonable basis or to be arbitrary and capricious.[143] Selection of the rational basis judicial standard would, effectively, leave the standard of review unchanged from before Article I, section 19 was enacted in such cases, presenting an oft-insurmountable challenge for those seeking to assert a violation of Article I, section 19 and would largely render it ineffective.

Conversely, a more stringent standard of review would make success under an Article 78 proceeding much more plausible, but bring with it coordinate risk. Article 78 proceedings can succeed by demonstrating that the challenged action is "affected by an error of law or was arbitrary and capricious or an abuse of discretion."[144] Failing to pass constitutional muster is clearly an "error of law."

Courts may hesitate to uniformly apply the strict scrutiny standard in analyzing Article I, section 19, because that standard may prove fatal even to governmental actions that are intended to be an improvement over the *status quo.* It may depend on the context of the claim, but if a person challenges a new, more stringent regulation as harming their

142. The application of Article I, section 19 to pre-existing statutes or permits is discussed *infra* pp. 158-62.
143. *See* N.Y. C.P.L.R. § 7803.
144. *Id.*

personal right to clean air, clean water or healthful conditions, and thereby constitutionally deficient, a court may wish to narrow the application of the right to preserve the remedial statute. Conversely, those opposing stronger environmental regulations may seek to weaponize Article I, section 19 in service of defeating new regulations, in order to leave the *status quo* in place. Abusing Article I, section 19 in this way would, of course, be completely at odds with the goals of the amendment.

What are the alternatives? First, courts might adopt intermediate scrutiny, requiring the government to demonstrate that actions impinge on the right to clean air, water, and a healthful environment are justified by an important state interest that is substantially related and proportionate to action the government has taken.

Alternatively, courts might adopt a contextual approach, where the appropriate standard of review turns on factors specific to the details of the challenge. One such approach would employ the principle of non-regression[145] to ratchet up the level of applicable scrutiny depending upon whether the challenged action weakens, strengthens, or does not change the current level of environmental protection.[146] Such a scheme for review could function as follows.

Imagine the hypothetical in which the N.Y. Department of Environmental Conservation ("DEC") issues a modified wastewater discharge permit for an existing polluter and downstream New Yorkers challenge the permit as a violation of Article I, section 19's guarantee of clean water. If the modified permit increases the level of permissible contaminants in the water discharged when compared to the original permit, arguably making the water less clean, the reviewing court would apply strict scrutiny when reviewing that change. On the other hand, if the modified permit lowers the level of permissible contaminants in

145. *See generally* Nicholas Bryner, *Never Look Back: Non-Regression in Environmental Law*, 43 U. PA. J. OF INT'L L. 555 (2022). An example of this principle in current U.S. law is the anti-backsliding provision of the Energy Policy and Conservation Act, which prohibits the Department of Energy from issuing new regulations that would lower energy efficiency requirements. 42 U.S.C. § 6295(o)(1); *see* NRDC v. Abraham, 355 F.3d 179 (2d Cir. 2004),

146. Another scholar has proposed an interesting possibility for a contextual approach to application of Article I, section 19, suggesting that the standard of review be rational basis when courts are asked to evaluate environmental tradeoffs, as with respect to weighing local environmental impacts of renewable energy projects against the need for decarbonization. *See* Dan Fisher, *New York's Green Amendment Dilemma*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 1127, 1159 (2024) ("In view of the possibility that such cases involve a conflict of constitutional interests that are fundamentally incommensurable, the right approach might instead be rationality review, and that courts ought to start from the assumption that Green Amendment Dilemma cases present instances of mixed conduct that are generally permissible in the sense that the political branches are better suited to working through the constitutional conflicts that inhere within them.").

the water discharged when compared to the original permit, arguably making the water cleaner, the reviewing court would apply rational basis review. On the gripping hand,[147] if the modified permit makes no change to the level of permissible contaminants in the water discharged when compared to the original permit, leaving the state of the water at an arguably already constitutionally-deficient level, the reviewing court would apply intermediate scrutiny.

This approach may be appealing because contextual approaches to choosing the appropriate standard of review are nothing new in constitutional law. Similar approaches have well-developed histories. For example, in First Amendment free speech challenges, the standard of review will vary depending on the type of speech that the government action is seeking to restrict and the way it is doing so. If the government is seeking to prevent the publication of newsworthy information (a "prior restraint")[148] or attempting to curb the spread of disfavored political ideas ("viewpoint discrimination"), the governmental action will most likely be subject to the strict scrutiny standard.[149] Where government action imposes content-neutral time, place and manner restrictions on speech, review of the action will likely be subject to a modified form of intermediate scrutiny.[150] And where the speech is of little or no social value, such as "true threats of violence," the level of review will be even less stringent and the courts more likely to uphold the governmental action.[151] Thus, New York courts would not be straying far from well-worn constitutional analysis should they develop a similarly contextual set of rules for determining which government actions trigger heightened scrutiny under Article I, section 19, as in the example above.

## III. Construing the Guarantees to Clean Air and Water and Ambient Environmental Health

### *A. Construing Each Element of Environmental Rights*

The terms contained in Article I, section 19 can be generically evaluated. Every word in § 19 should be given effect consistent with its plain meaning; the contemplations of the voters who adopted the

147. A fictional idiomatic phrase for a third option taken from the science fiction novels The Mote in God's Eye (1974) and The Gripping Hand (1993) by Larry Niven and Jerry Pournelle.

148. *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

149. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

150. *See* Madsen v. Women's Health Ctr., 512 U.S. 753 (1994).

151. *See* Counterman v. Colorado, 600 U.S. 66 (2023).

amendment; the everyday understanding of environmental rights; and the scientific knowledge appropriate to each context in which the rights are asserted. The courts are likely to eschew crabbed or narrow constructions that defeat the remedial objectives of § 19. As discussed in Part I, it is essential to assess the objectives of the rights articulated in light of the ambient environmental circumstances in the first decade of the 21st century when the amendment was being adopted to understand and construe the terms of § 19. Each case will vary as to how these terms may be applied, but the constitutional legal framework for such applications is based on ecology and other environmental sciences.[152]

*1. "Environmental Rights" for Each "Person"*

Beginning with the constitutional text, the public understands the plain meaning of "environment" from Article I, section 19's section title "Environmental rights."[153] Thus, the rights set forth in § 19 are interrelated and are to be construed in light of the meaning of "environment." The accepted dictionary definition of each person's environment is the complex of physical, chemical, and biotic factors (such as climate, soil, and living things) that act upon a person or other organism or an ecological or social community, and which ultimately determine each person's wellbeing and survival.[154] Essentially, the human environment encompasses all the ecological systems of the biosphere. It is a broad definition encompassing the several terms in Section 19 which are, themselves, interdependent and holistic.[155]

152. HOWARD FRUMKIN, ENVIRONMENTAL HEALTH: FROM GLOBAL TO LOCAL (2016).

153. New York State public school curriculum requirements provide for learning about the environment. *See, e.g.*, N.Y. STATE EDUC. DEP'T, THE LIVING ENVIRONMENT CORE CURRICULUM 19, https://www.nysed.gov/sites/default/files/programs/curriculum-instruction/livingen.pdf [https://perma.cc/TR5U-FPVG].

