The Private Litigation Impact of New York's Green Amendment

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The increasing urgency of climate change, combined with federal environmental inaction under the Trump Administration, inspired a wave of environmental action at the state and local level. Building on the environmental movement of the 1970s, activists have pushed to amend more than a dozen state constitutions to include "green amendments"—self-executing individual rights to a clean environment. In 2022, New York activists succeeded, and New York's Green Amendment (the NYGA) now provides that "Each person shall have a right to clean air and water, and a healthful environment."

However, the power of the NYGA and similar green amendments turns on judicial interpretations of their scope. In the first decision to reach the issue, a New York trial court held, with little analysis, that the NYGA provides no private rights against private polluters. This conclusion could severely limit the reach and significance of state environmental rights.

This article examines a single question: Does the NYGA grant private rights that are enforceable against private parties? In answering this question, we examine the 50-year history of private litigation under green amendments, the substance and historical context of the NYGA, and the broader structure of New York's constitution and environmental law. We conclude that the New York trial court got it wrong, and that the NYGA does provide a private cause of action against private parties. We further assess the indirect impact of constitutional envi-

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ronmental rights on private litigation, and conclude that the NYGA will have an enormous impact on private litigation generally, irrespective of whether New York's courts reject private litigation under the NYGA. This discussion provides a novel evaluation of the shadow that constitutional changes cast on non-constitutional law.

I. INTRODUCTION

On January 1, 2022, New York residents gained a new constitutional right. That right, born from five years of legislative struggle and approved in November 2021 by New York voters,[2] consists of just fifteen words appended to the end of New York's Bill of Rights: "Each person shall have a right to clean air and water, and a healthful environment."[3] This provision is commonly known as New York's "Green Amendment" (NYGA).

Many states, including New York, already addressed environmental quality in their constitutions when the NYGA was passed.[4] But only two other state constitutions had "green amendments," which are "self-executing provision[s] placed in the declaration of rights section of a constitution" that guarantee individual, inalienable rights "to basic environmental essentials" like "clean and healthy water, air, environments, and a stable climate."[5] New York was the third state to adopt a green amendment,[6] following Pennsylvania in 1971 and Montana in 1972.[7] These preceding green amendments emerged in response to the environmental movement of the early 1970s, at a time when public awareness of pollution and pesticides drove a rare environmental bipartisanism at the state and federal level.[8]

2. *See infra* notes 31–32 and accompanying text (discussing the amendment process in detail).

3. N.Y. CONST., art. 1, sec. 19.

4. *See infra* Section III (discussing green amendments).

5. *Id*. at 27–28.

6. *Id*. at 28.

7. *See infra* Sections III(A)(1) & (III)(B)(1) (discussing the history of the Montana Green Amendment and the Pennsylvania Green Amendment, respectively).

8. *See* Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENV'T L.J. 1, 2 (2007) (describing the "remarkable, bipartisan burst of legislative activity that created the regulatory infrastructure" of environmental law by 2007); Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. Rev. 981, 981–983 (1994) (describing the new paradigm of "environmental consciousness" that arose from structural shifts "born of Rachel Carson in 1961, perhaps assisted unwittingly by Ronald Coase, [that] redefin[ed] the scope of how societal governance decisions should be made."); *see also* RACHEL CARSON, SILENT SPRING (1962).

The NYGA emerges at another turning point for the environmental movement. The dire consequences of anthropogenic climate change have become increasingly apparent,[9] and a majority of Americans now perceive, and feel threatened by, climate risks.[10] A new paradigm of environmental law is emerging to address these challenges, and many have argued that state constitutional rights like the NYGA represent important tools in this effort.[11] However, the significance of individual environmental rights, like those guaranteed by the NYGA, remains unclear.

In the nascent years of the NYGA, one of several significant questions has emerged: Does the NYGA enable private parties to seek relief for environmental harms against other private parties? This question is vitally important to defining the reach and impact of the NYGA. Some environmental scholars have already claimed that the NYGA could be used to ensure the fair distribution of environmental harms and benefits,[12] "fill gaps" in environmental justice regimes,[13] and allow citizens to more effectively fight climate change in the courts.[14] Others, while acknowledging the potential for the NYGA to

9. *See generally* CLIMATE CHANGE 2023 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf [https://perma.cc/P38H-9KTT].

10. *See* Jennifer Marlon et al., *Yale Climate Opinion Maps 2023*, YALE PROGRAM ON CLIMATE CHANGE COMMC'N (Jan. 23, 2024), https://climatecommunication.yale.edu/visualizations-data/ycom-us/ [https://perma.cc/648T-JFE3].

11. *See, e.g.*, Wendy Kerner, *Making Environmental Wrongs Environmental Rights: A Constitutional Approach*, 41 STAN. ENV'T L.J. 83 (2022) (arguing "that there should be a Green Amendment in each state constitution to advance environmental rights nationwide"); Samuel Brown, *Green Amendments*, 36 NAT. RES. & ENV'T 64, 64 (Fall 2021) (describing "the movement currently gaining steam to amend state constitutions to enshrine environmental-related protections as fundamental rights.").

12. *See* Rebecca Bratspies, *"Underburdened" Communities*, 110 CAL. L. REV. 1933, 1983 (2022) (describing the NYGA's passage as a "historic" vote, and arguing that the NYGA "might be a game changer in terms of moving toward a commons-based environmental governance"); *see generally* Maya K. van Rossum & Kacy C. Manahan, *Constitutional Green Amendments Making Environmental Justice A Reality*, 36 NAT. RES. & ENV'T 27 (Fall 2021) (arguing that constitutional environmental rights like the NYGA are necessary to secure environmental justice for marginalized populations).

13. Alexandra Dapolito Dunn & Irma S. Russell, *Inclusiveness: Advancing Environmental Justice in A Diverse Democracy*, JUDGES' J., 6, 8 (Fall 2023) (listing the NYGA among state legislative efforts that could "supplement existing federal [environmental justice] efforts and fill gaps").

14. *See* Matthew Grabianski, *What* Held v. Montana *Immediately Offers for Constitutional Environmental Rights*, 11/16/2023 GEO. ENV'T L. REV. (Nov. 2023), https://www.law.georgetown.edu/environmental-law-review/blog/what-held-v-montana-immediately-offers-for-constitutional-environmental-rights/ [https://perma.cc/H8FU-3GAF] (discussing Held v. State, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct., Aug. 14, 2023), a landmark climate case holding that a Montana law that excluded certain climate impacts from environmental review pro-

affect environmental quality, have been hesitant to opine on its significance without a clearer picture of how courts will interpret it.[15] Still others, while expressing skepticism about "the ability of individual plaintiffs to use [constitutional environmental rights] to avert climate change,"[16] have emphasized that the significance of rights guaranteed by the NYGA often depends on the extent to which judicial systems allow individuals to assert them.[17]

Judicial interpretations of the NYGA will likely have impacts beyond New York, because the NYGA represents a single drop in the wave of similar state environmental action across the country. Perhaps inspired by the Trump Administration's rhetorical and regulatory opposition to environmental protection,[18] or spurred by the increasing urgency of climate action, many states have begun to consider similar environmental protections.[19] In the first months of 2024, state legislators in at least nine states have proposed new con-

cedures conflicted with the environmental rights in Montana's constitution, and noting the NYGA among a list of state constitutional environmental rights that may allow plaintiffs in other states to mimic the *Held* plaintiffs' success).

15. *See, e.g.*, Andrea White, *Protecting Future Generations from Climate Change in the United States*, 49 ECOLOGY L.Q. 501, 517 (2022) (declining to explore how the NYGA may be used to protect future generations from climate change "because it passed so recently that there is not yet significant case law attached to it"); Katherine Wilkin, *Use with No Review: How Special Use Permits in Municipal Zoning Perpetuate Environmental Injustice in Fossil Fuel Infrastructure Siting*, 54 Colum. Hum. Rts. L. Rev. 952, 996–98 (2023) (highlighting how green amendments can protect rural environmental justice communities, but noting that it is "unclear" how courts will interpret the recently added NYGA).

16. Quinn Yeargain, *Decarbonizing Constitutions*, 41 YALE L. & POL'Y REV. 1, 50 (Spring 2023).

17. *Id*. at 48 (emphasis original) (noting that "[u]nless [environmental constitutional amendments] independently inspire state legislatures and executives to act, bills of rights require that individual plaintiffs litigate their rights," and criticizing the effectiveness of individual litigation that "open[s] the door to judicial chicanery" and "puts the burden on *individual people* to assert their rights").

18. *See* Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393, 396 (2019) ("tracing how the Trump Administration has explicitly and implicitly reversed course on environmental policies to the detriment of low-income communities of color"); Joel A. Mintz, *Rolling Back and Losing Ground: EPA Regulation and Enforcement in the Trump Era*, 46 VT. L. REV. 124 (2021) (discussing weakened environmental enforcement during the Trump Administration); *but see* Joshua Ozymy & Melissa Jarrell Ozymy, *All Dried Up: The Prosecution of Water Pollution Crimes During the Trump Administration*, 35 TUL. ENV'T. L.J. 69, 87 (2022) (studying water pollution in the Trump Administration, and finding that "prosecutorial efforts can persist within the current regulatory and legal apparatus, even with [Trump's] hostile presidential pressure against these agencies").

19. *See Active States*, GREEN AMEND. FOR THE GENERATIONS, https://forthegenerations.org/active-states/ [https://perma.cc/GEW9-2SDA] (last visited Apr. 11, 2024) (discussing activist organizing around green amendments in 20 states, including three that currently have green amendments—New York, Montana, and Pennsylvania).

stitutional environmental protections,[20] and provisions like the NYGA have been held up as examples for similar constitutional reforms across the country.[21] To the extent other states adopt amendments similar to the NYGA, the NYGA's interpretation by New York courts will almost certainly inform the interpretation of those amendments.[22] If the language of the NYGA is interpreted to be a powerful tool for protecting private environmental rights against private parties, that interpretation may help to shape state environmental movements across the country.

Despite the potential importance of private litigation[23] to the NYGA—and the flurry of cases that have attempted to assert environmental rights under the NYGA against both government actors and private entities—to date only one court has addressed the viability of private litigation under the NYGA. In *Fresh Air for the Eastside v. State of New York* (*Fresh Air I*), a New York trial court held that the NYGA creates a cause of action against government actors, but not private ones.[24] That holding is supported by little substantive analysis and largely defers to an academic "explainer" that briefly opines on the issue.[25] Given the national scope of the green amendment movement, and the potential significance of the NYGA within that movement, the conclusion reached in *Fresh Air I*—that private parties cannot sue other private parties under the NYGA—demands a more thorough examination.

This article explores the implications of the NYGA for private environmental litigation, and argues that the *Fresh Air I* court was wrong: the NYGA does create private rights against private parties. In mak-

20. Drew Hutchinson, *Green Amendments Gain Traction in More States Ahead of Elections*, BLOOMBERG (Feb. 6, 2024), https://news.bloomberglaw.com/environment-and-energy/green-amendments-gain-traction-in-more-states-ahead-of-elections [https://perma.cc/6YNK-E5ZF].

21. *See* Tyler Demetriou, *Reinvigorating the Virginia Constitution's Environmental Provision*, 40 VA. ENV'T. L.J. 66, 98 (2022) (discussing the possibility of amending Virginia's constitution to include an environmental bill of rights); Johanna Adashek, *Do It for the Kids: Protecting Future Generations from Climate Change Impacts and Future Pandemics in Maryland Using an Environmental Rights Amendment*, 45 PUB. LAND & RES. L. REV. 113, 116 (2022) (arguing "that all states should adopt an [environmental rights amendment] to combat climate change").

22. High courts of states with constitutional provisions modeled after New York's often turn to New York law for guidance on how to interpret those provisions. *See, e.g.*, West v. Thomson Newspapers, 872 P.2d 999, 1016–17 (Utah 1994); Jacobs v. Major, 407 N.W.2d 832, 842 (Wis. 1987).

23. Throughout this article, "private litigation" is used to refer to causes of action brought by private parties against private parties.

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

25. *See infra* note 46.

ing this argument, this article uses the lens of the NYGA to more broadly discuss the impact of constitutional changes cast on non-constitutional law. Part II discusses the NYGA and the *Fresh Air* cases. Part III looks at the wider history of state constitutional environmental rights that preceded the NYGA and examines private obligations under other states' green amendments. Part III also situates the NYGA within New York's existing framework of environmental laws and regulations. Part IV analyzes the text, purpose, and historical context of the NYGA and concludes that the NYGA should be interpreted as independently enabling private litigation. Finally, Part V assesses the NYGA's indirect impact on private litigation, and argues that that the NYGA will have significant implications for private litigants, whether or not the amendment itself creates enforceable private obligations.

II. PRIVATE LITIGATION UNDER THE NYGA: THE *FRESH AIR* CASES

The NYGA is hardly a model of clarity. When the NYGA was added to the New York Constitution, it is likely that no one truly knew what it meant. The amendment's overall sentiment is clear: it endows "each person" with individual rights to "clean air and water, and a healthful environment."[26] But what does it mean to have individual rights to "clean" air and water, or a "healthful" environment? How can those rights be enforced? Against whom? These questions were raised repeatedly in the New York legislature,[27] and the answers provided suggested that the precise meaning of those words would be determined by… someone else. One legislator suggested that these questions would be resolved by "advocates and people that

26. N.Y. CONST. art. 1, § 19. As the Assembly sponsor of the NYGA put it: "It's in the largest sense a proposed Constitutional Amendment that is an expression of optimism. It is intended to assure our citizens that they will not be betrayed circumstantially by environmental degradation, and that the health and well-being of they and their families will not be compromised due to governmental inaction or negligence that may otherwise damage our air, land or water." Transcript of the New York State Assembly on February 8, 2021, at 31, https://www.bdlaw.com/content/uploads/2023/01/NYS-Assembly-Debate-Transcript-02-28-2021.pdf [https://perma.cc/B7KL-ZNJ3] (Assemb. Englebright).

27. *See, e.g.*, Transcript of the New York State Assembly on April 30, 2019, at 42–45, https://www2.assembly.state.ny.us/write/upload/transcripts/2019/4-30-19.pdf [https://perma.cc/EUR9-GPZT] (Assemb. Stec raising concerns about the meaning of the NYGA).

[the NYGA] negatively or positively affects."[28] Another warned that the amendment's ambiguity would shift authority from the legislature to the courts that would ultimately define its meaning and scope.[29]

Despite this debate, the NYGA's text—which was first introduced in 2017—was never modified.[30] The NYGA was incorporated into the New York Constitution on January 1, 2022, after nearly five years of political process[31] and with the approval of more than 70% of the 3 million New Yorkers who voted on the amendment.[32]

Almost immediately after the NYGA went into effect, a pair of cases in the New York Supreme Court of Monroe County (the *Fresh Air* cases)[33] raised two questions that go to the heart of the NYGA: (1) Can plaintiffs sue to enforce their NYGA rights without enabling legislation? (*i.e.*, is the NYGA self-executing?), and (2) If so, can a private plaintiff assert a claim under the NYGA against a private defendant? Though these questions were answered in the *Fresh Air* cases, they are currently the subject of an appeal before the Appellate Division,

28. Transcript of the New York State Senate on January 12, 2021, at 142, https://legislation.nysenate.gov/pdf/transcripts/2021-01-12T11:15/ [https://perma.cc/9J99-C3PD] (Sen. Jackson).

29. Transcript of the New York State Assembly on April 30, 2019 *supra* note 27, at 30, (Assemb. Goodell).

30. *Compare* Assemb. 6279, 2017–2018 Reg. Sess. (N.Y. 2017) *and* S. 5287, 2017–2018 Leg. Sess. (N.Y. 2017) *with* Assemb. 2064, 2019-2020 Reg. Sess. (N.Y. 2019) *and* S. 2072, 2019-2020 Leg. Sess. (N.Y. 2019).

31. An amendment to the New York State Constitution must pass both houses of the legislature in one legislative session and then must succeed in a second passage in the next session in front of a newly elected legislature, before then being voted on by the electorate. N.Y. CONST. art. XIX § 1. Following an initial unsuccessful attempt in the legislature (*see* Assemb. 6279, 2017–2018 Reg. Sess. (N.Y. 2017) *and* S. 5287, 2017–2018 Leg. Sess. (N.Y. 2017)), the amendment found success in the following 2019–20 legislative session. *See* Assemb. 2064, 2019-2020 Reg. Sess. (N.Y. 2019); S. 2072, 2019-2020 Leg. Sess. (N.Y. 2019). The amendment was again proposed in both houses in the 2021–22 session, and again, the bills passed both houses. *See* Assemb. 3169, 2021-2022 Reg. Sess. (N.Y. 2021)*;* S. 528, 2021-2022 Leg. Sess. (N.Y. 2021). The NYGA was sent for approval by the electorate on the 2021 ballot. N.Y. CONST. art. XIX § 1; *see also Report on the 2021 Statewide Ballot Proposals*, ASS'N. OF THE BAR OF THE CITY OF N.Y., https://www.nycbar.org/wp-content/uploads/2023/05/2020946-BallotProposals NYS2021.pdf [https://perma.cc/EFV8-63MN].

32. 2,129,051 New Yorkers voted in favor of the NYGA, while 907,159 opposed it. *See 2021 Election Results, Ballot Proposition 2*, N.Y. BD. OF ELECTIONS, https://elections.ny.gov/2021-general-election-ballot-proposal-2-results [on file with the Journal].

33. *See* Fresh Air I, No. E2022000699, 2022 WL 18141022 (N.Y. Sup. Ct. Dec. 20, 2022); Fresh Air for the Eastside, Inc. v. Town of Perinton (*Fresh Air II*), No. E2021008617, slip op. 34429 (N.Y. Sup. Ct. Dec. 8, 2022).

Fourth Department,[34] and will likely remain the subject of litigation in the coming years.[35]

The *Fresh Air* cases were brought by a non-profit called Fresh Air for the Eastside, Inc. (FAFE), less than a month after the NYGA came into effect. FAFE's singular goal is to "restore the right to clean, fresh air" to Rochester's eastside "by addressing the negative impacts caused by the High Acres Landfill on the climate and quality of life of its members and their children."[36] On January 28, 2022, FAFE brought suit against three public entities—the State of New York, the New York State Department of Environmental Conservation, and the City of New York—and one private entity—Waste Management of New York, L.L.C. (WMNY).[37] FAFE asserted a single claim: "Violation of Article I §19 of the New York Constitution."[38] In that claim, FAFE alleges that its members are being deprived of their right to clean air and a healthful environment as a result of fugitive emissions and noxious odors traceable to a landfill owned and operated by WMNY.[39] One week before initiating *Fresh Air I*, FAFE amended its petition in a related case (*Fresh Air II*) before the same court against the Town of Perinton, the Town of Perinton Zoning Board of Appeals, and WMNY.[40] FAFE amended its petition—which is predicated on the similar facts alleged in *Fresh Air I*—to add a claim for violating the NYGA.[41]

The *Fresh Air* cases immediately tested the viability of private claims under the NYGA. Among many motions filed to dismiss FAFE's petitions, two briefs directly addressed the issue of private litigation under the NYGA. First, in *Fresh Air I*, WMNY argued that the NYGA is not self-executing and that, even if it is, it does not give

34. *See, e.g.*, Fresh Air for the Eastside, Inc. v. New York, No. CA23-00179 (N.Y. App. Div. Dec. 22, 2023).

35. The fundamental nature of these two questions makes it likely that these claims will arise repeatedly, as all defendants can raise the first and all private defendants can raise the second as bases to dismiss a claim brought under the NYGA.

