S.528 (Jackson) / A.1368 (Englebright)

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BILL

S.528 (Jackson) / A.1368 (Englebright)

SUBJECT

Constitutional Right to Healthful Environment

DATE

January 11, 2021

OPPOSE

The Business Council opposes S.528 (Jackson) / A.1368 (Englebright), which would amend the New York State Constitution to establish a "self-executing right" that each person shall have a right to clean air, water, and a healthful environment. While the underlying intent is laudable, if enacted as is the proposed amendment to the State Constitution would undoubtedly flood courts with litigation and bring all manner of economic development to a halt.

The Business Council would argue that a direct right of action under the state constitution is largely unnecessary and duplicative as judicial review of most environmental actions is readily available under Article 78 of the Civil Practice Law & Rules, citizen suits can be brought seeking enforcement of environmental statutes, and State regulators are empowered with broad authority to police harmful conduct.

Standing and Self-Executing Rights

An analysis of this legislation necessarily begins with standing. Standing is a legal term that determines whether the party bringing a lawsuit has the right to do so, and that a court has the requisite authority to provide adequate relief. For an individual to establish standing, they must show that they have suffered an "injury" to their person or property, that there is a relationship between the injury and someone else's conduct or action, and that there is a remedy in law that would provide redress.

A self-executing provision in law, by contrast, creates a legally enforceable right in and of itself; it does not require that an "injury" affect one specifically, but rather just that the injury occurred. As such, the self-executing right contained in this legislation would mean any injury to air, water or the environment, whether it impacted someone directly or not would be actionable in court. In interpreting statutes, courts determine which causes of action can be asserted and against whom, the scope and breadth of available remedies, and the level of proof

needed to demonstrate injury or harm. This ensures that laws are applied consistently and reinforces foundational tenants of judicial process such as due process and equal protection. For example, under current law if a drinking water system is found to be in violation of adopted health standards, the current statutory and regulatory framework provides a pathway for injured parties to seek redress and consistent enforcement against those responsible.

However, unlike statutory law, self-executing rights lack predictability. Under this paradigm established by this bill, courts would be required to make case-by-case determinations as to whether an individuals' right to a healthful environment has been breached, a process that would require intensive fact finding, technical data and expert opinions, which are both time consuming and expensive to undertake. In addition, courts would have to situationally determine what exactly constitutes a "healthful environment". This degree of uncertainty would prove remarkably cumbersome not only for the judicial system, but also for any entity doing business in the state that may interact with air, water or environment.

Other States

Six other states have environmental bill of rights. Few of the bills of rights have been self-executing; most are dependent upon a specific statutory enforcement mechanism. The last state to adopt a bill of rights was Rhode Island in 1987. The last state to adopt a self-executing environmental right was Hawaii in 1978.[1]

Table A: Summary of Environmental Rights Provisions in Six States

State	Date	Section	Total words in provision	Mentions state public trust	Mentions future generations	Enforcement mechanism noted
Illinois	1970	Article XI	83	Yes	Yes	Self-Executing
Pennsylvania	1971	Article I Section 27 (in bill of rights)	61	Yes	Yes	Legislative
Montana	1972	Article II, Section 3 (in bill of rights)	60	Yes	Yes	Unclear— Subject to judicial interpretation
Massachusetts	1972	Article 97	191	Yes	No	Legislative
Hawaii	1978	Article XI, Section 9	57	Yes	Yes	Self-Executing
Rhode Island	1987	Article I, Section 17 (in bill of rights)	185	Yes	Yes	Legislative

Source: Art English and John J. Carroll.

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Note: Hawaii's environmental right attempted to define "healthful" using the standards established by federal and state environmental quality laws.

Uncertainty for the People of the State of New York

Aspirational goals are important. But, when those goals do not have a clear endgame and create significant collateral challenges, they can result in the opposite of the outcome desired. The Supreme Court of Pennsylvania struggled with the above issues when it considered how to apply Pennsylvania's environmental rights provision in Commonwealth v. National Gettysburg Tower, Inc. There, the court considered all aspects of Pennsylvania's environmental rights, and was clearly concerned about possible due process and equal protections issues resulting from arbitrary enforcement. In fact, the court openly questioned the provision's application to private property "[A] property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property."[2]

There is still time to avoid the pitfalls encountered by other states. Yet without due consideration of its direct and indirect impacts, this legislation could have a lasting and permanent impact on New York's ability to create meaningful economic development and jobs while simultaneously not achieving the sponsors' underlying intent.

It is for the above reasons that The Business Council opposes passage of S.528 (Jackson) / A.1368 (Englebright).

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1 "State Constitutions and Environmental Bills of Rights" By Art English and John J. Carroll

2 Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 302 A.2d 886 (Pa. Cmwlth. 1973)