154. *Environment*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/environment [https://perma.cc/36QA-BRUW].

155. Professional and scientific definitions of "environmental health" are widely available. *See, e.g.*, FRUMKIN, *supra* note 152, at 61. The Center for Disease Control National Center for Environmental Health: New York defines for the public Environmental Health as follows: "Environmental Health is everything around you. The air you breathe, the water you drink, the community around you, the places where your food is grown or prepared, your workplace and your home. When your environment is safe and healthy, you are more likely to stay healthy. But when your environment exposed you to dangerous events or toxic substances, your health can be affected negatively." *See CDC's National Center for Environmental Health: New York*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://web.archive.org/web/20240425052231/https://www.cdc.gov/nceh/information/state_factsheets/ny_state_fact_sheet.pdf [https://perma.cc/2ZHS-DAWF].

The key terms for the "Environmental rights" contained in Article I, section 19—"clean air and water, and a healthful environment"—can be generically evaluated in much the same way as other constitutional guarantees. Every word in § 19 is to be given effect using multiple lenses: its plain meaning and the contemplations of the voters who adopted the amendment; in the everyday understanding of environmental rights; and the scientific knowledge appropriate to each context in which the rights are asserted. The very fact that the voters accepted the legislators' decision to preface the rights themselves with the formal title, "*Environmental rights*," indicates the fundamental character of the amendment. The title is distinctive, unlike other sections in the Bill of Rights, and underscores the guarantees that follow.

The guarantee for each "person" is also plain. Any natural *person* in New York State—"each person"—is entitled to the environmental rights in § 19. Rights under § 19 are analogous to the fundamental rights accorded by other guarantees of the New York Bill of Rights. For example, Art. 1, § 11 states "No person shall be denied equal protection of the laws." This understanding is congruent with provisions of Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."[156] Moreover, "Everyone has the right to life, liberty and security of person," and "all are equal before the law and are entitled without any discrimination to equal protection of the law."[157] The right is a personal right.[158] To allege standing to sue in New York courts to secure a person's environmental rights, an individual person needs to show how she or he enjoys the rights that a governmental entity is denying.[159]

156. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1, 3, 7 (Dec. 10, 1948) https://www.un.org/en/about-us/universal-declaration-of-human-rights [https://perma.cc/CVA7-S7VL].

157. *Id.*

158. It remains to be seen if circumstances may emerge that would enable an association of people to assert the right, or more broadly for a local government to invoke the right on behalf of the people in its jurisdiction. In the former case, it seems likely that traditional organizational standing rules would apply. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 497–501 (2009). The latter situation is more complicated, as governmental entities sometimes need to launder constitutional challenges on behalf of their constituents into a form that makes out an injury to the entity's sovereign interests. *See* Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 Or. L. Rev. 363, 415 (2018).

159. This is akin to the showing that the injury is within the zone of interests that an environmental protection statute provides, such as for the State Environmental Quality Review Act, Article 8, Environmental Conservation Law. *See, e.g.*, Tuxedo Land Tr. Inc. v. Town Board of the Town of Tuxedo., 977 N.Y.S. 2d 272, 274 (2013). We anchor our analysis in an understanding that the amendment binds government. With respect to whether § 19 might apply to private parties, in *Fresh Air Fund for the Eastside,*

*2. "Clean air and water"*

The public also understands the plain meaning of "clean" air and water.[160] "Clean" air in § 19 may be defined in terms of the "person" whose lungs must breathe the ambient air available.[161] "Clean" water may similarly be defined in terms of the "person" who drinks, bathes, cooks foods with, or recreates in water. The latter is clear, for example, in the case of persons in Hoosick Falls, NY, whose drinking and bathing water was contaminated. Concerning both rights, a touchstone inquiry, indexed to lay/voter understanding, is simply whether air is safe to breathe and water safe to drink.

Water and air are also immediately related to biodiversity and ecological and human communities of life, both in terms of volume or quantity and in terms of quality. Acid rain contaminates surface

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*Inc. v. State*, the plaintiffs sought to apply Article I, section 19 to a private landfill operator by arguing that its conduct is "so entwined with governmental policies and had such governmental character that its actions can be regarded as state action." Fresh Air for the Eastside, Inc. v. State, 229 A.D.3d 1217, 1218 (N.Y. App. Div. 2024). The Appellate Division Fourth Department rejected the plaintiffs' argument, reasoning that "[a]lthough the disposal of municipal solid waste has traditionally been a governmental function, the fact that landfill operation is a regulated industry and that [the landfill operator's] customers are predominantly municipal entities is insufficient to impute state action to [the landfill operator's] conduct." *Id*. (citations omitted). Some have, however, argued that the amendment should be understood to bind private parties. *See* Evan Bianchi et al., *The Private Litigation Impact of New York's Green Amendment*, 49 COLUM. J. OF ENV'T. L. 357 (2024).

160. See, for example, Pete Seeger's popular songs about clean air and water, and the ongoing educational programs of the Clearwater exemplify the popular awareness. HUDSON RIVER SLOOP CLEARWATER, https://www.clearwater.org/about/ [https://perma.cc/3YR2-BJFV]. On November 8, 2022, New Yorkers overwhelmingly approved the "Clean Water, Clean Air and Green Jobs Environmental Bond Act," a ballot proposition to make $4.2 billion available for environmental and community projects. *See* N.Y. STATE, CLEAN WATER, CLEAN AIR AND GREEN JOBS AND ENVIRONMENTAL BOND ACT, https://environmentalbondact.ny.gov/ [https://perma.cc/K9RC-WEDU]. The public schools across New York teach environmental subjects K-12 and integrate them into public experiential education such as the "Billion Oyster" project for restoring clean water in New York harbor with the NYC Department of Education and other partners. BILLION OYSTER PROJECT, https://www.billionoysterproject.org/ [https://perma.cc/WH99-6N5L].

161. See the extensive programs of the American Lung Association. *Clean Air Outdoors*, AM. LUNG ASS'N., https://www.lung.org/clean-air/outdoors [https://perma.cc/JCL3-T3UY]. New York air conditions are reported in the "State of the Air 2023 Report." *Key Findings*, AM. LUNG ASS'N., https://www.lung.org/research/sota/key-findings [https://perma.cc/9LXR-XH3U]; *see also Report Card: New York*, AM. LUNG ASS'N., https://www.lung.org/research/sota/city-rankings/states/new-york [https://perma.cc/J5FG-Z8EH]. These reports are featured in newspaper and television reporting. *See, e.g.*, Dave Lucas, *American Lung Association in New York Releases Fourth Annual State of Lung Cancer Report*, WAMC NORTHEAST PUB. RADIO (Nov. 16, 2021), https://www.wamc.org/capital-region-news/2021-11-16/american-lung-association-in-new-york-releases-fourth-annual-state-of-lung-cancer-report [https://perma.cc/TQ3Y-DD66].