36. *About Us*, FRESH AIR FOR THE EASTSIDE, INC., https://www.freshairfortheeastside.com/about-us [https://perma.cc/J9PP-32DB] (last visited Apr. 11, 2024).

37. *See generally* Brief of Defendant, Fresh Air I, No. E2022000699, 2022 WL 18141022 (N.Y. Sup. Ct. Jan. 28, 2022).

38. *Id.* at 26–29.

39. *Id.* at 28.

40. *See* Amended Verified Petition, Fresh Air II, No. E2021008617, slip op. 34429 (N.Y. Sup. Ct. Jan. 20, 2022).

41. *Id.* at 37–38.

rise to a cause of action against private parties.[42] Second, in *Fresh Air II*, the Town of Perinton and Town of Perinton Zoning Board of Appeals argued that the NYGA does not create a private cause of action.[43]

On December 7, 2022, Justice John J. Ark issued a decision in *Fresh Air I*, dismissing FAFE's claim against private defendant WMNY.[44] The decision directly reached "whether the [NYGA] is self-executing and whether there can be direct action against private entities."[45] However, rather than addressing either question in detail, the decision instead largely deferred to a 7-page "explainer" published on the website of the Albany Law School Government Law Center.[46] The explainer suggests that the NYGA is self-executing and that it does not enable private litigation.[47] On the latter point, the explainer opines that while "[t]he Amendment allows enforcement against the government, . . . [i]t appears less likely that the courts will allow an action to prevent pollution to be brought directly against private entities under the [NYGA]."[48] The explainer's authors reached this view by analogizing the NYGA to other sections of New York's Bill of Rights:

> Article I, Section 11 provides that "No person shall because of race, color, creed or religion be subjected to any discrimination in his or her civil rights *by any other person or any firm, corporation, or institution*, or by the state or any agency or subdivision of the state." (Emphasis added). In contrast, Article I, section 3, pertaining to the free exercise of religion, and Article I, section 8, protecting freedom of the press, make no reference to private entities and, with certain limited excep-

42. Waste Management's Memorandum of Law in Support of its Motion to Dismiss at 3–10, Fresh Air I, No. E2022000699, 2022 WL 18141022 (N.Y. Sup. Ct. May 6, 2022). New York City asserted that "it is not clear that a claim can be asserted directly under the amendment at this juncture," but did not expressly argue that a cause of action *could not* be brought under the NYGA. *Id.* at 19.

43. Memorandum of Law in Support of Motion to Dismiss at 24, Fresh Air II, No. E2021008617, slip op. 34429 (N.Y. Sup. Ct. Feb. 22, 2022). *See also* Reply Memorandum of Law in Further Support of Motion to Dismiss at 14, Fresh Air II, No. E2021008617, slip op. 34429 (N.Y. Sup. Ct. Mar. 29, 2022). WMNY joined the town and zoning board's brief, but did not further argue that the NYGA does not apply to private parties, as it did in its initial memorandum.

44. *Fresh Air I* at 11–13.

45. *Id.* at 12.

46. *See id.* (quoting Scott Fein & Tyler Otterbein, *New York's New Constitutional Environmental Bill of Rights: Impact and Implications*, ALBANY L. SCH. GOV'T L. CTR. (2022), https://www.albanylaw.edu/government-law-center/new-yorks-new-constitutional-environmental-bill-rights-impact-and [https://perma.cc/Y729-TU7L]).

47. *Id*.

48. *Id*.

> tions, have been found to impose a restriction only on the government.[49]

This explainer persuaded Justice Ark, who implicitly accepted that the NYGA is self-executing, agreed with the explainer's analysis that the NYGA does not allow actions against private entities because it makes no reference to private parties, and granted WMNY's motion to dismiss.[50] A day later, Justice Ark issued a decision in *Fresh Air II* that refused to dismiss FAFE's NYGA claim against the town and zoning board, holding that the claim was applicable to events occurring after the NYGA was added to the Constitution on January 1, 2022.[51] That decision cited an online lecture delivered at the New York State Bar Association's annual meeting which referred to the rights provided by the NYGA as "self-executing rights" that "are to be observed and respected by all branches of New York State government, including local governments, [and] public authorities."[52]

The *Fresh Air* decisions represent the first—and for now, the only—decisions addressing whether the NYGA is self-executing and whether it enables private plaintiffs to bring suits against private defendants. But they surely will not be the last. Multiple parties are currently appealing the *Fresh Air I* decision to the Fourth Department,[53] and several other pending lawsuits in New York trial courts similarly assert private claims against private parties under the NYGA.[54] These parallel cases suggest that, at least in the eyes of New

49. *Id.* (quoting N.Y. CONST., art. I, §11).

50. Fresh Air I, No. E2022000699, 2022 WL 18141022, at 12–13 (N.Y. Sup. Ct. Dec. 20, 2022). .

51. Fresh Air II, No. E2021008617, slip op. 34429 at 9 (N.Y. Sup. Ct. Dec. 8, 2022).

52. *Id.* (quoting NICHOLAS A. ROBINSON, NYS BAR ASS'N ANN. MEETING LECTURE OUTLINE: THE NEW ENV'T RIGHTS IN NY'S CONST. BILL OF RIGHTS 15–16 (2022)). While the lecture also suggested that a NYGA claim cannot be brought against a private party (based on the same comparison with Article I, Section 8 employed in the above-discussed examiner), the *Fresh Air II* decision did not reach that issue.

53. Note to early readers: this issue is subject to active litigation, and may require supplemental analysis when an appellate decision is reached.

54. *See, e.g.*, Complaint, Abdullahi v. City of Buffalo, No. 801476 (N.Y. Sup. Ct. Jan. 30, 2023) (asserting a NYGA claim against multiple defendants, including Veolia North America); Verified Petition and Complaint, Ass'n of Prop. Owners of Sleepy Hollow Lake, Inc. v. Green Cty. Indus. Dev. Agency, No. EF2023-573 (N.Y. Sup. Ct Aug. 8, 2023) (asserting a NYGA claim against multiple defendants, including Flint Mine Solar, LLC). In *Marte v. City of New York*, the plaintiffs sought a declaratory judgment action under the NYGA against several private defendants. The court dismissed the petition on other grounds not related to whether the NYGA is self-executing (despite arguments from the defendants that it is not) or could be used to sue a private party. *See* Marte v. City of New York, No. 159068, slip op. 31198(U) at 9 (N.Y. Sup. Ct. Apr. 17, 2023) ("The Court's decision in this case is limited. It merely finds that the Green Amendment cannot be used to bring challenges that were already unsuccessful and where the chal-

York environmental litigants, the questions raised in the *Fresh Air* cases are far from settled.

III. PRIVATE LITIGATION UNDER STATE ENVIRONMENTAL LAW

The NYGA was not introduced in a vacuum. When it was debated, put to a vote, and passed, it joined an extensive body of state environmental law—one that is, in many regards, shaped by private causes of action. This Part looks at the broader context of private environmental litigation that formed the backdrop for the NYGA. Section A discusses the broader national context of environmental rights and looks at the history of private litigation of constitutional environmental claims in the two other states with green amendments: Montana and Pennsylvania. Section B provides a brief overview of private causes of action under New York's other significant environmental laws and highlights the diverse ways in which New York legislatures and courts have incorporated, or excluded, private environmental litigation.

A. Private Litigation Under Other Green Amendments

The NYGA was not the first provision enshrining environmental rights in a state constitution (including New York's). Most states address at least some environmental issues in their constitutions,[55] and several states like Hawaii,[56] Illinois,[57] and Massachusetts,[58] set out

lenge is time-barred. The instant opinion does not stand for the proposition that the Green Amendment is merely a statement of principles.").

55. *See* Rossum & Manahan, *supra* note 12, at 1–2 (noting that "44 states in the nation address the environment in their constitutions").

56. The Hawaii Constitution states that "[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law." HAW. CONST. art. XI, § 9. A separate section charges "the State and its political subdivisions" with conserving natural resources and maintaining "[a]ll public natural resources . . . in trust . . . for the benefit of the people." HAW. CONST. art. XI, § 1.

57. Illinois' Constitution adopts a similar approach to Hawaii's, providing that "[e]ach person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law." ILL. CONST. art. XI, § 2. However, the immediately preceding section charges the Illinois legislature with crafting laws to implement and enforce environmental rights. *See* ILL. CONST. art. XI, § 1.

58. The Massachusetts Constitution provides that "the people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic,

detailed constitutional environmental rights. Indeed, legal commentators, noting the ambiguity of the NYGA, looked towards interpretations of other state environmental rights to assess how courts may understand whether the NYGA provided a private cause of action.[59]

Several of these rights are structurally similar to the NYGA, characterized by being (1) self-executing; (2) framed as a right on equal footing with other protected constitutional rights, like property; and (3) protective of "the inalienable right[] of all people . . . to basic environmental essentials such as, but not limited to, clean and healthy water, air, environments, and a stable climate."[60] Maya van Rossum and Kacy Manahan, writing about the importance of green amendments, argue that they "contain the elements needed to give the greatest strength, guidance, and power for environmental and [environmental justice] protection," and that other forms of constitutional environmental rights provide only limited "enforceable rights," "relegate the vindication of environmental rights to the legislative process," and derogate environmental rights where they conflict with "other fundamental rights [like] property."[61] The NYGA is the third environmental right to meet these criteria, after the Montana Green Amendment (the MGA) and the Pennsylvania Green Amendment (the PGA).[62]

Over the 50 years that the MGA and PGA have been in effect, courts in both states have repeatedly addressed assertions of constitutional environmental claims between private parties. This Section examines the history of private litigation under the MGA and the PGA. While the constitutional decisions of other state courts do not bind interpretations of the NYGA, this litigation—and the structural differences between the MGA, PGA, and NYGA that it reveals—offers points of comparison for New York courts interpreting the NYGA.

and esthetic qualities of their environment," and grants the Massachusetts legislature "the power to enact legislation necessary or expedient to protect such rights." MASS. CONST. art. XCVII. Unlike Hawaii and Illinois, Massachusetts's Constitution is silent as to whether private causes of action arise under this environmental right. Massachusetts' environmental clause specifies in greater detail what environmental rights a person has and instructs the legislature to pass laws to protect these rights.

59. Sheila Birnbaum et al., *New York's Green Amendment: How Guidance from Other States Can Shape the Development of New York's Newest Constitutional Right*, JDSUPRA (Nov. 15, 2021), https://www.jdsupra.com/legalnews/new-york-s-green-amendment-how-guidance-2462721/ [https://perma.cc/AX77-3MSL].

60. Rossum & Manahan, *supra* note 12, at 2.

61. *Id*.

62. *See infra* Sections (III)(A)(1) & (III)(B)(1) (discussing the history of the Montana Green Amendment and the Pennsylvania Green Amendment, respectively).

1. Montana: Explicit Private Obligation, Ambiguous Private Implication

a. The History and Structure of the MGA

Montana's constitutional convention of 1972 enshrined environmental rights in two sections of the state constitution: Article II, Section 3, and Article IX, Section 1 (together, the MGA). Article II, Section 3 provides that, "All persons are born free and have certain inalienable rights . . . [which] include the right to a clean and healthful environment . . . In enjoying these rights, all persons recognize corresponding responsibilities."[63] Article IX, Section 1, further provides:

> "(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."[64]

The plain text of both sections of the MGA places environmental obligations on "persons," not solely on state actors. These clear textual restrictions on private actors render the MGA a potentially powerful tool for restraining private activity that causes environmental damage. However, the fragmented text of the MGA adds ambiguity. Article II identifies "the right to a clean and healthful environment" as "inalienable," and charges "all persons" with "corresponding responsibilities."[65] Article IX contains an obligation to "maintain and improve a clean and healthful environment," without referencing a corresponding right.[66] Together, these two features created a challenge in interpreting the MGA.[67]

Despite its potentially broad scope, the MGA went largely unused in the first three decades following the passage of Montana's 1972

63. MONT. CONST. art. II, § 3.

64. MONT. CONST. art. IX, § 1.

65. MONT. CONST. art. II, § 3.

66. MONT. CONST. art. IX, § 1.

67. Contrary to Article II, Article IX does not speak of fundamental or inalienable rights. *See* Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 HASTINGS L.J. 123, 139 (2022) (referencing the disconnect between Article II and Article IV as "a discrepancy that the Montana Supreme Court had to address in developing its constitutional environmental rights jurisprudence.").

constitution.[68] However, in 1999, the Montana Supreme Court revisited the MGA in *Montana Environmental Information Center (MEIC) v. Department of Environmental Quality*. In *MEIC*, three nonprofit organizations sued the Montana Department of Environmental Quality for making amendments to a private company's mineral exploration license that allowed it to discharge contaminated groundwater into two aquifers. MEIC argued that the amendments were made without a required "nondegradation review," and that even if the amendments were statutorily exempted from such review, the exemption violated the MGA.[69]

In reversing the District Court's holding that the MEIC plaintiffs lacked standing to sue, the Montana Supreme Court held that the MGA was self-executing. Additionally, the court reasoned that "because the right to a clean and healthful environment was included in Article II's 'Declaration of Rights,' it was a fundamental right, and strict scrutiny would apply to any statute or rule implicating that right."[70] Summarizing the *MEIC* court's analysis of the MGA's constitutional history, one recent scholarly review concluded that, "by adding the right to a clean and healthful environment to the list of inalienable rights, the delegates [to the Montana constitutional convention] made it unambiguous that it was a self-executing fundamental right deserving of the highest level of protections."[71] Moreover, the *MEIC* court held that the environmental rights in Article II and Article IX "were intended by the constitution's framers to be interrelated and interdependent and that state or *private action* which implicates either, must be scrutinized consistently."[72] Accordingly, the court would "apply strict scrutiny to state or *private action* which implicates either constitutional provision."[73]

68. "Montana's constitutional environmental right received a brief glance from the Montana Supreme Court in 1979 but otherwise remained in relative obscurity until the court revived it in 1999." Polk, *supra* note 67, at 139 (citing Kadillak v. Anaconda Co., 602 P.2d 147 (Mont. 1979), *superseded by statute*, MONT. CODE ANN. § 75-1-102 (2015); *see also* Nathan Bellinger & Roger Sullivan, *A Judicial Duty: Interpreting and Enforcing Montanans' Inalienable Right to A Clean and Healthful Environment*, 45 PUB. LAND & RES. L. REV., June 2022, at 5 ("For 27 years following the adoption of Montana's landmark constitutional right to a clean and healthful environment, the Montana courts pursued a largely narrow interpretation of the state's constitutional environmental protections, or avoided interpreting them all together . . .").

69. Montana Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1238 (1999).

70. Bellinger & Sullivan, *supra* note 68, at 6.

71. *Id*. at 18 (summarizing the impact of MEIC).

72. Montana Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1246 (1999) (emphasis added).

73. *Id*. (emphasis added).

However, while the *MEIC* court found that the MGA creates expansive private rights and obligations, the court provided little guidance for resolving conflicts between Montana's environmental rights and other constitutionally protected rights, like property rights.[74] Confronting, or avoiding, those conflicts would shape the next 25 years of private party litigation under the MGA.

b. Private Litigation under the MGA

MEIC changed the landscape of litigation under the MGA. Prior to *MEIC*, the Montana Supreme Court had largely interpreted the rights in the MGA "as legitimizing the state's exercise of its police power,"[75] and the MGA was primarily referenced in defense of state environmental enforcement actions.[76] *MEIC*, which emphasized the role of individual environmental rights under the MGA, led to a small surge in cases attempting to assert those rights.[77] While the majority of these cases targeted actions by government actors, in the decade following *MEIC* several plaintiffs attempted to assert constitutional environmental rights in their disputes with other private parties.

c. MGA as a Legal Obligation for Private Parties

Two years after *MEIC* emphasized the environmental rights and obligations of private persons, the Montana Supreme Court invoked the MGA in the context of a contractual dispute between two private parties. In *Cape-France Enterprises v. Estate of Peed*, the court allowed a private company to rescind its agreement to sell a piece of

74. *See* Polk, *supra* note 67, at 148 (noting that while the Montana Supreme Court has "clearly anticipated future conflicts between the environmental right and other important rights (such as property rights)," it has had more difficulty "articulat[ing] a generalized test" to describe the contours of Montana's environmental rights); *id*. at 141("After the MEIC decision, the Montana Supreme Court developed its environmental rights jurisprudence in a series of smaller, scattered matters.") .

75. Tammy Wyatt-Shaw, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something"*, 15 PUB. LAND L. REV. 219, 235 (1994).

76. *See* State v. Bernhard, 173 Mont. 464, 468 (Mont. 1977) ("Article II, Section 3, 1972 Montana Constitution declares that the right to a 'clean and healthful environment' is an inalienable right of a citizen of this state. Consistent with this statement and the cases cited, we hold that a legislative purpose to preserve or enhance aesthetic values is a sufficient basis for the state's exercise of its police power."); State *ex rel*. Dep't of Health & Env't Scis. v. Green, 227 Mont. 299, 305 (1987) (citing *Bernhard* for the proposition that a party's "constitutional rights to acquire and possess real and personal property . . . must be balanced with the rights of the public," including environmental rights under the MGA).

77. *See* Polk, *supra* note 67, at 139 (describing the post-MEIC cases).

land when the company established that completing the sale could cause serious and unanticipated environmental harm. In doing so, the Montana Supreme Court established two key principles: (1) that the MGA created legal obligations for private parties which could be violated by private activity that harmed the environment; and (2) that, "absent a demonstration of a compelling state interest, the judicial power could not be invoked in a manner that would abet the violation of [the MGA]."[78]

Cape-France Enterprises owned a tract of land in Bozeman, Montana, and agreed to sell five acres of the tract to two private individuals, Peed and Moore (together, the "Peed Defendants"), who wanted to build a hotel. As a condition of the sale, the parties attempted to subdivide and rezone the land,[79] but they faced a number of complications, including a "pollution plume" that was "spreading through the groundwater in Bozeman."[80] Montana's Department of Environmental Quality (MDEQ) notified Cape-France that the subdivision "would not be approved unless a well was first drilled and tested," but that new wells might spread the underground chemical plume, and the legal owner of the subdivision would be required by state and federal law to remediate any resulting contamination.[81]

This environmental hazard presented a serious obstacle to the sale. To fulfill the terms of the contract, the parties needed to drill a test well. However, the drilling of such a well could create significant environmental damage (and, not incidentally, expose the ultimate owner of the property to significant liability). Faced with this choice, Cape-France brought suit to rescind the agreement of sale, arguing that "the spread of the pollution and the potential liability involved with drilling a well rendered subdivision of the property impossible or impracticable."[82] The District Court granted summary judgment in favor of Cape-France, and the Peed Defendants appealed. On appeal, the dispositive issue was "Whether the District Court correctly concluded that the parties' buy-sell agreement was unenforceable on the grounds of impossibility or impracticability, and correctly refused to order specific performance."[83]

78. Bellinger & Sullivan, *supra* note 68, at 6–7.
79. Cape-France Enters. v. Est. of Peed, 305 Mont. 513, 514 (2001).
80. *Id*. at 515.
81. *Id*.
82. *Id*. at 516.
83. *Id.* at 514.

The Montana Supreme Court affirmed the District Court's grant of summary judgment. In doing so, the majority opinion invoked the MGA in two important ways. First, the court noted that fulfilling the contract as written would require Cape-France to take actions that exposed the public "to potential health risks and possible environmental degradation."[84] The court held that, given the environmental obligations placed on private parties by the MGA, "it would be unlawful for Cape–France…to drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks."[85] Second, the court held that ordering the remedy of specific performance requested by the Peed Defendants "would not only be to require a private party to violate the Constitution—a remedy that no court can provide—but, as well, would involve the state itself in violating [MGA]."[86] These holdings suggest that MGA imposes significant environmental obligations on private parties.

