The Value of Constitutional Environmental Rights and Public Trusts

John C. Dernbach
Widener University Commonwealth Law School

Follow this and additional works at: https://digitalcommons.pace.edu/pelr

Part of the Energy and Utilities Law Commons, Environmental Law Commons, and the Natural Resources Law Commons

Recommended Citation
Available at: https://digitalcommons.pace.edu/pelr/vol41/iss2/4

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.
ABSTRACT

As part of the modern environmental movement of the 1970s, five states (Hawaii, Illinois, Massachusetts, Montana, and Pennsylvania) adopted constitutional amendments recognizing a right to a quality environment, a public trust for public natural resources, or both. Half a century later, there is a renewed interest in constitutional environmental rights, inspired in no small part by the failure of existing laws to adequately address the climate crisis. A sixth state (New York) recognized a constitutional right to a quality environment in 2021, and more than a dozen states are considering such amendments. Still, the great majority of environmental protection at the state level is accomplished by statutes and regulations. In that context, what specific value do constitutional provisions add to environmental and natural resources protection?

This Article attempts to answer that question for U.S. states, based on judicial decisions in these six states. These provisions can contribute value in at least three ways, depending on how they are written and how courts interpret and apply them. First, constitutional environmental rights and public trusts limit governmental authority to act contrary to their provisions. They can be the basis for invalidating inconsistent statutes, regulations, and other government actions. They can be used in a variety of ways to improve access to the courts, and they have been used to broaden and deepen protection.
for public natural resources beyond the protection accorded under traditional public trust law. Second, they provide supportive authority for governmental efforts to protect the environment and natural resources. Third, they can provide the basis for legal actions against private parties.

Constitutional environmental rights and public trusts are not a silver bullet for all environmental problems. But they can add value to a state’s environmental and natural resources protection effort in a rich variety of ways.

ABSTRACT ........................................................................................................... 153
INTRODUCTION .................................................................................................. 154

I. FOUNDATION: JUDICIAL REVIEW BASED ON CONSTITUTIONAL TEXT .................................................................................................................. 160
II. LIMIT ON GOVERNMENTAL AUTHORITY .............................................. 165
   A. Basis for Invalidating Inconsistent Statutes, Regulations, and Other Government Actions ................................................................. 165
   B. Means of Improved Access to Courts to Challenge Government Decisions ............................................................................................ 174
      i. Relaxed Requirement for Standing to Sue .......................... 174
      ii. Right of Action Under Other Laws ................................. 175
      iii. Basis for Due Process Right of an Opportunity to be Heard ................................................................................................................. 176
   C. Broader and Stronger Public Trust Protection for Natural Resources ........................................................................................................ 179
      i. Pennsylvania ................................................................. 180
      ii. Hawaii .............................................................................. 185
III. SUPPORTIVE AUTHORITY FOR GOVERNMENTAL ACTIONS TO PROTECT ENVIRONMENT AND NATURAL RESOURCES .............. 193
   A. Confirmation and Extension of Police Power ...................... 194
   B. Guidance in Interpretation of Legislation and Other Legal Documents ................................................................................................. 196
   C. According Quasi-Constitutional Status to Statutes and Regulations ........................................................................................................ 198
   D. Constitutional Authority for Laws Whose Constitutionality Is Challenged on Other Grounds ................................................................. 199
IV. BASIS FOR SUITS AGAINST PRIVATE PARTIES .................................... 200
CONCLUSION ..................................................................................................... 202

INTRODUCTION

Environmental and natural resources law is comprised almost entirely of statutes and regulations. Federal, state, and even local agencies administer programs based on these statutes and regulations, approve or deny
permit applications under them, monitor compliance with them, and, when they are violated, are supposed to enforce them. A great deal of this law was adopted during the modern environmental movement of the 1970s, when the adverse environmental effects of modern development led to a wave of new and modified laws to address air pollution, water pollution, waste management, endangered species protection, and other environmental issues.¹

As part of that wave of lawmaking, five states amended their constitutions to explicitly recognize a public right to a quality environment. These states are Illinois (1970),² Pennsylvania (1971),³ Montana (1972),⁴

¹ If there is a beginning date for modern environmental law, it is probably January 1, 1970, when the National Environmental Policy Act was signed into law. There followed the Clean Air Act (1970), the Clean Water Act (1972), the Endangered Species Act (1973), the Resource Conservation Recovery Act (1976), and the Comprehensive Environmental Response, Compensation, and Liability Act (1980). These six statutes, together, have been described as the “canon” of environmental law. Todd S. Aagaard, Environmental Law Outside the Canon, 89 Ind. L.J. 1239, 1240 (2014); see generally Richard J. Lazarus, The Making Of Environmental Law (2d ed. 2023).

² Ill. Const. art. XI, § 2 (“Each 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.”).

³ Pa. Const. art. I, § 27 (“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.”).

⁴ Mont. Const. art. II, § 3 (“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.”); see also Mont. Const. art. IX, § 1 (“(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[, and] (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.”).
Massachusetts (1972), and Hawaii (1978). At the same time they adopted environmental rights provisions, two of these states also amended their constitutions to recognize a public trust in public natural resources and require the state to protect these resources for the benefit of present and future generations. They are Pennsylvania and Hawaii.

A half century later, there is renewed interest in adopting constitutional protection for the environment. This interest is driven by the failure of existing environmental and natural resources laws to adequately address

5. Mass. Const. art. XCVII ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights. In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes. Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.").

6. Haw. Const. art. XI, § 9 ("Each 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.").

7. At least one other state, Louisiana, does not have public trust language in its constitutional provision, but courts have construed it as creating a public trust. The Louisiana constitution provides:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

La. Const. art. IX, § 1. The absence of public trust language in the text has not prevented Louisiana courts from explaining and interpreting this provision as recognizing a public trust in the environment. See, e.g., Save Ourselves, Inc. v. La. Env’t Control Comm’n, 452 So. 2d 1152, 1154 (La. 1984). Still, this Article focuses on those states with provisions that expressly recognize environmental rights or a broad public trust because they represent the strongest form of expression of constitutional environmental rights, and because many states are considering the adoption of such provisions.

8. Pa. Const. art. I, § 27 ("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.").

9. Haw. Const. art. XI, § 1 ("For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.").
climate change, biodiversity, and other environmental and human health challenges, which is increasingly also seen as a failure to protect human rights. In fact, in 2022, the U.N. General Assembly adopted a resolution recognizing “the human right to a clean, healthy and sustainable environment.” This interest is also driven by a sense that constitutional environmental provisions have value in addressing those challenges. As part of

10. In states where there is no comparable expressly stated right, many courts in climate change cases have refused to imply such rights from the state constitution or other law. For example, in Sagoonick v. State, 503 P.3d 777 (Alaska 2022), youth plaintiffs filed a rule-making petition with the state for a regulation to reduce greenhouse gas emissions by eighty-five percent from 1990 levels by 2050. Id. at 789. When the state denied the petition, the plaintiffs challenged the denial in court, arguing among other things that the decision violates Article VIII of the state constitution. Article VIII, they said, provides each Alaskan with a “right to a climate system that is healthy enough to ‘sustain human life, liberty, and dignity.’” Id. at 801. Article VIII makes it “the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.” ALASKA CONST. art. VIII, § 1. It also requires the legislature to “provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.” Id. art. VIII, § 2. The Alaska Supreme Court declined to imply such a right from the state constitution, affirming the dismissal of the case on political question and non-justiciability grounds. Sagoonick, 503 P.3d at 795. In dissent, two justices argued that the court should “explicitly recognize a constitutional right to a livable climate—arguably the bare minimum when it comes to the inherent human rights to which the Alaska Constitution is dedicated.” Id. at 805 (Maasen & Carney, JJ., dissenting in part). See also Aji P. ex rel. Piper v. State, 480 P.3d 438 (Wash. App. 2021), petition for review denied, Aji P. v. State 497 P.3d 350, 351 (Wash. 2021). The youth plaintiffs in this case asked the trial court to declare that, under the state constitution, they have “fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty.” Id. 444–45. They requested both declaratory relief and a court order requiring the state adopt an “enforceable climate recovery plan” for reducing greenhouse gas emissions in order to stabilize the climate system. Id. at 446. To support their claims, they invoked state constitutional provisions concerning substantive due process, equal protection, and public trust. Id. The court of appeals held, among other things, that these provisions did not expressly support their claim for a right to a stable climate system. Id. at 454. Although the supreme court declined to review this case, one justice dissented from the denial: “The court should not avoid its constitutional obligations that protect not only the rights of these youths but all future generations who will suffer from the consequences of climate change.” Aji P., 497 P.3d at 353 (Whitener, J., dissenting).


that renewed interest, New York amended its constitution in 2021 to become the sixth state to recognize a public right to a quality environment. By one count, more than a dozen states have added similar environmental amendments to their constitutions. While there is no federal analogue to these provisions, advocacy to add such a federal amendment continues.

A variety of theoretical and ethical arguments have been made for constitutional recognition of environmental rights. For one thing, constitutionalizing environmental rights and public trusts gives them greater value simply because of their status in a constitution. Because a constitution is harder to amend than legislation or regulations, constitutionalizing public rights also makes them a more permanent part of the legal system. Due to their enduring nature and their higher legal status, public rights of the kind embodied in a bill of rights tend to more easily become part of the broader public discourse and public values over the long term than

---

13. N.Y. Const. art. I, § 19 ("Each person shall have a right to clean air and water, and a healthful environment.").


15. In Juliana v. United States, the plaintiffs claim that “the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change.” 947 F.3d 1159, 1164 (9th Cir. 2020). As a result, they argue, the U.S. government has violated the public trust doctrine as well as substantive due process under the U.S. Constitution by interfering with their right to a “climate system capable of sustaining human life.” Id. at 1164–65. The case was dismissed for lack of standing. Id. at 1175. A public trust claim is at the core of the Juliana case. Michael C. Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: Climate Change, Due Process, and the Public Trust Doctrine, 67 Am. U. L. Rev. 1, 42 (2017). For an argument supporting the plaintiffs’ due process claim on the grounds that climate change threatens life, liberty, and property, see James R. May & Erin Daly, Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, it Can.), 39 UCLA J. Environ. L. & Pol’y 39 (2021). In 2023, a federal district court allowed the Juliana plaintiffs to file a second amended complaint based on their request for declaratory judgment. Juliana v. United States, No. 6:15-cv-01517-AA, 2023 WL 3750334 (D. Or. 2023). The second amended complaint includes a public trust claim. Id. at *6.