waters and can degrade biological productivity.[162] Air and water pollution contribute to biodiversity loss. They also contribute to the cumulative impacts of pollution. The synergistic effects of such degrading forces on health and human well-being are a significant problem for human and ecological communities. "Clean" can thus also be defined in the context of ambient "environment" and overlap with a "healthful environment." As Assemblyman Englebright observed in the Assembly's debates on § 19, the concept of a "healthful environment" is a holistic and contextual right. In reply to an inquiry by his colleague Goodell, about whether healthful includes unnecessary noise, natural, scenic, historic, and esthetic qualities, Englebright replied: "*Of course*. The totality of these parts and pieces of our experience from our five senses is to give us a sense of well-being. And biologically, if we take care of the environment, the environment will take care of us."[163]

The constitutional text for the right to clean air and clean water thus has a core plain meaning that the lay public understands. Judges must honor this meaning and understanding in their application of Article I, section 19. Depending on the context, the application may, however, require translating lay meaning (clean water is safe water) in a highly granular fashion (how many parts per million of exposure to a chemical is safe?), or for air (clean air is safely breathable), what length of exposure to ambient air that holds known pollutants is a threshold for a violation of the right. Important contextual considerations will guide judicial assessment of what the terms of Article I, section 19 mean in specific circumstances, including most notably the statutory and regulatory context and scientific evidence.

In some contexts, there may be a *prima facie*, clear threshold that constitutes a breach of a person's rights under section 19. In some instances, an existing environmental law will set a standard for the permissible amount of a pollutant in the ambient environment—roughly consistent with expectations about what is "clean" and "healthful"—but ambient conditions will fail to meet that standard (what we might think of as an "acknowledged exceedance"). In that context, the question becomes less about the meaning of clean or healthful (as that will have largely been predetermined by statute and regulation) and more about (1) whether there is an actionable government act or omission

162. *Acid Rain*, N.Y. State Dep't of Env't Conservation, https://dec.ny.gov/environmental-protection/acid-rain [https://perma.cc/8KF7-39Z6].

163. Comments of Assemb. Englebright, N.Y. State Assemb. Debate (Apr. 24, 2017), 1:31-1:33, https://nystateassembly.granicus.com/MediaPlayer.php?view_id=7&clip_id=4222&meta_id=17575 [https://perma.cc/258Z-3WUE] (emphasis added).

that violates an individual's environmental rights by contributing to or producing the exceedance; and (2) if so, what remedy is warranted. As historically disadvantaged groups are disproportionately exposed to ambient environmental conditions that fail to meet existing standards (sacrifice zone), claims under Article I, section 19 to rectify instances of acknowledged exceedance may be of particular relevance as a tool for environmental justice.[164]

Alternatively, an existing environmental law may set a standard (or an agency may propose a standard), but an individual may challenge that standard as inadequate to meet constitutional requirements. In other words, a plaintiff might claim that the relevant statutory standard produces or would produce water or air that is not "clean" for constitutional purposes (what we might think of as statutory or regulatory insufficiency).

Finally, existing environmental law may be silent, as where regulators have not (yet) adopted a standard and an individual claims that ambient environmental conditions do not satisfy constitutional requirements. In these latter two contexts, scientific evidence would be central. In addition to identifying actionable government conduct, a plaintiff alleging a violation of Article I, section 19 would need to martial scientific evidence to demonstrate a constitutional environmental harm. Environmental rights claims of this type will be challenging to present since a person will need to adduce scientific evidence to frame or prosecute claims. To invoke § 19, a person will need to understand and know baseline data, ambient sampling of air and water and other environmental indicators, consult relevant scientific authorities, and assess health and ecological impacts. A knowledge of applicable environmental law will be needed. All relevant scientific disciplines will provide the evidentiary foundations for claims under Article I, section 19, as they do for all other aspects of environmental law. Unlike other fundamental rights in the Bill of Rights, Article I, section 19 will require persons asserting a denial of their environmental rights to present environmental evidence. Expertise will be drawn from ecology and other environmental sciences, from medicine, and from the social sciences. Since environmental law became a distinct body of law in the 1970s, courts have demonstrated competence in receiving scientific evidence in a wide range of cases, from judicial

164. Rebecca Bratspeis, *Unburdened Communities*, 110 CALIF. L. REV. 1933, 1941 (2023); Rebecca Bratspeis, *This Changes Everything: New York's Environmental Amendment*, THE NATURE OF CITIES (Feb. 25, 2022), https://www.thenatureofcities.com/2022/02/25/this-changes-everything-new-yorks-environmental-amendment/ [https://perma.cc/4FCS-9DLQ].

review of environmental impact assessments to hazardous waste contamination cases.[165]

A specific example drawn from the implementation of the federal Clean Air Act helps to illustrate how a law's textual meaning might be defined in context with reference to existing law and scientific evidence. Federal and New York air pollution laws provide that, in the air quality control regions designated for areas of New York State, primary national ambient air quality standards will be attained and maintained.[166] These air standards are set to be "requisite to protect the public health" with "an adequate margin of safety" to ensure that persons with sensitive lungs, such as children, the elderly, and individuals suffering from respiratory diseases, will be able to breathe air.[167] The Clean Air Act obliges New York to prepare and update a "State Implementation Plan," which "provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State."[168] When air quality actually violates the primary standard, the Clean Air Act authorizes a "citizen suit"[169] and provides for judicial review,[170] but under the Act there is no immediate way for a person to secure her or his basic right to breathe clean air, even if their breathing threatens their health and life.

Article I, section 19 may be deemed to provide a "bright line" that determines when the State has violated a person's right to clean air. If (a) a person's verifiable medical record places her or him within the ambit of those for whom the primary ambient air quality standards afford a margin of safety, and (b) the government's own ambient air quality testing shows that the national standard is not met, then a person may invoke New York's Bill of Rights in Article I, section 19. This would present an instance of statutory exceedance. Courts may hear a demand that a person's right under Article I, section 19 be enforced. This sort of bright line test allows a court to take into consideration everyday experiences and reasonable inferences, a recognition of the lay public's understanding of "clean."

It is not a defense for the State to claim that it has discretion under the Clean Air Act as to how or when to act to provide clean air. That claim is irrelevant to an individual person's right to breathe clean air.

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165. *See, e.g.*, Mark A. Chertok et al., *Environmental Law: Developments in the Law of SEQURA*, 77 Syracuse L. Rev. 717, 719 (2023) (the latest in an annual series of articles canvassing developments in New York Environmental Law).
166. Clean Air Act § 107, 42 U.S.C. § 7407.
167. Clean Air Act § 109, 42 U.S.C. § 7409.
168. Clean Air Act § 110(1), 42 U.S.C. § 7410(1).
169. Clean Air Act § 304, 42 U.S.C. § 7604.
170. Clean Air Act § 307(b), 42 U.S.C. § 7607(b).

The bright line is an objective test: either the air is clean for the person to breathe safely or it is not. The key questions in such a claim would not be the meaning of "clean air"—the National Ambient Air Quality Standards already provide at least a minimum—but the identification of an actionable (state) government act or omission and possibly how to structure a remedy.

