OLD GILLS BREATHE NEW LIFE: A RECENT FISH PROTECTION CASE CONSTITUTIONALIZED NORTH CAROLINA CITIZENS' ENVIRONMENTAL RIGHTS*

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INTRODUCTION

The piers used to be filled with fishers standing shoulder to shoulder, but now they are barren. One used to hear the chatter of fishers discussing their luck that day, but now the only thing that speaks is the wind whistling over the sounds of a depleted ocean. The fish are gone. The River Herring population may never recover. Many other fish species are following in its footsteps. Several of North Carolina's once bustling fisheries are desolate now that 84 to 98 percent of certain fish species have disappeared because of overfishing. These are the claims of plaintiffs in *Coastal Conservation Association v. North Carolina*, who blamed the State for mismanaging the coastal fisheries resource.[1] As part of the resolution of this case, the State just became constitutionally liable for the empty piers and dead fish. And surprisingly, it was done through a fifty-year-old environmental policy-focused Amendment to the North Carolina Constitution that just became exponentially more powerful.

This recent development has four parts. First, it will explain what happened in *Coastal*. Second, it will give a legal history of the

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1. Complaint at 6, Coastal Conservation Association v. State, 2022-NCCOA-589, 285 N.C. App. 267, 878 S.E.2d 288 (No. 20-CVS-12925).

Conservation Clause, other Green Amendments, and case law applying policy in the Conservation Clause. Third, this piece will explain how *Coastal* shifted the direction of the law from a policy consideration to an enforceable right. And finally, the piece will conclude by explaining how this is akin to fundamental rights and how it can be used to enhance environmental protections in the future.

I. HOW THE TIDE ROLLED IN: LEGAL HISTORY

Legal history illustrates the uniqueness of *Coastal*—the courts had never considered the Conservation Clause more than a policy declaration. In the early 1970s, fourteen states amended their state constitutions to protect the environment.[2] North Carolina was one of the states that joined in this trend, enacting the Conservation of Natural Resources Clause (the "Conservation Clause").[3] However, North Carolina's amendment was far weaker than that of other states.[4] Eight states and territories used the term "right" to explain citizens' interests in the environment while North Carolina only used the word "policy."[5] The word choice constituted a stark difference practically. At least initially, these eight states hoped for self-executing rights—which is a constitutional right that can be enforced without passing other laws—and two states guaranteed a private right of action in the Constitution.[6] These are called Green Amendments.[7]

Meanwhile, North Carolina did not provide for any affirmative rights—meaning, it did not require the government to act instead of merely refraining from acting (a negative right).[8] The Conservation Clause only said, "[i]t shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry."[9] The "policy" phrasing was mostly aspirational, and at the time, legal scholars excluded North Carolina from discussions of state environmental

2. § 7:3. Sources of state environmental law—State constitutional provisions, 1 L. of Envtl. Prot. § 7:3.

3. N.C. CONST. art. XIV, § 5.

4. *See id.*

5. Quinn Yeargain, *Decarbonizing Constitutions,* 41 YALE L. & POL'Y REV., no 2, 2023, at 1, 33–34.

6. *Id.* at 33.

7. Mary van Rossum & Kacy Manahan, *Constitutional Green Amendments*, 35 NAT. RESOURCES & ENV'T, 27 (2021).

8. *See* Yeargain, *supra* note 5, at 35.

9. N.C. CONST. art. XIV, § 5.

amendments because it was inconsequential constitutionally.[10] Originally, the Conservation Clause did not feature a private right of action, much less any language indicating the existence of a right.[11] Instead, states like North Carolina that used policy declarations encouraged their legislature to implement the policy through statutes, such as environmental protection bills, or appropriations of funds to address environmental issues.[12] Because of this difference, the Conservation Clause was not considered a Green Amendment like the other states' amendments that prescribed rights.[13]

North Carolina case law reinforced that the Conservation Clause was only a policy statute for nearly fifty years. The few cases that cite the Conservation Clause only had two uses for the clause. First, the government would validate their actions concerning the environment by referring to the Conservation Clause.[14] For example, in 2005, the Court of Appeals heard a case where the plaintiff contested the constitutional validity of a special assessment on his property.[15] The court used the Conservation Clause to show certain statutes' consistency with the constitution, such as a statute that proclaimed that the coast has a high recreational and aesthetic value.[16] Instead of having a cause of action directly under the Conservation Clause, Plaintiffs were required to sue through laws that utilize the Conservation Clause's policy declaration.[17]

Second, individuals used the Conservation Clause to reinforce the validity of the public trust doctrine.[18] The court in *North Carolina Coastal Fisheries Reform Group v. Captain Gaston LLC* cited the

10. Yeargain, *supra* note 5, at 34.

11. *See id.* at 33; N.C. Const. art. XIV, § 5 ("It shall be the policy of this State . . . ").