18. Compare, e.g., Pa. Const. art. III, § 6 (establishing amendment process for Pennsylvania legislation, which generally requires adoption by the House and Senate and signature by the Governor), with Pa. Const. art. XI, § 1 (establishing amendment process for Pennsylvania constitution, which requires that amendment be approved by two consecutive sessions of the state legislature and approved by the public in a subsequent referendum).
provisions in statutes or regulations. They thus foster the values they embody, in this case public rights to a quality environment and to have public natural resources conserved and maintained. In doing so, they add real but intangible directional guidance to state environmental and natural resources protection efforts.

Still, constitutional provisions cannot be the primary environmental protection tool; courts are constrained from deciding constitutional issues if a case can be decided on the basis of statutory, regulatory, or other issues. A great deal of this nonconstitutional law exists for natural resources and the environment. So what specific tangible value can constitutional provisions contribute to environmental and natural resources protection? This Article attempts to answer that question for U.S. states, based on judicial decisions in six states (Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, and New York).

This Article begins (Part I) by explaining the foundational importance of judicial review. Nearly all of the value of these provisions depends on the judicial enforceability of their text; without it, these provisions lack teeth. The rest of this Article examines the value these provisions can add when courts enforce them. In these states, the interpretation and application of each provision is dependent on its text, the understanding that its drafters had about its meaning and application, and the approach taken by particular courts in interpreting and applying it. There is no single universal answer to the question of the specific value of constitutional environmental provisions. Rather, there are many possible pathways to value, not all of which are realized in any particular state.

This Article identifies three ways these provisions can have value, based on major cases decided thus far, at least in the state where they were decided. As Part II explains, constitutional environmental provisions limit

19. The application of the longstanding due process and equal protection clauses of the U.S. Constitution to same-sex marriages is a recent example. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 675 (2015). See also EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS 186–88 (2013) (explaining that a purpose of state constitutional environmental amendments is providing the basis for a public movement on behalf of the environment).


21. My object is not to evaluate these provisions but rather to describe and categorize the ways in which they add value to the overall environmental protection effort. For a critique of these provisions, see Amber Polk, The Unfulfilled Promise of Environmental Constitutionalism, 74 HASTINGS L.J. 123, 179 (2023) (arguing that these provisions are “not being interpreted as entitlements to substantive environmental outcomes.”).

the exercise of governmental authority. They can be the basis for invalidating inconsistent statutes, regulations, and other government actions. This, of course, is the most obvious way in which a constitutional provision can work. They can also be used to improve access to the courts to challenge government decisions—by easing standing requirements, providing a right of action under other laws, and providing the basis for a due process right to an opportunity to be heard. In addition, constitutional public trusts have been used to broaden and deepen protection for public natural resources beyond the protection accorded under traditional public trust law. Public trusts constrain governmental authority by obliging governments to manage public natural resources in specific ways.

Part III addresses the issue of adding value in a different way. It describes the ways in which such provisions support the exercise of governmental authority to protect the environment and natural resources. They confirm and even extend the police power, provide guidance in interpretation of statutes and other legal documents, give a measure of constitutional status to statutes and regulations, and provide constitutional support for environmental statutes and regulations that are challenged as unconstitutional on other grounds. Finally, as Part IV explains, they can be drafted and interpreted to provide a right of action against private parties.

Constitutional environmental provisions are not a silver bullet for all environmental problems. But they can add value to a state’s environmental and natural resources protection effort in a rich variety of ways.

I. FOUNDATION: JUDICIAL REVIEW BASED ON CONSTITUTIONAL TEXT

An assessment of the value of these provisions must begin with a recognition of the foundational importance of judicial review. Constitutional environmental rights and public trusts are meaningful only to the extent that courts are willing to enforce them based on their text. Otherwise, they are almost entirely aspirational. This Article focuses on those states where judicial review based on the constitutional text is available; some courts with these provisions (Massachusetts and Illinois) have declined to exercise judicial review. A court in another state (Pennsylvania) substituted its own three-part balancing test for the text of the constitution; that test was employed for more than four decades until the state’s supreme court set it aside in 2017. While Pennsylvania courts are now applying the text of the provision, they have been doing so for less than a decade. Only two states (Hawaii and Montana) have a long history of judicial review based on the text of their provisions. New York’s provision is so new that it has yet to be applied by an appellate court. This is an essential cautionary point about
these constitutional provisions, but it is more than that. It means that those drafting and advocating new or modified constitutional environmental provisions need to have a clear and practical understanding of how judicial review will work, and how judges will see their role in enforcing them.

Illinois and Massachusetts provide little if any judicial review of their provisions. Illinois was the first of these states to adopt a constitutional environmental provision, declaring a right to a “healthful environment.” The drafting committee for this provision emphasized that it was not creating a new remedy; rather it was “merely intended to create standing for individuals to represent the public interest.” Thus, in 1995, the Illinois Supreme Court held that this provision “does not create any new causes of action.” Plaintiffs, it said, must base their claims on “a cognizable cause of action” that is separate from, and in addition to, the constitutionally declared right.

The Massachusetts provision states: “The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment.” No state court decisions hold that this is judicially enforceable, and no decisions hold to the contrary. The Massachusetts provision also authorizes

23. For an explanation of how Illinois and Massachusetts could expand judicial review under these provisions, see Kacy Manahan, The Constitutional Public Trust Doctrine, 49 ENV’T L. 263, 298–305 (2019).

24. ILL. CONST. art. XI, § 2. Immediately before that section, the state constitution states: “The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.” ILL. CONST. art. XI, § 1.


28. MASS. CONST. art. XCVII.


30. The closest case on this point appears to be Enos v. Sec’y of Env’t Affs., 731 N.E.2d 525 (Mass. 2000). In that case, plaintiffs claimed that the agency’s decision to grant a permit to operate a sewage treatment plant violated the Massachusetts Environmental Policy Act. Id. at 527–28. The court held that the plaintiffs lacked sufficient interest for standing under the Act to bring that claim. Id. at 531–32. The plaintiffs also claimed that their constitutional right to clean air and water provides an independent basis for standing. The court rejected that argument as well. Id. at 532 n.7. The court’s focus throughout the opinion on the
the State to acquire land by eminent domain for conservation and other purposes, and provides a form of public trust protection to lands acquired in this manner. Most of the reported appellate cases under this provision involve the acquisition, use, and disposition of public land.

Pennsylvania’s provision (Article I, Section 27) provides a right “to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” It also imposes on the Commonwealth a public trust responsibility to “conserve and maintain” “public natural resources” for the benefit of present and future generations. Judicial interpretation of each part of Pennsylvania’s entire environmental provision was interrupted in 1973, two years after it was adopted, by a Commonwealth Court decision that substituted a judicially invented balancing test for the text of the Amendment. (The Commonwealth Court is an intermediate appellate court in Pennsylvania.) As a result, there was no meaningful judicial development of either part of the provision for more than four decades; instead, nearly all of the case law concerned this three-part test. The state’s Supreme Court overruled that decision in 2017, reinstating the text of the amendment as the law to be applied, and thus recognizing that each of the two parts needs to be analyzed separately.

sufficiency of the plaintiffs’ interest, rather than their right to clean air and water, indicates that this opinion is about standing, not constitutional rights.


34. Id.

35. Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), aff’d, 361 A.2d 263 (Pa. 1976). The test was as follows:

The court’s role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefore that to proceed further would be an abuse of discretion?

Id. The Pennsylvania Supreme Court did not affirm on the basis of that test; however, it merely noted that the Commonwealth Court had used it. 361 A.2d at 272 n.23.


The balancing test grew out of a judicial perception that the constitutional provision, if interpreted as written, was anti-development. That perception, in turn, was created by two cases brought under the provision shortly after it was adopted, both of which challenged proposed activities that seemed environmentally insignificant to the courts. In one, the attorney general challenged the construction of an observation tower on private land just outside the Gettysburg Battlefield National Park as inconsistent with the constitutional right to the preservation of the national, scenic, historic, and esthetic values of the environment. The courts rejected that challenge. The Commonwealth Court observed that, under the state’s position, it “becomes difficult to imagine any activity in the vicinity of Gettysburg which would not unconstitutionally harm its historic values.” In the second case, which led to the balancing test, plaintiffs challenged a state-sponsored project to use a half-acre of a 21.7-acre city park to widen a street (River Street) for public safety purposes. This project, the plaintiffs argued, violated the state’s constitutional duty to conserve and maintain public natural resources. Here again, the Commonwealth Court said, “it becomes difficult to imagine any activity in the vicinity of River Street which would not offend the interpretation of Article I, Section 27 which plaintiffs urge upon us.”

The Commonwealth Court expressly held out its balancing test as a reasonable alternative to the constitutional text. “The result of our holding is a controlled development of resources rather than no development,” it said. “Judicial review of the endless decisions that will result from . . . a balancing of environmental and social concerns must be realistic and not merely legalistic.” That test ignored the constitutional text and failed to treat it as recognizing environmental rights. It made no distinction between the

40. Id. at 895.
41. Id.
43. Id. at 94.
44. Id.
45. Id.
46. Id.
47. The test was also unnecessary, even on the facts of those cases. In Gettysburg Tower, the state lost its bid for an injunction without it. Commonwealth v. Nat’l Gettysburg
provision’s two parts—the people’s right to a quality environment, and the people’s right, as public trust beneficiaries, to have the Commonwealth “conserve and maintain” public natural resources. Because the test was directed at compliance with applicable statutes and regulations, it substituted nonconstitutional law for constitutional law and created no room for courts to hold that a statute or regulation violated Article I, Section 27. Not surprisingly, parties invoking Article I, Section 27 almost never won.

The Pennsylvania Supreme Court began returning Article I, Section 27 jurisprudence to its text in 2013 in a plurality opinion in Robinson Township v. Commonwealth. That opinion, authored by then-Chief Justice Ronald Castille, reflects an original understanding of the provision based on its text. It also reflects a different understanding of the effect of the provision’s text on development. The early history of the state, he wrote, is characterized by “uncontrolled and unsustainable development,” which had “health and quality of life consequences,” and which relegated “to history books . . . valuable natural and esthetic aspects of our environmental inheritance.” Indeed, the opinion describes in some detail how the environmental degradation caused by prior development led to the adoption of

Battlefield Tower, Inc., 302 A.2d 886, 895 (Pa. Commw. Ct. 1973), aff’d, 311 A.2d 588 (Pa. 1973). In Payne, the Commonwealth Court could simply have decided that, under the de minimis environmental injury shown in that case, the plaintiffs did not show a violation of the Commonwealth’s constitutional duty to conserve and maintain public natural resources.