Just as evolving conditions give rise to new applications of rights to speech or assembly, or governmental intrusions on privacy, what constitutes clean air, clean water, and a healthful environment will likely evolve as well. And, of course, it is not only judges who will be called upon to assess what the terms of Article I, section 19 mean in specific circumstances. Article I, section 19 should have a significant constitutive function in shaping the content of environmental statutes, regulations, and permits going forward.[171] In exercising their authority, government actors, including agencies and local governments, must consider not just how to implement their statutory authority, but how to do so consistent with Article I, section 19. Even the Legislature, in adopting laws, must be mindful that they do not contravene environmental rights. The meaning of Article I, section 19 in specific contexts will thus take shape with input from different branches and levels of government, the regulated community, advocates, and the citizenry in addition to the judiciary.

*3. "A Healthful Environment"*

As Assemblyman Englebright observed in the Assembly's debates on the amendment, the concept of a "healthful environment" is a holistic and contextual right. As noted above, debate in the Assembly focused on whether "healthful" includes unnecessary noise or natural, scenic, historic, and esthetic qualities. Englebright replied: "Of course, the totality of these parts and pieces of our experience from our five senses is to give us a sense of well-being. And biologically." He added, "if we take care of the environment, the environment will take care of us."[172]

This broad conceptualization of a "healthful environment comports with the plain meaning definition of "environment." Each person is

171. Rebecca Bratspies, *Administering Environmental Justice: How New York's Environmental Rights Amendment Could Transform Business as Usual*, 41 PACE ENV'T. L. REV. 100, 103 (2024) (explaining that "state and local agencies can translate constitutional environmental rights into facts on the ground and begin building an administrative culture that prioritizes and values the constitutional right to clean air, clean water, and a healthful environment").

172. Comments of Assemb. Englebright, *supra* note 163.

part of and has an interest in nature.[173] The American Psychological Association has documented that human time spent in nature supports mental health and wellbeing.[174] A healthful environment is one in which biodiversity is sustained, and ecosystem integrity is measurably maintained.[175] The Legislative debates about the amendment treat beauty and culture and nature conservation as entitlements of the People of the State of New York.[176] These are elements of a healthful environment.

It may well be that New York will construe § 19 as Montana has its analogous constitutional right to the environment. In 1999, The Montana Supreme Court held that: "*Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." The environmental rights provide broad protections for recreation and beauty that are "both anticipatory and preventative."*[177]

*4. The Plain Meaning of "Environmental Rights"*

Thus, "clean" air and water are key components of a healthy environment, but the "healthful environment" embraces complementary and additional elements. The health of the biosphere determines the health of humans. The hydrologic cycle and biodiversity function without regard to national, state, or local borders. A person's lungs are a human common denominator, essentially the same everywhere. Just as constitutional guarantees to Due Process of Law and other fundamental rights exist and are applied analogously in different jurisdictions, so too

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173. The advent of climate change impacts underscore this. *See* Helen Pearson, *The Rise of Eco-Anxiety: Scientists Wake Up to the Mental-Health Toll of Climate Change*, 628 NATURE 256–258 (2024), https://www.nature.com/articles/d41586-024-00998-6 [https://perma.cc/7EC6-HTS8].

174. Kirsten Weir, *Nurtured by Nature*, Am. Psych. Ass'n (Apr. 1, 2020), https://www.apa.org/monitor/2020/04/nurtured-nature [https://perma.cc/BRE4-3L7F].

175. Seen in this light, it is likely that § 19 has the additional legal effect of establishing a further foundation for each person to enjoy the nature liberties set forth in some or all of the provisions set forth in the "Conservation Bill of Rights" in Article XIV, Sections 3 and 4.

176. *See, e.g.*, Comments of Assemb. Englebright, *supra* note 163, at 1:28-1:29 ("It will begin with the children of the state, who will be taught that it is their right to grow up in a healthful environment. And I believe that that will shape their behavior as stewards of the environment. I believe it will shape the future of not only their families and their children and their children's children, but that there will be a tradition . . . to believe in the future . . . as it relates to the health and well being of the people and the environment."). Video and transcripts of the Assembly debates can be found on the New York State Legislature's website at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A06279&term=2017&Summary=Y&Chamber%26nbspVideo%2FTranscript=Y Y [https://perma.cc/ER7Q-4GQN].

177. Montana Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1249 (Mont. 1999).

Environmental Rights are likely to receive analogous protection under the various state and nations constitutions that recognize them. That said, New York courts will chart their own course.

## IV. Operationalizing Article I, § 19

The procedural aspects of operationalizing Article I, section 19, along with the available mechanisms to enforce the right in practice, also present significant questions. It is certainly the case that the elected officials and agencies of New York's government at the state, county, and municipal levels are obliged by their oaths of office to uphold the New York Constitution and carry out the mandate of Article I, section 19 by modifying their approaches to protecting the environment without being compelled to do so. Nonetheless, the reality of operationalizing Article I, section 19 will involve litigation and administrative action instigated by non-governmental actors against the government.[178] Because of the multiplicity of governments whose decisions implicate Article I, section 19, it will be important that New York courts provide a clear body of state-wide decisional law quickly.[179] As regular litigators in New York's courts know well, there are many nuances of New York civil practice that demand careful attention.[180]

While a full survey of the panoply of issues attendant in stating and litigating a claim under Article I, section 19 is beyond the scope of this Article,[181] some significant considerations may be noted: (A) claims under Article I, section 19 challenging existing regulations and permits may be brought at any time since January 1, 2022, when it came into

178. *See* Nicholas A. Robinson, *The Dawn of Environmental Human Rights in New York*, 43 N.Y. Env't L. 30 (2023), *reprinted in 95* N.Y. State Bar Ass'n J. 41, 42 (July/Aug. 2023).

179. Indeed, the early litigation is already underway. At the time of the writing of this article, multiple suits are pending in New York state courts employing the NYGA to one degree or another. Pace University Elizabeth Haub School of Law maintains a regularly updated list of the pending litigations, including the party filings on its website. Cases, *Pace University Elizabeth Haub School of Law*, https://nygreen.pace.edu/cases/ [https://perma.cc/9RJE-3EVS] (last visited Nov. 1, 2024).

180. *See* David L. Ferstendig, *The CPLR: A Practitioner's Perspective*, 16 N.Y.U. J. Legis. & Pub. Pol'y 680, 682–83 (2013) (describing nuanced array of practice rules).

181. The novelty of Article I, section 19, in New York jurisprudence, and the small number of cases pending, have precluded much written professional analysis, or continuing legal education. For analogous commentaries from other jurisdictions, see *Secondary Literature*, Pace Univ. Elizabeth Haub Sch. of L., https://nygreen.pace.edu/secondary-literature/ [https://perma.cc/ST4N-2DV7] (last visited Nov. 1, 2024). For an early CLE presentation, see Nicholas A. Robinson, Professor, Elisabeth Haub Sch. of L. at Pace Univ., N.Y. State Bar Ass'n Annual Meeting before the Environment and Energy Law Section (Jan. 25, 2022), https://digitalcommons.pace.edu/lawfaculty/1205/ [https://perma.cc/C2HA-XBBS].

force, in courts or at the administrative level; (B) the available remedies to petitioners will often raise novel questions of first impression, which may be problematic; (C) the doctrine of constitutional avoidance may slow the development of precedent, particularly where litigants raise claims under Article I, section 19 in conjunction with other statutory claims; (D) facial challenges may be difficult to prevail upon because of the statutory presumption of constitutionality; and (E) plenary actions to enforce Article I, section 19, like other sections of the Bill of Rights, have no statute of limitations, but failures to have challenged a permit or act within the four month statute of limitations under CPLR article 78 may present procedural issues about timeliness of a claim or remedy.