The *Cape-France* opinion was not unanimous, and attracted criticism both within the court and from outside commentators. Three Justices—Justice Leaphart,[87] Justice Rice,[88] and Chief Justice Karla Gray[89]—argued in a concurrence and separate dissents, respectively, that the majority should not have reached the constitutional issue. Chief Justice Gray, the strongest proponent of this point, argued that the parties did not present their case as raising a constitutional issue, and that the majority "improperly inserts a discussion of a critically important," and underdeveloped, constitutional right.[90] She further stated that the majority's interpretation was "dicta in its entirety," and warned that this dicta may improperly "take[] on a life of its own."[91] Similarly, an academic commentary written shortly after *Cape-France* admonished that "By neglecting to provide adequate analysis in Cape-France, the court left Montanans without parameters to design endeavors that will pass constitutional muster," and

84. *Id*. at 519.
85. *Id*. at 520.
86. *Id*.
87. *Id.* at 521 (J. Leaphart, concurring) ("Having resolved the issue presented under the impossibility of performance doctrine, I would not address the constitutional issues.").
88. *Id.* (J. Rice, dissenting) ("I believe this case can and should be resolved without reaching the constitutional issues—and without the sweeping constitutional holding—reached by the majority.").
89. *Id.* at 531 (C.J. Gray, dissenting) (same).
90. *Id*.
91. *Id*.

might unleash a wave of opportunistic litigation as many real property contracts "could be tied to degradation of the environment."[92] Perhaps because of this criticism, the more than twenty-year-old decision in *Cape-France* remains the closest that the Montana Supreme Court has come to recognizing that the MGA could create substantive, rather than simply procedural, environmental rights and obligations.[93]

d. MGA as a Standalone Cause of Action

Despite the explicit burden that the text of the MGA places on private entities, and the *Cape France* court's determination that private entities can violate the MGA by breaching those obligations, the MGA has had surprisingly little impact on the quintessential private environmental lawsuit: the environmental tort. Since *MEIC* and *Cape-France*, a handful of private litigants in Montana have attempted to sue private parties for environmental torts under the MGA itself. However, Montana's courts have been leery of allowing the MGA to expand the remedies available to plaintiffs alleging private environmental torts.

The Montana Supreme Court's approach to constitutional tort claims under the MGA was first developed in 2007 in a pair of cases argued on the same day: *Sunburst School District No. 2 v. Texaco, Inc.* and *Shammel v. Canyon Resources Corp*. In *Texaco*, a Montana school district and "approximately ninety adjoining private property owners" sued Texaco, Inc. for damages to their property caused by gasoline leaks from Texaco's nearby refinery.[94] The plaintiffs brought a number of claims against Texaco, "including trespass, strict liability for abnormally dangerous activity, public nuisance, violation of the constitutional right to a clean and healthful environment, wrongful occupation of property, and constructive fraud."[95] Following a full trial, the Montana trial court found Texaco strictly liable to the plaintiffs as a matter of law for trespass and for "for conducting an abnormally dangerous activity," and issued a number of instructions to the jury on the remaining counts, including an "instruct[ion to] the

92. Chase Naber, *Murky Waters: Private Action and the Right to A Clean and Healthful Environment an Examination of Cape-France Enterprises v. Estate of Peed*, 64 MONT. L. REV. 357, 365 (2003).

93. *See* Polk, *supra* note 67, at 168.

94. Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 338 Mont. 259, 263 (2007).

95. *Id*. at 266.

jury to award damages if Texaco had violated Sunburst's constitutional right to a clean and healthful environment."[96] The jury subsequently awarded the plaintiffs a wide range of damages, including "a single [combined] award of $226,500 for private nuisance, public nuisance and constitutional tort."[97]

On appeal to the Montana Supreme Court, Texaco argued that the trial court improperly instructed the jury that it could "award monetary damages, pursuant to Article II, Section 3, of the Montana Constitution, for any alleged constitutional tort committed by Texaco."[98] Texaco argued that the constitutional right was not "self-executing," and that the MGA did not create a stand-alone cause of action for monetary damages against private parties.[99] In response, the plaintiffs argued that the MGA established "a fundamental constitutional right" that imposed duties on private entities, and that a private cause of action against private parties for monetary damages was necessary "in order to vindicate" that right.[100]

The Montana Supreme Court, however, refused to resolve the general question raised by Texaco's appeal—that is, whether MGA created a freestanding constitutional cause of action against private parties for environmental torts. Instead, the *Texaco* court noted that, while "the absence of any other remedy support[s] the establishment of a constitutional tort," Montana has long held that "courts should avoid constitutional issues whenever possible."[101] On this basis, the Montana Supreme Court held "that the District Court erred in instructing the jury on the constitutional tort theory where, as here, adequate remedies exist under statutory or common law."[102] In a concurring opinion, Justice James C. Nelson emphasized that he did not read the majority's opinion as "rejecting, *per se,* a constitutional tort for violation of the fundamental right to a clean and healthful environment," and recognized "that a future case may present a factual and legal scenario that might well require us to address the constitutional tort theory on the merits."[103]

96. *Id*. at 267.
97. *Id*.
98. *Id*. at 263.
99. *Id*. at 279 (citing Dorwart v. Caraway, 312 Mont. 1, 16 (2002)).
100. *Id*. at 279.
101. *Id*.
102. *Id*. at 280.
103. *Id*. at 288 (Nelson, J., concurring in part and dissenting in part). Another concurrence in part and dissent in part by Chief Justice Karla M. Gray argued that the majority had mischaracterized Texaco's position on appeal, and while the issue of MGA's "self-executing" status was

The Montana Supreme Court reaffirmed and clarified this position just fifteen days later in *Shammel*.[104] There, three families who owned land downstream of a mine sued the mine operator and its parent company, both for allegedly contaminating their properties with a variety of chemicals and for diverting groundwater and stream flows from their properties in an effort to contain the contamination.[105] Among other tort claims, the families asserted a distinct right to recover money damages under the MGA, based on the operator's alleged violation of their constitutional right to a "clean and healthful environment."[106] This claim was dismissed, and the families appealed. Unlike *Texaco*, *Shammel* raised only one question on appeal: "whether the constitutional right to a clean and healthful environment, Montana Constitution, Article II, Section 3, and Article IX, Section 1, provides for the recovery of money damages in a constitutional tort action between private parties."[107] The Montana Supreme Court provided a clear, albeit still incomplete, answer: "Where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment does not authorize a distinct cause of action in tort for money damages between two private parties."[108]

Subsequent decisions have repeated the holdings of *Texaco* and *Shammel*.[109] While this line of cases leaves the door open for private constitutional torts under the MGA, the Montana Supreme Court has not articulated what, if any, circumstances might permit a plaintiff to bring such a claim against a private party.

raised in oral argument, the core of Texaco's appeal focused on whether the violation of a constitutional right could be considered in assessing damages under other causes of action. *See id*. at 300–06 (Gray, C.J., concurring in part and dissenting in part).

104. *See generally* Shammel v. Canyon Res. Corp., 338 Mont. 541 (2007).

105. *Id.* at 543.

106. *Id*. at 542.

107. *Id*.

108. *Id*. at 544–45.

109. *See, e.g.*, Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, *LLC*, 355 Mont. 387, 398 (2010) (affirming a judgment dismissing claims for monetary damages under the MGA brought by the neighbors of a shooting range who were purportedly harmed by its operation, since the plaintiffs "failed to demonstrate how common law or statutory remedies would not adequately address any potential damages.").

2. Pennsylvania: No Explicit Private Obligation, Limited Private Implication

a. The History and Structure of the PGA

The PGA originated in Pennsylvania's House of Representatives in 1970, and its language was finalized that same year.[110] The PGA was placed up for a referendum in 1971 with the unanimous approval of Pennsylvania's House and Senate, and approved for inclusion in the Constitution of the Commonwealth of Pennsylvania by nearly 80% of voters.[111] The PGA, which was incorporated as Section 27 of Article I, the Declaration of Rights, provides that:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[112]

Structurally, the PGA has two distinct clauses: the first sentence identifies an environmental right, and the second and third sentences charge the Commonwealth of Pennsylvania with conserving public natural resources in trust as the "common property of all people."[113] The State Representative who drafted the amendment, Franklin Kury, intended the amendment to "promote citizen standing, which had previously been conspicuously absent in Pennsylvania," and give private individuals the "ability to challenge environmental incursions."[114] However, as Representative Kury acknowledged in a law review article written 20 years after the PGA's enactment, "the Amendment . . . is silent on procedural issues that had to be addressed before the Amendment could be effective, such as: whether the Amendment is self-executing, what standards

110. *See* Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENV'T L.J. 123, 123 (1991).

111. The amendment was approved by a vote of 1,021,342 in favor of the amendment to 259,979 against. *See id.* at 123 n.2 and accompanying text.

112. PA. CONST. art. I, § 27.

113. The Pennsylvania Supreme Court has cited with approval comments from the PGA's legislative history that refer to the PGA as conceptually composed of "two separate bills," albeit bills with a significant interpretive relationship. Robinson Twp. v. Commonwealth, 623 Pa. 564, 645 (Pa. 2013) (quoting 1970 Pa. Leg. J.-House 2269, 2272 (Apr. 14, 1970)).

114. Kury, *supra* note 110, at 124.

to apply to enforce the Amendment, and who would be responsible for enforcing it."[115]

For the first forty years of the PGA's life, these procedural issues remained largely unanswered.[116] In several early cases, Pennsylvania courts either reached inconclusive decisions about the "self-execution" question, or concluded that the PGA was self-executing, but interpreted the rights in the PGA "so narrow[ly] as to effectively render it unenforceable without legislative action—or, in other words, *not* self-executing."[117] In practice, some commentators have noted that early decisions treated the constitutional environmental rights guaranteed by the PGA as equivalent in importance to other government interests like economic development.[118]

In 2013, the Pennsylvania Supreme Court acknowledged the somewhat tangled line of precedents surrounding the PGA and charted a new course for the right.[119] In *Robinson Township v. Commonwealth*, a group of Pennsylvania municipalities, organizations, and citizens challenged Act 13, a revision to Pennsylvania's Oil and Gas Law that changed permitting standards for oil and natural gas wells and prohibited "any local regulation of oil and gas operations, including via environmental legislation."[120] The plaintiffs alleged, among other claims, that Act 13 violated the PGA by preventing local governments from fulfilling their constitutional obligations as environmental trustees.[121] "[T]he Commonwealth Court briefly discussed and ultimately rejected" claims that Act 13 violated the PGA, holding that any such municipal obligation "derived from the Municipalities Planning Code," a statute, rather than from Pennsylvania's constitution.[122]

On appeal, the Pennsylvania Supreme Court reversed the Commonwealth Court's holding and concluded that Act 13's suspension of environmental laws violated the PGA. The court's interpretation

115. *Id*. at 125.

116. Yeargain, *supra* note 16, at 36.

117. *Id*.

118. For an extensive discussion of this early line of cases, *see* Margaret J. Fried & Monique J. Van Damme, *Environmental Protection in A Constitutional Setting*, 68 TEMP. L. REV. 1369, 1390–99 (1995).

119. *See* Yeargain, *supra* note 16, at 40 (summarizing the intersection of *Robinson* and concluding that "[w]hile the court did not wholly displace the previous caselaw in the state . . . it largely discarded it.").

120. Robinson Twp. v. Commonwealth, 623 Pa. 564, 587–88 (Pa. 2013).

121. *Id*. at 589.

122. *Id.* at 616 (quoting Robinson Twp. v. Commonwealth, 52 A.3d 463, 489 (Pa. Commw. Ct. 2012)).

focused on the second clause of the PGA, which charges the Commonwealth of Pennsylvania with acting as trustee of public natural resources.[123] The court found that the clause was self-executing because it "speaks on behalf of the people, to the people directly, rather than through the filter of the people's elected representatives to the General Assembly" and, in doing so, "create[s] a right in the people to seek to enforce the obligations" of the Commonwealth as trustee.[124] Moreover, the court held that the PGA creates enforceable constitutional environmental obligations to the people at "all existing branches and levels of government,"[125] and that the General Legislature cannot "remove necessary and reasonable authority from local governments to carry out these constitutional duties" without assuming the constitutional obligations itself.[126] Subsequent scholars have characterized the decision in *Robinson* as "plac[ing] the environmental rights protected in section 27 on equal footing with the 'political rights' protected by the state constitution."[127]

b. Private Litigation under the PGA

Unlike the MGA,[128] the plain text of the PGA does not explicitly impose any obligations on private actors. Clause 1 of the PGA describes environmental rights of "the people," without describing corresponding responsibilities,[129] and Clause 2 of the PGA directly charges the Commonwealth of Pennsylvania with conserving Pennsylvania's public natural resources in trust for the people. As these clauses are read together,[130] Pennsylvania's courts have generally held that the

123. The majority opinion noted that, while rights under the first clause of the PGA may be implicated by Act 13, the appellants "ha[d] not developed arguments regarding the merits of such claims sufficient to enable [the court] to render a reasoned decision." *See id.* at 683 n.56 and accompanying text.

124. *Robinson Twp.*, 623 Pa. at 684.

125. *Id*. at 688–89.

126. *Id*. at 689.

127. Yeargain, *supra* note 16, at 39–40.

128. *See supra* text accompanying note 63.

129. *Compare* PA. CONST., ART. I, § 27, *with* MONT. CONST. ART. II, § 3 (emphasizing that, in enjoying the MGA's right to a clean environment, "all persons recognize corresponding responsibilities").

130. *See Robinson Twp.,* 623 Pa. at 645 (noting that "the two paradigms, while serving different purposes in the amendatory scheme, are also related and overlap to a significant degree" and citing with approval legislative history suggesting that the clauses should be interpreted to operate cohesively).

PGA "does not impose duties or obligations on private parties."[131] Nevertheless, the PGA has had some impact on litigation against and between private parties in one realm—private property disputes.

c. PGA as a Limit on Private Property Rights

Pennsylvania's courts quickly recognized that the PGA might reshape the boundaries of private property in Pennsylvania. In 1973, two years after the PGA's passage, the Pennsylvania Supreme Court heard a case which argued that the PGA represented a limit on the use of private property. In *Shapp v. National Gettysburg Battlefield Tower, Inc.*, the Commonwealth of Pennsylvania brought an action under the PGA to enjoin a private company from building an observation tower on private land near Gettysburg Battlefield National Park. While no party alleged that the proposed tower violated any statutes or regulations, the Commonwealth claimed that PGA gave Pennsylvania the authority to enjoin private action that would disrupt "the natural, scenic, historic and esthetic values of the environment,"[132] and that the proposed tower represented "a despoilation of the natural and historic environment."[133] The Pennsylvania Supreme Court rejected this argument. While the majority opinion acknowledged that the PGA reshaped constitutional protections around private property rights,[134] the court expressed concern that, if the PGA were deemed self-executing without implementing legislation, "a

131. Clean Air Council v. Sunoco Pipeline L.P., 185 A.3d 478, 494 (Pa. Commw. 2018); *see also* Feudale v. Aqua Pa., Inc., 122 A.3d 462, 466 (Pa. Commw. 2015) *aff'd*, 635 Pa. 267, 135 A.3d 580 (2016) ("The plain language of the Environmental Rights Amendment charges the Commonwealth, as trustee, with the duty to conserve and maintain Pennsylvania's public natural resources, and we are unaware of any case law applying this duty to non-Commonwealth entities."); *but see* Marques v. Bunch, 18 Pa. D. & C.3d 371, 388 (Pa. Com. Pl. 1980) (describing an individual's dumping of farm waste as occurring "in violation of [the individual's environmental] permit, the Clean Streams Law, and [the PGA]"). *Marques* is discussed below in more detail. *See infra* note 144 and accompanying text.

132. Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 197 (Pa. 1973).

133. *Id*. at 195.

134. This element of *National Gettysburg Battlefield Tower* has been emphasized in recent constitutional litigation in Pennsylvania. *See* League of Women Voters of Pennsylvania v. Boockvar, 247 A.3d 1183 (Pa. Commw. Ct. 2021), *aff'd sub nom.* League of Women Voters of Pennsylvania v. DeGraffenreid, 265 A.3d 207 (Pa. 2021) (noting that "[e]very amendment must have some impact on other provisions of the Constitution, or it would be surplusage," and that the Pennsylvania Supreme Court had "observed that the Environmental Rights Amendment, Pa. Const. art. I, § 27, impacted property rights protected by the United States and Pennsylvania Constitutions.").

property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property."[135] In a dissent joined by Justice Eagean, Chief Justice Jones argued that, unlike other state environmental rights cited by the majority, the PGA contains no language directing the legislature to enact implementing statutes, and so should be construed as a direct limitation on the use of private property.[136]

For forty years following *National Gettysburg Tower*, few litigants attempted to invoke the PGA in property disputes. That pattern changed in 2013 when, as previously discussed, the Pennsylvania Supreme Court reversed course in *Robinson* and declared the PGA to be self-executing.[137] Following *Robinson*, a number of individuals, organizations, and local governments have launched collateral challenges against private actors by arguing that the PGA limits the authority of Pennsylvania governments to permit environmentally harmful uses of private property like fossil fuel extraction and pipelines development.[138] The challenges have been largely unsuccessful for a variety of reasons,[139] including plaintiffs' difficulties in "proving a legally cognizable harm"[140] and courts' reluctance to police inaction by one Commonwealth government entity where another is already actively regulating the environmental harm in question.[141]

135. *Nat'l Gettysburg Battlefield Tower, Inc.*, 454 Pa. at 202–03.

136. *Id.* at 209-10 (1973) (Jones, J., dissenting) ("That the language of the amendment is subject to judicial interpretation does not mean that the enactment must remain an ineffectual constitutional platitude until such time as the legislature acts.").

137. *See* Robinson Twp. v. Commonwealth, 623 Pa. 564, 684 (Pa. 2013).

138. These litigants have seen the PGA as "a pathway by which these groups can challenge agency actions in which they were previously not considered interested parties." Tara K. Righetti, *The Incidental Environmental Agency*, 2020 UTAH L. REV. 685, 733 (2020) (noting that recent PGA decisions "have emboldened individuals and municipalities to challenge oil and gas and other industrial permitting activities").

139. *See* John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 WIDENER COMMONWEALTH L. REV. 147, 169 (2020) (collecting cases, and noting that "[i]n the cases decided thus far, the Commonwealth Court has rejected all [PGA] challenges to local government decisions permitting shale gas development."); *Id*. at 175 ("The [PGA] cases involving pipelines tend to involve local zoning authority. In these cases, however, the [PGA] claimants have all lost.").

140. *Id*. at 169.