48. PA. CONST. art. I, § 27; Payne, 312 A.2d at 93–94. The test uses almost none of the words and phrases that are contained in the provision. There is no mention of clean air, pure water, or preservation of specified environmental values. Similarly, the test does not mention public trust, present or future generations, or the state’s duty to “conserve and maintain” public natural resources. Instead, it uses “environmental incursion” and “environmental harm,” and in its third prong creates a balancing test that is nowhere to be found in the text of the provision. Id. at 94. The omission of words and phrases that are distinctive to each part of the amendment, and the substitution of more general words, erases the distinction between the two parts. And perhaps more fundamentally, it makes the text nearly meaningless.

49. Because the test limits judicial review to determining compliance with statutes and regulations, there is no room for a reviewing court to analyze the constitutionality of a statute or regulation.

50. Dernbach & Prokopchak, supra note 36, at 344, 348 (only nine of seventy-nine reported judicial or Environmental Hearing Board decisions applying the Payne test were favorable to the challenging party).


52. Robinson Twp., 83 A.3d at 969 (explaining that “this Court has an obligation to vindicate the rights of its citizens where the circumstances require it and in accordance with the plain language of the Constitution”).

53. Id. at 963.
Article I, Section 27.\textsuperscript{54} The provision, the plurality said, fosters “legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.”\textsuperscript{55} Using that perspective, the plurality opinion lays out a framework for applying the text of the two-part provision,\textsuperscript{56} a framework that a majority of the court adopted in 2017\textsuperscript{57} and has applied in subsequent decisions.\textsuperscript{58}

There is nothing comparable to this aspect of Pennsylvania’s jurisprudence in the other states. In Hawaii and Montana, as the cases described in the remainder of this Article show, courts have used the text of the constitutional provision to decide cases since the provision was first adopted, sometimes favoring the plaintiffs and sometimes not. And in New York, where the state’s environmental rights amendment took effect on January 1, 2022,\textsuperscript{59} there are no appellate decisions.

II. LIMIT ON GOVERNMENTAL AUTHORITY

Constitutional environmental rights and public trusts limit governmental authority to act contrary to their provisions. They can be the basis for invalidating inconsistent statutes, regulations, and other government actions. They can be used in a variety of ways to improve access to the courts, and they have been used to broaden and deepen protection for public natural resources beyond the protection accorded under traditional public trust law.

A. Basis for Invalidating Inconsistent Statutes, Regulations, and Other Government Actions

Constitutions are at the apex of the hierarchy of laws. Constitutions, including constitutional environmental provisions, provide a basis for invalidating inconsistent statutes, regulations, and other laws inconsistent with constitutions. In that way, they work as a limit on governmental power. Two states, Montana and Pennsylvania, provide examples of how this works for statutes. In both, lawsuits under their constitutional environmental provisions tend to target laws that reduce pre-existing legislative protections for public health and the environment. In this context, these provisions play a distinct anti-backsliding role.

\textsuperscript{54} Id. at 960–63.  
\textsuperscript{55} Id. at 958.  
\textsuperscript{56} Id. at 951–59.  
\textsuperscript{59} N.Y. Const. art. I., § 19.
Montana’s constitution recognizes the “inalienable” right of the people to a “clean and healthful environment.” The Montana Supreme Court applied that right against legislative exemptions in two cases. In Montana Environmental Information Center v. Department of Environmental Quality, the state legislature exempted arsenic discharges from water well or monitoring well tests from review under the state’s water quality non-degradation statute. Plaintiffs claimed the exemption violated their right to a “clean and healthful” environment. They demonstrated that the tests would increase the concentration of arsenic in the receiving water in excess of the concentration that would have required review under the non-degradation statute. The exemption, the state’s supreme court held, thus intrudes on the plaintiffs’ right to a “clean and healthful environment.” It further held that this exemption should be subject to strict scrutiny because this right is stated in Montana’s Declaration of Rights and is therefore fundamental. Strict scrutiny is the most demanding level of scrutiny under that state’s constitution. Under Montana law, the exemption is impermissible unless 1) there was a compelling state interest for enactment of the exemption, 2) the exemption was “closely tailored to effectuate that interest,” and 3) the exemption represented “the least onerous path that can be taken to achieve the State’s objective.” The court remanded the case to the district or trial court for a strict scrutiny evaluation of the exemption.

In a later case, Park County Environmental Council v. Montana Department of Environmental Quality, the Montana Supreme Court held that a legislative exemption to the Montana Environmental Policy Act (MEPA) violated the right to a “clean and healthful environment.” MEPA requires an assessment of environmental impact prior to government actions that may

60. Mont. Const. art. II, § 3.
62. Id. at 1243 (citing Mont. Const. art. II, § 3; id. art. IX, § 1).
63. Id. at 1239.
64. Id. at 1246, 1249.
65. Id. at 1246; see Mont. Const. art. II, § 3.
66. Montana courts apply a different and less demanding level of scrutiny, called middle-tier scrutiny, to rights that are not stated in the Declaration of Rights. Under middle-tier scrutiny, the state must demonstrate: “(1) that its classification . . . is reasonable; and (2) that its interest in classifying . . . is more important than the people’s interest in obtaining [constitutionally significant benefits].” Mont. Env’t Info. Ctr., 988 P.2d at 1245 (citing Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1314 (Mont. 1986)).
67. Id. at 1246.
68. Id. at 1249.
significantly affect the environment. The amendment barred courts from issuing equitable relief to prevent violations of MEPA. In this case, the Department of Environmental Quality approved an exploration permit for mining in the Yellowstone River watershed fifteen miles from Yellowstone National Park, even though its MEPA analysis did not adequately analyze wildlife and water quality effects. Under the statutory amendment, the company would have been able to continue conducting exploration activities while the MEPA defects were being corrected. In addition to vacating the permit, the court held the amendment unconstitutional on its face, using strict scrutiny analysis, because it removed “the Plaintiffs’ only available remedy adequate to prevent potential constitutionally-proscribed environmental harms.” Since that decision, the Montana Supreme Court has stated that “any failure by the Legislature to provide adequate remedies for advance environmental review and protection before government approval of activities with potential for significant environmental degradation is a violation of the fundamental right to a clean and healthful environment.”

In August 2023, a Montana trial court issued a decision invalidating another legislative exemption. In that case, Held v. Montana, sixteen youth plaintiffs sued the state, claiming that the state violated their constitutional right to a “clean and healthful environment” by adopting and implementing a legislative exception for climate change to MEPA. The exemption “bars agencies from considering [greenhouse gas] emissions and climate impacts for any project or proposal, even to assess whether the project complies with the Montana Constitution.” The trial court made detailed findings of fact about the impact of climate change on Montana’s environment, the harm it is causing plaintiffs, how defendants’ actions contribute to both

70. Id. at 295.
71. Id.
72. Id. at 306–08.
73. Id. at 302–03.
74. Id. at 310. The Montana Supreme Court has held certain exemptions to be consistent with the constitutional right to a “clean and healthful environment,” but only because the exemption by itself did not authorize any environmental degradation. Mont. Const. art. II, § 3. In both cases, the project or activity was still subject to MEPA and required the issuance of specific permits before it could proceed. Clark Fork Coal. v. Mont. Dep’t of Nat. Res. & Conservation, 481 P.3d 198, 219 (Mont. 2021); N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm’rs, 288 P.3d 169, 172 (Mont. 2012).
75. Clark Fork, 481 P.3d at 217–18. The court explained that this rule derives from an “in tandem” reading of Montana’s two constitutional environmental provisions and its prior jurisprudence. Id.; Mont. Const. art. II, § 3; id. art. IX, § 1.
77. Id. at *1–2.
78. Id. at *126.
climate change and harm to the plaintiffs, and how the MEPA exemption contributes to that harm and prevents full review of technologically and economically available alternatives to fossil fuels in Montana. The court held that the plaintiffs “have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system.” The exemption infringes on that right, the court held, and thus is subject to strict scrutiny. The state failed to put on evidence to show that the law is narrowly tailored to serve a compelling government interest. The trial court therefore held the exemption to be unconstitutional and enjoined the state from acting in accordance with it. The Montana attorney general has announced that he would appeal the decision to the state’s supreme court.

The Pennsylvania Supreme Court has also used the state’s environmental provision to hold legislation unconstitutional. But, as explained earlier, it took more than four decades for that to happen.

In Robinson Township v. Commonwealth, the Pennsylvania Supreme Court held unconstitutional several provisions of Act 13 of 2012, a state statute designed to promote shale gas development. In Chief Justice Ronald Castille’s plurality opinion, three of the court’s seven justices applied Article I, Section 27 instead of the balancing test. A fourth justice agreed that the legislation was unconstitutional, but based his holding on substantive due process. This case was the first time Section 27 had been used, even by a plurality, to hold a statute unconstitutional. The plurality opinion also brought attention to a fundamental point that had been more or less lost in decades of litigation—that Section 27 is contained in Pennsylvania’s Declaration of Rights, the state’s analogue to the U.S. Bill of Rights, and thus functions as a limitation on governmental power. The environmental rights in Section 27, the plurality stated, are “on par with, and enforceable to the

79. Id. at *11–110.
80. Id. at *129.
81. Id.
82. Id. at *127.
83. Id. at *129. The legislative exemption was contained in two separate provisions of Montana law. Id. at *1–2.
86. Id. at 913.
87. Id. at 1000–01 (Baer, J., concurring).
88. Id. at 948–49, 953.
same extent as, any other right reserved to the people in Article I.”89 That limit on governmental power, of course, includes a limit on the ability of the legislature to act contrary to Section 27.