### *A. Administrative Options*

Petitioners can raise issues and claims related to Article I, section 19 in the context of administrative actions initiated or continuing after the incorporation of Article I, section 19 into the Constitution. Litigants who start at the administrative level have several key advantages if their goal is to increase the strength of existing environmental regulation. By starting at the agency, those petitioners avoid dealing with later arguments that they failed to exhaust their administrative remedies[182] and they allow the target agency (e.g., the Department of Environmental Conservation) the opportunity to update its regulations and develop positive administrative precedent regarding Article I, section 19.[183]

And litigants should not have to wait or should not have to wait long to safely commence such actions. Article I, section 19 gives petitioners an avenue to challenge the continuation of existing permits on their current terms. DEC's regulations allow anyone other than the permitted entity itself to seek modification, suspension, or revocation of an existing permit "at any time" where, among other grounds, there has

182. An exhaustion defense is somewhat dubious for an Article I, section 19 claim even if it is not raised at the administrative level. Constitutional claims are typically exempt from the exhaustion requirement. *See* Town of Oyster Bay v. Kirkland, 978 N.E.2d 1237, 1240 (N.Y. 2012). Nevertheless, the Attorney General asserted an exhaustion claim in her motion to dismiss in the ongoing FAFE litigation, though the argument was later abandoned on appeal. In any case, the issue is best avoided for early Article I, section 19 litigants because it inserts a secondary issue into the case. See the discussion on avoiding additional issues *infra* at pp. 159-164.

183. Like courts, administrative agencies in New York are bound by a kind of *stare decisis*. Later adjudicatory decisions by the agency must either follow applicable agency precedent or acknowledge that precedent and explain why the agency is not doing so. *See In re* Charles A. Field Delivery Serv., 488 N.E.2d 1223, 1226–27 (N.Y. 1985); Terrace Court v. New York State Div. of Hous. and Cmty. Renewal, 963 N.E.2d 1250, 1253 (N.Y. 2012).

been "a material change in . . . applicable law."[184] While DEC does not appear to have previously made use of this provision for a change in the constitution, it has used it when there has been a change in regulation.[185] And a relevant change in the constitutional scheme in which all of New York's environmental laws and regulations must operate certainly seems to qualify as "material" where, for example, a petitioner is making the kind of regulatory insufficiency claim discussed above.[186]

Alternatively, a petitioner can simply wait for both permits and regulations. They will not have to wait long. The New York State Administrative Procedure Act ("SAPA") generally requires all agencies to review all of their regulations in five-year intervals[187] and to publish which rules are under review in an annually issued regulatory agenda.[188] The review process includes public comment and the decision not to modify a rule is subject to the same level of judicial scrutiny as a new rulemaking. This means that parties seeking to assert that existing regulations must be modified to comport with the guarantees of Article I, section 19 will have a chance to do so for any existing regulation in short order. Similarly, many permits last only for periods of a few years, and applications for permit renewal are an opportunity to challenge existing permits on grounds arising under Article I, section 19.

### *B. Remedies*

The guarantees in the Bill of Rights provide substantive rights, but also have a procedural dimension: where there is a right, there is a remedy.[189] The remedies available upon a judicial finding that the government violated Article I, section 19 will necessarily depend upon the context. An unconstitutional permit, ordinance, regulation, or statute would be struck down or reinterpreted to avoid the constitutional infirmity. In the event of a violation of the right to clean air, the remedy might involve providing a person air purification in her or his home

184. N.Y. Comp. Codes R. & Regs. tit. 6, § 621.13(a)(4).

185. There are no reported cases or administrative decisions to be found applying 6 N.Y.C.R.R. § 621.13(a)(4) to constitutional changes specifically. DEC has used the provision to reconsider permits based on a change in regulation or statute. *See, e.g.*, Notice of Intent to Revoke Air State Facility Permit of NYC Energy LLC, 2017 WL 2869903, at *1 (N.Y. Dep't Env't Conservation 2017).

186. There is also a ready analogy to motions to renew under N.Y. C.P.L.R. § 2221(e)(2), where even "A clarification of the decisional law is a sufficient change in the law to support renewal." Dinallo v. DAL Elec., 874 N.Y.S.2d 246, 247 (N.Y. App. Div. 1st Dep't 2009). If mere clarification of the law is sufficient, it is hard to see how a new constitutional amendment could fail to be.

187. N.Y. A.P.A. § 207 (McKinney 2024)(1)(a).

188. *Id.* § 207(2).

189. *See* Magraw, *supra* note 103.

or apartment, providing oxygen, or medical care to prevent or offset the harm caused by breathing polluted air. In the event of a violation of the right to clean water, the remedy could be as straightforward as providing potable water in containers, as has been done for lead pipes in Flint, Michigan.[190]

Courts will determine whether Article I, section 19 enables a remedy to order a state agency to bring a specific enforcement action against a specific regulated entity. In one case, *Fresh Air Fund for the Eastside, Inc. v. State*, plaintiffs concerned about odors from a landfill operating pursuant to a state permit filed an action seeking a declaration that the permitting agency, landfill operator, and New York City, which sends municipal waste to the landfill, were violating their rights under Article I, section 19. The plaintiffs' prayer for relief also asked the court to issue an order requiring the closure of the landfill or immediate abatement of the odors. On appeal from the Supreme Court's denial of motions to dismiss, the Appellate Division Fourth Department reasoned that "although the complaint 'ostensibly seeks declaratory relief, it is essentially a CPLR article 78 proceeding in the nature of mandamus,' seeking to compel the State to take enforcement action against a private entity" because "the only conduct on the part of State defendants that the complaint alleges violates the constitutional right of plaintiff's members to clean air and a healthful environment is their regulatory failure to take enforcement actions against [the landfill operator] based on its allegedly inadequate operation of the landfill."[191] Having characterized the complaint in this way, the Fourth Department dismissed the action because "[t]he remedy of mandamus is typically not available where . . . a party seeks to compel an administrative agency of the State to take enforcement action against a private entity."[192]

Plaintiffs may be wise to style their claims and requests for relief to avoid the appearance of requesting a specific enforcement action. It seems clear, however, that courts cannot simply neglect to address constitutional deprivations occurring under the auspices of a permit. The challenge will be discerning how to frame and bring such claims. As discussed below, one possibility is that claims that ongoing violations of

190 *See* Ryan Felton, *Bottled water must be delivered to Flint residents in lead crisis, judge rules*, The Guardian (Nov. 12, 2016, 8:50 AM), https://www.theguardian.com/us-news/2016/nov/12/flint-michigan-lead-bottled-water-delivery [https://perma.cc/XAE2-M3UE].

