New American

Written by **Selwyn Duke** on March 4, 2024

The New ERA: "Green" Constitutional Amendments are "a Wolf in Sheep's Clothing"

"Each person shall have a right to clean air and water, and a healthful environment," reads the "green amendment" to the New York State Constitution. Seventy percent of Empire State voters cast ballots in November 2021 supporting the measure, too, and it's not hard understanding why. Such a "right" sounds so innocuous, so common-sense oriented, so unarguable; besides, the first time most voters heard about the proposal was in the voting booth. But, warns one critic, such constitutional provisions are "a real wolf in sheep's clothing."

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"Provisions," plural, is correct, too, because a green amendment — also known as an Environmental Rights Amendment (ERA) — may soon be coming to a state near you. As *The Hill* recently reported:

> Life, liberty — and a clean environment?
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> A national coalition of environmental activists is trying to amend state constitutions to establish a guaranteed right to a safe climate or a clean environment — analogous to the right to freedom of religion or freedom of speech.
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> They argue that such language, which the constitutions of Pennsylvania, New York and Montana already sport, would give the environment a solid legal grounding against industrial interests amid the climate fight — and enable states to maintain meaningful protections even in the face of deregulation by a future conservative federal government.
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> This week, legislators in New Jersey, New Mexico and Hawaii will hold committee hearings on so-called green amendments — with states such as California and Connecticut waiting in the wings.
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> Bills have also been introduced to propose such amendments in Republican-led states including Iowa, West Virginia, Florida, Tennessee and Texas.

So what's the problem with this seemingly noble goal? The issue, warned City Journal's James B. Meigs in 2021 about NY's ERA, is that

> beneath its innocent veneer, the amendment could upend environmental law in the state.
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> "It's a real wolf in sheep's clothing," Tom Stebbins, executive director of the Lawsuit Reform Alliance of New York (LRANY) told me. As written, the amendment appears to give individuals and activist groups undefined — potentially unlimited — rights to sue both the state government and private parties over perceived environmental wrongs. In other words,

> Stebbins says, the measure takes environmental enforcement "out of the hands of accountable elected officials and puts it in the hands of private attorneys. That's not the way to govern." Philip K. Howard, a longtime advocate of nonpartisan legal and regulatory reform, told me he believes the provision "will open a Pandora's box of litigation."
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> New York's Green Amendment is the product of a long-term progressive project. For decades, activists have worked to redefine laudable goals — such as providing health care or housing — as "rights" on a par with those enumerated in the Constitution. ("The right to clean water, air and a healthful environment should be as fundamental as a person's right to free speech and assembly," one group maintains.) That effort has dovetailed with the rise of the "environmental justice" movement, which reframes environmental problems as examples of racial or class discrimination. A letter to state legislators in support of the measure signed by some 70 advocacy groups states that the "Green Amendment is a powerful and important tool for combating environmental racism."

Of course, "environmental racism" is a passion-stoking propaganda term that should raise eyebrows and suspicion. Moreover, as indicated above, ERAs could strip environmental decisions from the purview of legislators — who are elected by the people and are thus most directly answerable to them — and place them in judges' laps. (Note: Federal judges are appointed, not elected. New York Supreme Court justices are elected, but must run for reelection *only every 14 years*, which largely insulates them from electoral remedy.) And with courts having already arrogated too much power to themselves and judicial activism rife, should we really outsource yet another role to them?

ERAs are also, of course, a gift to trial lawyers — and, surprise, surprise, the American Bar Association is all for them. After all, they love Pandora's boxes requiring their involvement. This is currently playing out in NY, too, in a case where Finger Lakes-area residents are suing the state over a malodorous local landfill (tweet below).

The argument rejected by Judge Ark (above) was put forth by notoriously anti-Trump attorney general Letitia James. Defending the state, she said that the ERA's "vagueness" makes it useless without being "activated by enabling legislation that defines terms and duties," reports SustainableFingerLakes.org.

She has a point, too. The problem?

So does the judge.

That is, NY's green constitutional amendment *is* ridiculously open-ended and vague — regardless, it *is* a constitutional amendment. Translation:

We must absolutely abide its dictates, which are we know not what.

What constitutes "clean" air and water and a "healthful" environment? How many parts per million of a given substance's presence can "clean" air and water have?

Of course, as with all open-ended laws, *judges will decide*.

The good news is that Judge Ark ruled that the ERA is not enforceable against private companies, only the government. (In contrast, James is shamelessly suing a major beef producer for allegedly producing "unsustainable" products.) More bad news, however, is that such provisions may mandate an impossibility.

That is, the spirit behind ERAs apparently is what the New York League of Conservation Voters claims the NY green amendment requires: "that all people must have the same degree of protection from environmental health hazards," relates Meigs — "equality," in other words.

The problem is that this is vague, too: Equality tells us nothing about quality. You can have equality in filth and rotten stenches, for example.

In truth, we all want healthful environments and, thankfully, our air and water are cleaner than they were 60 years ago. But equality? Is it realistic thinking that the air in a densely populated inner-city area will be *as* "clean" as in a green, leafy, rich suburb 30 miles away or in the bucolic hinterlands 200 miles away? You can make impossibility a mandate, but not a reality.

But you can do much damage trying to make an impossibility a reality. So when your taxes in your ERA-saddled state are higher and its budget busted, just know that part of the reason why is an intense greening process — occurring in trial lawyers' wallets and bank accounts.

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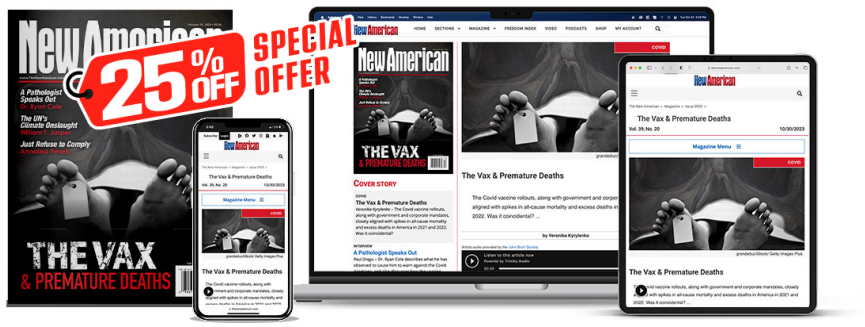

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