Prior to Act 13, local governments had been preempted from regulating how shale gas activities should be conducted; most technical environmental regulation of these activities was reserved to the State. Municipalities could, however, use their zoning authority to regulate where such activities occur.90 Act 13 changed that. It declared that state environmental laws “occupy the entire field” of oil and gas regulation, “to the exclusion of all local ordinances.”91 In addition, it required “all local ordinances regulating oil and gas operations” to “allow for the reasonable development of oil and gas resources,” and imposed uniform rules for oil and gas regulation.92 The petitioners claimed this and other provisions of Act 13 violated Section 27,93

The plurality agreed. It explained that the Commonwealth is the trustee under the provision, which means that local governments are among the trustees with constitutional responsibilities (along with all branches of state government).94 The preemption of all local environmental regulation of shale gas development, the plurality explained, violates Section 27 because “the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.”95 It went on to state that these provisions were unconstitutional for two reasons. “First, a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district [including residential] is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life.”96 Second, under Act 13 “some properties and

89. Id. at 953–54.
92. See id. § 3304, declared unconstitutional by Robinson Twp., 83 A.3d 901.
93. Robinson Twp., 83 A.3d at 915–16. The petitioners also challenged Section 3215 of the legislation, which prohibited drilling or disturbing areas within specific distances of streams, springs, wetlands, and other water bodies, but required the Department of Environmental Protection (DEP) to waive these distance restrictions if the permit applicant submitted “additional measures, facilities or practices” that it would employ to protect these waters. Id. at 984; 58 Pa. Cons. Stat. § 3215(b)(4) (2012), declared unconstitutional by Robinson Twp., 83 A.3d 901.
94. Robinson Twp., 83 A.3d at 957.
95. Id. at 977.
96. Id. at 979.
communities will carry much heavier environmental and habitability burdens than others.”97 This result, the plurality stated, is inconsistent with the obligation that the trustee act for the benefit of “all the people.”98

Four years later, in Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF II), a solid majority of the Pennsylvania Supreme Court set aside the longstanding balancing test that had been used in lieu of the text of the amendment, and used Section 27 to hold another statute unconstitutional.99 In this case, PEDF brought a declaratory judgment action against the Commonwealth, challenging the constitutionality under Article I, Section 27 of legislation involving the disposition of funds received from oil and gas lease sales on state forest lands.100 The challenged legislation authorized the use of those funds for the state’s general fund, which meant that the legislature could allocate them in any way it saw fit.101 PEDF argued that all proceeds from oil and gas leasing are subject to the constitutional public trust.102 Because the state lands and the gas they contain are “public natural resources,” PEDF argued, money received from leasing is subject to the same trust restrictions, which means that the money can be spent only to “conserve and maintain” public natural resources.103 The Pennsylvania Supreme Court agreed. Because proceeds from the sale of the trust corpus are subject to public trust restrictions, the court held, royalties based on gross production from oil and gas wells are subject to the public trust.104

97. Id. at 980.
98. Id. The plurality also decided that the buffer zone provisions for water bodies in section 3215 of Act 13 violate Section 27. Id. at 982–84. First, the plurality reasoned, the legislation “does not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver of the Section 3215(b) setbacks.” Id. at 983. Second, “[i]f an applicant appeals permit terms or conditions . . . Section 3215 remarkably places the burden on [DEP] to ‘prove[e] that the conditions were necessary to protect against a probable harmful impact of [sic] the public resources.’” Id. at 984. Third, because Section 3215 prevents anyone other than the applicant from appealing a permit condition, it “marginalizes participation by residents, business owners, and their elected representatives with environmental and habitability concerns, whose interests Section 3215 ostensibly protects.” Id.
99. See Pa. Env’t Def. Found. v. Commonwealth (PEDF II), 161 A.3d 911, 916 (Pa. 2017). The shorthand name for this case is PEDF II; the Commonwealth Court decision from which it was appealed, Pa. Env’t Def. Found. v. Commonwealth, 108 A.3d 140 (Pa. Commw. Ct. 2015), is PEDF I. A close reader of the footnotes will see that there are several subsequent Supreme Court cases involving the same parties. To keep things as simple as possible, and to distinguish this case from the others, PEDF II is the only one of these cases named as such in the text, and the others are not numbered.
100. PEDF II, 161 A.3d at 916.
101. Id. at 921–22.
102. Id. at 916.
103. Id. at 934–35.
104. Id. at 937–38.
The court said: “Without any question, these legislative enactments permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee’s fiduciary obligations.”

The Pennsylvania legislature responded by allocating a substantial share of the oil and gas leasing proceeds to fund the day-to-day operations of the state Department of Conservation and Natural Resources (DCNR), which manages state forests and parks and also runs the oil and gas leasing program on those lands. PEDF sued the state, arguing that these new funding statutes violated Section 27 on their face. That is, PEDF argued that there were “no circumstances” under which these statutes could be administered in a constitutionally valid way. PEDF did not challenge DCNR’s actual expenditures as violative of the constitution. In a 2022 decision, the Pennsylvania Supreme Court upheld this legislation, reasoning that it is possible that DCNR could be expending the entirety of the trust funds in a way that is consistent with Section 27. That decision, of course, keeps open the possibility of future Section 27 challenges about the manner in which DCNR actually spends this money.

These cases all involve the constitutionality of legislation. Other constitutional environmental rights cases involve, for example, landfills and shale gas drilling permits. Here, the success of constitutional challenges is mixed. New York’s amendment recognizes the “right to clean air and water, and a healthful environment.” In *Fresh Air for the Eastside v. State of New York*, a citizen group claimed that the operations of a solid waste landfill caused odors, fugitive emissions, and greenhouse gas emissions, thus violating their constitutional right. Many, but not all, of these impacts result from solid waste law violations at the landfill, they claimed, suggesting that the landfill would be operating unconstitutionally even if it complied

---

105. *Id.* at 938 [citing Robinson Twp. v. Commonwealth, 83 A.3d 901, 950 (Pa. 2013)]. The Court then stated: “To the extent the remainder of the Fiscal Code amendments transfer proceeds from the sale of trust assets to the General Fund, they are likewise constitutionally infirm.” *Id.* (emphasis omitted). In a later case, the Pennsylvania Supreme Court extended this holding, which concerns the expenditure of royalties from oil and gas leasing, to the expenditure of bonus, rental, and penalty payments from oil and gas leasing. *Pa. Env’t Def. Found. v. Commonwealth* 255 A.3d 289, 314 (Pa. 2021).


107. *Id.*

108. *Id.* at 1202.

109. *Id.* at 1200–01.

110. *Id.* at 1201.

111. N.Y. CONST. art. I., § 19.


113. *Id.* at 5.
with all applicable statutes, regulations, and permit conditions. In this sense, the citizen group is attempting to use the amendment to fill gaps it sees in the existing regulatory regime.\footnote{114} Defendants included the State, which issued a permit for the landfill and has statutory responsibility to regulate its operation.\footnote{115} The trial court refused to dismiss the case against the State, holding that constitutional rights limit the government and explaining that the state lacks the authority or discretion to violate the constitutional environmental rights of citizens.\footnote{116}

In Pennsylvania, the \textit{Robinson Township} decision described above means that local governments can once again decide where shale gas facilities can be located.\footnote{117} “A substantial number of the Commonwealth Court decisions on section 27 since \textit{PEDF II} have involved local land use and zoning decisions concerning” shale gas production facilities and pipelines.\footnote{118} A key case, \textit{Frederick v. Allegheny Township Zoning Hearing Board}, involved a challenge to a local government ordinance authorizing shale gas development and a subsequently issued permit for a shale gas well.\footnote{119} The court employed a test, detailed below, which was different from Montana’s strict scrutiny test for determining the constitutionality of these actions.

\footnote{114}{In Louisiana, where the courts apply a form of public trust analysis to a constitutional environmental provision that does not expressly recognize a public trust, see \textit{La. Const.} art IX, § 1, the courts use the public trust rules to provide a gap-filling role. In \textit{Save Ourselves, Inc. v. La. Env’t Control Comm’n}, 452 So. 2d 1152 (La. 1984), the state’s supreme court rejected the issuance of a permit for a hazardous waste disposal facility, and made clear that the applicant’s compliance with all applicable regulations was not sufficient under the state constitution:

\begin{quote}
From the present record we cannot tell whether the agency performed its duty to see that the environment would be protected to the fullest extent possible consistent with the health, safety and welfare of the people. The record is silent on whether the agency considered alternate projects, alternate sites or mitigation measures, or whether it made any attempt to quantify environmental costs and weigh them against social and economic benefits of the project. From our review it appears that the agency may have erred by assuming that its duty was to adhere only to its own regulations rather than to the constitutional and statutory mandates.
\end{quote}

\textit{Id.} at 1160. \textit{See also} \textit{Rise St. James v. La. Dep’t of Env’t Quality}, No. 694,029 (La. 19th Jud. Dist. Ct. Sept. 8, 2022) (vacating air quality permits for proposed new chemical manufacturing complex for, among other things, state’s failure to comply with constitutional public trust).

\footnote{115}{\textit{Fresh Air for the Eastside}, slip op. at 2–3.}

\footnote{116}{\textit{Id.} at 28.}

\footnote{117}{\textit{Robinson Twp. V. Commonwealth}, 83 A.3d 901, 1008 (Pa. 2013).}

\footnote{118}{\textit{See John C. Dernbach, \textit{Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions}, 30 \textit{Widener Commonwealth L. Rev.} 147, 168–79 (2021).}

The challenged ordinance allowed “oil and gas well operations in all zoning districts so long as they satisfy enumerated standards designed to protect the public health, safety and welfare.”\textsuperscript{120} The township used that ordinance to issue a permit for a shale gas well in a district that was zoned residential/agricultural (R-2).\textsuperscript{121} Under the permit, a drilling rig project, the “Porter Pad,” would drill thousands of feet underground and enable other actions needed to recover natural gas from shale.\textsuperscript{122} Objectors, who were adjacent landowners, challenged the ordinance as, among other things, a violation of their right to “clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment” under Article I, Section 27.\textsuperscript{123} The Commonwealth Court upheld the ordinance and permit.\textsuperscript{124}