191. Fresh Air for the Eastside, Inc. v. State, 217 N.Y.S.3d 381, 385–86 (N.Y. App. Div. 4th Dep't 2024).

192. *Id.* at 385.

permits transgress a plaintiff's environmental rights might be addressed through a petition to revoke or modify a permit.

Whether monetary compensation or damage is available for a violation of Article I, section 19 is as of yet untested. With the Court of Appeals decision in *Brown v. State* in 1994,[193] New York became the twentieth state to recognize a direct cause of action for monetary damages based on a violation of its state constitution.[194] While the decision in *Brown* explicitly recognized a cause of action together with damages only for a violation of the equal protection and search and seizure clauses of New York's Bill of Rights, it provided a framework for determining whether a violation of other New York constitutional provisions could give rise to monetary compensation. The principal requirements of *Brown*, as may pertain to the actions bought under Article I, section 19, for the recovery of monetary damages, are twofold: (1) recovery of compensation can only exist if there are no other remedial measures "necessary and appropriate to ensure the full realization of the rights they state" and (2) common law antecedents exist to allow a remedy to be implied.[195]

Five years after its decision in *Brown*, the Court of Appeals elaborated upon its holding, clarifying that monetary compensation in an action challenging the validity of a search warrant was not appropriate given the presence of other remedies available to the plaintiff, including suppression of the evidence at trial.[196] The Court contrasted a flawed search warrant with the circumstances underlying *Brown*, which involved city wide racially based stops and interrogations for which, according to the Court, "neither declaratory nor injunctive relief was available to plaintiffs . . . . [f]or those plaintiffs it was damages or nothing."[197]

Concerning the second requirement as a predicate for compensation set forth in *Brown*, common law antecedents need to be identified. The common law origin for safeguarding the public from adverse environmental impacts began as early as the 1500s and accelerated between 1850 and 1900, when increased industrialization created new sources of pollution from factories. During this time, common law torts based upon trespass and nuisance developed to address the impacts of industrialization and were recognized by the courts. Remedial

193. Brown, *supra* note 113, at 191.
194. Donoghue & Edelstein, *supra* note 113.
195. *Id.* at 175.
196. Martinez v. City of Schenectady, 761 N.E.2d 560, 564 (N.Y. 2001).
197. *Id.* at 563.

requirements typically included injunctions to forestall future damages and remediate existing issues.[198]

If an antecedent is deemed to exist, the availability of monetary compensation for violations of Article I, section 19, will ultimately turn upon the existence or absence of other remedial measures at the time a violation occurs. A brief hypothetical may help highlight the alternatives.

Assume the government intends to issue a permit authorizing the discharge of industrial wastewater containing contaminants. An impacted party may seek administrative remedies to prevent the permit from issuing and, failing that, bring suit seeking judicial review permitted under New York State law.[199] Such action must be commenced within four months of a final agency action on the matter, which in this case would be the issuance of a permit.[200] At that point, existing law will likely be deemed adequate to afford an opportunity to parties seeking to have the violations addressed, foreclosing the award of compensatory damages under Article I, section 19.

The analysis shifts if the aggrieved party seeks to remedy *an ongoing violation* of an existing permit. In this circumstance, a citizen suit to compel enforcement of an environmental law is not available in New York. An impacted party may bring private tort actions against a polluting entity based on common-law nuisance, trespass, or personal injury. Those causes of action do not compel the state or locality to enforce a violation of environmental law unless the challenged violation was the result of the government's own conduct or that of its employees or agents.

The remaining alternative to address ongoing permit violations is that an impacted party may petition the government to modify or revoke a permit for ongoing violations of the permit.[201] The state agency that issues environmental permits has made clear that while it may consider requests from an interested party for modification, suspension, or revocation, it is not obligated to act. Should the agency conclude that the violation exists, but it does not justify modification or revocation

198. Richard A. Epstein, *From Common Law to Environmental Protection: How the Modern Environmental Movement Has Lost Its Way*, 23 Sup. Ct. Econ. Rev. 141, 146 (2015).

199. *CPLR 217: Petitioner Must Commence Proceeding for Writ of Prohibition Within a Time "Reasonably Necessary to Protect His Rights"*, 47 St. John's L. Rev. 530, 535–36 (1973); Dominick L. Gabrielli & John M. Nonna, *Judicial Review of Administrative Actions in New York: An Overview and Survey*, 52 St. Johns L. Rev. 361, 369–70 (1978).

200. N.Y. C.P.L.R. § 217.

201. N.Y. Comp. Codes R. & Regs. tit. 6, § 621.13(a)–(b).

of a permit, the aggrieved party may seek judicial review, and in that context again raise Article I, section 19 as warranting remedial action and monetary compensation.

### *C. Constitutional Avoidance*

Ultimately, fulsome implementation of Article I, section 19 will require that the New York Court of Appeals and the Appellate Divisions render decisions setting the scope of the right and how it may be vindicated in future litigation. But, getting appellate courts to issue decisions on constitutional issues, particularly issues of first impression, can be a challenge as a result of the availability of the doctrine of constitutional avoidance.

New York courts employ the constitutional avoidance doctrine to decide cases on other, non-constitutional grounds.[202] Under one common formulation, courts are directed to avoid resolving constitutional questions if there are other issues in the case that can dispose of the entire matter.[203] Thus, where a case presents multiple claims and it can be resolved on a narrow, settled issue, New York courts will do so. Here, that means leaving the constitutional issue unaddressed without the petitioner having the opportunity for appellate review of that issue.[204]

For example, imagine a hybrid Article 78 proceeding challenging a new regulation on permissible contaminant levels in wastewater discharges. The petition presents both a meritorious SAPA procedural challenge to how the regulation was adopted and a substantive constitutional claim under Article I, section 19 on the basis that the allowed contaminant levels do not meet the constitutional requirement of clean water.[205] Under the avoidance doctrine, courts are required to address the SAPA challenge first, thereby resolving the entire case without ever reaching the constitutional issue.

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202. There are several different formulations of the constitutional avoidance doctrine. *See* Earnest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1574 (2000) (discussing the doctrine and its development); *see generally* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

203. Young, *supra* note 202, at 1574–75 ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case can be disposed of." (quoting Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

204. This risk is not minimized by bringing parallel litigations raising separate claims, but seeking the same goal, for two reasons. First, the cases may be consolidated. Second, if the case that does not involve the NYGA issue is resolved in their favor first, it will moot the case with the NYGA issue.

205. N.Y. C.P.L.R. § 7803(2), (3).

Importantly, a "win" that leaves the critical constitutional questions unresolved, as in the example above, is the end of the road for the petitioner in that case. There is no appeal available to them. The CPLR requires that an appellant be "aggrieved" in order to take an appeal.[206] Petitioners who receive the relief that they are seeking, invalidation of the new regulation in the example above, are not "aggrieved" within the meaning of the CPLR and may not prosecute an appeal. This is true even if the petitioner would have preferred that the reviewing court decide the matter on other grounds, such as a constitutional challenge.[207] The losing side can appeal, of course, but may strategically choose not to in order to limit the precedential effect of the decision from Supreme Court to that individual case and regulation.