12. 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 & RESOURCES L. REV. 113, 131 (2022).

13. *Id.*

14. *See* Parker v. New Hanover Cnty., 173 N.C. App. 644, 653, 619 S.E.2d 868, 875 (2005) (citing the Conservation Clause to show endorsement of the government action); Smith Chapel Baptist Church v. City of Durham, 348 N.C. 632, 502 S.E.2d 364 (1998), *opinion superseded on reh'g,* 350 N.C. 805, 517 S.E.2d 874 (1999) (citing the Conservation Clause to show endorsement of the government action); Cooper v. United States, 779 F. Supp. 833 (E.D.N.C. 1991) (citing the Conservation Clause to show endorsement of the government action); BSK Enterprises, Inc. v. Beroth Oil Co., 246 N.C. App. 1, 783 S.E.2d 236 (2016) (citing the Conservation Clause to show endorsement of the government action).

15. *See generally Parker*, 173 N.C. App. at 653, 619 S.E.2d at 875.

16. *Id.* at 653, 619 S.E.2d at 875.

17. *Id.*

18. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 560 F. Supp. 3d 979, 1008 (E.D.N.C. 2021), *aff'd,* 76 F.4th 291 (4th Cir. 2023).

Conservation Clause (along with supporting statutes) to explain that it "empowers" the State to use the doctrine to protect the public trust rights of North Carolina citizens.[19] North Carolina courts have used similar language in other cases. For example, in *Cooper*, the court used the word "authorize" to describe the Conservation Clause's effect on the State government.[20] These words grant power to the State, but they do not create an obligation.[21] While one case in 1988, *Rohrer v. Credle*, used the term "mandated," the North Carolina courts followed *Cooper* instead.[22] This distinction is crucial. It is the difference between the Conservation Clause directly guaranteeing a right versus giving the state government the discretion to enact new statutes or create common law precedent.

Similarly, *Nags Head* was originally winding down the normal public-trust-path of interpreting the Conservation Clause before the court took a different direction. The case began when the Town of Nags Head took an easement out of a private, ocean-front property to replenish the beach.[23] The landowner argued that the town needed to pay compensation according to the eminent domain statute.[24] The town countered by saying that they could avoid paying compensation because the easement was already implied under the policy that the town could protect and preserve public trust rights.[25] In its holding, the court explained the public trust doctrine—public trust rights that include the right to enjoy all recreational activities offered by public trust lands, as well as the right to use the beaches.[26] They then connected this doctrine to the Conservation Clause and later environmental statutes. At this point in the legal analysis, courts usually employ the words "authorizes" or "empowers." But the *Nags Head* court pivoted. Instead, it said the "State is *tasked* with protecting these rights pursuant to the North Carolina Constitution," and then it quoted the Conservation Clause.[27] There was no other analysis pertaining to the Conservation Clause, nor were there any mentions that the Conservation Clause could possibly present a private right of action.

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19. *Id.* (citing N.C. CONST. art. XIV and N.C. GEN. STAT. § 113-131).

20. Cooper v. United States, 779 F. Supp. 833, 835 (E.D.N.C. 1991).

21. *See id.*

22. State ex rel. Rohrer v. Credle, 322 N.C. 522, 532, 369 S.E.2d 825, 830 (1988).

23. Town of Nags Head v. Richardson, 260 N.C. App. 325, 326, 817 S.E.2d 874, 878 (2018), *aff'd,* 372 N.C. 349, 828 S.E.2d 154 (2019).

24. *Id.*

25. *Id.*

26. *Id.* at 334–35, 817 S.E.2d at 883.

27. *Id*. at 334, 817 S.E.2d at 833 (emphasis added).

However, "tasked" presented a stronger connotation—it framed the Conservation Clause as more of an *obligation* for the States, rather than a lofty goal. Perhaps the courts meant to assign more weight to the Conservation Clause, or perhaps this one word was an accident. Regardless, this word presented the *Coastal* court with an opportunity—and it took it.

II. ABOUT *COASTAL*

The plaintiffs in *Coastal* were citizens of North Carolina who sued the State for allowing overexploitation and waste in fish populations, "which in turn threaten the right of current and future generations of the public to use such public waters to fish."[28] Specifically, they alleged that North Carolina, acting through the North Carolina Division of Marine Fisheries and the North Carolina Marine Fisheries Commission permitted, and even facilitated, destructive fishing practices, such as trawling in estuarine waters with many juvenile finfish and using "unattended" gillnets.[29] Trawling is when commercial shrimp boats plow the bottom of waters, a technique otherwise known as "bulldozing the oceans."[30] This practice is detrimental to fish populations when done in areas vital for spawning and nursery grounds.[31] Meanwhile, gillnets are essentially a curtain net that indiscriminately trap fish regardless of the intended catch.[32] When gillnets are unattended, there is massive waste—unwanted fish die alongside the target fish.[33]

The plaintiffs alleged that while North Carolina encouraged these practices, all other southeastern states "either banned or severely curtailed" them.[34] The plaintiffs claimed this decades-long mismanagement caused multiple fish species to "decline[] precipitously—84 to 98 percent—since the last major fisheries management reform legislation was enacted in North Carolina in 1997."[35]

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28. Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 269, 878 S.E.2d 288, 292 (2022).

