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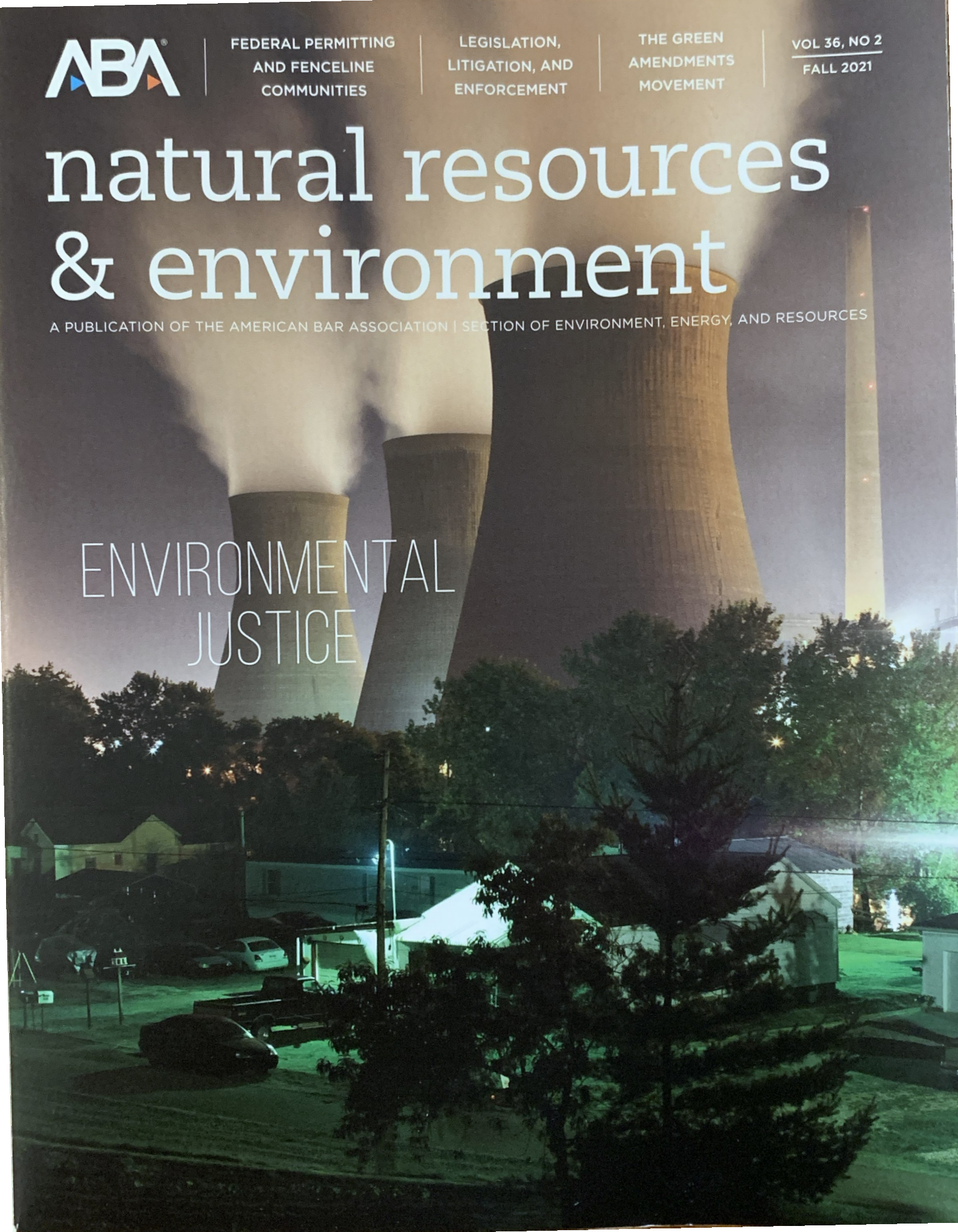
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ENVIRONMENTAL JUSTICE



Constitutional Green Amendments

Making Environmental Justice a Reality

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I imagine if you couldn't trust the water coming out of your faucets because it was tainted with dangerous levels of lead or cancer-causing chemicals. Imagine if the air quality was so poor in your neighborhood that you couldn't safely enjoy the outdoors without fear of an air pollution-induced heart attack or asthma attack. What if research showed the pollution in your community was so bad it was impacting the ability of your children to learn in school because of its effect on their bodies and brains? How would you feel if your community was suffering from pollution and degradation not only because our laws are not strong enough to provide essential protections, but because the laws were structured and implemented to disregard the environmental health of your children, family, and community because of the color of your skin or your ethnicity? For many Americans, this isn't a hypothetical but their experience. Environmental degradation impacting predominantly Black, Indigenous, or people of color (BIPOC) communities—environmental racism—is a reality for many living within these communities.