The court described the process and standard for reviewing the objectors’ claims as follows: “Judicial review of the government’s action requires an evidentiary hearing to determine, first, whether the values in the first clause of the Environmental Rights Amendment [(the right to a quality environment)] are implicated and, second, whether the governmental action unreasonably impairs those values.”\textsuperscript{125} Zoning, the court said, implicates “the ‘natural, scenic, historic and esthetic values of the environment,’” thus satisfying the first requirement.\textsuperscript{126} “It does so by placing compatible uses in the same zoning district; by establishing minimum lot sizes and dimensional requirements; providing parking and signage controls; and requiring landscape and screening controls.”\textsuperscript{127} But the court found that the objectors did not prove unreasonable impairment of those values.\textsuperscript{128} The permit issued under the amended ordinance, the court held, would not result in any legally cognizable harm:

\[T\]he Zoning Board found that oil and gas development and agricultural uses “have long safely coexisted within rural communities.” The only feature of the Porter Pad that will be visible from any of Objectors’ homes is the portion of the drilling rig that rises over the treetops. Once drilling operations cease, the rig will be removed during the pumping phase. When pumping ends, the land can be returned to its original state. In the

\begin{itemize}
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} See id. at 680–83.
\item \textsuperscript{123} Id. at 691.
\item \textsuperscript{124} Id. at 702.
\item \textsuperscript{125} Id. at 695.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. at 697.
\end{itemize}
meantime, oil and gas drilling will support the agricultural use of land in the R-2 Zoning District.129

The Commonwealth Court’s analysis indicates that it recognized the temporary nature of drilling and the broader community benefit of gas operations as reasons to find that the Objectors’ rights had not been violated. That court has decided a number of similar cases in the same way.130

B. Means of Improved Access to Courts to Challenge Government Decisions

Constitutional environmental provisions can work to improve citizen access to state courts in several ways. To be sure, the existence of a constitutional provision that can be used as a cause of action improves citizen access, as explained above. But these provisions can improve access to courts to challenge government decisions in at least three other ways as well. They have been used to ease the requirements for standing to sue; they can provide a right of action under other laws; and they can provide the basis for a due process right to an opportunity to be heard. In all these ways, constitutional environmental provisions provide procedural opportunities for persons to challenge governmental actions; they act, in a basic way, as limits on governmental authority.

i. Relaxed Requirement for Standing to Sue

Illinois and Hawaii relax their standing requirements somewhat when a person sues under their constitutional environmental provisions. As explained above, the Illinois provision does not authorize an independent right of action for violation of the right to a healthful environment, rather it requires plaintiffs seeking relief to rely on other laws that provide a right of action.131 Still, plaintiffs who claim that a violation of another law compromises their right to a healthful environment can use this provision to obtain limited relief from the state’s standing requirements. The Illinois provision “does away with the ‘special injury’ requirement” for standing “typically employed in environmental [public] nuisance cases.”132 As a result, “a plaintiff need not allege a special injury to bring an environmental claim.”133

129. Id. (citations omitted).
130. Dernbach, supra note 118, at 172–74.
132. Id.
133. Id.
Hawaii employs a three-part standing test, requiring that the “plaintiff must have suffered an actual or threatened injury; the injury must be fairly traceable to the defendant’s actions; and a favorable decision would likely provide relief for the plaintiff’s injury.”\textsuperscript{134} But since 1975 (three years prior to the adoption of its constitutional environmental provisions), Hawaii has not required plaintiffs to assert an injury that is different in kind from the injury suffered by the public.\textsuperscript{135} Thus, the Hawaii Supreme Court has held that an environmental organization has standing to vindicate its now-constitutionally-recognized right to a clean and healthful environment even though its members did not use or own the land at issue.\textsuperscript{136}

\textbf{ii. Right of Action Under Other Laws}

The Hawaii environmental rights provision (Article XI, Section 9) authorizes state court actions for its enforcement.\textsuperscript{137} Although it recognizes a right to “a clean and healthful environment,” the meaning of that phrase is to be defined by the legislature through laws “relating to environmental quality.”\textsuperscript{138} Thus, in Hawaii, courts do not decide what “a clean and healthful environment” means; the legislature does. But the Hawaii Constitution adds: “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.”\textsuperscript{139} In a 2010 case, \textit{County of Hawai’i v. Ala Loop Homeowners}, a group of homeowners used this provision to challenge a proposed development.\textsuperscript{140} The Hawaii Supreme Court held that Article XI, Section 9 creates a right of action to enforce Chapter 205 of Hawaii’s statutes, which concerns land use and does not expressly authorize private suits for its enforcement.\textsuperscript{141}

In that case, a county exempted a proposed charter school project on a 28-acre parcel from an otherwise applicable special permit process under Chapter 205 designed to review health and safety issues.\textsuperscript{142} The Hawai’i Supreme Court first decided that Chapter 205 is a law “relating to environmental quality,” which means that it is a law defining the meaning of a “clean

\textsuperscript{134} In re Application of Maui Elec. Co., 408 P.3d 1, 22 (Haw. 2017).
\textsuperscript{135} Id.
\textsuperscript{137} Haw. Const. art. XI, § 9.
\textsuperscript{138} Id.
\textsuperscript{139} Id. This provision is limited to actions in state court; it does not enlarge the jurisdiction of federal courts. Fiedler v. Clark, 714 F.2d 77, 80, n. 1 (9th Cir. 1983).
\textsuperscript{140} Cnty. of Haw. v. Ala Loop Homeowners, 235 P.3d 1103, 1106 (Haw. 2010).
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 1107.
and healthful environment” that can be privately enforced. Among other things, the court explained, Chapter 205 requires “consideration of issues relating to the preservation or conservation of natural resources.”

The court then held that the right of action under Article XI, Section 9 does not require further legislation to be judicially enforceable; it is self-executing. The text indicates that it can be enforced without legislation, and its drafting history indicates it was meant to be treated that way. In addition, the court noted, a 1986 statute authorizes attorney fees for environmental rights litigation under Chapter 205 because the legislature found that “the public has rarely used” the right to a clean and healthful environment. Thus, the Hawaii constitution creates a private right of action to enforce laws relating to environmental quality.

Under other Hawaii statutes, citizens may also have the ability to sue for protection against human-induced climate change. In Navahine F. v. Department of Transportation, plaintiffs, who are minors, claim that the Department violated their right to a “clean and healthful” environment because its “actions and inactions” resulted in “high levels of greenhouse gas emissions” and “continued reliance on fossil fuels.” They argue that this is inconsistent with the state’s legislatively established zero emissions target and other laws requiring reductions in greenhouse gas emissions. In denying the Department’s motion to dismiss, the Hawaii Circuit Court held in 2023 that these laws “are laws relating to environmental quality,” and that the plaintiffs are allowed to pursue their claims.

iii. Basis for Due Process Right of an Opportunity to be Heard

The Hawaii Supreme Court has held several times that the right to a “clean and healthful environment” includes a constitutionally protected property right to an opportunity to be heard prior to state action that may

143. Id. at 1121.
144. Id. at 1122.
145. Id. at 1122, 1127.
146. Id. at 1127–28.
147. Id. at 1127–78
149. Id. at 5–6.
adversely affect this right. A 2017 decision, for example, In re Application of Maui Electric Company (MECO), involved a challenge by the Sierra Club to a power purchase agreement (PPA) between MECO and another company. Under that agreement, MECO would purchase electricity generated by a facility burning sugar processing residue and other fuels, including coal. Public utilities such as MECO are regulated monopolies; they have an exclusive right to supply electricity in a particular region, and the Public Utilities Commission (PUC) is supposed to ensure that they receive a reasonable rate of return on their investment, but no more than a reasonable return. Under Hawaii law, public utilities such as MECO are allowed to recover power purchase costs from customers if the PUC approves. The Sierra Club sought to intervene in the PUC proceeding concerning that decision, alleging injury to members living near the facility. It challenged, among other things, the use of coal under the agreement. The PUC denied its motion to intervene and approved the PPA.

The Sierra Club argued on appeal that it was entitled to a hearing under the due process clause of the state constitution, which provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” In general, persons are entitled to prior notice and an opportunity to be heard before the government can deprive them of life, liberty, or property. The right to a “clean and healthful environment,” the Club argued, is a property right protected under the due process clause, and the state’s supreme court agreed. Under state law, the court reasoned, a property interest does not need to be real estate, chattels, or money to be protected under the due process clause; the property interest can also be a “legitimate claim of entitlement” to a particular benefit. The right to a clean and healthful environment, the court held, “is a legitimate entitlement

---

153. Id.
154. Id. at 5.
155. Id.
156. Id. at 6.
157. Id.
158. Id. at 7–8.
159. Id. at 8; HAW. CONST. art. I, § 5.
161. Id. at 12–13.
162. Id. at 12 (citing Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu, 773 P.2d at 250, 260 (Haw. 1989)).
stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process.”

Hawaii legislation requires the PUC “when exercising its duties to recognize the ‘need’ to reduce reliance on fossil fuels and to ‘explicitly consider’ the levels and effect of greenhouse gas emissions.” Because this is a law “relating to environmental quality” under the Hawaii Constitution, the court said, the Sierra Club has a protectable property interest in having an opportunity to be heard prior to the decision approving the agreement. The court held that the PUC was required to hold a hearing on “the impacts of approving the Agreement on Sierra Club’s members’ right to a clean and healthful environment, including the release of harmful greenhouse gases.” The state supreme court has found a similar procedural due process right to be heard in three subsequent cases involving the right to a clean and healthful environment. One of these cases, In Re Hawaii Electric Light Co., is a good illustration of how procedural rights can change outcomes. That case involved a challenge to PUC approval of rate recovery for a PPA for electricity from a proposed biomass powerplant. The court held that the PUC violated the environmental and due process rights of Life of the Land, a community action organization, by refusing to provide it with an opportunity to be heard on the impacts of greenhouse gas emissions caused by the agreement and its costs. The court also vacated PUC approval of the agreement and remanded the case to the PUC for consideration of these impacts.

On remand, the PUC found after a hearing “that the proposed project would emit substantially more carbon than it sequestered for at least the first 25 years of operation and raise ratepayer prices for the full term. And

163. Id. at 13.
164. Id. at 14.
165. Id. at 15.
166. Id. at 21.
167. In re Haw. Elec. Light Co., 445 P.3d 673, 697 (Haw. 2019); In re Gas Co., 465 P.3d 633, 650–51, 654 (Haw. 2020) (In a rate increase proceeding based on two recently established liquid natural gas projects, court held PUC violated environmental and due process rights of nongovernmental organizations by refusing to allow them to be heard on impact of these projects on climate change, vacated PUC decision, and remanded case to PUC.); Protect & Pres. Kahoma Ahupua’a Ass’n v. Maui Plan. Comm’n, 489 P.3d 408, 410 (Haw. 2021) (The court vacated the Planning Commission’s decision to approve an affordable housing project, holding that the Coastal Zone Management Act is a law relating to environmental quality under Article XI, § 9, that the association was denied due process to protect its right to a clean and healthful environment, and that the Commission was required to make findings on consistency of proposed project under the Coastal Zone Management Act.).
169. Id. at 697.
170. Id. at 697–98.
the PUC found Hu Honua’s promise of eventual carbon neutrality speculative at best.” As a result, the PUC reversed its prior decision and refused to approve the PPA. Hawaii Electric appealed. In 2023, the Supreme Court upheld the PUC decision. Essentially, the court held that the PUC followed the remand instructions it gave in its earlier decision—to consider greenhouse gas emissions from the proposed plant and its costs in light of the public interest. The PUC’s actions, the court held, “aligned with its statutory and constitutional obligations.”