29. *Id.* at 280, 878 S.E.2d. at 298.

30. Complaint at 85, 92, Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 878 S.E.2d 288 (2022) (No. COA21-654).

31. *Id.* at 88.

32. *Id.* at 148.

33. *Id.* at 149.

34. *Id.* at 13.

35. *Coastal Conservation Ass'n*, 285 N.C. App. at 270, 878 S.E.2d at 292.

As a result, plaintiffs alleged, only four out of sixteen coastal fish stocks were listed as viable while all others were considered "depleted, recovering, of concern" or of unknown status.[36]

Plaintiffs claimed these adverse effects impeded both their constitutional and public trust doctrine rights.[37] They alleged breaches of obligation: under the public trust doctrine; under the Right to Hunt, Fish, and Harvest Wildlife Clause in the North Carolina Constitution; and under the Conservation of Natural Resources Clause.[38] Plaintiffs hoped to enjoin the State from committing further breaches.[39]

The State moved to dismiss all claims.[40] For the Conservation Clause breach claim, the State argued that there was no valid legal claim even possible because that clause "does not articulate any enforceable individual right but instead clarifies state policies."[41] The trial court disagreed with this argument and denied the motion to dismiss.[42] The State appealed to the Court of Appeals of North Carolina.[43]

In the holding of *Coastal*, the court explained North Carolina's three-part test for establishing a claim under the State Constitution: (1) the State must have violated an individual's constitutional rights; (2) the claim must present facts sufficient to support the allegation; and (3) there cannot be an adequate state remedy.[44] Because the case was in the motion to dismiss stage, all facts the Plaintiffs alleged were taken as true for the sole purpose of determining if there was a potentially viable case as a matter of law.[45]

To begin, the court recognized that there is an implied individual constitutional right to harvest fish under the Conservation Clause.[46] The court established the right by combining interpretations from two public trust doctrine cases—*Town of Nags Head v. Richardson* and *Rohrer v.*

36. Complaint at 66, Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 878 S.E.2d 288 (No. COA21-654).

37. *Coastal Conservation Ass'n* 285 N.C. App. at 270, 878 S.E.2d at 292.

38. *Id.*

39. *Id*., 878 S.E.2d at 292.

40. *Id.*, 878 S.E.2d at 292.

41. *Id* at 271, 878 S.E.2d at 293.

42. *Id.* at 269, 878 S.E.2d at 291.

43. *Id.*, 878 S.E.2d at 291.

44. *Id.* at 279, 878 S.E.2d at 298.

45. *Id.* at 269, 878 S.E.2d at 291–92.

46. *Id.* at 280, 878 S.E.2d at 298–299.

Credle.[47] In *Nags Head*, one piece of dicta mentioned that the Conversation Clause supported public trust rights, a common law doctrine. But one word mentioned in the case gave the *Coastal* court an avenue for new interpretation: "The State is *tasked* with protecting [public trust] rights pursuant to the North Carolina Constitution."[48] In *Credle*, a nearly 40-year-old case, the court mentioned that the Conservation Clause "mandates" allowed the *Coastal* court to expand its meaning.[49] The court combined these two cases to determine that the State has a constitutional duty to protect both public trust rights and public lands.[50] These constitutional rights include State protection of harvestable fish "for the benefit of all its citizenry."[51] Element one of establishing a constitutional claim—the state violating an individual's constitutional rights—was met.[52]

The Court found that Plaintiffs also met the second element: alleging sufficient facts that the State violated this right.[53] Such violations can include both action and inaction: permitting and protecting questionable fishing methods, refusal to address overfishing, and tolerating inadequate harvest reporting.[54] This conduct presents a viable claim that the government curtailed the public's right to fish.[55] The court further held that since this claim was pled in the alternative to the public trust doctrine claim, the Plaintiffs met the third element.[56] Thus, the Court denied the State's motion to dismiss.[57] The State did not seek review by the North Carolina Supreme Court.[58]

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47. *See id.* at 280, 878 S.E.2d at 298 (combining case law from *Nags Head* and *Credle* for their opinion).

48. *See id.*, 878 S.E.2d at 298 (citing Town of Nags Head v. Richardson, 260 N.C. App. 325, 334, 817 S.E.2d 874, 883 (2018)).