Ending Environmental Racism Requires Systemic Reform

The United States' system of environmental laws sacrifices communities of color, Indigenous, low-income, and immigrant communities (environmental justice or EJ communities) to heavy industries, oil and gas operations, truck traffic, dangerous development practices, corporate and military toxic contamination, and conditions that contaminate and degrade their water, air, soil, and environment. The ramifications are many—serious illness, economic hardship, undermined education, depression, diminished quality of life, and more. Across our nation, EJ communities are living in “sacrifice zones” and are more deeply impacted by pollution and environmental degradation. According to Mustafa Santiago Ali, former Assistant Associate

Administrator for Environmental Justice and Senior Advisor for Environmental Justice and Community Revitalization at the U.S. Environmental Protection Agency, a “sacrifice zone” is “where we place everything that nobody else wants: coal-fired power plants, incinerators, petrochemical facilities and waste treatment facilities.” *Mustafa Santiago Ali Describes the Path Forward for Environmental Justice*, High Country News (Dec. 3, 2020).

Environmental racism is finally starting to garner the attention it deserves with the need for true EJ as a call to action to end the inequitable treatment of BIPOC. Securing EJ requires deeply rooted, system-wide, legal reform; among the essential fixes will be to amend our state and federal constitutions to recognize the rights of all people to clean and healthy environments. The current failing of our state and federal constitutions to recognize the inalienable rights of all people to fundamentals like clean water and air, a livable climate, and healthy environments is a noteworthy and gaping hole that has resulted in environmental racism that is both institutionalized and largely unchallengeable under the law. Raising up environmental rights to the constitutional level would provide the systemic reform necessary to transform EJ from a laudable goal or inspiring rhetoric to an enforceable right of the people and obligation of all government officials. But not just any constitutional language will do—constitutional “Green Amendments” enshrine environmental rights so they can transcend a system of law and government that passively allows systemic environmental racism to fester in an endless feedback loop.

The term “Green Amendment,” as defined in the book *The Green Amendment: Securing Our Right to a Healthy Environment*, refers to a self-executing provision placed in the declaration of rights section of a constitution that recognizes and protects the inalienable rights of all people regardless of race, ethnicity, national origin, or socioeconomic status to basic environmental essentials such as, but not limited to, clean and

healthy water, air, environments, and a stable climate. Maya K. van Rossum, *The Green Amendment: Securing Our Right to a Healthy Environment* (2017). Because the Green Amendment is in the declaration of rights section, environmental rights are placed on par with other protected rights such as speech, religion, and property. As of November 2021, there are three states with environmental protections that meet these Green Amendment criteria: Pennsylvania, Montana, and New York. However, Green Amendments For the Generations is seeking constitutional Green Amendments in every state constitution—and ultimately in the federal Constitution.

Current legal protections in place for the environment have failed to address the disproportionate impacts experienced by BIPOC. Land use laws, coupled with redlining and other perpetuating racial inequities, concentrate undesirable uses in BIPOC communities, allowing environmental burdens to accumulate over time. Pollution control laws, such as the Clean Air Act and similar state laws, tend to focus on reduction of pollution across large geographical areas, and can be blunt instruments when used to address localized pollution harming a specific community. Environmental laws based on permitting, such as the Clean Water Act and the Clean Air Act and similar state statutes, are structured so that, at best, government allows environmental degradation in the communities that have limited ability to participate in permitting decisions, and at worst, already-burdened communities are specifically targeted by industry anticipating (often accurately) that they will not be challenged due to a lack of resources or opportunities to engage. And while pay-to-pollute, market-based regulatory programs, such as “cap-and-trade,” may reduce overall pollution when looking at the numbers across a geographic region, on the ground, EJ communities are often where pollution credits are spent. Information-gathering environmental laws, such as the National Environmental Policy Act and similar state counterparts, require an agency to recite the impacts of environmental degradation, but the government is often not motivated, let alone required, to reach a substantive decision based on that information. Newly enacted legislation in various states explicitly requires meaningful consideration and government action based on EJ considerations. These laws, however, often contain loopholes and operate within the framework of preexisting environmental and land use laws that do not provide sufficient environmental protection or fully address existing or emerging environmental threats in need of attention. And litigators who have attempted to remedy the problem by using constitutional provisions or statutes meant to prevent discrimination have faced an uphill battle when seeking to prove discriminatory intent. A Green Amendment provides a pathway to address these issues.