While the PUC did not adopt a carbon neutrality standard in its evaluation, the court said “it is not so clear that the agency would have erred” had it done so. Because the impacts of climate change grow each year and the “chances to mitigate dwindle,” the “right to a life-sustaining climate system is not just affirmative; it is constantly evolving.”

C. Broader and Stronger Public Trust Protection for Natural Resources

Two states—Pennsylvania and Hawaii—have broad and explicit public trust provisions for public natural resources. Both of these states had pre-existing public trust law for certain natural resources. In each state, constitutional recognition of the public trust did not merely codify that pre-existing law; it created a separate body of law, broader and more protective than that law. That law, like the public trust law that preceded it, limits the government’s ability to act in ways that are contrary to its duties as trustee. Significantly, the courts in both states have relied on traditional trust law in doing so. A longstanding issue in public trust law is whether the public trust framework can be applied in contexts other than the one it historically originated from, particularly the right of public use of navigable waterways. By writing a broader version of the public trust into their constitutions, these

---

172. Id. at 334, 336.
173. Id. at 334.
174. Id. at 336.
175. Id.
176. Id. “The reality is that yesterday’s good enough has become today’s unacceptable. The PUC was under no obligation to evaluate an energy project conceived of in 2012 the same way in 2022. Indeed, doing so would have betrayed its constitutional duty.” Id.
177. For a review of these and the narrower public trust provisions in other states’ constitutions, see Manahan, supra note 23.
two states have freed it from its “historical shackles.” In so doing, they have created constitutional presumptions favoring protection of a broad range of public trust resources. Because these provisions were adopted by public referenda, they have also provided the public trust with a democratic imprimatur that the common law public trust lacks, and thus can help to shield courts applying the constitutional public trust from claims of judicial activism.

i. Pennsylvania

The public trust clause of Article I, Section 27 of the Pennsylvania constitution makes the Commonwealth the trustee of “Pennsylvania’s public natural resources.” It requires the Commonwealth to “conserve and maintain” these resources for the benefit of present and future generations. This provision broadens the scope of pre-existing Pennsylvania public trust law. Subsequent judicial interpretation has also strengthened the protections it provides.

Before Section 27 was adopted in 1971, Pennsylvania’s public trust law applied principally to two types of resources—navigable waters, including the bed and banks of those waters up to the high-water mark, and

---

179. See Joseph L. Sax, Liberating the Public Trust Doctrine from Its Historical Shackles, 14 U.C. DAVIS L. REV. 185, 185 (1980). Plaintiffs have typically been unsuccessful in seeking injunctive or declaratory relief to address government inaction on climate change based on the common law of public trust because courts typically have been unwilling to extend the public trust beyond its traditional boundaries. See, e.g., Aronow v. State, No. A12–0585, 2012 WL 4476642, at *2 (Minn. Ct. App. 2012) (“Aronow argues that the public-trust doctrine applies to the atmosphere but provides no legal support for his argument, and we are aware of no caselaw from Minnesota, or any other jurisdiction, in which a court has expanded the scope of the public-trust doctrine to include the atmosphere.”). In so doing, they have often pointed to the absence of a constitutional provision that addresses climate change. See, e.g., Butler v. Brewer, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *7 (Ariz. Ct. App. 2013) ("[E]ven assuming without deciding that the atmosphere is part of the public trust, there is no constitutional basis upon which we can determine that state action or inaction [on climate change] is unconstitutional, or otherwise violates any controlling law."); Svitak ex rel. Svitak v. State, No. 69710-2-I, 2013 WL 6632124, at *2 (Wash. Ct. App. 2013) ("Because our state constitution does not address state responsibility for climate change, it is up to the legislature, not the judiciary, to decide whether to act as a matter of public policy.").

180. Pennsylvania voters approved Article I, Section 27 by a 4-to-1 vote in a public referendum. PEDF II, 161 A.3d 911, 916 (Pa. 2017). Hawaii’s constitutional environmental provisions were part of an overall revision of the state’s constitution in its 1978 Constitutional Convention, which was approved in a public referendum. Cnty. of Haw. v. Ala Loop Homeowners, 235 P.3d 1103, 1121, 1123 (Haw. 2010).

181. PA. CONST. art. I, § 27.

182. Id.

183. Perhaps the seminal Pennsylvania case is Carson v. Blazer, 2 Binn. 475, 494–95 (Pa. 1810) (holding that the state owns the land underlying Susquehanna River, and that the
publicly dedicated land. This law generally prohibited the government from transferring such property to private parties.

Section 27, which imposes a constitutional public trust on “public natural resources,” applies to those resources, and more. The Robinson Township plurality said that these resources include “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” In PEDF II, the Pennsylvania Supreme Court held that these resources include state forests and parks as well as the gas trapped in the shale under these forests and parks. In Marcellus Shale Coalition v. Department of Environmental Protection, the gas industry argued that public natural resources are limited to publicly owned property. The Commonwealth Court disagreed. Public natural resources, it held, “may be located on privately owned property, but they are not purely private property.”

These resources are public, not because they are publicly owned, but because they “implicate the public interest,’ thereby triggering protection under the Pennsylvania Constitution.”

The Commonwealth’s obligation under Section 27 is to “conserve and maintain” these public natural resources for the benefit of present and future generations. According to the state’s supreme court, this trust responsibility has two parts. “First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. Second, the Commonwealth must act affirmatively


189. Id.

190. Id. at 479 (citing Robinson Twp., 83 A.3d at 955).

191. Id.

192. PA. CONST. art. I, § 27.
via legislative action to protect the environment.”193 Significantly, “[t]rustee obligations are not vested exclusively in any single branch of Pennsylvania’s government;” they apply to “all agencies and entities of the Commonwealth government, both statewide and local.”194

The Pennsylvania Supreme Court uses traditional trust law to interpret and buttress this obligation.195 Because the public trust for natural resources historically has drawn on the conceptual framework of traditional trust law, and because lawyers and judges have experience with traditional trust law, this is both reasonable and appropriate.196 Thus, the court has repeatedly said that the trust duties of prudence, loyalty, and impartiality must be used to interpret Section 27’s public trust clause.197 The duty of prudence involves “considering the purposes” of the trust and exercising “reasonable care, skill, and caution” in managing the trust corpus.198 The duty of loyalty requires the trustee to manage the trust corpus “so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries.”199 Trustees have a duty to consider both present and future generations at the same time. Thus, the trustee cannot be “shortsighted” and must instead “consider an incredibly long timeline.”200 Finally, the duty of

194. Id. at 934 n.23.
195. “[W]hen reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” Id. at 930.
196. John C. Dernbach, The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources, 54 U. Mich. J.L. Reform 77, 93 (2020). Even the iconic public trust case, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892), draws on elements of traditional trust law. Id. at 88–90; but see Chernaiak v. Brown, 475 P.3d 68, 72 (Or. 2020) (declining, “in this case, to adopt plaintiffs’ position that, under the public trust doctrine, the state has the same fiduciary duties that a trustee of a common-law private trust would have, such as a duty to prevent substantial impairment of trust resources.”).
198. PEDF II, 161 A.3d at 938 (citing 20 Pa. CONS. STAT. § 7780); id. at 932 n.24 (“[T]he duty to administer with prudence involves ‘considering the purposes, provisions, distributional requirements and other circumstances of the trust and ... exercising reasonable care, skill and caution.’”); see also In re Estate of McAleer, 248 A.3d 416, 445 (Pa. 2021) (Donohue, J., concurring) (“In navigating the potentially complex legal landscape of trust administration, a trustee should seek competent [professional advice] not only for guidance on what will best serve the trust’s purpose, but also to determine the potential risks that a trustee is subject to when making these difficult decisions in the course of trust administration.”).
199. PEDF II, 161 A.3d at 932.
impartiality requires the Commonwealth to manage “the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust.”

These duties to the beneficiaries mean that the public trust is supportive of environmental justice. This occurs because environmental rights, including public trust beneficiary rights, are held equally by each individual. As previously explained, the Pennsylvania Supreme Court plurality opinion in Robinson Township invalidated state legislation that set aside local zoning and imposed uniform rules on where shale gas operations could occur. Even though the legislation only adversely affects some properties and communities, the plurality reasoned, it violates Section 27 because the trustee has the obligation to act for the benefit of “all the people.”

In addition to recognizing that the Commonwealth as trustee of public natural resources is bound by the trustee’s duties of prudence, loyalty, and impartiality, the supreme court held in 2022 that the Commonwealth is bound by the trustee’s duty to keep trust fund money separate from other money, and to keep an accurate accounting of that money. This is basic traditional trust law, and the state supreme court applied it to the constitutional public trust. The case involved the use of money the state receives from the use or sale of public natural resources, and more specifically revenues from oil and gas leasing on state lands. But it is not hard to imagine a future case involving a claim that an accounting is required for the status of the public natural resources themselves.