49. *See id.* at 280, 878 S.E.2d at 298 (citing Rohrer v. Credle, 322 N.C. 522, 532, 369 S.E.2d 825, 831 (1988)).

50. *Id.* at 280, 878 S.E.2d at 298.

51. *Id.* at 280, 878 S.E.2d at 298-99.

52. *Id.*, 878 S.E.2d at 298–99.

53. *Id.* at 280, 878 S.E.2d at 298.

54. *Id.*, 878 S.E.2d at 298.

55. *Id.*, 878 S.E.2d at 298.

56. *Id.* at 280, 878 S.E.2d at 299.

57. *Id.* at 284, 878 S.E.2d at 301.

58. The Coastal Review, *State declines to appeal fisheries case to NC Supreme Court*, ISLAND FREE PRESS (Oct. 13, 2022), https://islandfreepress.org/fishing-report/state-declines-to-appeal-fisheries-case-to-nc-supreme-court/.

III. CHANGING THE TIDES: COASTAL IMPLICATIONS

The *Coastal* court established that, for the first time in fifty years, the Conservation Clause provides a private right of action under the constitution for North Carolina citizens dissatisfied with the State's protection of the environment. Under this new precedent, the State has a "constitutional duty to not only protect the public lands, but also the public trust rights attached thereto."[59] The Conservation Clause provides an avenue for declaratory and injunctive relief to citizens whose rights are violated by the state.[60] Simply put, North Carolinians just gained a new constitutional right.

Notably, this opinion was at the motion to dismiss stage—an early stage of litigation.[61] It is certain that a private right of action exists, but the exact contours of the law are still emerging. Therefore, *Coastal* presents us with a piece of clay that litigators and judges can mold into a beautiful, solid sculpture. This recent development illustrates how litigators and judges can and should shape the law. While this piece imagines grand sculptures, it is important to remember that this law is still an untouched lump of clay.

Returning to the analysis of the right itself, the right extends to protecting the harvestable fish population for the benefit of all North Carolina citizens.[62] Potential violations certainly extend to positive acts, since the court explained that there were sufficient facts to show that the State could have "mismanaged" the fisheries.[63] The potential violation included many positive actions like "permitting, sanctioning, and even protecting" methods of fishing.[64]

Even more significantly, this right of action probably extends to the State's inaction. For example, the allegations also include many negative actions, such as "refusing to address" overfishing and "tolerating a lack of reporting."[65] It is notable that the court said, "the alleged facts here support Plaintiffs' contention the State *did not protect* the

59. *Coastal Conservation Ass'n*, 285 N.C. App. at 280, 878 S.E.2d at 298.

60. *Id.* at 280, 878 S.E.2d at 299.

61. *Id.* at 284, 878 S.E.2d at 301.

62. *Id.* at 280, 878 S.E.2d at 208–299 ("[T]he alleged facts here support plaintiff's contention the State did not protect the harvestable fish population . . . Plaintiffs have alleged a colorable constitutional claim.").

63. *Id.* at 280, 878 S.E.2d at 298.

64. *Id.*, 878 S.E.2d at 298.

65. *Id.*, 878 S.E.2d at 298.

harvestable fish population."[66] Non-protection is inaction. This tracks the language of the Conservation Clause which indicates State policy is to "conserve and protect."[67] It is also consistent with *Nags Head* and *Credle* which used affirmative words like "tasked" and "mandated."[68] A brand new Court of Appeals of North Carolina case reinforces this interpretation, saying "[w]e held that [the Conservation Clause] was created to protect the right to fish against encroachment, and that the State had an *affirmative duty* pursuant to the amendment."[69] Therefore, the court established an affirmative duty to take action to protect fisheries, in which State inaction can constitute a violation of the constitution.

Based on the facts of this case, this constitutional duty applies, at the very least, to protecting the harvestable fish population for the benefit of all citizens.[70] This case plainly protects fishing on the coast.[71] However, the court's language has an even broader application. First, the court says the State must protect the harvestable fish population for the "benefits to all citizens" that the fish could have.[72] This point implies that there are other possible benefits the fish could have besides food.[73] The court did not expand further, so its exact scope is unknown.[74] However, based on typical practices concerning fish, protected uses could include recreational fishing, fishing for industrial products, or tourism attractions.

Second, the court said the State has a duty "not only to protect public lands, but also the public rights attached thereto."[75] Three inferences may be drawn from this statement. First, the court intends for this statement to apply not only to waters, but also to lands. While this could be inferred from the language of the Conservation Clause, this statement reinforces it. Second, the court separates the State's duty to protect the public lands and the public's rights to the land. This means that the land *itself* has the right to be protected, apart from the public's rights to use it. Notably, this provision is entirely separate from the

66. *Id.*, 878 S.E.2d at 298.