Essential Green Amendment Elements for Advancing Environmental Justice

Although 44 states in the nation address the environment in their constitutions, only three states—Pennsylvania, Montana, and New York—elevate the inalienable rights to clean water, air, and healthy environments so they are constitutionally recognized, self-executing, enforceable, belonging to all people,

protected from government overreach, and on par with other fundamental rights like speech, property, and religion. *See* Pa. Const. art. I, § 27; Mont. Const. art. II, § 3 & art. IX, § 1; *see also* Mont. *Env'tl. Info. Ctr. v. Dep't of Env't Quality*, 988 P.2d 1236, 1246 (Mont. 1999); N.Y. Const. art. I, § 19.

Most state environmental rights provisions suffer the same fundamental flaws: They declare environmental rights to be good public policy as opposed to being enforceable rights; they relegate the vindication of environmental rights to the legislative process where it currently stands with all of its fundamental flaws; they fail to raise up environmental rights so they are on par with, as opposed to being subservient to, other fundamental rights including property; and they fail to ensure environmental rights are inviolate from infringement absent a compelling state interest. Securing an explicit declaration of rights protection for environmental rights is a clearer and more successful path to protecting BIPOC. But the key to that success, as discussed below, is in the constitutional language and placement secured.

Constitutional Green Amendments contain the elements needed to give the greatest strength, guidance, and power for environmental and EJ protection. It is their combination of elements that provides powerful promise for ending environmental racism. These essential elements include, at a minimum, the clear recognition of fundamental environmental rights such as clean and healthy water, air, climate, flora, fauna, and environments; placement in a constitution's declaration of rights to ensure the provision is self-executing and on par with other fundamental rights; and a clear statement that these are individual rights that belong to *all* people. To ensure greater clarity and strength, it is beneficial to include trustee language with natural resources identified as the corpus of the trust and all people, including future generations, as the intended beneficiaries. As discussed below, recognizing a trustee obligation upon the state with all the people as the beneficiaries of a wide-ranging natural resources trust brings well-defined fiduciary obligations that strengthen understanding of the constitutional rights and obligations. And while declaration of rights placement helps establish self-executing status for environmental rights, a strong Green Amendment should explicitly include a statement that it is self-executing to avoid controversy in court.

Securing Environmental Justice Through Equitable Protection

Environmental racism is rarely overt. It is generally the result of repeated siting, permitting, development practices, or technology decisions ostensibly having nothing to do with race that leave BIPOC communities with growing levels of pollution. For example, EJ communities are often the target for multiple heavy industry operations under the guise of concentrating environmental pollution in already-degraded areas to protect still-pristine ecosystems; or claiming economic and jobs benefits from siting industries in lower-income communities because property costs are lower and therefore overhead costs for start-up are reduced and company success is more likely. These seemingly rational arguments have the effect of consolidating polluting activities near BIPOC communities and perpetuating environmental racism. With Green Amendment

protection, challenging the disproportionate environmental harms does not require a demonstration of intentional race-based decision-making—a high hurdle that can often be insurmountable in the absence of a “smoking gun” admission somewhere on the record. Rather, environmental rights protection is focused on the environmental harm—e.g., the actual or anticipated contamination of the water, air, soils, or environments, and whether that burden is being distributed equitably.

Declaration of rights placement guaranteeing the rights of “all people” to a clean and healthy environment establishes two complementary pathways for addressing systemic racism, neither of which requires evidence of racist intent. The first is a demonstration that the level of pollution and degradation inflicted on a community rises to a constitutional violation. This pathway focuses on environmental harm inflicted from the perspective of the community experiencing it and the implications for health, safety, quality of life, and other benefits secured or denied as the result of environmental quality. A violation would be made clear by the information gathered during the decision-making process. As Pennsylvania’s Chief Justice Castille made clear with regards to protection of environmental rights: “because the obligation exists a priori to any statute purporting to create a cause of action,” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013), a Green Amendment also requires informed decision-making as a constitutional prerequisite to acting.