141. *See id.* at 169–174 (summarizing challenges to local government inaction on shale gas production).

d. PGA as a Vehicle for Public Nuisance Claims

The PGA has also served as the basis of claims against private parties for public nuisance. Under the Second Restatement of Torts, which courts in Pennsylvania apply, a public nuisance is "'an unreasonable interference with a right common to the general public,' such as the right to clean public water and fresh air in public spaces."[142] Private plaintiffs can sue to enjoin a public nuisance if the "property or civil rights" of such private plaintiffs are specifically and significantly injured by the nuisance, "over and above the injury suffered by the public generally."[143]

One early Pennsylvania public nuisance case, *Marques v. Bunch,* went so far as to hold that the PGA itself creates a private obligation to protect natural resources. In 1980, Anthony Marques sued a neighboring farmer, Dewey Bunch, Jr., for a variety of environmental torts arising from Bunch's alleged dumping of contaminants on neighboring lands, in public waterways, and in groundwater reservoirs. Finding that Bunch had created a public nuisance through this contamination, the Bucks County Court of Common Pleas held, without comment on the unprecedented nature of the ruling, that a private farmer's "sludge dumping activities have resulted in the pollution of both surface waters and groundwaters of the Commonwealth in violation of Bunch's permit, the Clean Streams Law, and Pa. Const., Art. 1, §27."[144] *Marques* does not explicitly elaborate on the relationship between the PGA and the relief granted, but discussion throughout suggests that the PGA may have represented a statement of public policy that factored into the common-law public nuisance calculus.[145]

Five years later, another case, *PECO v. Hercules, Inc*., again raised the intersection of the PGA and public environmental nuisance.[146] In 1973 the Philadelphia Electric Company (PECO) discovered chemical contamination in the Delaware River originating from a piece of land PECO acquired. In 1980 the Pennsylvania regulatory authorities also discovered chemical contamination in the Delaware River originat-

142. Baptiste v. Bethlehem Landfill Co., 965 F.3d 214, 220 (3d Cir. 2020) (quotations and citations omitted).

143. Pennsylvania Soc. for Prevention of Cruelty to Animals v. Bravo Enterprises, Inc., 237 A.2d 342, 348 (Pa. 1968).

144. *Marques v. Bunch*, 18 Pa. D. & C.3d 371, 388 (Pa. C.P.. 1980).

145. *See id*. at 382–84.

146. Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 315 (3d Cir. 1985).

ing from a plot of land owned by PECO and required the company to conduct environmental remediation. PECO sued the party that had sold it the contaminated land for its remediation costs, and was eventually awarded damages under theories of private and public nuisance. One of the defendants, Hercules, Inc., appealed the verdict to the Third Circuit.

Hercules challenged both theories of liability. Applying the Second Restatement of Torts and the doctrine of *caveat emptor*, a panel of the Third Circuit held that private nuisance was unavailable to PECO because the relationship between the parties was governed by a chain of contractual transfers, not by tort.[147] However, in so ruling, the court noted that the PGA creates a public "right to 'pure water,'" and that "[i]f PECO—as a riparian landowner—had suffered damage to its land or its operations as a result of the pollution of the Delaware, it would possibly have a claim for public nuisance."[148]

These cases suggest that individual plaintiffs in Pennsylvania can use public nuisance claims to enjoin certain violations of the environmental rights protected by the PGA. However, it is worth noting the relative obscurity of these cases. *Marques* is an outlier decision by a trial court and may be of limited precedential value.[149] While *Hercules* is a higher-profile case, its language around the intersection of the PGA and public nuisance provides an example rather than an analysis of the facts before the court, and therefore may be considered dicta. Nevertheless, these cases present one possible path for asserting rights under the PGA against private polluters.

B. Private Litigation under New York's Environmental Laws

The NYGA has counterparts and comparisons within New York, as well as in other states. When the NYGA was enacted, it joined a well-established body of state environmental law, with statutory roots

147. In particular, the court held broadly that the purchaser of real property could not assert a claim of private nuisance against a remote seller "where there has been no fraudulent concealment," as this "would in effect negate the market's allocations of resources and risk." *Id*.

148. *Id.* at 316.

149. Contemporaneous plaintiffs who initially asserted rights under the PGA dropped those claims in favor of common law nuisance and negligence claims, *see* O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 646 n.1 (E.D. Pa. 1981), and *Marques* has not been raised by other courts addressing private liability under the PGA. *See* Feudale v. Aqua Pa., Inc., 122 A.3d 462, 466 (Pa. Commw. Ct. 2015) *aff'd*, 635 Pa. 267 (Pa. Sup. Ct. 2016) ("[W]e are unaware of any case law applying [duties under the PGA to protect public natural resources] to non-Commonwealth entities.").

stretching back to the nineteenth century.[150] While these state environmental laws take a variety of forms and serve a wide range of functions, they share one thing in common with the NYGA: they have inspired creative lawsuits brought by private litigants seeking to rectify private environmental harms.

The purpose of this Subsection is to give an overview of the many various ways by which New York's key environmental laws support, or reject, private environmental claims against private actors. First, it examines private actions under New York's *other* constitutional environmental provision, the "Forever Wild" provision. Next, it looks at private litigation under one of New York's most significant environmental statutes, the State Environmental Quality Review Act. Finally, it provides a high-level overview of private causes of action in New York's other environmental laws. In each case, analysis of private actions reveals the same pattern—New York courts are reluctant to allow private environmental actions under environmental laws that do not create explicit private rights or that specifically grant enforcement rights to the state.

1. The "Forever Wild" Provision

While the NYGA is the first time New York's constitution has guaranteed individual environmental rights, it is not the only environmental clause in New York's constitution. In the nineteenth century, an early environmental law—The Forest Preserve Act of 1885—was enshrined in the New York Constitution shortly after its passage.[151] The Forest Preserve Act, and the subsequent constitutional provision that came to be known as the "Forever Wild" provision, created the Adirondack and Catskill Forest Preserves.[152] In so doing, the provision proclaimed that those areas "shall be forever kept as wild forest lands."[153]

150. *See generally*, THE LIBRARY OF CONGRESS, THE EVOLUTION OF THE CONSERVATION MOVEMENT, 1850-1920, https://memory.loc.gov/ammem/amrvhtml/cnchron2.html (last visited Apr. 9, 2024). This Subsection does not discuss private environmental litigation under New York's common law, which is addressed below (*see infra* Section IV.B), and has even deeper roots.

151. Daniel G. Payne & Richard S. Newman, *"Forever Wild" Provision of the New York State Constitution (Constitutional Convention of 1894)*, *in* THE PALGRAVE ENVIRONMENTAL READER (2005) (explaining that due to loopholes in the Forest Preserve Act, a group of conservationists at the 1894 New York Constitutional Convention led a campaign to insert a fully protective "forever wild" clause into the State constitution.).

152. *Id*.

153. Article XIV, section 1 of the New York Constitution states in part, "[t]he lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law,

In stark contrast to the 15-word NYGA, the "Forever Wild" provision is almost excessively detailed. The Forever Wild provision contains more than 2,200 words, and explicitly bars both public and private parties from developing or exploiting specified forest preserves, subject to lengthy exceptions.[154] Unlike the NYGA, the Forever Wild provision contains explicit enforcement mechanisms. Article XIV, section 5 provides that violations of the Forever Wild provision "may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen."[155] While this enforcement mechanism permits some suits between private actors, these suits are better characterized as quasi-*qui tam* actions rather than as true private litigation. New York courts have made clear that citizen plaintiffs who sue under the Forever Wild provisions are acting in place of the Attorney General to enforce the rights of the public, rather than asserting their own rights.[156] In practice, citizen suits under the Forever Wild provisions are rare,[157] and as the Forever Wild provision binds both state officials and private actors, citizens more frequently sue state officials directly for alleged failures to comply with or enforce the Forever Wild provisions.[158]

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." N.Y. CONST. art XIV, § 1.

154. *See id*. (stating that protected lands "shall not be leased, sold or exchanged, or be taken by any corporation, public or private"); *see also* State v. Moore, 114 N.Y.S.3d 781, 782 (N.Y. App. Div. 2020) (citing the Forever Wild provision to support the claim that certain private development on disputed land "would be prohibited if it were, as [the State of New York] claimed, state-owned forest preserve land."); *see* also Jorling v. Adirondack Park Agency, 173 N.Y.S.3d 385 (N.Y. Sup. Ct. 2021), *rev'd on other grounds*, 185 N.Y.S.3d 354 (N.Y. App. Div. 2023) (describing the Forever Wild provision as a "constitutional prohibition against a private person or entity occupying [certain protected] lands and waters[.]").

155. N.Y. CONST. art. XIV, § 5.

156. New York courts have described this private cause of action as "a secondary right" that is exercisable "if the Attorney-General defaults" in her obligations to restrain violations of the Forever Wild provision. People v. System Properties, Inc., 281 A.D. 433, 445 (N.Y. App. Div. 1953).

157. This, apparently, has always been the case. *See* Daniel W. Coffey, *A Critique of New York's Proposed Private Environmental Law Enforcement Act*, ALB. L. ENV'T OUTLOOK, Fall 1995, at 23,24 ("the constitutional citizen suit is seldom invoked and little litigation has arisen under it.").

158. *See* Nicholas A. Robinson, *Updating New York's Constitutional Environmental Rights*, 38 PACE L. REV. 151, 181 n.100 (2017) (noting that "Article XIV is subject to judicial enforcement via an Article 78 proceeding," and citing several recent citizen suits against New York officials for failures to uphold the Forever Wild provision).

2. Private Actions under SEQRA

In addition to its two constitutional environmental provisions, New York law contains an extensive body of environmental statutes. The most well-known of these is the State Environmental Quality Review Act (SEQRA), which creates a rigorous environmental review process meant to minimize the adverse effects of government action on the environment.[159] SEQRA was passed in 1975 as a response to the federal National Environmental Policy Act ("NEPA").[160] Largely mirroring NEPA's federal environmental review requirements, SEQRA requires any state entity that is either taking or approving an action with a potentially significant environmental impact to prepare an assessment identifying the potential adverse environmental impacts of that action.[161] Unlike NEPA, which requires environmental review but does not dictate substantive outcomes,[162] SEQRA frequently requires state officials to take affirmative actions to avoid environmental harm.[163] For example, SEQRA directs agencies to take steps that, "to the maximum extent practicable, minimize or avoid adverse environmental effects" of state actions.[164]

While SEQRA outlines extensive environmental review processes for government actors, it "contains no provision regarding judicial review" and no provisions for enforcement.[165] Nevertheless, private

159. N.Y. COMP. CODES R. & REGS. tit. 6, § 617 (2024).

160. Matthew A. Sokol, *Enacting SEQRA: The Legislative Debates and a 25-Year Look Back*, 11 ENV'T L. IN N.Y. 13, 16 (2000) (quoting Governor Hugh Carey).

161. SEQRA is a complex statutory and regulatory regime, and this summary elides a significant amount of detail that is outside of the scope of this Article. For an overview of the structure and requirements of SEQRA, *see* N.Y. DEPT. ENV'T CONSERV., THE SEQR HANDBOOK (4th ed. 2020) https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf [https://perma.cc/J5Z3-U25A].

162. *See* Ray Vaughan, *Necessity and Sufficiency of Environmental Impact Statements under the National Environmental Policy Act*, *in* 38 AMERICAN JURISPRUDENCE PROOF OF FACTS 3D 547 (Feb. 2024 update) ("NEPA is a procedural statute only; it makes no substantive demands on the federal agencies" and "mandates no particular result from the consideration of environmental impacts, but only that those impacts be identified and considered.").

163. *See* Jackson v. New York State Urb. Dev. Corp., 67 N.Y.2d 400, 434 (N.Y. 1986) ("SEQRA is not merely a disclosure statute; it "imposes far more 'action-forcing' or 'substantive' requirements on state and local decisionmakers than NEPA imposes on their federal counterparts[.]").

164. N.Y. ENV'T CONSERV. LAW § 8-0109(1) (2006); *see also* Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1249-50 (1982) (providing early commentary on the "action-forcing" requirements of SEQRA and contrasting it with NEPA).

165. Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 77 N.Y.2d 761, 770 (N.Y. 1991) ("While highly particular in setting out the various requirements, SEQRA contains no provision regarding judicial review.").

litigants frequently allege violations of SEQRA in lawsuits, using other provisions of New York law that permit private parties to sue government agencies and officers for purported failures to perform their legal duties.[166] Interestingly, while SEQRA primarily creates environmental obligations for government actors, not private ones,[167] under some circumstances private plaintiffs can end up on both sides of SEQRA enforcement litigation. This is the result of New York's rules of civil procedure, which requires courts to join parties "who might be inequitably affected by a judgment in [an] action."[168]

SEQRA actions have been shaped by the legislature's failure to include any explicit provisions for "citizen suits."[169] In 1991 the New York Court of Appeals closely examined the scope of SEQRA citizen suits in *Society of Plastics Industry, Inc. v. County of Suffolk*,[170] a suit brought by "representatives of the plastics industry" alleging that a municipal law banning plastic takeout containers had purportedly received insufficient environmental review.[171] Noting that the New York legislature had considered, and rejected, provisions granting broad standing to individuals to enforce SEQRA by suit,[172] the Court of Appeals refused to adopt an "open door policy," holding instead that "the Legislature [had] made clear that some limitation on standing . . . was appropriate."[173] Without guidance from the legislature, the Court of Appeals drew those limitations from the common law of standing.[174] Under the standards developed by New York courts

166. *See* N.Y. C.P.L.R. § 7803(1) (McKinney 2003) (codifying the writ of mandamus, and permitting actions that challenge "whether [a New York] body or officer failed to perform a duty enjoined upon it by law").

167. SEQRA allows state agencies to delegate some of the work of preparing environmental reports to private entities that are requesting state action, like companies applying for construction permits. However, state agencies and officers remain primarily responsible for ensuring that their activities comply with SEQRA. *See, e.g.*, N.Y. ENV'T CONSERV. LAW § 8-0109(3) (2006).

168. N.Y. C.P.L.R. § 1001(a) (1963); *see also* Philip E. Karmel, *SEQRA litigation—Proper Parties to SEQRA Litigation*, *in* 9 N.Y. PRAC., ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 4:40 (2d ed. Oct. 2023 update) (discussing joinder in SEQRA litigation).

169. Matthew Sokol, 11 ENV'T L. IN N.Y. 13, 16 (2000) (noting that no citizen suit bill has been enacted in New York).

170. Soc'y of Plastics Indus., 77 N.Y.2d at 769–71.

171. *Id*. at 764.

172. *See id.* at 770 ("Had the Legislature intended that every person or every citizen have the right to sue to compel SEQRA compliance—thus assuring above all else that the [environmental impact statement] process would be scrupulously followed, irrespective of the source of the challenge—it could easily have so provided; it did not.").

173. *Id.* at 771.

174. *Id.* at 771–75.

over the intervening decades, plaintiffs seeking to allege a violation of SEQRA "must show (1) an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA."[175]

3. Private Actions under other Environmental Laws

Alongside SEQRA, New York has enacted voluminous statutes and regulations that govern environmental quality, penalize pollution, and ensure the protection of environmentally sensitive species, regions, and ecosystems. Most of the statutes are located in New York's Environmental Conservation Law (ECL),[176] although some pollution-related provisions are contained in other statutes regulating specific activities, like New York's Navigation Law.[177] Unlike SEQRA, many of the statutes contained in the ECL create explicit obligations for private individuals,[178] and most sections of the ECL are subject to explicit enforcement provisions.[179]

However, private causes of action are rare under the ECL for a simple reason: the ECL does not, generally, create private environmental rights. In the case of the provisions that control water pollution[180] and air pollution,[181] this reservation is explicit. These statutes provide that the benefit of the environmental codes, rules, and regulations governing water and air pollution "shall inure solely to and shall be for the benefit of the people of the state generally,"[182] and that regulation of water and air pollution under the ECL "is not intended to create in any way new or enlarged rights or to enlarge

175. Tuxedo Land Tr., Inc. v. Town Bd. of Tuxedo, 977 N.Y.S.2d 272, 274 (N.Y. App. Div. 2013).

176. N.Y. ENV'T CONSERV. LAW §§ 1-0101–75-0119.

177. *See, e.g.*, N.Y. NAV. LAW § 181(1) (providing that "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained.").

178. *See, e.g.*, N.Y. ENV'T CONSERV. LAW § 17-0501(1) (prohibiting "any person" from "directly or indirectly" polluting protected waters); N.Y. ENV'T CONSERV. LAW § 37-0107 (prohibiting "persons" from storing or releasing regulated "substances hazardous or acutely hazardous to public health, safety, or the environment").

179. *See* N.Y. ENV'T CONSERV. LAW §§ 71-0101–71-4412 (describing enforcement procedures for many of the provisions of the ECL).

180. N.Y. ENV'T CONSERV. LAW §§ 17-0101–17-2105.

181. N.Y. ENV'T CONSERV. LAW §§ 19-0101–19-1105.

182. N.Y. ENV'T CONSERV. LAW § 19-0705 (addressing air pollution and contamination); N.Y. ENV'T CONSERV. LAW § 17-1103 (addressing water pollution and contamination).

existing rights."[183] Moreover, these statutes provide that violations of regulations governing water and air pollution "shall not create by reason thereof any presumption of law or finding of fact" that can be used in litigation "for the benefit of any person other than the state."[184] In these two areas, the ECL is clear: the environmental rights it creates are held by the people generally, and are not individual.[185]

While other sections of the ECL do not so explicitly repudiate private environmental actions, New York courts have nevertheless concluded that the environmental rules and regulations of the ECL do not create causes of actions between private parties.[186] Where the ECL authorizes New York's Attorney General to enforce its provisions, but does not explicitly give such rights to private individuals, courts have held that those provisions "benefit the public at large" and do not create individual environmental rights against polluters.[187]

183. N.Y. ENV'T CONSERV. LAW § 19-0705; N.Y. ENV'T CONSERV. LAW § 17-1103.

184. N.Y. ENV'T CONSERV. LAW § 19-0705; N.Y. ENV'T CONSERV. LAW § 17-1103.

185. Other sections, which apply to the management of environmentally sensitive areas more generally, provide an explicit private cause of action against the government for private persons harmed by management decisions, but do not expressly permit actions against private entities. *See* N.Y. ENV'T CONSERV. LAW § 34-0112 (providing that "[a]ny person aggrieved by an act, order, determination or decision of the [environmental] commissioner made pursuant to this article may seek judicial review").

186. *See* Kalden Const. Co. v. Hanson Aggregates New York, Inc., 634 F. Supp. 2d 319, 322 (W.D.N.Y. 2009) (concluding that "the weight of authority in New York is that the ECL does not provide a private right of action.").

187. *See* Women's Voices for Earth, Inc. v. Procter & Gamble Co., 581 N.Y.S. 2d 962, 962 (N.Y. Sup. Ct. 2010) (holding that "there is no private right of action under ECL § 71–3103, which gives the Attorney General the power to enforce" the ECL's environmental standards for household cleaning products, and that "Petitioners do not fulfill the first prong of the private right of action inquiry, which is whether they are part of 'the class for whose particular benefit the statute was enacted," because "[t]he statute was to benefit the general public at large."); *see also* Town of Wilson v. Town of Newfane, 906 N.Y.S.2d 721, 721 (N.Y. App. Div. 1992) (holding that a private plaintiff could not bring claims against a private defendant "predicated upon defendant's violation of certain regulatory provisions" governing the operation of landfills, "[b]ecause the [ECL] specifically authorizes the Attorney-General to enforce" such rules and regulations); Nowak v. Madura, 304 A.D.2d 733, 733 (N.Y. App. Div. 2003) (upholding the dismissal of a private claim challenging private defendants' "unauthorized alterations to [a] drainage system" in violation of the ECL, as "[t]hat statute does not confer a private cause of action," and citing *Town of Wilson v. Town of Newfane*, 906 N.Y.S.2d; Geysir Sales Corp. v. Arctic Glacier, Inc., 78 A.D.3d 653, 653 (N.Y. App. Div. 2010) (reversing a lower court's denial of a motion to dismiss a claim brought under the ECL for damages caused by a leak of ammonia "from the defendant's ice-manufacturing facility," and holding that "[t]he ECL did not create a private cause of action to recover damages for violations of" a provision relating to the storage of hazardous substances).