67. N.C. CONST. art. XIV, § 5.

68. Town of Nags Head v. Richardson, 260 N.C. App. 325, 334, 817 S.E.2d 874, 883 (2018); *See Coastal Conservation Ass'n*, 285 N.C. App. at 280, 878 S.E.2d at 298 (citing Rohrer v. Credle, 322 N.C. 522, 532, 369 S.E.2d 825, 831 (1988)).

69. Oates v. Berger, 2025 WL 1118741, at *5 (N.C. Ct. App. Apr. 16, 2025).

70. *Coastal Conservation Ass'n*, 285 N.C. App at 280, 878 S.E.2d at 298–99.

71. *Id.* at 282, 878 S.E.2d at 300; *Oates*, 2025 WL 1118741, at *5.

72. *Coastal Conservation Ass'n,* at 280, 878 S.E.2d at 299.

73. *Id.*, 878 S.E.2d at 299.

74. *Id.*, 878 S.E.2d at 299.

75. *Id.* at 280, 878 S.E.2d at 298.

citizen's rights to use the land. And finally, the "public rights attached thereto" means that the public trust doctrine is now a constitutional guarantee. This is the best indication for the Conservation Clause's scope based on citizen's rights attached to the public trust doctrine. At a minimum, this language that the land itself has a right to be protected shows that this Conservation Clause encompasses the public trust doctrine and then some.

The notion that the Conservation Clause's new constitutional duties extend beyond the public's right to fish is further exemplified by the other cause of action in the suit—the Right to Hunt, Fish, and Harvest Wildlife Clause. This is a different clause in the constitution, which the court interpreted to impose "an affirmative duty on the State to preserve the people's right to fish and harvest fish" among other activities like hunting.[76] Applying it to the facts of *Coastal*, the court determined that there were adequate facts that, if proven, could show the State violated its right to preserve fisheries for the benefit of the public. This wording is particularly similar to the cause of action under the Conservation Clause.[77] It indicates that the Conservation Clause is broader than just fishing and hunting. Instead, the Conservation Clause is more focused on the conservation of natural resources, as its name suggests, which encompasses protecting the land, waters, *and* the citizen's rights that are attached to them. This protects natural resources, and can connect to citizens' rights if the destruction of those resources then injures their use of the resources. Meanwhile, the Right to Hunt, Fish, and Harvest Wildlife relies on citizen's activities, but can connect to natural resources when it hinders those activities.

Because the Attorney General did not seek review from the North Carolina Supreme Court, this ruling comes from the highest possible court and is binding on all lower courts in North Carolina.[78] *Coastal* is good law. The North Carolina Constitution now has an affirmative duty under the Conservation Clause to protect public lands and waters, or it can face suit directly under the Clause from private citizens.

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76. *Id*. at 282, 878 S.E.2d at 300.

77. *Id.* at 280, 878 S.E.2d at 298 (ruling that the state has a "constitutional duty not only to protect the public lands, but also the public rights attached thereto.").

78. The Coastal Review, *supra* note 58.

IV. POTENTIAL FOR A TSUNAMI: WHY THIS CHANGE COULD BE MONUMENTAL

The Conservation Clause's revitalization was essential because before *Coastal*, the policy-driven amendment did not provide citizens enough environmental protection. It had no real substantive effect. In fact, the Conservation Clause was so insignificant that it was regularly omitted from discussions of environmental constitutional policies.[79] While legal scholars analyze the contours of other state environmental rights, they dismissed the Conservation Clause as "aspirational"[80] or for "aesthetic" value.[81] Prior to *Coastal*, the Conservation Clause was weak and omitted from environmental rights conversations for good reason. Now, it acts like a Green Amendment.

While the state relies exclusively on legislative actions, North Carolina faces escalating environmental devastation. In addition to fishing crises, the coasts are experiencing unprecedented rates of erosion. Sea-levels typically rose 0.14 inches per year from the 1990s and early 2000s, but over the last decade the rates have been 3.5 times that figure—0.5 inches per year.[82] For example, Wilmington's high tides could be 2.26 feet higher by 2050.[83]

All the while, North Carolina's Division of Public Health warns that "increasing frequency and intensity of precipitation and extreme weather events . . . has caused extensive and widespread flooding along the coast."[84] Hurricanes are getting stronger, wetter, and deadlier.[85] Hurricane Florence in 2018 exemplified how climate change has boosted

79. Yeargain, *supra* note 5, at 35.

80. *Id.*

81. Milton S. Heath, Jr. & Alex L. Hess, III, *The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation*, 29 CAMPBELL L. REV. 535, 539 (2007).