Meaningful informed decision-making includes an understanding of the burdens a community already bears, and whether the new or cumulative impacts of proposed government action will exacerbate an existing constitutional infringement or increase burdens to a level that results in infringement. Requiring this understanding reduces the potential and opportunity to repeatedly place pollution burdens on the same communities over and over. The assessment is not one based on race or socioeconomic status; it is an assessment based on environmental conditions (existing and anticipated), but its effect is to expose and prevent environmental inequity. In addition, while environmental rights are meant to be vindicated primarily through legislative and executive branch action, the declaration of rights placement ensures that check-the-box compliance with existing law is not automatic compliance with the constitutional obligation. There is a separate and higher duty to comply with the constitution. Therefore, if facts, science, cumulative impacts analysis, existing conditions, or EJ concerns demonstrate that stronger environmental protections are needed to avoid infringing upon environmental rights, the constitution provides the government with the authority *and* the obligation to implement those stronger protections. Information obtained must be used as part of the decision-making process to ensure impacted rights are constitutionally protected, thereby adding the teeth lacking from most information-gathering legislation. A challenge to a decision infringing upon environmental rights would involve demonstration of environmental harm rising to the constitutional level. This argument, by itself, can secure a constitutionally mandated remedy and protection.

The second path in which a Green Amendment addresses systemic racism is through a factual demonstration that government is not equitably protecting the rights of EJ communities

as compared to other surrounding communities and that the EJ community is bearing a disproportionate burden of environmental harm. This demonstration may be in the context of a state or federal Equal Protection Clause challenge based on discrimination against the exercise of a fundamental right rather than an equal protection challenge based on targeting of a suspect class. Much like in voting rights cases where the Supreme Court has held that the fundamental right must be protected equally “without regard to race, sex, economic status, or place of residence within a State,” discriminatory overburdening of fundamental environmental rights “is easily demonstrable mathematically” as well as scientifically. *Reynolds v. Sims*, 377 U.S. 533, 561–63 (1964). When it comes to the equal protection of the exercise of fundamental rights, “[o]ne must be ever aware that the Constitution forbids ‘sophisticated as well as simpleminded modes of discrimination.’” *See id.* (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Disproportionate burdening of the exercise of fundamental state constitutional rights such as education and privacy have also been subject to strict scrutiny under an equal protection analysis in state courts. *See, e.g., Serrano v. Priest*, 487 P.2d 1241, 1255–59 (Cal. 1971); *Planned Parenthood of the Great N.W. v. State*, 375 P.3d 1122, 1143 (Ala. 2016); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 642–43 (N.J. 2000). The constitutional recognition that the environmental rights protected belong to “all people” requires government to respect and protect environmental rights equitably across communities regardless of race, ethnicity, or socioeconomic status, and conversely creates a constitutional prohibition on disproportionately burdening one segment of the population with unconstitutional levels of environmental degradation.

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This constitutional mandate for equitable protection is a valuable tool in preventing environmental racism. As discussed, overcoming the burden of proving discriminatory intent when challenging government laws or actions that appear facially neutral has impeded success in protecting BIPOC. Green Amendments focus on the environmental outcomes for

communities as opposed to the intentional or unintentional motivations for getting there. Demonstrating the existence of a disproportionate environmental burden that rises to a constitutional level, complemented by the well-established principle that government action that inflicts harm based on race and perpetuates the pernicious harms of historic discrimination is not a compelling state interest justified under strict scrutiny review, can support a successful constitutional challenge when a Green Amendment is in play.

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A Green Amendment with an explicit obligation for the state to act as trustee of its natural resources—with present and future generations as identified beneficiaries—strengthens this line of argument. The fiduciary duties of a trustee to ensure fairness and equity in the benefits and burdens borne by the beneficiaries redirects the focus to the equity of the environmental burden and the impact on the constitutional right as opposed to proof of discriminatory intent or classification. For example, when faced with new legislation that mandated industrial fracking operations in all zoning districts and created a disproportionate burden causing some properties and communities to “carry much heavier environmental and habitability burdens than others,” a plurality of the Pennsylvania Supreme Court, relying in significant part on the trustee obligation to “treat all beneficiaries equitably in light of the purposes of the [environmental] trust,” determined the “disparate effect” to be “irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of ‘all the people.’” *Robinson Twp.*, 83 A.3d at 980 (plurality).