Not only can limiting the issues in a given case to claims under Article I, section 19 prevent courts from using the doctrine of constitutional avoidance to sidestep the constitutional issues, it can also increase the likelihood of obtaining review by the New York Court of Appeals where there has been an adverse decision by the Appellate Division. Appeals to the Court of Appeals are mostly a matter of discretion and permission to appeal is overwhelmingly denied, but there are a few situations where litigants have an appeal as of right to the Court.[208] Most relevant to successfully obtaining review of novel claims under Article I, section 19 is CPLR § 5601(b)'s grant of an appeal as of right "from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States" and a coordinate New York State constitutional provisions found in Article VI, section 3(b)(1)-(2).[209]

There is no guarantee that limiting the issues to constitutional claims will receive Court of Appeals review after an adverse decision of the Appellate Division, but it does increase the odds greatly over cases where leave to appeal is required. To be sure, the availability of appeals under CPLR section 5601(b) and Article VI, section 3(b)(1)-(2) has been manipulated by the Court of Appeals on occasion.[210] As a

206. N.Y. C.P.L.R. § 5511.

207. T.D. v. New York State Off. of Mental Health, 690 N.E.2d 1259, 1260 (N.Y. 1997).

208. *See* N.Y. C.P.L.R. § 5601; *see generally* Arthur Karger, The Powers of the New York Court of Appeals §§ 6.1–8.1 (3d ed. 2005) (explaining the grounds for appeal as of right).

209. *See also* Karger, *supra* note 208. at § 7:1.

210. Kachalsky v. Cace, 925 N.E.2d 80, 80 (N.Y. 2010) (Smith, J., dissenting) ("But we have at times followed the practice–one in which, I confess, I have joined–of giving 'substantial' a much more flexible meaning, so flexible that it confers on us, in effect, discretion comparable to that we have in deciding whether to grant permission to appeal under C.P.L.R. 5602."); *see generally* Alan J. Peirce, *What Does it Mean if Your Appeal as of Right Lacks a "Substantial" Constitutional Question in the New*

general matter, though, early cases raising questions under Article I, section 19 should overcome the three most common stumbling blocks for constitutional appeals as of right: (1) that the constitutional issue be "preserved,"[211] (2) that the constitutional issue be "directly involved," and (3) that the constitutional issue be "substantial." Preservation, in this context, means that the argument has been made in the courts below, starting at the trial level.[212] This should uniformly be the case where the constitutional issue is the only issue being pressed by the petitioner.[213] Similarly, "direct involvement" is met when the decision below addresses the constitutional issue in a manner that is dispositive.[214] This, too, should be met in almost all early cases under Article I, section 19 where the petitioner has limited their issues to constitutional challenges. And, though the squishiest of the three requirements, it is hard to see how questions of first impression on a brand-new amendment to the New York State Constitution fails to meet any honestly-applied definition of substantiality.

Obtaining early Court of Appeals review may prove to be especially important in the development of the jurisprudence around Article I, section 19. Even a single adverse Appellate Division decision on Article I, section 19 has the potential to derail the utility of the amendment state-wide for however long it takes for a later case to be decided by the Court of Appeals or contradicted by the Appellate Division from another department. This is because a unique feature of New York's court structure is that Supreme Court and the Appellate Divisions are, constitutionally speaking, *one court*. Consequently, the first Appellate Division to rule on a legal issue binds every trial court in the entire state "until the Court of Appeals or [another Appellate Division] pronounces a contrary rule."[215]

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*York Court of Appeals?*, 75 Alb. L. Rev. 899, 899–900 (2012); Meredith R. Miller, *An Illusory Right to Appeal: Substantial Constitutional Questions at the New York Court of Appeals*, 31 Pace L. Rev. 583, 584 (2011).

211. Preservation is often viewed as a component of direct involvement. *See* Henry v. N.J. Transit Corp., 210 N.E.3d 451, 454–55 (N.Y. 2023). We have separated the two for purposes of this discussion to highlight the requirement that the lower court decision has directly addressed the constitutional issue.

212. *Henry*, 210 N.E.3d at 455.

213. This is assuming that the petitioner has not inadvertently caused some other procedural issue to be injected into the case by, for example, failing to bring the action within 4 months inviting litigation on the timeliness of the action. *See infra* p. 158.

214. *See, e.g.*, Twin Coast Newspapers, Inc. v. State Tax Comm'n, 476 N.E.2d 998, 999 (N.Y. 1985) ("Since a question of statutory interpretation would be dispositive, this appeal must be dismissed.").

215. Mountain View Coach Lines, Inc. v. Storms, 476 N.Y.S.2d 918, 920 (N.Y. App. Div. 2d Dep't 1984); *see also* People v. Turner, 840 N.E.2d 123, 127 (N.Y. 2005); Duffy v. Horton Mem'l Hosp., 488 N.E.2d 820, 822 (N.Y. 1985).

### *D. Facial Challenges*

While Article I, section 19 can clearly be invoked to challenge statutes, ordinances, and local laws as facially unconstitutional, facial challenges may be difficult to win because New York Courts must apply the statutory "presumption of constitutionality."[216] That presumption comes into play for all facial challenges to the constitutionality of legislative enactments, including local laws and zoning ordinances.[217] Overcoming the presumption requires that the petitioner prevail over "the heavy burden of proving beyond a reasonable doubt that the statute is in conflict with the constitution."[218] This is a higher bar than one might think, as the Court of Appeals has repeatedly observed that a successful challenge must "'demonstrat[e] that in any degree and in every conceivable application, the law suffers from wholesale constitutional impairment.'"[219]

Overcoming the presumption and demonstrating facial unconstitutionality is not impossible,[220] but doing so may be difficult in the context of challenges under Article I, section 19. It may prove difficult to demonstrate that the legislation will *necessarily* result in a lack of clean air, clean water, or the creation of an unhealthy environment *in every conceivable case* where it applies. An early New York Court of Appeals decision holding that a measure does not violate Article I, section 19, no matter how carefully couched in the context of the presumption, could chill future challenges and be applied overly broadly by lower courts, undermining the new constitutional guarantee even where specific governmental actions are later challenged.

Challenging only specific actions rather than enactments as a whole will also make it easier to avoid similarly problematic holdings with respect to the standing of potential petitioners bringing claims under Article I, section 19. Simply put, the more general the governmental action being challenged, the more difficult that it may prove to be to identify a party suffering an injury that is sufficiently "specific to the individuals who allege it, and . . . 'different in kind or degree from the public at large.'"[221] A s with facial constitutional challenges, any early decisions finding a lack of standing for plaintiffs raising claims under Article I, section 19 could create problematic precedent.