The very few liability provisions applicable to private parties in the ECL and other New York environmental laws reinforce the general principle that New York's environmental statutes do not create private rights against private parties. For example, the ECL's provisions on forest fire control allow private suits against private parties who negligently or willfully start forest fires, but do not define any special category of environmental injury, and instead treats "damages" as arising from ordinary tort law.[188] Similarly, New York's Navigation Law contains extensive provisions detailing environmental liability for oil spills, and allows individuals who are directly or indirectly damaged by an oil spill to bring suits "directly against the person who has discharged the petroleum" for their own damages, but does not create or imply any personal environmental rights that would expand such damages beyond the bounds of traditional tort law.[189] Analysis of private actions under the ECL reveals a pattern shared by private actions under the "Forever Wild" provision and SEQRA: New York courts are reluctant to create private causes of action if an environmental law (1) does not create an explicit private right or (2) explicitly provides for enforcement by state agents rather than by private litigation.

IV. REVISITING THE *FRESH AIR* CASES

The *Fresh Air* cases addressed two key questions: (1) whether the NYGA is self-executing; and (2) whether private entities owe enforceable obligations to other private parties under the NYGA.[190]

188. *See* N.Y. ENV'T CONSERV. LAW §§ 71-0711, 0713. The statute does, however, provide an environmental penalty clause of sorts by making willful firestarters liable to private individuals "for the higher of actual damages or damages at the rate of five dollars for each tree killed or destroyed." N.Y. ENV'T CONSERV. LAW § 71-0711.

189. N.Y. NAV. LAW § 181(5).

190. Of course, even if the NYGA does not apply to purely private conduct, that does not mean that *all* private conduct is immune from constitutional challenge. It is well-established that "[p]rivate conduct may . . . be found to be 'state action,' and thus subject to constitutional protection, where the government has participated in private conduct to such an extent that the conduct can be deemed to be fairly attributable to the state." Curiously, although FAFE made this exact argument in *Fresh Air I*, the decision contains no discussion of it. *See* Plaintiff's Memorandum of Law in Opposition to the Motion to Dismiss by Waste Management of New York, L.L.C. at 15–16, Fresh Air I, No. E2022000699, 2022 WL 18141022 (N.Y. Sup. Ct. June 17, 2022)). Though we take no position on whether the doctrine should apply to WMNY's actions as alleged by FAFE, we note that the doctrine may provide a viable route for litigants to maintain NYGA claims against private parties in certain circumstances. *See, e.g.*, Clean Air Council v. Sunoco Pipeline L.P., 185 A.3d 478, 492 (Pa. Commw. Ct. 2018) (discussing the availability of a

Despite the enormous significance of these questions to the scope and power of the NYGA, the *Fresh Air* court answered both with barely a paragraph of analysis.

Addressing the first question, the court held that the NYGA *is* self-executing.[191] Though that conclusion is on appeal,[192] this Section does not address the issue because the court's holding accords with the well-established New York law principal that "constitutional provisions are presumptively self-executing."[193] Moreover, the state rights that inspired the NYGA—the PGA and MGA—have both been found to be self-executing.[194]

This Section focuses instead on whether the NYGA creates private claims against private parties. *Fresh Air I*'s brief analysis of this question suggests a clarity to New York's constitutional law that is simply absent.[195] As this Section argues, where the text of a section of New York's Bill of Rights is ambiguous with respect to whether it incorporates a state action requirement, courts must apply a more robust analysis—one that considers the section's substantive, historical, and comparative context.

This Section analyzes the NYGA with the benefit of this context, and concludes that *Fresh Air I* incorrectly decided that the NYGA provides no remedy for environmental claims between private parties. Subsection A discusses the relationship between the NYGA and other sections of New York's Bill of Rights, and asserts that *Fresh Air I*'s comparison of these rights overlooks the unique nature of the NYGA. Subsection B examines at the legislative history of the NYGA, and finds that this history is, at best, divided on the question of whether the NYGA contains a private cause of action. Subsection C similarly assesses constitutional litigation under the NYGA's antecedent green amendments, the MGA and the PGA, and concludes that these histories provide little guidance for interpreting the NYGA. Finally, Subsection D looks at the broader structure of New York's en-

private cause of action under the PGA where a private pipeline company was acting with eminent domain authority delegated from the Commonwealth of Pennsylvania).

191. *Fresh Air I* at 12–13; Fresh Air II, No. E2021008617, slip op. 34429 at 8–9 (N.Y. Sup. Ct. Dec. 8, 2022).

192. *See* Brief of Defendant at 11–51, Fresh Air for the Eastside, Inc. v. State of New York, No. CA23-00179 (N.Y. App. Div. Dec. 22, 2023).

193. *See* Brown v. State of New York, 89 N.Y.2d 172, 186 (N.Y. 1996) (citing People v. Carroll, 3 N.Y.2d 686 (1958)); *but see infra* note 227 and accompanying text (discussing the limited utility of legislative history when interpreting constitutional provisions).

194. *See supra* Sections (III)(A)(1) and (III)(B)(1).

195. *See Fresh Air I* at 12–13.

vironmental law, and argues that the NYGA represents exactly the type of environmental right that New York law treats as privately enforceable: one that creates individual environmental rights and provides no explicit mechanism for government enforcement of those rights.

A. The NYGA Arises in a Unique Constitutional Context that Should Shape Its Interpretation

The *Fresh Air* court's interpretation of the NYGA was heavily shaped by early commentators who opined that NYGA claims can only be brought against government entities.[196] These commentators argued that the NYGA does not explicitly say that it binds private conduct, so a private party cannot violate it. They point to Section 11, the equal protection provision, which specifically prohibits discrimination "by any other person or by any firm, corporation, or institution,"[197] and compare it to Sections 3 and 8, the free exercise and freedom of speech and press provisions, respectively, which do not expressly bind private actors, and have been held to apply only to state action.[198] The perspective of these commentators was not an outlier; several prominent New York environmental scholars adopt-

196. *See infra* notes 47–49, 52 and accompanying text (discussing the use of academic and practitioner commentary in *Fresh Air I*); *see also Fresh Air I* at 12–13.

197. Section 11 provides:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. CONST. art. 1, §11.

198. Section 3 provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

N.Y. CONST. art. 1, §3.

Section 8 provides:

> Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.Y. CONST. art. 1, §8.

ed essentially the same analysis as part of broader discussions of the NYGA's impact.[199]

While the interpretation of the NYGA endorsed by the *Fresh Air* court is temptingly simple, it elides a nuanced constitutional landscape. The commentators cited in *Fresh Air I* are right that the plain text of Section 11 binds private conduct.[200] But it also explicitly prohibits discrimination "by the state or any agency or subdivision of the state."[201] This makes Section 11 an awkward analogue for the NYGA, which does not explicitly prohibit private *or* state action. Put differently, *Fresh Air I*'s holding that an NYGA claim cannot be brought against a private party because the NYGA "makes no reference to private entities" is inconsistent with its holding that an NYGA claim can be brought against a public party, because the NYGA also makes no reference to governmental entities.[202] A simple textual interpretation is thus unsatisfying, at best.[203]

199. *See* Katrina Kuh, Evaluating the Adoption of a Green Amendment to the NYS Constitution (Oct. 26, 2021) (Address to the New York Bar Association) (powerpoint on file with the Journal) (contrasting Section 11 with Sections 3 and 8, and arguing that "under relevant NY precedent, the right would likely be interpreted not to authorize suits against private parties); Nicholas Robinson, The Impact of the Green Amendment: A New Era of Environmental Jurisprudence (Jan. 25, 2022) (address Before the New York State Bar Association January 2022 Annual Meeting, Environment and Energy Law Section) (outline available at https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=2203&context=lawfaculty [https://perma.cc/N424-ENWN]).

However, other legal commentators who more narrowly focused on the issue of private litigation, were less sure. *See* Birnbaum et al., *supra* note 59 (noting that under the NYGA it is "unclear whether, if a private right of action exists, it can be asserted against private companies," and examining the impact of other states' environmental rights on private litigation).

200. *See, e.g.*, Scheiber v. St. John's Univ., 638 N.E.2d 977, 979 n.2 (N.Y. 1994) (acknowledging that Section 11 applies to private religious institutions).

201. N.Y. CONST. art. 1, §11.

202. *Compare* Fresh Air I, No. E2022000699, 2022 WL 18141022, at 12–13 (N.Y. Sup. Ct. Dec. 20, 2022) *with* Fresh Air II, No. E2021008617, slip op. 34429 at 8–9 (N.Y. Sup. Ct. Dec. 8, 2022). In its motion to dismiss in *Fresh Air I*, WMNY pointed to the environmental rights contained in the Hawaii and Illinois Constitutions. *See* Waste Management's Memorandum of Law in Support of its Motion to Dismiss at 9–10, Fresh Air I, No. E2022000699, 2022 WL 18141022 (N.Y. Sup. Ct. May 6, 2022). But both of those Constitutions have the same problem—while they allow plaintiffs to enforce their rights against private parties, they also expressly refer to public parties. *See* HAW. CONST. art. XI, §9 ("Any person may enforce this right against any party, *public* or private . . . ." (emphasis added)); ILL. CONST. art. XI, §2 ("Each person may enforce this right against any party, *governmental* or private . . ." (emphasis added)).

Moreover, *Fresh Air I* holds that FAFE's claim against the state actors was correctly brought under the NYGA itself, rather than under Article 78 of New York's Civil Practice Law and Rules (CPLR), which codifies writs of mandamus and which is used to vindicate constitutional environmental rights *See Fresh Air I* at 13 ("A declaration of constitutional rights is most appropriate in a declaratory judgement action, not a CPLR Article 78 proceeding."); *see also* Robinson,

The better approach, then, is not one that looks solely at the NYGA's text, but one that incorporates a more holistic analysis. The remainder of this Subsection employs such an approach, concluding that the context and substance of the NYGA favor interpreting it to govern private action as well as state action.

To begin, it is useful to compare the NYGA to other sections of New York's Bill of Rights that have been interpreted as governing state action only. The commentators who assert that the NYGA governs only state action rely primarily on the Court of Appeals' seminal decision in *SHAD Alliance v. Smith Haven Mall*,[204] in which the court addressed whether a shopping mall owner violated Section 8, the freedom of speech and press provision, by enforcing a blanket policy against the distribution of leaflets. Before *SHAD Alliance* was decided, the United States Supreme Court had held that such activity violated the federal Constitution's First Amendment.[205] The question before the New York Court of Appeals was therefore: Should Section 8 be interpreted the same way?

Yes, the Court of Appeals concluded—Section 8 governs public conduct only, not private action.[206] In answering this question, the

supra note 158, at 181 n.100 (2017) (discussing the enforcement of New York's other constitutional right, the Forever Wild provision, through "Article 78 proceeding[s]").

203. Proponents of this interpretation may argue that an explicit reference to government entities is unnecessary due to the broader equitable principle that the creation of a legal right implies an injunctive remedy against government actors who violate that right. *See* Marbury v. Madison, 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress"); Note, *Interpreting Congress's Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1505–07 (2021) (describing *Ex Parte Young*'s "equitable remedy" of injunctive relief against state officials for violations of federal law); *see* also Hurrell-Harring v. State, 15 N.Y.3d 8, 26 (2010) (citing *Marbury*, and holding that New York courts have an "essential obligation to provide a remedy for violation of a fundamental constitutional right").

However, these cases speak to the availability of *remedies*, rather than the scope of rights. While this Article does not dispute that "a clear constitutional or statutory mandate" guarantees at least an equitable remedy against government violation, *Hurrell-Harring v. State*, 15 N.Y.3d at 26, it is circular, at best, to argue from this centuries-old principle that the possibility of an equitable remedy against government actors makes the scope of a textually ambiguous right clear.

204. SHAD All. v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985). Though *SHAD Alliance* concerns Section 8 specifically, its logic and rationale apply equally to the similarly situated Section 3. *See* Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 245 (S.D.N.Y. 2005) (noting that "several New York courts have held that Section Three only pertains to state action" and collecting cases). Similarly, Professor Nicholas Robinson points to *SHAD Alliance* for the proposition that the NYGA "do[es] not enable law suits against private parties." *See* Robinson, *supra* note 199.

205. *See, e.g.*, Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972).

206. *See SHAD All.*, 488 N.E.2d at 1213–17.

court drew on Section 8's historical context, traditional understandings of speech rights, and "contemporary approaches to constitutional adjudication."[207] The court determined that the New York Constitution, generally—and its Bill of Rights, specifically—was historically intended to protect individual rights by limiting and defining state authority: "[W]hile the drafters of the 1821 free speech clause may not have envisioned shopping malls, there can be no question that they intended the State Constitution to govern the rights of citizens with respect to their government and not the rights of private individuals against private individuals."[208]

The court also drew on a body of literature to posit that "a Bill of Rights is designed to protect individual rights against the government,"[209] and that doctrines limiting the scope of individual constitutional rights to state actions are "a crucial foundation for both private autonomy and separation of powers."[210]

While this Article does not argue that *SHAD Alliance* was wrong in its assessment of Section 8, it is less clear that *SHAD Alliance*'s conclusions and assumptions extend to the NYGA. A central component of *SHAD Alliance*'s reasoning was the Court of Appeals' recognition that "the New York Bill of Rights, like its Federal counterpart, was intended by its drafters to serve as a check on governmental, not private, conduct."[211] While that may have been true when the initial Bill of Rights—which included Section 8 (and Section 3)—appeared in the 1821 New York Constitution, that is certainly not true today. As discussed, Section 11 (the first addition to the original Bill of Rights, in 1938) plainly prohibits private actors from "discriminating in [the] civil rights" of any person.[212] Section 11's focus on private action is significant, as it signals the first time New York's Bill of Rights did more than safeguard individual rights against government action. Section 11 thus undermines the Court of Appeals' blanket char-

207. *Id*. at 1213.

208. *SHAD All.*, 488 N.E.2d at 1215.

209. *SHAD All.*, 488 N.E.2d at 1215 (citing THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS, 36–37 (rev. ed. 1972); LEARNED HAND, THE BILL OF RIGHTS (Harvard Univ. Press 1958); HENRY ROTTSCHAEFFER, AMERICAN CONSTITUTIONAL LAW § 305 (1939); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 1147, n. 1 (1978)).

210. *SHAD All.*, 488 N.E.2d at 1216.

211. *Id.* at 1214; *see also id.* at 1215 ("[A] Bill of Rights is designed to protect individual rights against the government . . ."); *id.* at 1216 ("A State Constitution is a document defining and limiting the powers of State government . . .").

212. N.Y. CONST. art. I, §11 (prohibiting discrimination "by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state").

acterization of the Bill of Rights as serving solely as a shield against the state. Treating the NYGA as a protection against private parties would therefore be consistent with the Bill of Rights' purpose as understood in its modern context.

The NYGA is further distinguished from other sections of New York's Bill of Rights because it lacks any reference to state action. In comparison, Section 8 contains the following express restriction on government lawmaking ability: "[N]o law shall be passed to restrain or abridge the liberty of speech or of the press."[213] Section 3 similarly prohibits a person from "be[ing] rendered incompetent to be a witness on account of his or her opinions on matters of religious belief"—a decision that could only be made by a court—and also exempts "acts of licentiousness, or . . . practices inconsistent with the peace or safety of this state"—a nod to the executive branch's authority.[214] Such invocations of state action (which appear expressly or implicitly in many other Bill of Rights' sections) appear nowhere in the NYGA, suggesting that it should be read more broadly.[215]

Moreover, the substance of the rights conferred by the NYGA further distinguish it from other sections of the Bill of Rights. The NYGA enshrines the rights to "clean air and water" and "a healthful environment."[216] These rights are unique, in that they affect every person in New York and imply no particular relationship between protected individuals and government action. Consider the right to "a healthful environment," for example. That right does not clearly depend on any particular action by the person invoking the right, nor does it suggest the specter of government action. In contrast, many other sections of the Bill of Rights make sense only if construed in the context of government action. For example, as noted above, Section 8 provides that "*no law shall be passed* to restrain or abridge the liberty of speech or of the press."[217] Similarly, Section 3 provides that "[t]he free exercise and enjoyment of religious profession and

213. N.Y. CONST. art. I, §8.

214. N.Y. CONST. art. I, §3; *see also* People v. Parks, 359 N.E.2d 358, 367 (N.Y. 1976) ("[T]he question of witness competency is a matter of law to be determined by the court.").

215. *Cf.* Clyatt v. United States, 197 U.S. 207, 216 (1905) (recognizing that, unlike "the prohibitions of the 14th and 15th Amendments [which] are largely upon the acts of the states," the "13th Amendment names no party or authority," a distinction which warranted treating the latter as applicable to private action as well as state action).

216. N.Y. CONST. art. I, §19.

217. N.Y. CONST. art. I, §8 (emphasis added).

worship . . . *shall be forever allowed* in this state"[218]—again protecting active, affirmative conduct against state prohibition.

This distinction makes a difference. Unlike these other sections, the NYGA regulates conduct that does not necessarily arise in the shadow of government action. Rather, the NYGA is effectively an absolute prohibition on an unhealthy environment and a declaration that clean air and water must be always available in all parts of New York.[219] In this way, the NYGA is similar to the Thirteenth Amendment of the U.S. Constitution, the only federal amendment interpreted as prohibiting private conduct,[220] which "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[221] Given the NYGA's sweeping mandate, courts should be cautious about drawing simple analogies between the NYGA and other sections of New York's Bill of Rights; the NYGA's guarantees may reasonably be recognized as providing a right against *all* environmental harm, caused by state actors and private actors alike.

B. To the Extent Legislative History is Relevant, it Shows that the Legislature was Divided on Whether the NYGA Allows Suits against Private Parties.

The Court of Appeals' analysis in *SHAD Alliance* relied, in part, on the opinions of the drafters of the Bill of Rights, as evinced in the debates at the 1821 Convention.[222] At first glance, that reliance is not

218. N.Y. CONST. art. I, §3 (emphasis added).

219. While this language raises ambiguities and interpretive challenges, these challenges are comparable to the interpretive challenges presented by the Thirteenth Amendment's positive right to be free from involuntary servitude. *See* James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 430 (2018) ("To comply with the [Thirteenth Amendment's] command that slavery shall not 'exist,' we must determine which [badges and incidents of slavery] are so important to slavery and involuntary servitude that when they exist, it cannot be said that those conditions have been entirely eliminated.")

220. This statement does not consider the now-repealed Eighteenth Amendment, which created direct private obligations by banning "the manufacture, sale, [and] transportation of intoxicating liquors." U.S. CONST. amend. XVIII Sec. 1.

221. Civil Rights Cases, 109 U.S. 3, 20 (1883). "Virtually uniquely" among the [federal] Constitution's rights-conferring provision, the Thirteenth Amendment] lacks a state action requirement." Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1768 (2012).

222. SHAD All. v. Smith Haven Mall, 488 N.E.2d 211,1213–14 (N.Y. 1985) ("General Root, for example, explicitly directing himself to the '4th clause, respecting the liberty of speech and

surprising. After all, courts frequently turn to legislative history when interpreting ambiguous statutes.[223] But in those circumstances, the objective is to determine the intention of the body that actually enacted the statute into law.[224] In contrast, it is questionable whether the same objective is met by reviewing the debates at the 1821 Convention, because the delegates to that Convention were not the same body that ultimately approved the Constitution. Instead, the 1821 Constitution was submitted *to the electorate* for approval.[225]

The NYGA was also added to the New York Constitution by vote of the people.[226] One scholar has noted that, in an analogous context, "[t]he nature of initiatives"—*i.e.*, electorate-proposed statutes or constitutional amendments—"makes inquiries into the motives of the body enacting the challenged statute incredibly difficult, if not impossible."[227] Given this potentially insurmountable obstacle, it is fair to question whether legislative history is an adequate, or even useful, source for courts attempting to decipher the meaning of a

the press . . . said it was doubtless intended to secure the citizen as well against the arbitrary acts of the legislature, as against those of the judiciary.'" (quoting NATHANIEL H. CARTER & WILLIAM L. STONE, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821 167 (1821)).