Skeptics of the application of traditional trust law to a public trust for natural resources worry that the trustee’s traditional duty to maximize financial return to beneficiaries will undermine public trust law for natural resources. That worry has not been borne out. To begin with,  

201. PEDF II, 161 A.3d at 933.  
204. Robinson Twp., 83 A.3d at 980 (quoting PA. CONST. art I, § 27). The court held another legislative provision unconstitutional for the same reason. Id. at 973–74.  
206. Id.  
207. Id. at 1198.  
208. See Dernbach, supra note 185, at 161–64.  
209. E.g., Katrina Fischer Kuh et al., N.Y. State Bar Ass’n Env’t & Energy L. Section, Report and Recommendations Concerning Environmental Aspects of the New York State Constitution, 38 PACE L. REV. 182, 204–05 (2017) (“We are doubtful about the propriety of applying technical aspects of private trust law to a constitutionally-expressed environmental public trust right and recommend that the drafting and legislative history accompanying the adoption of an environmental right in New York should indicate that it is grounded in the
Pennsylvania’s Supreme Court has explained that the Commonwealth cannot treat public natural resources “as a mere proprietor, ‘pursuant to which it ‘deals at arms[‘] length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations.’”210 Rather, “[a]s a trustee, the Commonwealth must deal ‘with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.’”211

In *Yaw v. Delaware River Basin Commission*, a federal case, plaintiffs challenged that understanding and lost.212 In that case, several Pennsylvania state legislators and local governments claimed that the Commission’s ban on hydraulic fracturing for gas in the Pennsylvania part of the Delaware River watershed violated several provisions of the U.S. Constitution.213 The federal district court dismissed the case for lack of standing, and the court of appeals affirmed.214 As part of their argument on standing, the state legislators and local governments claimed to be trustees of Pennsylvania’s natural resources under Section 27.215 The ban’s reduction in revenues from hydraulic fracturing, they said, has “‘directly and substantially injured the Trust’s corpus.’”216 The court of appeals disagreed, saying this argument turns Section 27 “upside down.”217 The court explained: “The problem with this argument is that it ignores the explicit purpose of [Section 27] and mistakes the unique public trust it created for a run-of-the-mill financial trust in which the trustees have a duty to maximize profits.”218 The court added:

> [T]he fact that the [public trust clause of Article I, Section 27] requires certain fracking proceeds to remain in the trust does not mean that trustees somehow have a duty to keep fracking. To the contrary, the duty of loyalty requires trustees to “manage the corpus of the trust so as to accomplish the

---

211. *PEDF II*, 161 A.3d at 932.
213. *Id.* at 307.
214. *Id.* at 322–23.
215. *Id.* at 320.
216. *Id.* at 321 (citing their claim in record).
217. *Id.*
218. *Id.* at 321–22.
trust’s purposes,” which here is the conservation and maintenance of Pennsylvania’s public natural resources.219

ii. Hawaii

Hawaii’s public trust law prior to 1978 has two sources—common law and Hawaiian Kingdom law and custom.220 When the Hawaiian Kingdom recognized fee simple ownership of property in 1848, it expressly reserved the ownership of all “water in natural watercourses . . . and rivers [which] remained in the people of Hawaii for their common good.”221 Under this law and the common law, the state holds the bed and banks of navigable waters up to the high water mark for public purposes, and cannot transfer public trust property to others.222 The same is true for ocean shorelines “below the high water mark.”223 In a 1977 case, the Hawaii Supreme Court held that the state’s public lands are “held in public trust by the government for the benefit, use and enjoyment of all the people.”224 The case involved a land extension into the ocean caused by lava flows.225 The new land, the court held, must be open for public uses such as recreation, and can only be sold if it would further the public interest.226

Public trust amendments to the Hawaii Constitution in 1978 “elevated the public trust doctrine to the level of a constitutional mandate.”227 These amendments, and subsequent decisions by the state supreme court, have built on, and transformed, Hawaii public trust law.

219. Id. at 322.
225. Id. at 751–52.
226. Id. at 735.
227. Waiahole, 9 P.3d at 443.
Under these amendments (Article XI, Section 1), “the State and its political subdivisions shall conserve and protect Hawaiʻi’s natural beauty and all natural resources, including land, water, air, minerals and energy sources,” for “the benefit of present and future generations.” In addition, the state and its political subdivisions “shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” They further provide that “[a]ll public natural resources are held in trust by the State for the benefit of the people.” A separate provision essentially reiterates this obligation for water resources: “The State has an obligation to protect, control and regulate the use of Hawaiʻi’s water resources for the benefit of its people.”

Under the constitution, “public natural resources” includes “land, water, air, minerals and energy sources” that implicate the public interest in some way. They include, but are not limited to, the resources protected under traditional trust law—water resources and state lands. By its own terms, the public trust also extends to “air, minerals and energy sources” that have a public aspect. The state’s supreme court has treated water runoff, native trees, and forest habitat as public natural resources, and has suggested that the constitutional public trust also extends to endangered species. The state as well as political subdivisions of the state, such as counties, have public trust responsibilities.

The state and its subdivisions are obliged not only to “conserve and protect” public trust resources, they must also “promote the development and utilization” of natural resources, which necessarily includes “public natural resources.” The constitution thus “directs the State and its agencies to assess and balance ‘protection’ and ‘utilization’ of public trust resources.” While “[a]n agency’s constitutional public trust obligations are

229. Id.
230. Id.
231. Id. art. XI, § 7.
232. Id. art. XI, § 1.
239. In re Maui Elec. Co., 506 P.3d at 200–01 (citing In re Conservation Dist. Use Application (CDUA), 431 P.3d 752, 773 (Haw. 2018)).
independent of its statutory mandates,” they “operate in tandem” because an agency must conform to both its statutory authority and its constitutional responsibilities.240

Recognizing that different realms of natural resources protection have different statutes and regulations, the state applies the constitutional public trust in a context-specific manner. Three issues illustrate the type of review that is required of projects that may affect public trust resources—water diversions, use of public lands, and public natural resource impacts from energy projects. While many of the rules applicable to projects affecting one resource are also applicable to others, the Hawaii Supreme Court tends to analyze each resource somewhat differently. For each of these three types of projects, the level of constitutional public trust protection appears much more detailed and exacting than under the state’s traditional public trust law.

Water resources have received the most detailed attention, and the Hawaii Supreme Court has articulated detailed principles for the scope and application of the trust for water resources. To begin with, these resources include both surface and groundwater.241 The state has the “authority and duty to preserve the rights of present and future generations” in these resources.242 This authority “precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes,” including claims based on prior uses.243 The state, as well as local governments, are obliged “to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”244 Those seeking to use water resources for public or private purposes, including those that involve diversion of water, have the burden of demonstrating that the proposed use is consistent with, and will not impair, the state’s constitutional obligation to protect water resources for the benefit of present and future generations.245

240. Id. at 202.
241. In re Water Use Permit Applications (Waiahole), 9 P.3d at 447 (“[T]he public trust doctrine applies to all water resources, unlimited by any surface-ground distinction.”).
242. Id. at 453.
243. Id.
244. Id.
245. Id. at 453–55, 473. In deciding whether to issue permits for water uses or diversions, the state must “consider the cumulative impact of existing and proposed diversions on trust purposes and . . . implement reasonable measures to mitigate this impact, including the use of alternative sources.” Id. at 455. “In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.” Id.
In *Kauai Springs, Inc. v. Planning Commission of County of Kauai*, the Hawaii Supreme Court synthesized its jurisprudence into a checklist of public trust principles for agencies reviewing water use or diversion permit applications:

To assist agencies in the application of the public trust doctrine, we distill from our prior cases the following principles:

a. The agency’s duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use.

b. The agency must determine whether the proposed use is consistent with the trust purposes:
   i. the maintenance of waters in their natural state;
   ii. the protection of domestic water use;
   iii. the protection of water in the exercise of Native Hawaiian and traditional and customary rights; and
   iv. the reservation of water enumerated by the State Water Code.

c. The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection.

d. The agency should evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water.

e. If the requested use is private or commercial, the agency should apply a high level of scrutiny.

f. The agency should evaluate the proposed use under a “reasonable and beneficial use” standard, which requires examination of the proposed use in relation to other public and private uses.

Applicants have the burden to justify the proposed water use in light of the trust purposes:

a. Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs.

b. The applicant must demonstrate the absence of a practicable alternative water source.

c. If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that the requested use is nevertheless reasonable and beneficial.

d. If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.246

---

246. *Kauai Springs, Inc. v. Plan. Comm’n of Cnty. of Kauai*, 324 P.3d 951, 984–85 (Haw. 2014) (citations omitted). Hawaii is not the only state to take this approach. In Louisiana, which does not have a constitutionally expressed environmental public trust but where the
In cases challenging agency action as violative of the constitutional public trust, courts are obliged to give the action a “close look.” In a 2000 case, In re Water Use Permit Applications (Waiahale), the Hawaii Supreme Court overturned parts of a water diversion permit for failing to reserve sufficient water to protect instream flows with a “reasonable ‘margin[] of safety’” to account for lack of scientific certainty about what level of instream flow is sufficient. Diversions from a stream should be considered, the court held, only after instream flow standards have been set, and only for water in excess of the protected instream flow. This rule, the court said, even applied to diversion permits for the same stream that had previously been authorized, which means that such permits are revocable on public trust grounds. In the Kauai Springs case, the court upheld the Planning Commission’s denial of a water use permit application where the applicant failed to demonstrate compliance with permitting requirements and regulations relevant to the proposed use that were imposed by other agencies. “In light of the duties of the Planning Commission to preserve the rights of present and future generations in the waters of the state,” the court explained, “this burden is not unreasonable.”

courts have nonetheless implied one, see sources cited supra note 7, the courts require state agencies to address these issues in writing before making a decision:

First, have the potential and real adverse environmental effects of the proposed facility been avoided to the maximum extent possible? Second, does a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the proposed facility demonstrate that the latter outweighs the former? Third, are there alternative projects which would offer more protection to the environment than the proposed facility without unduly curtailing non-environmental benefits? Fourth, are there are alternative sites which would offer more protection to the environment than the proposed facility site without unduly curtailing nonenvironmental benefits? Fifth, are there are mitigating measures which would offer more protection to the environment than the facility as proposed without unduly curtailing non-environmental benefits?

In re Am. Waste & Pollution Control Co., 633 So.2d 188, 194 (La. App. 1st Cir. 1993).

247. Kauai Springs, 324 P.3d at 975.

248. Waiahale, 9 P.3d at 468.

249. Id. at 427.

250. Id.

251. Kauai Springs, 324 P.3d at 989.

252. Id. The court has used the constitutional public trust to invalidate water licenses in other contexts as well. See also In re ‘Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 287 P.3d 129, 145 (Haw. 2012) (holding, among other things, that amendment of instream flow standards by Commission on Water Resource Management was invalid because Commission did not fully protect instream flows and failed to consider recycled wastewater as an alternative to diverting stream water); In re Waiole O Molo- kai, Inc., 83 P.3d 664, 672 (Haw. 2004) (vacating water use permit issued by Water Resources Management Commission for numerous errors, including failure “to discharge its public trust
The state’s supreme court has also used the constitutional public trust to impose significant duties on the state’s management of public lands. In *Ching v. Case*, the court held that “the state has a *continuing* duty to monitor the use of trust property, even if the use of the property has not changed.” In 1964, Hawaii’s Department of Land and Natural Resources leased 22,900 acres of public trust land to the United States for military purposes for a sixty-five-year period. The leases contained conditions intended to protect the land from damage and contamination. Plaintiffs sued the state for failure to protect these lands in accordance with the lease terms and the state’s constitutional public trust duties. The trial court agreed with the plaintiffs, and the Hawaii Supreme Court affirmed.