Some states have considered and even proposed explicitly recognizing the obligation of the state to equitably protect environmental rights regardless of race, ethnicity, or wealth. While this additional language may strengthen an argument to secure equitable environmental protections across communities, the declaration of rights placement and obligation to protect environmental rights for “all people” should alone ensure equitable protection. In addition, adding such language to a Green Amendment risks failing to acknowledge certain classifications that may later be used to disenfranchise unenumerated groups;

for example, could the failure to identify children, pregnant people, or people who are immunocompromised leave them vulnerable to inadequate environmental protection? Using broader, more inclusive language, as is the traditional structure for constitutional declaration of rights provisions, arguably ensures a greater opportunity and obligation for equitable protection.

Self-Executing Amendments Raise Up Environmental Rights and Justice

The self-executing nature of a Green Amendment, generally secured by its declaration of rights status, is vitally important. A self-executing environmental right ensures that the amendment defines and guides any proposed new government action as well as the interpretation and application of existing laws. It prevents the right from being solely defined by the legislature or regulatory agencies.

This is a critical feature of the Green Amendment because environmental laws and regulations have helped to perpetuate and support environmental racism and to create environmental “sacrifice zones” where industry and resulting environmental damage are concentrated. Thus, it is essential that the definition of environmental rights is not exclusively delegated to legislatures for interpretation and definition. Self-executing status ensures a whole-government approach to the interpretation, implementation, and protection of the rights.

In the absence of self-executing recognition, aggrieved communities are denied the critical pathway of an independent and unbiased adjudication before the courts for assessing whether their rights have been violated. If environmental rights are not self-executing, and instead are defined by the legislative or executive branch of government, they will once again become subservient to the political whimsies of the day with only election politics as the solution for protection and change. For example, article XX, section 21 of the New Mexico Constitution includes an obligation to protect natural resources and the environment. That duty, however, is expressly delegated to the state legislature and, as a result, New Mexico courts have not interpreted the provision to be self-executing. In responding to a constitutional challenge to New Mexico legislation, that state’s court of appeals upheld the legislation and asserted that if the public does not like how the legislature is carrying out its constitutional obligations, they as “voters have the opportunity to exercise their desire for political change regarding complex environmental issues at the ballot box during each election cycle.” *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015). By expressly limiting implementation of the constitutional obligation to the legislature and removing it from the realm of self-executing constitutional provisions, the court ensured that the constitutional authority lay with the legislature and not the people. Declaration of rights placement, complemented by a clear statement that the rights are self-executing, ensures environmental rights will be protected appropriately.

As self-executing provisions with independent legal enforceability, Green Amendments can help EJ communities fill legislative or regulatory gaps to address a serious environmental condition or threat, and to check government action when it fails to establish protections essential to prevent new or ongoing

environmental rights abuses. For example, per- and polyfluoroalkyl substances (a man-made family of chemicals with serious health consequences for those exposed) contaminate drinking water in most states. Env't Working Grp., *PFAS Contamination in the U.S.* (Jan. 6, 2021). The Union of Concerned Scientists has demonstrated that this toxic burden disproportionately harms EJ communities. See Genna Reed, *PFAS Contamination Is an Equity Issue and President Trump's EPA Is Failing to Fix It*, *The Equation* (Oct. 30, 2019). The proliferation of this dangerous family of chemicals has been significant due to a lack of regulation, with legal requirements only starting to emerge in recent years. In the absence of legislation or regulation to prevent or address this contamination, communities benefiting from a Green Amendment could rely upon their constitutional right to clean water in a legal challenge seeking needed government protection.

Similarly, in a highly urbanized community such as Camden, New Jersey, with air pollution so serious that its public schools are identified as being in the top five worst areas in the nation for neurotoxins impacting school children, a constitutional right to clean air could potentially be relied upon to secure upgraded air pollution prevention technologies when new permit or permit renewal decisions are being made and regulatory requirements aren't up to the task of protecting environmental rights.

A Green Amendment compels action to protect environmental rights as part of, and in addition to, the existing laws within a state, including in those situations where government protections are deficient, absent, or lacking.

Green Amendments Transform Environmental Justice from Rhetoric to Reality

Environmental justice won't be achieved by nibbling around the edges and relying on the same legislative strategies of the past. Systemic environmental reform requires a transformational restructuring in how we think about, recognize, and protect our environment and environmental rights. It is time to use the supreme law of our land—our state and federal constitutions—to recognize and protect the rights of BIPOC to be free from bearing disproportionate environmental burdens and to secure true environmental justice. ♻️

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