223. *See, e.g.*, Kimmel v. State, 80 N.E.3d 370, 377 (N.Y. 2017) (relying on legislative history to interpret the Equal Access to Justice Act).

224. *See, e.g.*, Tompkins Cty. Support Collection Unit ex rel. Chamberlin v. Chamberlin, 786 N.E.2d 14, 19 (N.Y. 2003) ("The primary goal of the court in interpreting a statute is to determine and implement the Legislature's intent."). Of course, reliance on legislative history is far from a universally condoned practice. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("[L]egislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)); Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. Chi. L. Rev. 81, 97 (2017) ("Relying on text does the least harm, for the text is visible to everyone, while legislative history can take people by surprise (especially given judicial discretion about which history to emphasize, a choice that judges lack when dealing with enacted texts).").

225. *See, e.g.*, *Constitutions and Constitutional Conventions: 1821 New York State Constitutional Convention*, N. Y. STATE ARCHIVES, https://www.archives.nysed.gov/research/constitutions-and-constitional-conventions. [https://perma.cc/QL9B-QHEJ] Such "legislative" analysis is relatively common; *Shad Alliance* is not the only instance in which the Court of Appeals has analyzed the history, debates, and discussions of a constitutional amendment. *See, e.g.*, People v. Carroll, 148 N.E.2d 875, 878 (N.Y. 1958).

226. *See supra* notes 31–32 and accompanying text (describing the passage of the NYGA).

227. D. Zachary Hudson, *Interpreting the Products of Direct Democracy*, 28 Yale L. & Pol. Rev. 233, 225 (2009).

constitutional provision that was added by the electorate, not the legislature.[228]

While legislative history may not be a particularly appropriate or useful tool for interpreting the NYGA, the *Fresh Air* cases show that litigants have already begun highlighting relevant legislative history to support their reading of the amendment.[229] That historical record shows robust debate on whether the NYGA would provide a private cause of action against private parties—but also shows that the legislature never resolved this question.

The New York State Assembly debated private litigation under the NYGA as early as April 2018. Assembly member Andrew Goodell questioned whether the NYGA would provide an "independent judicial platform" for individuals to enforce, for example, the use or disuse of genetically modified organisms.[230] The sponsor of the Assembly's NYGA bill, Steve Englebright, responded that it would not, but then suggested that the amendment would not give rise to *much* litigation, suggesting the possibility of a private cause of action against private parties: "There are six other states that have passed a measure very, very similar to this. We have not seen any notable trend of increased litigation or lawsuits."[231] Assembly member Goodell remained unconvinced:

> So, what does this Constitutional amendment do? . . . [T]his would give a Constitutional right to every individual to bring a private right of action against their local government or against the MTA or against NYSERDA or against their city claiming that whatever the city is doing or the MTA is doing or the City of New York is doing or any local government is doing or any local business or industry is violating their Constitutional right.[232]

The same issue was again raised in the Assembly several years later, though with more involvement from members on both sides of the debate. One member who opposed the NYGA because of its lack of specificity "suspect[ed] that there'll be lots of actions in court re-

228. One member of the New York Assembly exemplified the point when she raised several concerns regarding ambiguity in the NYGA, but ultimately decided to "leave it up to the voters in my district to decide . . . as to what the costs are associated with this and the rights under the New York State Constitution as amended." Transcript of New York State Assembly on February 8, 2021, *supra* note 26, at 75 (Assemb. Giglio). *Id.* at 31 (Assemb. Englebright).

229. Fresh Air II, No. E2021008617, slip op. 34429 at 6–8 (N.Y. Sup. Ct. Dec. 8, 2022); Fresh Air I, No. E2022000699, 2022 WL 18141022, at 8–9 (N.Y. Sup. Ct. June 17, 2022).

230. Transcript of the New York State Assembly on April 24, 2018, at 49–50 https://assembly.ny.gov/av/session/ [https://perma.cc/4B2T-XP9Y] (Assemb. Goodell).

231. *Id.* at 50 (Assemb. Englebright).

232. *Id.* at 51–52 (Assemb. Goodell).

lated to this legislation, particularly with regards to property. . . . [H]ere's a prime lever in which I believe that citizens will now have the ability to—to file civil actions against their fellow citizens."[233] Another opponent expressed the same concern: "This will certainly create a right of private action for individuals to bring—file for lawsuits as an individual person from a Constitutional perspective. . . . [W]ith this process, we're not just talking about natural gas, we're opening this right of action, private action on renewable projects as well, because I think it's going to cause some Constitutional problems."[234] Another member implicitly echoed this position, noting that he could not support the NYGA until it recognized a carve-out for the agriculture industry—a carve-out which would be meaningless if the amendment did not enable private litigation.[235]

Several proponents of the NYGA also maintained that the amendment would grant a private cause of action against private parties. One Assembly member stated: "I don't think anyone really doubts whether . . . if your neighbor is producing polluted water that migrates to your property that that polluted water is a violation of your rights for which you might be able to have legal recourse. Why should it be different if your neighbor is sending air as opposed to water onto your property that can sicken you?"[236] In his view, protecting property use is "among the reasons why we have courts to protect our rights, and it's also why occasionally we need to take action to add to the bundle of rights that we, as New Yorkers, are entitled to."[237] Another Assembly member pushed back on the idea of carve-outs or exemptions and the need to suppress future litigation, noting that the NYGA "will simply make it so that companies, developers, governments, and everyone in between must be thoughtful about environmental impact and how that impact relates to real living, breathing people."[238]

233. Transcript of the New York State Assembly on February 8, 2021, *supra* note 26, at 37 (Assemb. Smullen).

234. *Id.* at 41–42 (Assemb. Palmesano); *see also id.* at 42–44 ("I mean, you can have private right of actions and lawsuits against wind farms that are being developed . . . What about someone, you know, who has a wood stove? Is that going to allow a neighbor to file a lawsuit against someone if they have a wood stove? . . . I think a Constitutional Amendment opens up that windfall of lawsuits that is just going to cost more, it's going to provide a great deal of uncertainty to our energy markets, as well.").

235. *Id.* at 92 (Assemb. Manktelow).

236. *Id.* at 64 (Assemb. Gottfried).

237. *Id.* at 64–65 (Assemb. Gottfried).

238. *Id.* at 70 (Assemb. Septimo).

In contrast, other Assembly members stated that the NYGA would not enable private litigation. One member who supported the NYGA noted: "This is a mandate to our government to clean air and water. This is not a stipulation specific to actions between private citizens."[239] Another supporter echoed these comments, stating that "[t]here is nothing that gives a citizen an explicit right to sue another private citizen or private corporation, a landfill, a farm, a wind turbine manufacturer, under this law. . . . This amendment does not convey upon the citizenry any additional rights of action against other businesses, against other people, against their neighbors."[240] Two additional proponents went further, disclaiming any private cause of action at all. The first, Assembly member Englebright, the bill's sponsor, responded to a question about whether the amendment would create a private cause of action by saying:

> I'm, again, a geologist, not a lawyer. I would leave that to the lawyers to decide. That is certainly not a[n] intent because we have not spoken to it and we have not attempted in the language of the measure to create a – a right of action. But I would – it's my understanding, I would point out, that anyone can sue anybody for anything. So, it doesn't prevent that, but it doesn't create anything new either.[241]

The second tried to quell the concerns expressed by opponents to the amendment: "We've heard several [objections to the amendment], including an assumption of a private right of action for environmental damage. I can assure my colleagues that this Constitutional Amendment does not do that."[242]

Several aspects of this legislative history bear mentioning. First, the relevant legislative history comes only from the Assembly. Though the NYGA was discussed in Senate sessions, the issue of private litigation was never raised in that legislative body.[243] The lack of any meaningful discussion in the Senate raises another basis to question whether the legislative history is a useful source to consult in interpreting the NYGA. After all, the underlying NYGA bill had to be passed by both legislative bodies, twice, before being sent to a

239. *Id.* at 61 (Assemb. Kelles).

240. *Id.* at 68–69 (Assemb. Lunsford).

241. *Id.* at 84 (Assemb. Englebright).

242. *Id.* at 90 (Assemb. Simon).

243. *See* Transcript of the New York State Senate on January 12, 2021, https://www.nysenate.gov/transcripts/2021-01-12t1115 [https://perma.cc/Q4S8-5L8H]; Transcript of the New York State Senate on April 30, 2019, https://www.nysenate.gov/transcripts/2019-04-30t1531 [https://perma.cc/GHF9-UBS3].

vote by the people.[244] With the only relevant statements made by members of the Assembly—and with only a handful of the 150 Assembly members engaging in the discussion, at that—one may question whether those statements can truly be said to represent the views of the legislature as a whole.

Second, even if the legislative history is considered as representative of the legislature's position, that history shows that there was no unifying belief amongst New York legislators with respect to whether the NYGA would allow a private cause of action against private parties. That said, it does show that there were three categories of Assembly members who weighed in on the issue: (1) Assembly members who *opposed* the NYGA bill, and believed it *would* support a private cause of action against private entities; (2) Assembly members who *supported* the NYGA bill, and also believed it *would* support private-on-private suits; and (3) Assembly members who *supported* the NYGA bill, but believed that it *would not* create a private cause of action against private parties.[245] The dichotomy between the first and third categories is not particularly surprising. It is not uncommon for politicians opposing a bill to exaggerate its scope and for those supporting the bill to do the opposite—they are, after all, partisans who have their own political agendas.[246] Thus, the second category of Assembly members—those who supported NYGA bill and advocated for an interpretation of the amendment that would allow private causes of action against private parties—is particularly notable, as those members had little incentive to portray the NYGA as a sweeping amendment that would enable private litigation. Yet, that is exactly what those members suggested during Assembly sessions.[247]

Third, putting aside the question of actual motives, the raw numbers show that a majority of Assembly members who commented on the issue believed that the NYGA would permit private causes of action against private parties.[248] Thus, while both sides will find sup-

244. *See* N.Y. CONST. art. XIX, §1.

245. *See supra* notes 231–242 and accompanying text.

246. *See* James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. OF EMPL. & LABOR L. 118, 119 (2008) (opining that "committee reports and floor statements are produced by partisans-actors with a stake in the legislative contest to which they are contributing").

247. *See supra* notes 236–238 and accompanying text.

248. *Compare supra* notes 234–343 and accompanying text (statements of Assemblymembers Goodell, Smullen, Palmesano, Manktelow, Gottfried, and Septimo, framing the NYGA as allowing private litigation) *with* notes 241–243 and accompanying text (statements of As-

port in the legislative history moving forward, those who advocate for an interpretation of the amendment that allows for private suits against private individuals will be able to point to a more legislators who appeared to share their view.

C. Comparison with other Green Amendments is Inconclusive.

The *SHAD Alliance* court also supported its conclusions about availability of private causes of action under the Bill of Rights by examining contemporaneous interpretations of "free speech" clauses in other states' constitutions.[249] Of the two other green amendments, one (the MGA) has been held to contain a private cause of action against private parties, while the other (the PGA) has not. However, a close examination of the language of these amendments, and the respective decisions surrounding them, suggests that neither provides applicable guidance on the interpretation of the NYGA.

As previously discussed, Article II, Section 3 of the Montana Constitution provides that the right to a clean and healthy environment creates "corresponding responsibilities" for "all persons,"[250] and Article IX, Section 1(1) provides that "[t]he state *and each person* shall maintain and improve a clean and healthful environment in Montana for present and future generations."[251] The Montana Supreme Court has held that this language "clearly" creates environmental duties for private individuals[252] and has used it as a starting place to discuss whether those private duties may be enforced by private litigation.[253] The NYGA, in contrast, contains no such explicit allocation of responsibilities—it is completely silent as to who, exactly, is charged with maintaining New York's environmental quality.

semblymembers Engelbright, Simon, Lunsford, and Kelles, who claimed that the NYGA would not impact private environmental litigation).

249. SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1213-14 (N.Y. 1985).

250. MONT. CONST. art. II, § 3.

251. MONT. CONST. art. IX, § 1 (emphasis added).

252. *See* Montana Env't Info. Ctr. v. Dep't of Env't Quality, 296 Mont. 207, 232 (Mont. 1999) (J. Leapheart, concurring) (agreeing that "Article IX, Section 1, clearly imposes an obligation on private entities, as well as the state, to maintain and improve a clean and healthy environment," but arguing that the majority's discussion of private action in addressing the case before it was dicta); *see also* Cape-France Enterprises v. Est. of Peed, 305 Mont. 513, 520 (Mont. 2001) ("[T]he text of Article IX, Section 1 applies the protections and mandates of this provision to private action—and thus to private parties—as well.").

253. *See supra* Section (III)(A)(1)(ii.)(b) (discussing the Montana Supreme Court's jurisprudence around private litigation under the MGA).

Unlike the MGA, the plain text of the PGA does not explicitly impose any obligations on private actors. Much like the NYGA, Clause 1 of the PGA establishes that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment," and provides no corresponding obligations or responsibilities.[254] In response, Pennsylvania courts have generally refused to allow private litigation under the PGA.[255] However, in practice, Pennsylvania court decisions rejecting private litigation under the PGA have relied on Clause 2 of the PGA, which directs the Commonwealth of Pennsylvania to conserve Pennsylvania's public natural resources in trust for the people—a mandate not contained in the text of the NYGA.[256] Pennsylvania's courts have consistently held that, *because these clauses are read together*, the PGA "does not impose duties or obligations on private parties."[257]

The brevity of the NYGA means that neither the MGA's explicit private obligation nor the PGA's implicit rejection of private obligations are perfect analogues. The NYGA, unlike the MGA, does not explicitly impose obligations on private actors, so the chain of Montana decisions springing from *MEIC* provide little support for the argument that the NYGA contains a private cause of action against private parties. And the NYGA lacks the PGA's language that Pennsylvania courts have relied upon to infer that the PGA only binds government actors. Reference to these other green amendments thus does not meaningfully inform the NYGA's interpretation.

D. A Private Cause of Action under the NYGA is Consistent with New York's Environmental Law

Finally, reading the NYGA in the context of New York's broader regime of environmental law strongly suggests that the NYGA can, and *should*, create enforceable private rights against private parties. The idea of examining an existing statutory framework to interpret a new constitutional right contains some inherent tension, as constitutional

254. PA. CONST., art. I, § 27.

255. *But see* Marques v. Bunch, 18 Pa. D. & C.3d 371, 388 (Pa. Ct. C.P. 1980) (describing an individual's dumping of farm waste as occurring "in violation of [the individual's environmental] permit, the Clean Streams Law, and [the PGA]").

256. PA. CONST., art. I, § 27.

257. *See* Robinson Twp. v. Commonwealth, 623 Pa. 564, 645, 83 A.3d 901, 950–51 (Pa. 2013) (noting that "the two paradigms, while serving different purposes in the amendatory scheme, are also related and overlap to a significant degree"); *see supra* note 131.

changes nullify inconsistent statutory provisions under New York law.[258] However, this simple dictum elides a more complicated relationship between statutes and constitutional amendments. In interpreting constitutional language, New York courts strongly consider the existing law and governance practices that formed the legal context of a constitutional provision.[259] As a general rule of construction in New York, statutes are presumptively constitutional and are only supplanted by constitutional amendments where the two cannot be reasonably reconciled.[260] In short, preexisting statutes inform constitutional interpretation not because they are superior to constitutional law but because they form part of the historical legal context that shapes judicial interpretations of legislative intent.[261]

As discussed above, New York's environmental law may be characterized as disfavoring private litigation.[262] The Forever Wild constitutional provision allows private plaintiffs to sue private violators, but such suits are not truly private—instead, they are quasi-*qui tam* suits that seek to protect the environmental rights of the public.[263] While SEQRA, New York's premier environmental statute, generates an enormous volume of litigation by private plaintiffs, its obligations fall almost entirely on government officers and agencies, and private defendants are only collaterally involved in SEQRA suits as necessary parties to suits challenging a public-private interaction like permit applications.[264] Finally, the vast majority of the ECL, New York's

258. *See* People ex rel. Clark v. Adel, 129 Misc. 82, 89 (N.Y. Sup. Ct. 1927) ("[A] constitutional provision necessarily nullifies every statutory provision which is inconsistent with the new constitutional provision."); Charles W. Sommer & Bro., Inc. v. Albert Lorsch & Co., 254 N.Y. 146, 147 (N.Y. 1930) (holding that constitutional amendments automatically invalidate contradictory statutes).

259. New York Pub. Int. Rsch. Grp., Inc. v. Steingut, 40 N.Y.2d 250, 258 (N.Y. 1976) (noting that New York courts "look with advantage to circumstances and practices which existed at the time of the passage of the constitutional provision").

260. In re Fay, 291 N.Y. 198, 204–07 (N.Y. 1943) (observing that "a presumption of constitutionality attaches to every statute," that "a statute can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law," and that no "reasonable mode of reconciliation" can align the statue with the applicable constitutional provision); *see also* John Bourdeau et al., § 15 *Effect of Constitutional Provision on Existing Statutes*, *in* 20 N.Y. JUR. 2D CONSTITUTIONAL LAW (Nov. 2023).

261. *See* W. New York Water Co. v. Brandt, 18 N.Y.S.2d 128, 133 (N.Y. App. Div. 1940) (noting that contemporaneous interpretations of legal phrases used in constitutional language "are powerless to vary the terms of the Constitution," but "may be of material assistance in showing that a word or clause was used in a certain sense").

262. *See supra* Section III(B) (discussing private environmental litigation in New York).

263. *See supra* note 159 and accompanying text.

264. *See supra* Section III(B)(2) (discussing SEQRA litigation).

chapter of environmental statutes, is enforceable only by public officials, and supports no private actions whatsoever.[265]

However, a more nuanced reading of the cases interpreting New York's environmental laws suggests that the NYGA is not limited by these precedents. Where New York courts have generally concluded that New York's environmental laws do not create private causes of action, those conclusions have been based on either (1) findings that the environmental laws invoked by plaintiffs provide *collective* rights, not individual ones[266] or (2) findings that the relevant environmental laws are subject to provisions that favor state enforcement over private litigation.[267] Concerning the NYGA, neither of these factors weighs against a private cause of action. The NYGA, at its core, is hard to construe as a collective environmental right: it guarantees environmental rights to "[e]ach person."[268] Moreover, as repeatedly discussed, the NYGA contains no explicit reference to any enforcement mechanism.

New York's environmental regulatory regime has another consistent theme that is much more relevant to interpretation of the NYGA: that private litigation can vindicate environmental harm even if a comprehensive government enforcement regime is in place. The sections of New York environmental law that *do* explicitly permit private litigation are the exceptions that prove this rule. As previously discussed, New York laws governing forest fires[269] and oil spills[270] contain extensive regulations and public enforcement mechanisms, but allow private plaintiffs to pursue litigation against private defendants for environmental damage to their persons or property despite the existence of comprehensive regulatory regimes.

265. *See supra* Section III(B)(3) (discussing private actions under the ECL).

266. People v. System Properties, Inc., 281 A.D. 433, 445 (N.Y. App. Div. 1953) (expressing a structural preference for enforcing the Forever Wild provision through suits brought by the Attorney General, as citizen suits are "secondary" mechanisms to enforce the provision's fundamentally public rights); Women's Voices for Earth, Inc. v. Procter & Gamble Co., 29 Misc. 3d 358, 360 (N.Y. Sup. Ct. 2010) (holding that a section of the ECL that establishes environmental standards for household cleaning products "was to benefit the general public at large," not to create private rights).