82. Gareth McGrath, *New studies show 'unprecedented' sea-level rise along the North Carolina coast*, WILMINGTON STAR-NEWS (Apr. 25, 2023, 5:00 AM), https://www.starnewsonline.com/story/news/local/2023/04/25/studies-show-sea-level-rise-is-accelerating-off-north-carolina/70101145007/.

83. *Id.*

84. *Epidemiology: Occupational and Environmental*, N.C. DIV. OF PUB. HEALTH, https://epi.dph.ncdhhs.gov/oee/programs/climate.html.

85. Jeff Berardelli, *How Climate Change is Making Hurricanes More Dangerous*, YALE CLIMATE CONNECTIONS (July 8, 2019), https://yaleclimateconnections.org/2019/07/how-climate-change-is-making-hurricanes-more-dangerous/.

storms—they move slowly, dump unthinkable amounts of water, and devastate communities.[86]

Expanding beyond the coast, most parts of North Carolina are experiencing extreme heat more and more frequently.[87] On average, 4000 people visit North Carolina emergency rooms because of heat-related illnesses during the warm seasons.[88] Emergency room visits also increased by 42 to 66 percent for cardiovascular and respiratory issues due to climate hazards like pollen, ozone, and moisture in homes from floods.[89] Climate change ravages North Carolina and will continue to do so absent a change. These trends also reveal that it is not enough to rely on the North Carolina legislature to combat environmental issues. As environmental activist Maya van Rossum wrote, "[l]egislative environmentalism has had its day, and the environment is still on the brink of catastrophe—we need a new way forward."[90]

Under *Coastal*, the revived Conservation Clause amendment frees environmental protection efforts from relying solely on legislative action. Citizens no longer need wait for a cumbersome process of bills becoming law through lobbying, fundraising, and advocacy.[91] The affirmative aspect of this new right ensures that the state must take steps to protect the environment even if it did not assign the duty unto itself.[92]

For example, Pennsylvanian plaintiffs used their Green Amendment to force their state to clean up a toxic site when government

86. Corey Davis, *Florence After Five: Redefining the Future*, N.C. STATE CLIMATE OFF.: CLIMATE BLOG (Sept. 14, 2023), https://climate.ncsu.edu/blog/2023/09/florence-after-five-redefining-the-future/#:~:text=%E2%80%9CThe%20storms%20are%20getting%20stronger,as%20heavy%20rainfall%20and%20freshwater.

87. N.C. DIV. OF PUB. HEALTH, *supra* note 84.

88. *Id.*

89. *Id.*

90. MAYA VAN ROSSUM, THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT 15 (2017); Barry E. Hill, *Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where Do We Go From Here?*, 49 ENV'T L. REP. 10362, 10371 (2019) (quoting *id.*).

91. *See* van Rossum & Manahan, *supra* note 7, at 30 ("If environmental rights are not self-executing, and instead are defined by the legislative or executive branch of government, they will once again become subservient to the political whimsies of the day with only election politics as the solution for protection and change.").

92. *See* Yeargain, *supra* note 5, at 44 (discussing rights imposing an affirmative duty of protection on the state government).

officials failed to do so.[93] They *made* the officials protect the environment. Avoiding politics also means avoiding inconsistency—laws change with whichever party is dominating at the time. A constitutional right will remain untampered. North Carolinians can remain holders of environmental rights no matter who is elected that November. Even if North Carolina were to pass a harmful law, regulation, or other form of state action, then under this new precedent, the plaintiff can sue for a violation of their rights, just like in *Coastal*.[94] Further, this avoids the single-mindedness of legislation, which typically covers one topic at a time such as hazardous pollution, endangered species, or clean air. Green Amendments like this one are much more versatile and, as will be explained further, have the potential to span various areas.[95] While legislation is available, North Carolinians now have another avenue for environmental protection.[96]

Green Amendments reframe environmental protection as a fundamental rights issue. As van Rossum said, "This authority is the inalienable, indefeasible, inherent rights we all possess as residents of the earth."[97] As a constitutional right, it is "on par with other protected rights such as speech, religion, and property."[98] The Conservation Clause has self-executing enforcement in its own right—no extrinsic legislation needed.[99] This enforcement right will prevent government actions that hurt the environment as well as compel government action to protect it where existing governmental protections are inadequate.[100] The court provided near "affirmative duty" language in *Coastal* when it provided liability for state inaction.[101] The duty placed on the state government forces officials to prioritize preventing a constitutional violation, which

93. Samuel L. Brown, Maya K. van Rossum, Antoinette Sedillo Lopez, Terry A. Sloan & Artemisio Romero y Carver, *Green Amendments: Vehicles for Environmental Justice*, 51 ENV'T L. REP. 10903, 10905 (2021).

94. *See* Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 280, 878 S.E.2d 288, 299 (2022) (allowing for a private right of action under the Conservation Clause).