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216. *See* People v. Viviani, 169 N.E.3d 224, 229 (N.Y. 2021).
217. *See* Police Benevolent Ass'n of New York v. City of New York, 224 N.E.3d 522, 531 (N.Y. 2023); Town of Delaware v. Leifer, 139 N.E.3d 1210, 1215 (N.Y. 2019).
218. *Viviani*, 169 N.E.3d at 229 (cleaned up).
219. *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (citations omitted).
220. *See, e.g.*, *Viviani*, 169 N.E.3d at 229.
221. Sierra Club v. Village of Painted Post, 43 N.E.3d 745, 749 (N.Y. 2015) (quoting Soc'y of Plastics Indus. v. County of Suffolk, 573 N.E.2d 1034, 1044 (N.Y. 1991)).

### *E. Timing*

Finally, while claims under Article I, section 19 may be brought as plenary lawsuits, for declaratory or injunctive relief, they doubtless will often involve review of decisions of administrative agencies. The courts may need to address the relationship of the plenary action with a judicial review petition under Article 78 of the Civil Practice Law and Rules ("CPLR"). As noted above, in *Fresh Air Fund for the Eastside, Inc. v. State*, the Fourth Department rejected plaintiffs' efforts to style their claim as a declaratory judgment action, finding that it constituted and would be treated as an Article 78 proceeding in the nature of mandamus.[222] Until courts clarify whether or not CPLR Article 78 applies to claims arising under Article I, section 19, when possible, like Article 78 petitioners, persons suing to assert claims under Article I, section 19 may wish to be careful to bring their actions within 4 months of the governmental action they seek to challenge. While petitioners have opposed motions to dismiss based on whether the type of action is properly an Article 78 proceeding, declaratory judgment action, or something else,[223] it is important to consider whether judicial review of a fundamental provision of the Bill of Rights, like Article I, section 19, is distinguishable from review of a governmental decision merely as a matter of administrative law.[224]

## Conclusion: *Constitutionalizing* Environmental Rights

The principles and framework of the New York State Constitution have guided the Empire State since the Constitutional Convention first convened in White Plains, New York, in 1776, leading to the adoption of the Constitution in Kingston on April 20, 1777.[225] Voters have confirmed many amendments, both proposed by seven constitutional conventions[226] and proposed by the Legislature. This ongoing debate

222. Fresh Air for the Eastside, Inc. v. State, 229 A.D.3d 1217 (N.Y. App. Div. 2024).

223. Fresh Air for the Eastside, Inc. v. State, No. E2022000699, 2022 WL 18141022, at *8 (N.Y. Sup. Ct. Dec. 20, 2022).

224. N.Y. C.P.L.R. § 217(1).

225. See the New York State Library timeline, *Timeline*, N.Y. State Libr., https://www.nysl.nysed.gov/collections/nysconstitution/timeline [https://perma.cc/57CR-G4CK], and the Historical Society of the NY Courts, *New York State Constitution*, Hist. Soc'y of the N.Y. Courts, https://history.nycourts.gov/about_period/nys-constitution/ [https://perma.cc/Y47E-78LD]. New York's "distinctive constitutional culture" from the colonial period onward is discussed in Daniel J. Hulsebosch, Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830 (Thomas A. Green, Hendrik Hartog & Daniel Ernst eds., Univ. N.C. Press, 2005).

226. The seven conventions were 1801, 1821, 1846, 1867, 1894, 1915, 1938. *See Bibliography*, *in* Making a Modern Constitution: The Prospects for

about the Constitution has produced significant innovations. In 1821, for instance, rights of freedom of speech and *habeas corpus* were added to the Bill of Rights.[227] Throughout, New York has debated the "liberties" that a people hold and the duties that the government must observe to ensure those rights.

New York's Constitution has evolved and doubtless will evolve further. The Constitution is uniquely an expression of the values of the body politic in New York over time. It defines and safeguards the public interest and individual liberties. State constitutional rulings have recognized and construed rights apart from analogous protections under federal law. New York's innovations are part of federalism.[228]

Rachel Carson observed in her classic work *Silent Spring*, "If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers despite their considerable wisdom and foresight could conceive of no such problem."[229] When New York voters adopted the Legislature's recommendation for vesting their "Environmental Rights" in the Bill of Rights, their decisions reflected the positive and innovative approach to the State's constitutional framework.[230] Adopting Article I, section 19, is only the first step in an intergenerational legal process to attain environmental justice for all persons. Over the years, New York courts developed a sound record of advancing constitutional rights—including the Article XIV provisions on the environment.

Chief Judge Judith S. Kaye has written profoundly about how New York has advanced and refined new rights. "[T]he People of this State

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Constitutional Reform in New York 363, 370–82 (Rose Mary Bailly & Scott N. Fein eds., 2016). The voters did not accept the recommended amendments of the convention convened in 1967. *Id.*

227. Bruce W. Dearstyne, *New York State Begins: The First State Constitution, 1777*," *in* Making a Modern Constitution: The Prospects for Constitutional Reform in New York 3, 20 (Rose Mary Bailly & Scott N. Fein eds., 2016).

228. "When starting out after the Revolutionary War, the citizenry had become used to seeing their state governments as keepers of the Rule of Law, the population proved willing to unite under one polity but unwilling to endanger the Rule of Law by allowing an unfamiliar entity–the national government–to win too much power. If there was any question about that, the framers made their objective clear in the Tenth Amendment to the U.S. Constitution: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to States, are reserved to the States respectively, or to the people.'" Albert M. Rosenblatt, *Always in the Direction of Liberty: The Rule of Law and the (Re)emergence of State Constitutional Jurisprudence*, 90 N.Y. State Bar Ass'n J. 25, 25 (Jan. 2018).

229. Rachel Carson, Silent Spring 12–13 (Boston, Houghton Mifflin 1962).

230. Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L. Rev. 399, 409 (1987).

have chosen to 'constitutionalize' a great number of other matters in the Bill or Rights." [231] These rights involve issues as diverse as labor rights, pensions, and education. In light of the historical development of the State's Bill of Rights, it is not surprising that the People have invested their Environmental Rights with the sanctity of the State's Bill of Rights. As Judge Kaye further observes, "It is a fact of human nature, and of the democratic process, that an action—both an individual and as a community—sometimes conflicts with our most basic, or overarching values. Therefore, what we set out to embody in a Constitution are those values that we do wish to sacrifice to more transient choices."[232]

In construing Article I, section 19, New York courts will fashion an independent body of jurisprudence to recognize it as a human right in ecological settings. The overwhelming vote in favor of the "Green Amendment" in 2021 is a recognition that community behavior, allowing pollution to grow incrementally so vast, has impaired individual liberties to clean air and water and a healthful environment. This Article offers an initial assessment of the challenges that New York's courts will face initially as they construe each person's Environmental Rights. The era of constitutional jurisprudence for environmental rights has barely begun, and is likely to grow quickly, mirroring rising trends in environmental impairment.[233] It is reasonable to conclude, with Judge Kaye, that the State's courts will now develop "an independent body of state constitutional doctrine [that] not only has deep historical roots but also is theoretically sound."[234]

231. *Id.*
232. *Id.* at 421.
233. Nicholas A. Robinson, *Depleting Time Itself: The Plight of Today's "Human" Environment*, 51 Env't Pol'y & L. 361, 362 (2021).
234. Kaye, *supra* note 230, at 425.