267. *See* Town of Wilson v. Town of Newfane, 181 A.D.2d 1045, 1045 (N.Y. App. Div. 1992) (rejecting private litigation under a section of the ECL "[b]ecause the [ECL] specifically authorizes the Attorney-General to enforce" that section); Nowak v. Madura, 304 A.D.2d 733, 733 (App. Div. 2003) (same); Geysir Sales Corp. v. Arctic Glacier, Inc., 78 A.D.3d 653, 653 (N.Y. App. Div. 2010) (same).

268. N.Y. CONST., art. 1, sec. 19.

269. *See* N.Y. ENV'T CONSERV. LAW §§ 71-0711, 0713.

270. *See* N.Y. NAV. LAW § 181(5).

While these laws do not purport to *create* private rights, they permit private litigation to vindicate those rights created by other sections of the law. Similarly, New York law contains a significant category of environmental torts that exist in the shadow of New York's environmental regulations, and that are rooted in purported harm to private interests.[271] Together, these examples show that New York law does not disfavor private remedies for environmental harm to private rights; it merely rejects the idea that general environmental regulation, without more, *creates* private rights. When New York's voters enshrined environmental rights for "[e]ach person" in the NYGA, the existing legal framework suggests that they intended those rights to be accorded remedies against private infringement.

V. SUING IN THE SHADOW OF THE GREEN AMENDMENT

Regardless of whether New York's courts embrace a private cause of action under the NYGA, the existence of a constitutional environmental right is likely to influence private litigation in the state. State courts use a number of interpretive techniques to "import constitutional values into private settings" including "enforcing constitutional norms through existing common law causes of action, elaborating common law doctrines in the light of constitutional norms, and developing common law defenses informed by constitutional norms."[272] Even without creating a cause of action against private parties, the NYGA may shape doctrines in other areas of law that incorporate public policy or societal norms of "reasonableness." Two areas of private litigation, contract law and the common law of private nuisance, may be particularly suitable to revision in light of the NYGA.

A. The NYGA and Contract

Even if the NYGA is not interpreted as creating environmental obligations for private individuals, it may open the door for private contracts to be voided as illegal or against public policy. Montana

271. *See infra* Section V(B) (discussing New York's environmental tort doctrines).

272. Helen Hershkoff, *Lecture: The Private Life of Public Rights: State Constitutions and the Common Law*, 88 N.Y.U. L. REV. ONLINE at 11 n.32 (2013), https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReviewOnline-88-1-Hershkoff.pdf [https://perma.cc/M5KC-JCBN] (quoting Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms, in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW, DUAL ENFORCEMENT OF NORMS 151, 156–62 (James A. Gardner & Jim Rossi eds., 2011)).

provides a model for how a constitutional environmental right can limit the enforcement of environmentally harmful contracts. As discussed in Section III(A)1)(ii)(a), the Montana Supreme Court has held that a doctrine of legal impossibility prevents Montana's courts from enforcing contracts that would harm rights protected under the MGA. While the *Cape-France* court held that the plaintiff had direct obligations under the MGA that would be violated by fulfilling the terms of the contract, it also found that enforcing an environmentally damaging contract "would involve the state itself in violating [MGA]."[273] Even if courts ultimately find that private parties have no legal obligations under the NYGA, *Cape-France* raises the possibility that the NYGA may limit judicial enforcement of environmentally damaging contracts.

While contract law in New York offers parties enormous flexibility to enter into voluntary agreements that create binding legal obligations, statutes and common law doctrines set outer limits on these obligations.[274] In particular, New York law provides that "illegal contracts, or those contrary to public policy, are unenforceable," and New York's courts "will not recognize rights arising from them."[275] Parties seeking to escape contractual obligations that would cause environmental damage might invoke the NYGA in arguing that such contracts should be treated as void as a matter of public policy. There are at least two contexts in which the NYGA might be invoked against a contract: to prevent environmental harm to one of the parties to a contract, or to prevent environmental harm to third parties through the performance of the contract. These contexts require

273. *Id*. at 520.

274. "All contracts are made subject to any law prescribing their effect or conditions to be observed in their performance, such that the law is as much a part of the contract as if it had been actually written into it." Glen Banks, *Illegality and Public Policy*, *in* 28 N.Y. CONTRACT LAW § 1:14 (Thomson Reuters ed. 2023); *see, e.g.*, GLEN BANKS, *Malum in Se*, *in* 28 N.Y. CONTRACT LAW § 7:6 (Thomson Reuters ed., 2023) (discussing the general unenforceability of contracts made to accomplish unlawful acts or in violation of a penal statute).

275. Szerdahelyi v. Harris, 67 N.Y.2d 42, 48 (N.Y. 1986); *see also* Pecora v. Cerillo, 621 N.Y.S.2d 363, 366 (N.Y. App. Div. 1995) ("It has long been held that contracts that are in whole or in part against public policy are void,"); Matter of Validation Rev. Assocs., Inc., 646 N.Y.S.2d 149, 150 (N.Y. App. Div. 1996), *rev'd on other grounds*, 91 N.Y.2d 840, 690 N.E.2d 487 (N.Y. 1997) ("In general, parties may incorporate into their contracts any provisions that are not illegal, unconscionable, restricted by legislation, or violative of public policy,"); Matter of Part 60 Put-Back Litig., 165 N.E.3d 180, 188 (N.Y. 2020) (noting that New York courts "will enforce the bargain that contracting parties have freely made, absent some violation of law or transgression of a strong public policy.").

separate analysis, as there are significant differences in how courts treat first-party and third-party harm when interpreting contracts.

1. Invoking the NYGA Against a Contract that Harms a Party

A party seeking to invalidate a contract might argue that fulfilling the terms of the contract would abrogate that party's right to clean air, clean water, or a healthful environment. The success of such an argument would depend heavily on the weight that courts give to the specific environmental rights harmed by the disputed contract. The mere fact that an agreement waives a protected right does not generally invalidate it under New York law unless an overriding issue of public policy is invoked by such a waiver.[276] The parties to a contract can—and frequently do—waive constitutional or statutory rights.[277] New York law gives significant weight to the freedom to contract itself, and a contract purporting to waive legal rights is generally enforceable unless enforcing it runs contrary to an overriding issue of public policy.[278] However, this rule is a general one, and in certain highly sensitive circumstances doctrine or statute may forbid the waiver of specific legal rights.[279]

276. "An agreement is not necessarily against public policy because it waives a constitutional or statutory right. Generally, parties may agree to waive statutory rights unless a question of public policy is involved." *Matter of Validation Rev. Assocs., Inc.*, 646 N.Y.S.2d at 150 (quotations and citations omitted).

277. For example, settlement agreements almost universally involve one or more parties surrendering a legal claim to which they may have been legally entitled. *See* Glen Banks, *Settlement Agreements*, *in* 28 N.Y. CONTRACT LAW § 26:2 (Thomson Reuters ed. 2023) (noting that under New York law, "[a]fter a party executes a valid settlement agreement, it cannot subsequently seek both the benefit of the agreement that is the subject of the settlement and the opportunity to pursue the claim it agreed to settle" and that "[i]n order for there to be a settlement agreement, the parties must intend to terminate or discharge the claims being settled.").

278. *See* New England Mut. Life Ins. Co. v. Caruso, 73 N.Y.2d 74, 81 (N.Y. 1989) ("Freedom of contract itself is deeply rooted in public policy . . . and therefore a decision to refrain from enforcing a particular agreement depends upon a balancing of the policy considerations against enforcement and those favoring the encouragement of transactions freely entered into by the parties."); 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353 (N.Y. 2019) (citations and quotations omitted) ("Freedom of contract is a deeply rooted public policy of this state and a right of constitutional dimension.").

279. For example, New York regulations provide that tenants cannot agree to waive any provision of New York's Rent Stabilization Law or the enacting Rent Stabilization Code, and that any agreement that purports to waive those provisions is void. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.13. Similarly, New York courts have held that "an agreement in purported or actual settlement of a landlord-tenant dispute which waives the benefit of a statutory protection is unenforceable as a matter of public policy, even if it benefits the tenant." Drucker v. Mauro, 814 N.Y.S.2d 43, 44 (N.Y. App. Div. 2006).

A close analogy could be drawn between contracts that allocate environmental rights under the NYGA and surrogacy contracts, which involve voluntary contracting around the creation of children and associated parental rights. In the 1980s, New York had extensive laws governing the transfer of children from the custody of one set of guardians to another, by adoption or otherwise.[280] However, these laws did not specifically provide for surrogacy contracts, in which one person agrees to conceive and bear a child with the goal of eventually transferring that child to the custody of another.[281] Before New York enacted surrogacy laws, these contracts presented a challenge for New York family courts, who were faced on one hand with consenting contracting parties, and on the other hand were asked to allow parties to enter into contracts that purportedly assigned critical parental rights.[282] In response to this challenge, New York courts found that if such contracts did not violate the adoption laws of New York they were not inherently void, but were voidable by the parties if a dispute arose, given the strong state interest in the welfare of children and extensive regulation of custody as a matter of public policy.[283] The NYGA may make courts similarly cautious of enforcing contracts that damage the environmental rights of a contracting party, which, like surrogacy contracts in the 1980s, take place against a complex background of statutes and regulations designed to protect the impacted rights. Courts may also be more likely to declare contracts voidable under the NYGA where, as in *Cape-France*, the environmental harm occasioned by the contract could

280. *See* Matter of Paul, 550 N.Y.S.2d 815, 817–19 (N.Y. Fam. Ct. 1990) (discussing contemporaneous laws governing adoption in New York).

281. *See* Deborah Machalow, note, *Legislating Labors of Love: Revisiting Commercial Surrogacy in New York*, 90 IND. L.J. SUPPLEMENT, 2015, at 10–13 (providing a history of surrogacy laws in New York).

282. *See generally* In re Adoption of Baby Girl L.J., Anonymous, 505 N.Y.S.2d 813 (N.Y. Sur. Ct. 1986) (grappling with the issue throughout, and ultimately "request[ing] the legislature to review this serious problem").

283. *See Baby Girl L.J.*, 505 N.Y.S.2d at 817 (holding that surrogacy contracts "are not void, but are voidable because the individual state's adoption statutes, which are designed to safeguard the best interests of the child, take precedence over any agreement between the parties."); Andres A. v. Judith N., 591 N.Y.S.2d 946, 948 (N.Y. Fam. Ct. 1992) (issuing a declaration of maternity and paternity in response to a petition from four individuals party to a surrogacy contract, and noting that "since the parties are all in agreement as to [issues of biological parenthood] the court does not have to rule on the legality of said surrogate contract."); but *see* In re Paul, 550 N.Y.S.2d 815, 818 (N.Y. Fam. Ct. 1990) (declining to follow *Baby Girl L.J.*, 505 N.Y.S.2d at 817, and concluding that surrogacy contracts are "void under the law of the State of New York" because of prohibitions against paid adoptions).

not have been anticipated by the parties and so was not considered in the initial bargained-for exchange.[284]

2. Invoking the NYGA Against a Contract that Causes Third-Party Environmental Harm

A party seeking to invalidate a contract might also argue that fulfilling the terms of the contract would infringe on the environmental rights of third parties. While such a contract repudiation might be genuinely motivated by environmental conscience, a party invoking such an argument might also reasonably be worried, like the *Cape-France* plaintiff, about incurring environmental liability themselves.[285] The NYGA may prove to be a powerful tool for litigants arguing that an environmentally damaging contract should be deemed unenforceable as against public policy, even if the contracted activity is not necessarily illegal *per se*.

Contract litigation focused on harm to third parties, or externalities, is treated significantly differently than litigation alleging that a contract impermissibly harms one of the parties. Conceptually, "[c]ontracts begin with private deals, but are bounded by public interests."[286] Most contracts create *some* externalities, good or bad, in that they affect people who are not party to them. While contract law generally focuses on the interests and intent of the parties to a contract, "parties' freedom to advance their joint goals is cabined by nonparties' legally protected interests."[287] While contract law has few mechanisms for formally assessing and protecting third-party interests,[288] judges can incorporate the concerns of the public into contract law by declaring certain contracts void as against "public policy."[289] This concept, while seldom used in practice, sets outer boundaries on the extent to which contracts can harm third parties, and attempts to ensure that contracts proceed only "when the exter-

284. *See supra* Section III(A)(1)(ii)(a).

285. *See supra* note 79 and accompanying text (discussing the risk of environmental liability faced by the plaintiff in *Cape-France*).

286. Hoffman & Hwang, *supra* note 286, at 986.

287. Omri Ben-Shahar et. al., *Nonparty Interests in Contract Law*, 171 U. PA. L. REV. 1095, 1097 (2022).

288. Indeed, it is structurally difficult for parties to a contract to create effective and enforceable protections for third parties in their contracts, even when they attempt to. *See* Kishanthi Parella, *Contractual Stakeholderism*, 102 B.U. L. REV. 865, 909 (2022) (discussing the issue of third-party protections in M&A agreements).

289. Ben-Shahar et. al., *supra* note 287, at 1098.

nalities they create—which are inevitable—are acceptable to the public."[290]

As previously discussed, New York courts will not enforce contracts that are deemed contrary to public policy.[291] Addressing the key role of third-party interests in this determination, one New York court eloquently summarized the conceptual roots of the doctrine:

> The term 'public policy' has been defined as the principle which declares that no one can lawfully do that which has a tendency to be injurious to or against the public good will or welfare. The principle that contracts against public policy are void and unenforceable is not based upon any desire to relieve a party from the obligation which he has assumed, but rather is based upon the theory that such an agreement is injurious to the interests of society in general, and that the only way to stop the making of such contracts is to refuse to enforce them, leaving the parties without a remedy for a breach thereof.[292]

While contracts that require their parties to break the law are generally unenforceable, there are otherwise very few bright lines to the doctrine.[293] For example, in 1918 a Connecticut court, applying a similar doctrine in *Hanford v. Connecticut Fair Association*, refused to enforce a contract that required the parties to host a beauty contest for babies during a deadly outbreak of "infantile paralysis"—now known as polio.[294] While the court gave no suggestion that performing the contract would have been illegal, the majority opinion held that "[t]he court will not require the performance or award damages for a breach of a contract in which the public have so great an interest as the preservation of health, if the health is in fact endangered, no more than it would require one to be performed the tendency of which was immoral, or which interfered with the right of every one

290. Hoffman & Hwang, *supra* note 286, at 982.

291. Szerdahelyi v. Harris, 67 N.Y.2d 42, 48 (N.Y. 1986); *see also* Pecora v. Cerillo, 621 N.Y.S.2d 363, 366 (N.Y. App. Div. 1995) ("It has long been held that contracts that are in whole or in part against public policy are void"); In re Validation Rev. Assocs., Inc., 646 N.Y.S.2d 149, 150 (N.Y. App. Div.1996), *rev'd on other grounds*, 91 N.Y.2d 840 (N.Y. 1997) ("In general, parties may incorporate into their contracts any provisions that are not illegal, unconscionable, restricted by legislation, or violative of public policy,"); In re Part 60 Put-Back Litig., 36 N.Y.3d 342, 354 (N.Y. 2020) (noting that New York courts "will enforce the bargain that contracting parties have freely made, absent some violation of law or transgression of a strong public policy.").

292. Vill. of Upper Nyack v. Christian & Missionary All., 540 N.Y.S.2d 125, 130 (N.Y. Sup. Ct. 1988), *aff'd*, 547 N.Y.S.2d 388 (N.Y. App. Div. 1989).

293. "While some bargains are so offensive to society that courts will not entertain the action—essentially leaving the parties where they are—in other cases an illegal agreement is not so repugnant and may be enforced. It is all a matter of degree." Denburg v. Parker Chapin Flattau & Klimpl, 82 N.Y.2d 375, 385 (N.Y. 1993).

294. Hanford v. Connecticut Fair Ass'n, 92 Conn. 621, 103 A. 838, 839 (Conn. 1918).

to earn a livelihood by a lawful occupation."[295] Summarizing *Hanford*, Professors David Hoffman and Cathy Hwang emphasized that "[t]here is no general public health exception to contract enforcement—but the court found one."[296] More recently, New York courts have consistently refused to enforce contracts that purport to preemptively excuse medical malpractice, regardless of the intent of the parties, citing an overwhelming policy interest in maintaining the public welfare.[297] Even without going so far as to declare a contract void, courts may modify their interpretation of contracts or the damages awarded for contractual breaches based on explicit or implicit consideration of public policy.[298]

Despite the flexibility of this doctrine, courts do not universally consider third-party harm to be a violation of public policy. Absent a clear statutory mandate that makes a contract explicitly illegal, some courts may even be reluctant to consider apparent dangers to the public as public policy violations. For example, in *N.J. Magnam Co. v. Fuller*, a group hired a contractor to build a grandstand to certain specifications.[299] When a part of the grandstand collapsed during construction, however, the contractor refused to proceed unless the plans were revised because he felt that the grandstand would not be safe for the public.[300] The Supreme Judicial Court of Massachusetts held that the contract "contains no stipulation … that the grand stand … would be safe when completed," and granted judgment against the contractor, giving no weight to public safety whatsoever.[301] Recent scholarship examining the enforcement of contracts during pandemics has noted that courts vary in their willingness to

295. Hanford v. Connecticut Fair Ass'n, 92 Conn. 621, 103 A. 838, 839 (Conn. 1918).

296. Hoffman & Hwang, *supra* note 286, at 981.

297. *See, e.g.*, Ash v. New York Univ. Dental Ctr., 564 N.Y.S.2d 308, 311 (N.Y. 1990) (citing *Johnston v. Fargo*, 184 N.Y. 379, 385 (N.Y. 1906)) (refusing to enforce a purported medical malpractice waiver that a dental patient signed in exchange for discounted dental care from a medical teaching institution, and finding that such waivers were unenforceable as against public policy); Poag v. Atkins, 806 N.Y.S.2d 448 (N.Y. Sup. Ct. 2005) (finding that a purported malpractice waiver signed by a cancer patient seeking an experimental vitamin-based cancer treatment, and knowingly foregoing more traditional cancer treatments like chemotherapy or radiation treatment, "offends public policy").

298. *See* Ben-Shahar et. al., *supra* note 287, at 1131–32 (discussing the development of "restoration damages" for breaches of contractual promises by mining companies to restore land, reflecting courts' recognition of the fact "that the accumulation of unrestored land has a devastating negative effect on society.").

299. N.J. Magnam Co. v. Fuller, 222 Mass. 530, 533 (Mass. 1916).

300. *Id*.

301. *Id.* at 534.

consider public hazards, especially when they lack executive or legislative guidance.[302]

With this mixed record of judicial concern for third-party harm, the passage of the NYGA may, quite reasonably, inspire New York courts to weigh environmental interests more heavily in public policy analysis. As a constitutional right supported by the majority of New York voters,[303] the NYGA memorializes a very direct public policy of protecting the right to a clean and healthful environment. If New York courts were to cite the NYGA as establishing a policy disfavoring the enforcement of environmentally damaging contracts, they would be following a long tradition of judicial deference to statutory priorities for guidance on public policy. For example, prior to the growth of state legislation requiring the restoration of strip mines, "courts tended to ignore [the] social harm [of environmental damage] when adjudicating contract breach lawsuits brought by owners against mining companies that left the grounds unrestored."[304] However, following the passage of such laws, judges, "[e]xplaining that the social policy had changed . . . required breaching companies to pay for the full cost of restoration."[305] The NYGA similarly offers New York courts a new constitutional mandate to consider third-party environmental harms in interpreting contracts.