95. Adashek, *supra* note 12, at 131.

96. There are also strong environmental protections stemming from executive orders, administrative law, international law, and beyond. However, for the sake of time, this paper focuses on Green Amendments and their relation to legislation.

97. VAN ROSSUM, *supra* note 90, at 43-44; Hill, *supra* note 90, at 10371 (quoting VAN ROSSUM, *supra* note 90).

98. van Rossum & Manahan, *supra* note 7, at 28. *See also* Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93, at 10906.

99. van Rossum & Manahan, *supra* note 7, at 30.

100. *Id*. at 31.

101. *See supra* Part III.

in turn means preventing environmental harm. Decision-makers must *act* to prevent harm. They cannot accept degradation as a foregone conclusion, but instead, they must backtrack in their thought-process to avoid liability.[102] This alters both the legal scheme and the mindset of decision-makers in Raleigh, which cannot be understated in terms of effectiveness.[103] North Carolina decision-makers can no longer dismiss the environment as inconsequential, an issue for later, or low-priority without facing legal consequences.

The Conservation Clause, now a true Green Amendment, advances the idea that resources belong to the people of North Carolina, not the state.[104] The state has responsibility to protect the resources for North Carolinians.[105] While Green Amendments give rights belonging to all people, there are two key demographics who experience dramatic growth in their rights: minority communities and future generations.

The first group who the new Conservation Clause immensely impacts are minority and underrepresented communities. The brunt of pollution issues and environmental degradation largely fall on minority communities through repeated siting and permitting, development practices, or technology decisions.[106] For example, coal-fired power plants, incinerators, and waste treatment facilities will usually be developed in areas highly populated by minorities.[107] This phenomenon is called environmental racism.[108]

In recent years, activists and politicians began calling for environmental justice, a plan to end the inequitable environmental treatment for minority communities.[109] Many believed that systemic injustices are so deeply-rooted in our legal system that the best cure are Green Amendments: "'Green Amendments' enshrine environmental rights so they can transcend a system of law and government that passively allows systemic environmental racism to fester in an endless

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102. Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 92, at 10906.

103. *Id.*

104. *See id.* at 10907 (explaining that Green Amendments make a state's resources property of the citizens).

105. *See id.* (explaining that green amendments make state officials trustees for the citizen's natural resources).

106. van Rossum & Manahan, *supra* note 7, at 28.

107. *Id.*

108. *Id.*

109. *Id.*

backloop."[110] Green Amendments, like the revamped Conservation Clause, give equal protection to every citizen. Where non-minority communities have the benefit of more statutory weaponry when suing for environmental harms in court because they are more likely to be represented in the legislature, minority communities now have a right of action to sue for their harms too.[111]

One legal scholar argued that residents of Flint, Michigan—a predominately African-American city that suffers from unsafe drinking, washing, and bathing water because of state and local government decisions—could have had more success in their legal fight had there been a Green Amendment in Michigan.[112] In reality, the Environmental Protection Agency's (EPA) Office of Inspector General recommended that the EPA should more strictly oversee state drinking water programs, but the EPA "was, for the most part, absolved of any real responsibility to Flint Residents."[113] The legal scholar explained that in the fake Michigan-Green-Amendment-world, Flint residents would clearly have a strong case because there was cause-in-fact injury, and even more, state officials would have taken their complaints more seriously.[114] The Flint water crisis exemplifies the need for Green Amendments: water, the key to all life, needs to be protected, and if citizens cannot succeed in court for their state-poisoned water, what type of America are we living in? The new Conservation Clause helps protect North Carolinians from a legal fate like those in Flint. And, on a larger scale, it will help curb the systemic effects of environmental racism for minority communities.

The new interpretation of the Conservation Clause also immensely benefits future generations. One potential benefit is if the courts included future generations as beneficiaries of North Carolina's natural resources. Many legal scholars argue that this is a crucial part of any Green Amendment: "it's not about what we need now, but what is good for our children and grandchildren."[115] Future generations will be "extremely vulnerable" to climate change, so it is important to protect

110. *Id.*

111. *See id.* at 31 ("In the absence of legislation or regulation to prevent or address this contamination, communities benefiting from a Green Amendment could rely upon their constitutional right to clean water in a legal challenge seeking needed government protection.").