B. The NYGA and the Common Law of Nuisance

There is another area of private litigation that may be dramatically shaped by the NYGA, even if courts determine that the NYGA does not create a cause of action between two parties: common law doctrines that relate to individual environmental rights. Common law arises from a combination of tradition, social recognition, and judicial precedent.[306] A constitutional amendment represents both an act of supreme lawmaking and a strong statement of societal priori-

302. *See* Hoffman & Hwang, *supra* note 286, at 1002 ("[I]t's not obvious that courts are always willing to wait for the sanction of other branches of government before declaring contracts to be hazardous.").

303. *See New York's Environmental Right Repository: History of the Amendment*, PACE U., https://nygreen.pace.edu/ [https://perma.cc/4JHA-5BGT] (last visited Apr. 12, 2024).

304. *See* Ben-Shahar et. al., *supra* note 287, at 1140.

305. *Id.* at 1141.

306. Mark S. Coven, *The Common Law as a Guide to State Constitutional Interpretation*, 54 SUFFOLK U.L. REV. 279, 299 (2021) (describing the structure of common law, and noting that "the common law is constantly changing as the attitudes of the state's populace changes. The common law is not static and reflects the state's changing fundamental beliefs and mores.").

ties, and so could lead to a fundamental reordering of common law. While, as this Subsection will discuss, there are significant limits to this thesis, the environmental rights protected in the NYGA may significantly change the way that New York's lawyers and judges interpret environmental common law doctrines in private litigation.

1. Constitutional Amendments and the Common Law

The relationship between constitutional amendments and common law is complex. At a superficial level, the New York Constitution is the state's highest law,[307] and the enactment of a new constitutional amendment supplants or nullifies any inconsistent common law doctrine.[308] On that level, any modification of constitutional rights may be said to throw open the whole of the common law to reexamination. However, New York law also contains a presumption that amendments are not intended to change the common law unless "the express declarations or reasonable implications" of an amendment are inconsistent with preexisting doctrines.[309] While the NYGA cannot, therefore, be viewed as a complete "reset button" for environmental common law, New York courts may increasingly look to the NYGA as a source of norms for common law interpretation and as a tool to distinguish pre-NYGA common law precedent.

Scholars have long recognized that constitutions, and particularly state constitutions, can have significant impacts on common law doctrines. State litigation between private parties "routinely proceeds under the common law," which often embodies a set of rights against private actors that parallel state constitutional rights against gov-

307. *See* Sage v. City of New York, 154 N.Y. 61 (N.Y. 1897) (referring to New York's 1777 Constitution as "the result of all the legislative power that the people of the state of New York, untrammeled by any higher law, could exert"); *see also* John Bourdeau et al., *§ 2 Nature and Structure of New York Constitution*, *in* 20 N.Y. JUR. 2D CONST. L. (Nov. 2023) ("The New York Constitution has been described as a fundamental act of legislation by the people of the state. Within the field in which it operates, it is the supreme law of the state.").

308. Bourdeau et al., *supra* note 307.

309. John Bourdeau et al., § 16 *Effect of Constitutional Provision on Common Law*, *in* 20 N.Y. JUR. 2D CONST. L. (Nov. 2023). This principle reflects a general rule in New York statutory interpretation that "[r]ules of the common law are to be no further abrogated than the clear import of the language used in the statute absolutely requires." *Transit Comm'n v. Long Island R. Co.*, 253 N.Y. 345, 355 (1930); In re Liquidation of Midland Ins. Co., 16 N.Y.3d 536, 547 (N.Y. 2011) (describing this interpretive rule as "axiomatic"). New York Courts have applied this principle in assessing the impact of constitutional amendments on the common law. *See W. New York Water Co. v. Brandt*, 259 A.D. 11, 16 (N.Y. App. Div. 1940) ("The common law is repealed by the Constitution to the extent that it is inconsistent therewith and only to that extent.").

ernment actors.[310] Even where private individuals are barred from enforcing a constitutional right against other private parties, "[t]hat conclusion . . . does not and should not foreclose a state court from asking a separate and analytically distinct question:" whether such an action is permitted under state common law.[311] These parallel causes of action can then "serve as a pathway for the indirect enforcement of constitutional values in disputes that do not involve a government actor."[312]

This dynamic played out in a set of state cases addressing political speech on private property, sometimes called the "Shopping Mall Cases."[313] As shopping centers became increasingly prevalent in the 1970s and 1980s, the locus of public commercial activity shifted from publicly owned downtowns to privately owned shopping malls.[314] This dynamic confronted courts across the United States with an increasing number of disputes between shopping mall owners and private individuals seeking to engage in political or expressive speech.[315] After several opinions in the Supreme Court found that the First and Fourteenth Amendments to the U.S. Constitution "have no part to play" in disputes about political activity on private property,[316] the Supreme Court "handed the baton to the states to

310. Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 742, (1992); *Id.* at 732 (noting that "the mere fact that a common law right received constitutional recognition did not signify that it was thereby extinguished as a common law right."). Indeed, common law rights often *precede* constitutional rights, and serve as a basis for their structure. *See* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 170 (1928) ("Many of the rights which the Constitution of the United States protects . . . against legislative power were first protected by the common law against one's neighbors").

311. Hershkoff, *supra* note 272, at 7–8.

312. *Id.* at 8.

313. Kaye, *supra* note 310, at 739 (using the phrase "shopping mall cases" to describe this set of decisions); Hershkoff, *supra* note 272, at 7–8 (describing common law claims associated with shopping mall use that parallel constitutional rights); Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 168–69 (1980) (referring to cases around "shopping centers").

314. See Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 168–69 (1980).

315. *See id.* (describing the changing cultural dynamics underlying these cases); *see also* Kaye, *supra* note 310, at 739 (noting that, as a set, these cases dealt with "[t]he central legal question [of] whether individuals have a right of access to privately-owned shopping malls to gather petitions or engage in other expressive activity.").

316. *See* Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 567 (1972) (holding, in a case about Vietnam War protestors ejected from a shopping mall for distributing leaflets, "that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only."); Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976) (holding, in a dispute

decide whether, under their own constitutions, they would offer more expansive rights than had been found under the federal Constitution."[317]

In response to the Supreme Court's shopping mall decisions, courts in some states, like California, found that their state constitutional rights "protect[ed] 'speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.'"[318] Other state courts refused to apply state constitutional rights against private actors, but instead reached similar conclusions under the common law. While, as discussed above, New York itself took a different approach, and decided its own "Shopping Mall Case," *SHAD Alliance*, on strictly constitutional grounds,[319] these cases illustrate the influence that state constitutional rights can have on non-constitutional common law doctrines. In *Lloyd Corp. v. Whiffen*, the owner of a privately owned shopping center sought an injunction against a group of individuals who entered the mall to seek signatures for ballot initiative petitions.[320] The Oregon Court of Appeals reversed an initial injunction, holding that a blanket injunction against political speech in a shopping mall "violated defendants' rights of expression under Article I, Section 8, of the Oregon Constitution."[321] The Oregon Supreme Court, on appeal, rejected the parties' attempts to categorize the case as a constitutional one "without first examining the parties' rights on a sub-constitutional level."[322] Applying doctrines of private nuisance and trespass, a majority of the Oregon Supreme Court determined that blanket injunctive relief was inappropriate because the potential harm to the plaintiff was significantly less than the importance of the enjoined activity to the public.[323] In doing so, the Oregon Supreme Court acknowledged the

about striking workers ejected from a private shopping center for distributing pamphlets, "that if the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co. We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this.").

317. Kaye, *supra* note 310, at 739.

318. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 78 (1980) (quoting and affirming Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979)).

319. *See supra* note 204 and accompanying text.

320. *See* Lloyd Corp. v. Whiffen, 773 P.2d 1294, 1296 (Or. 1989).

321. *Id*. at 1295.

322. *Id*. at 1297.

323. *Id*.

centrality of political constitutional rights to its decision without finding that Oregon's constitution itself created a cause of action against private individuals.[324] In a 1992 article discussing the intersection of constitutional and common law rights, New York Court of Appeals Judge Judith Kaye observed approvingly that, "without constitutionalizing the result, the [*Whiffen*] court injected state constitutional values—here, Oregon's constitutional provisions regarding the process of filing petitions and obtaining signatures—into a traditional balancing test" under Oregon's common law.[325]

2. Casting the NYGA's Shadow on New York's Common Law

The NYGA, as a new and powerful statement of societal values, may have a significant impact on New York's common law. As *Whiffen* demonstrates, state courts have a long history of importing constitutional norms "into areas of private life that are outside the reach of federal constitutional protection and usually are considered to be beyond constitutional influence of any sort," from wrongful termination to contractual interpretation.[326] The norms and meaning of the NYGA have yet to be firmly established by courts,[327] and at this point it is difficult to predict the precise impact that NYGA may have on New York's common law. However, the NYGA offers a vehicle for attorneys to challenge aspects of pre-NYGA common law that conflict with the text or implications of the NYGA, and offers judges an opportunity to "indirectly enforce state constitutional norms" through

324. *See id.* at 1301 (holding that "[t]he public policy behind the signature-gathering process limits equitable enforcement of plaintiff's preferred total exclusion of signature solicitors.").

325. Kaye, *supra* note 310, at 741. Judge Kaye also cites to the New Jersey Supreme Court's decision in *State v. Shack*, which similarly used policy considerations imported from constitutional law to inform common law doctrines defining property rights. *See id.* at 741–42; *see also* State v. Shack, 277 A.2d 369, 371–72 (N.J. 1971) (refusing to address a constitutional challenge to a trespassing statute, but holding that a farmer's property rights did "not include the right [to] bar access to government services available to migrant workers." The New Jersey Supreme Court further noted that "[t]he policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges.").

326. Hershkoff, *supra* note 272, at 11

327. *See* Gordon J. Johnson, *New York State Constitution Article I, § 19 "Environmental Rights", in* ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 1:1.50 (William R. Ginsberg & Philip Weinberg ed., 2023) (reviewing litigation to date under the NYGA).

the application of common law in disputes between private parties.[328]

One doctrinal area may be particularly open to revision post-NYGA: the doctrine of private nuisance. Private nuisance is a legal cause of action in common law that arises when one party's action or inaction clashes with another party's use of property. Under New York law, a party may be liable for a private nuisance if their conduct invades another's "interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities."[329] Setting aside, for the moment, actions deemed negligent or reckless or activities that are abnormally dangerous, the elements of an intentional private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act."[330] Private nuisance is often the basis for claims against private entities that allege private environmental harms.[331] As such, common law claims alleging private environmental nuisances may have a close nexus to the environmental rights guaranteed by the NYGA, and may be particularly likely to be influenced by the NYGA. As the Oregon Supreme Court demonstrated in *Whiffen*, private nuisance can be an appealing place for courts to incorporate constitutional norms into private actions.[332]

Two particular elements of private nuisance may be significantly impacted by the NYGA: (1) the unreasonableness of challenged ac-

328. Hershkoff, *supra* note 272, at at 4. Professor Hershkoff describes this practice as "distinct from mere policymaking," because interpreting constitutional statements of public policy legitimizes, justifies, and constrains courts' existing policymaking "when they look to changed circumstances, concepts of reasonableness, or contemporary social concerns that generate new expectations." *Id.* at 4, 12, 13.

329. Copart Indus., Inc. v. Consol. Edison Co. of New York, 362 N.E.2d 968, 971 (N.Y. 1977).

330. *Id.* at 570.

331. *See* Chenango, Inc. v. Cnty. of Chenango, 681 N.Y.S.2d 640, 640 (N.Y. App. Div. 1998) (arising from a dispute about "odors, noise and vibrations" emanating from a landfill); Allen v. Gen. Elec. Co., No. 2001/03711, 2003 WL 22433809, at *1 (N.Y. Sup. Ct. Sept. 29, 2003), *aff'd*, 16 A.D.3d 1095 (N.Y. App. Div. 2005) (permitting a private nuisance claim arising from a plaintiff's proximity to a "toxic waste environmental spill and remediation effort" to go forward); New York et al., v. Fermenta ASC Corp., 238 A.D.2d 400, 403 (N.Y. App. Div. 1997) (discussing an environmental private nuisance claim arising from a chemical release).

332. *See* Lloyd Corp. v. Whiffen, 773 P.2d 1294, 1299 (Or. 1989) (evaluating a proposed injunction's "effect on the public interest," and noting that the enjoined "signature-gathering process for political petitions is a form of political speech and no one contests that free speech is one of our society's most precious rights.").

tions, and (2) such actions' intrusions on property rights. The question of whether an interference is "unreasonable in character" explicitly considers societal norms. Under New York common law, a claim of private nuisance hinges "upon the demonstrated unreasonableness of the nuisance creator in view of his own needs and those of his neighbors."[333] Private nuisance cases are often disputes arising from "conflicting though valid uses of land,"[334] rather than from allegations that a particular use is categorically prohibited. This assessment relies as much on the factual and social context of an action as on black-letter law or legal precedent.[335] "[N]ot every intrusion will constitute a nuisance. 'Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other.'"[336] In such a context, the NYGA may support courts or advocates granting significant weight to environmental harms.

Similarly, the question of whether a particular activity harms a property interest can be significantly impacted by other constitutional rights. While "property" may seem like an inviolate institutional monolith, property interests are generally created and defined by sources like state law and common law; "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[337] As previously discussed, courts and scholars have long recognized that constitutional protections of speech and expression have had "a very significant impact on the use, enjoyment

333. Mandell v. Pasquaretto, 350 N.Y.S.2d 561, 566 (N.Y. Sup. Ct. 1973).

334. Little Joseph Realty, Inc. v. Town of Babylon, 363 N.E.2d 1163, 1168 (N.Y. 1977).

335. Great Atl. & Pac. Tea Co. v. New York World's Fair 1964-1965 Corp., 249 N.Y.S.2d 256, 258 (N.Y. Sup. Ct. 1964) ("The test as to the permissible use of or action upon one's own land is not whether the use causes injury to a neighbor's property, or that the injury was its natural consequence, or that the act is in the nature of a nuisance, but is as to whether the act or use is a reasonable exercise of the dominion which the owner has over his property.").

336. Nussbaum v. Lacopo, 27 N.Y.2d 311, 315 (N.Y. 1970) (quoting Campbell v. Seaman, 63 N.Y. 568, 577 (N.Y. 1876)).

337. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (internal quotations omitted) (remarking that the Supreme Court traditionally resorts to "existing rules or understandings that stem from an independent source such as state law to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments"); *see also* Samuel C. Kaplan, *Grab Bag of Principles or Principled Grab Bag?: The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 504 (1998) (describing the conclusion in *Lucas* that property rights derive from state and common law sources as "largely unremarkable" as a matter of constitutional law).

and control of property."[338] Similarly, social and constitutional protections for privacy have created defensible property interests,[339] and vice versa.[340] As such, courts may reasonably read the NYGA as strengthening property interests in environmental wellbeing, and weakening property rights that result in negative environmental externalities.[341] Under such a reading, the NYGA may render New York courts more likely to find that private nuisance plaintiffs have protectable property interests in their environmental wellbeing, and that actions that harm those environmental interests are unreasonable.

VI. CONCLUSION

The fifteen words of the NYGA promise ambitious but ambiguous environmental rights. But the promise of those rights may die on the vine if judicial interpretations reduce the NYGA and other green amendments to environmental platitudes, rather than defensible entitlements.[342] The first case to interpret the NYGA, *Fresh Air I*, threatens to immediately diminish its scope by holding, with little discussion, that the NYGA provides no protection against private polluters.[343] In response to this threat, the analysis in this article is of-

338. Robert A. Sedler, *Property and Speech*, 21 WASH. U. J.L. & POL'Y 123, 123 (2006).

339. Katz v. United States, 389 U.S. 347, 352 (1967) ("One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.").

340. Rakas v. Illinois, 439 U.S. 128, 153 (1978) ("property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable.").

341. While not directly related to private litigation, the NYGA may significantly impact environmental property expectations in the "takings" context. "If a state's background rules of property forbid certain uses, then those restrictions, such as common-law nuisance restrictions, 'inhere in the title itself,' and the property owner purchases the property subject to those conditions." Kaplan *supra* note 337 at 505. *See, e.g., Lucas,* 505 U.S. at 1034–35 (J. Kennedy, concurring) (noting that, for the purpose of determining whether environmental regulation constituted a "taking" of property, the owner's "reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.").

342. *See* Yeargain, *supra* note 16, at 48–49 (2023) (arguing that "[t]he jurisprudential realities of the American court system are ultimately the biggest drawback of environmental bills of rights in state constitutions," and, while expressing skepticism as to the overall effectiveness of constitutional environmental rights, noting that "[i]f an environmental-rights provision applied *perfectly*—that is, if it were self-executing, if it were recognized by a state supreme court as conferring a private right of action, and if the terms in the right were adequately defined—it would be *perfectly* suited to challenging individual acts of pollution.").

343. *See supra* Part II (discussing the *Fresh Air* cases).

fered a resource for judges, litigants, and scholars attempting to interpret and apply New York's environmental right.

This Article addresses a threshold question raised by the NYGA and other constitutional environmental rights: do they provide a private cause of action against private parties? In resolving this question, we have closely scrutinized the relationship between the NYGA and other elements of New York's Bill of Rights, the legislative history of the NYGA, constitutional litigation under other states' green amendments, and the broader structure of New York's environmental law. From this broad historical, comparative, and contextual analysis, we conclude that the *Fresh Air I* decision wrongly dismissed the idea that the NYGA constrains private parties. A more comprehensive assessment casts doubt on *Fresh Air I*'s cursory analysis, and provides strong arguments in favor of interpreting the NYGA as enabling private suits against private parties. We further argue that, whether New York's courts overturn the *Fresh Air* cases and permit private litigation under the NYGA, the NYGA may have a significant impact on private litigation through doctrines that incorporate public policy or societal norms of "reasonableness." At each step, this Article urges courts, attorneys, and scholars to view the NYGA as a sea change in New York's environmental law, rather than a toothless cliché.

In narrowly focusing on the key threshold question of whether the NYGA binds private parties, many significant questions about the NYGA fall outside of this article's scope. In the coming years, New York's courts will undoubtedly grapple with a wide range of questions, ranging from the definitions of ambiguous terms like a "healthful environment" and "clean air and water" to process issues like the appropriate plaintiffs and available remedies. In focusing on the interpretive question of *whether* the NYGA provides rights against private action, this article also leaves unaddressed a key normative question: *should* the NYGA constrain private action? New York, and the world, face an increasingly urgent pressure to adapt our society, economy, and legal system to the physical and societal impacts of climate change. Would a private cause of action against private parties under the NYGA allow plaintiffs to supplement the enforcement

resources of New York's government in this titanic struggle?[344] Or would such a cause of action simply provide another veto point for well-resourced litigants to block the changes to our physical environment that this struggle requires?[345] In concluding that the NYGA likely permits private litigation, this article leaves the answer to this equally important question to the reader, and to future generations of New Yorkers.

344. *See* Barry Breen, *Citizen Suits for Natural Resource Damages: Closing A Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 874–877 (1989) (arguing that there is "much to gain" from allowing private environmental suits, as such suits increase environmental enforcement, supplement public enforcement budgets, and "dramatically increase polluters' exposure to liability," and there is "little to lose" because such suits "are merely a procedural device for enforcing the substantive law").

345. *See* Michael B. Gerrard, *A Time for Triage*, 39 ENV'T F. 38 (2022) (discussing the tension between short-term environmental protection and the necessity to quickly build renewable energy to combat climate change); *see also* Transcript of the New York State Assembly on February 8, 2021, *supra* note 26, at 42–44 (Assemb. Palmesano) (expressing concerns about NYGA claims being brought against wind developers).