112. Hill, *supra* note 90, at 10382.

113. *Id.*

114. *Id.*

115. Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93, at 10907.

them before troubles arrive.[116] Green Amendments are more capable of creating these protections than legislation because constitutional amendments "cannot fall as easily to the whims of the legislature" with its broad language and lasting presence in the state constitution.[117]

For *Coastal*, there are two impacts for future generations. The first is indirect: the definite change in the State's behavior regarding fish harvesting will hopefully correct bad acts that negatively affect the future.[118] The second impact is that opinions could interpret *Coastal*'s demand that the state protect fish "for the benefit of all its citizenry" to include future generations who will grow up to harvest fish.[119] For this result, the courts would need to interpret the benefit broadly—it does not have to be immediate; the benefit can extend years into the future.[120] If the broader interpretation is upheld, then future cases could later interpret "all its citizenry" to include unborn generations—making the State protect the environment now to protect future North Carolinians. Including future generations as beneficiaries ensures a prospective mindset towards resource conservation—the idea that the environment is more than the now; it is the future.[121] In the context of *Coastal*, for example, future generations could have their own right to the fishing populations, ocean pollution, and water quality that the state would need to protect resources *long-term*. The Conservation Clause would address current overfishing while also enforcing preventative measures for potential future problems.[122] If the courts use this interpretation, this would be an avenue to force North Carolina to address one of the future generations' most pressing issues—climate change.[123]

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116. Adashek, *supra* note 12, at 137.

117. *Id. at* 138.

118. *See* Adashek, *supra* note 12, at 134 (arguing that a Green Amendment would help future generations); Coastal Conservation Ass'n v. State, 285 N.C. App. 267, 280, 878 S.E.2d 288, 298-99 (calling for the State to protect the fisheries for the benefit of its citizenry).

119. *See Coastal Conservation Ass'n*, 285 N.C. App. at 280, 878 S.E.2d at 298.

120. *See* Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93. at 10907 (arguing that Green Amendments should not just provide benefits for problems now but also benefit future citizens).

121. Adashek, *supra* note 12, at 138.

122. *See id.* (arguing that including future generations in Green Amendments will enact proactive and precautionary environmental protection)*;* Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93, at 10907 (arguing that Green Amendments should not just provide benefits for problems now but also benefit future citizens).

123. Adashek, *supra* note 12, at 136–37 (explaining that future generations are more vulnerable to climate change and that preventative legislation from Green Amendments can protect them).

V. WHERE SHOULD LITIGATORS CAST THEIR NETS NEXT?

Litigators in North Carolina should explore the depth and contours of the Conservation Clause so citizens can learn about the extent of their rights. Foremost, further litigation is needed to see what standard will be applied to determine whether the state breached their duty to protect North Carolina's natural resources. How easy will it be to find the state liable? How beneficial do the resources need to be to citizens to be subject to protection? Or will they protect the resources themselves absent citizens' use of them, just as *Coastal* alluded to? Will there be a balancing test? Does this apply to citizens who are not yet born? As of April 2025, these issues have not yet been litigated in court. Litigation will be critical in determining the Conservation Clause's flexibility and efficacy as an environmental protector. Litigators could expand water protection to state sanctioning of offshore drilling, pollution, and forever chemicals which poison rivers. And while it is a natural reading of the Conservation Clause that the state has a duty to "conserve and protect its *lands* and waters," litigators should present a case involving land to create judicial precedent.[124] For example, potential land related litigation could involve pollution or deforestation. Litigators could also connect the Conservation Clause with emerging atmospheric trust litigation.[125]

Coastal also has practical effects outside North Carolina. The other states whose constitutions have amendments that are "mere policy declarations" could follow North Carolina's precedent and decide that policy-based amendments are meant to be substantive.[126] Moreover, more and more Green Amendments in the states advances the probability of a federal Green Amendment, since environmental activists are currently focusing on the state level and will eventually take it to the federal

124. N.C. CONST. art. XIV, § 5 (emphasis added).

125. A developing aspect of law that North Carolina can now be a part of is atmospheric trust litigation. This is the argument that the public trust doctrine applies not only to land and water, but also the atmosphere. Hill, *supra* note 90, at 10377. The atmospheric trust doctrine encapsulates issues from smog to climate change. *Id.* Climate change causes temperatures to rise, which leads to ice glaciers melting, sea level rise, and then inevitable beach erosion and land loss on North Carolina coasts. Adashek, *supra* note 12, at 114. The Conservation Clause constitutionalized the public trust doctrine, and if litigators can encapsulate the atmosphere in citizens' rights then plaintiffs will have more direct pathways to hold the state accountable for preventing climate change.

126. Adashek, *supra* note 12, at 131.

level.[127] While it is a small bit of progress nationally, it is one step closer to guaranteeing environmental rights for all Americans.

CONCLUSION

Coastal created a new cause of action under the North Carolina Constitution. North Carolina lawmakers now have a duty to protect the state's natural resources; they can be held liable for both inaction and action. This is a monumental step in the fight for environmental protection in North Carolina. With worsening environmental quality, this is a much-needed advancement in law that gives citizens a new avenue to protect their rights. The legal landscapes are changing, and the environment is becoming a force of nature in North Carolina constitutional law.

127. Brown, van Rossum, Lopez, Sloan, & Carver, *supra* note 93, at 10907.