The Hawaii Supreme Court held that “an essential component of the State’s duty to protect and preserve trust land is an obligation to reasonably monitor a third party’s use of the property.” The court then held that the state “breached its constitutional trust duties by failing to reasonably monitor or inspect the trust land at issue.” “The most basic aspect of the State’s trust duties,” the court explained, is the “obligation ‘to protect and maintain’” public trust property. The court then stated that, “[u]nder common law, this obligation includes an obligation to reasonably monitor the trust property.” “Reasonable monitoring ensures that a trustee fulfills the mandate of ‘elementary trust law’ that trust property not be permitted to ‘fall into ruin on [the trustee’s] watch.’” The Hawaii Supreme Court upheld the trial court’s determination that the State had breached this duty; the State provided evidence of only three inspection reports over the many decades of the lease, all of which were inadequate.

---

254. *In re Gas Co.*, 465 P.3d 633, 654 (Haw. 2020) (citing *Ching*, 449 P.3d at 1175–76 (italicized word underlined in original)).
255. *Ching*, 449 P.3d at 1150.
256. *id.* at 1150–51.
257. *id.* at 1152–53.
258. *id.* at 1150 (This duty, the court said, “exists independent of whether the third party has in fact violated the terms of any agreement governing its use of the land.”).
259. *id.*
260. *id.* at 1168 (quoting State ex rel. Kobayashi v. Zimring, 566 P.2d 725, 735 (Haw. 1977)).
261. *id.* (citing Restatement (Third) of Trusts § 90 cmt. b (Am. Law. Inst. 2007); Tibble v. Edison Int’l, 575 U.S. 523, 528 (2015)).
263. *id.* at 1178.
that did exist indicated significant damage to environmental, cultural, and historic resources, and the State’s failure to restore that damage.\textsuperscript{264} The State thus “breached its constitutional trust duties by failing to reasonably monitor or inspect the trust land at issue.”\textsuperscript{265}

Still, Hawaii courts in public trust land use cases sometimes employ balancing in ways that allow controversial projects to move forward. One prominent case involved a permit issued by the Board of Land and Natural Resources for a thirty-meter telescope on state-owned conservation district land on the summit of Mauna Kea, a dormant volcano.\textsuperscript{266} Among other things, plaintiffs challenging the issuance of the permit argued that it violated the state’s constitutional public trust duties.\textsuperscript{267} The Hawaii Supreme Court held otherwise.\textsuperscript{268} The “plain language” of the constitutional provision “requires a balancing between the requirements of conservation and protection of public natural resources, on the one hand, and the development and utilization of these resources on the other in a manner consistent with their conservation.”\textsuperscript{269} In addition, “any balancing between public and private purposes must begin with a presumption in favor of public use, access and enjoyment.”\textsuperscript{270} The permit included conditions to protect the site. The telescope would have to be taken down and the site restored by no later than 2033, and there was no evidence that Native Hawaiian practitioners had used the site.\textsuperscript{271} In addition, the court said, the permit was for a “world-class telescope” that will “investigate and answer some of the most fundamental questions regarding our universe.”\textsuperscript{272} The court also described a “substantial community benefits package” that had already helped Hawaii students, including Native Hawaiians.\textsuperscript{273} The court thus held that the Board complied with its constitutional trustee duties in issuing the permit.\textsuperscript{274}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{264} \textit{Id. at} 1179–80.
\item \textsuperscript{265} \textit{Id. at} 1150. \textit{See also} \textit{Kelly v. 1250 Oceanside Partners}, 140 P.3d 985, 1011 (Haw. 2006) (recognizing that the state Health Department’s constitutional public trust duty to protect coastal waters required Department to “not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented”).
\item \textsuperscript{266} \textit{In re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Rsrv.}, 431 P.3d 752, 757 (Haw. 2018).
\item \textsuperscript{267} \textit{Id. at} 761.
\item \textsuperscript{268} \textit{Id. at} 775.
\item \textsuperscript{269} \textit{Id. at} 773.
\item \textsuperscript{270} \textit{Id. at} 774.
\item \textsuperscript{271} \textit{Id. at} 774, 791.
\item \textsuperscript{272} \textit{Id. at} 775.
\item \textsuperscript{273} \textit{Id.}
\item \textsuperscript{274} \textit{Id.}
\end{itemize}
\end{footnotesize}
applying the court’s *Kauai Springs* public trust framework for water resources to public lands. They argued, for example, that the majority’s analysis did not directly address “the presumption in favor of public use, access, enjoyment, and resource protection,” and that the various community benefits were not a valid substitute for public use of the resource. These justices nonetheless found that the Board’s factual findings and permit conditions were sufficient to show that the Board satisfied its obligations under that framework.

For energy and climate, much of the state’s constitutional litigation involves the right to a clean and healthful environment, discussed above. But the public trust provision of the state’s constitution also plays a role in this issue, and the Hawaii Supreme Court in 2022 articulated rules for governmental consideration of energy projects that affect public trust resources. The “legislature has committed to protect the climate and mitigate climate change by reducing reliance on fossil fuels” and by establishing a goal of achieving “100% renewable energy by 2045.” To carry out that legislation, Maui Electric entered a PPA for the electricity from a “solar-plus-battery” facility, and the state Public Utilities Commission (PUC) approved that agreement. Another power company challenged the agreement, arguing that the constitutional public trust (Article XI, Section 1) required the PUC to make detailed findings about the affected resources. The state supreme court rejected that challenge. When “the proposed project poses a reasonable threat to a trust resource,” the court said, “the PUC as a
trustee must further assess that threat.” To “approve the project’s PPA, the PUC must affirmatively find that there is no harm to the trust resource or that potential harm is justified.” A “reasonable threat,” the court said, exists when there is “tangible evidence that reasonably connects the threatened harm to the proposed project.” In this case, the court said, the PUC examined the opposing power company’s unsupported allegations concerning water runoff, native trees, and forest habitat, and properly found that they did not demonstrate a reasonable threat.

In *Navahine F. v. Department of Transportation*, discussed above, the minor plaintiffs also claim that the Department of Transportation breached the constitutional public trust by operating “the state’s transportation system in a way that contributes to greenhouse gas emissions and continued reliance on fossil fuels.” The Department’s motion to dismiss argued that the constitutional public trust “does not apply to the climate, because climate is not air, water, land, minerals, energy resource or some other ‘localized’ natural resource.” The court denied the motion, saying it did not have to decide whether the public trust applies to climate because the Department had conceded that climate change adversely affects public natural resources. The State also argued, in effect, that it has no obligation to address climate change because the problem is too big. The court disagreed, citing *Ching v. Case*, and holding that the State as trustee has an obligation to maintain trust assets and prevent them “from falling into disrepair.”

### III. SUPPORTIVE AUTHORITY FOR GOVERNMENTAL ACTIONS TO PROTECT ENVIRONMENT AND NATURAL RESOURCES

Constitutional environmental provisions do not simply work as limits on governmental authority. They also provide supportive authority to protect the environment and natural resources. These provisions serve as pole stars or guiding principles for state and local governments, as well as regulated parties, nongovernmental organizations, and the public. They also
support the legitimacy of, and strengthen public support for, environmental and natural resources protection. To be sure, most government actions to protect the environment are based on statutes and regulations. But constitutional environmental provisions can also be used to support the government’s exercise of legal authority under other law. Their constitutional authority makes this support consequential. They play this supporting role when another law (say a statute, regulation, or ordinance), or the government’s attempt to exercise authority under such a law, is being challenged on other legal grounds. In these cases, the constitutional environmental provision is invoked in support of that other law. Each of these supporting roles modifies governmental authority in the direction of greater protection for natural resources and the environment. They involve changes at the margins of governmental authority; in the main they do not create a new landscape. Yet taken together they show ways in which these provisions can strengthen the foundation and scope of governmental actions taken to protect the environment and natural resources.

While most of the cases below involve the use of constitutional environmental provisions to defend governmental actions, there is no particular reason why they cannot also be used proactively as a basis for future governmental actions on behalf of the environment. They are not a substitute for statutes and regulations, but they could be used in support of particular provisions in new or modified statutes or regulations, not only in Hawaii but in other states. They can also help justify gubernatorial executive orders.

**A. Confirmation and Extension of Police Power**

The police power provides state and local governments with the authority to protect public health, safety, welfare, and morals.293 Government actions outside the scope of the police power can be overturned in court.294 State and local governments have a long history of using the police power as justification for legislation to protect public health and the environment.295 But questions sometimes arise about the boundaries of the police power. The rights recognized by these provisions (e.g., the right to a quality environment, the right of public trust beneficiaries to have the government

293. See, e.g., Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926) (noting the police power provides that cities can implement zoning regulations as long as there is a rational relationship to “health, morals, safety, and general welfare of the community”).

294. See, e.g., id. at 395 (“[B]efore the ordinance can be declared unconstitutional, [its] provisions [must be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”); Boundary Drive Ass’n v. Shrewsbury Twp. Bd. of Supervisors, 491 A.2d 86, 90 (Pa. 1985).

295. E.g., Ambler Realty Co., 272 U.S. at 387.
protect public natural resources) necessarily authorize government actions to protect them. Thus, courts have held, state or local laws intended to protect these rights cannot be challenged as outside the scope of the government’s police power.296

Pennsylvania provides an example. In a 1980 case, National Wood Preservers, Inc. v. Commonwealth, Department of Environmental Resources, the Pennsylvania Supreme Court cited Section 27 when it stated that “maintenance of the environment is a fundamental objective of state power.”297 This understanding has been borne out in cases involving both clauses of Pennsylvania’s amendment.

The first clause of Pennsylvania’s amendment recognizes, among other things, a right to “the preservation of the . . . historic and esthetic values of the environment.”298 Before this provision was adopted, the Commonwealth Court assumed but did not decide that municipalities had the authority to protect historic values.299 Afterwards, in United Artists’ Theater Circuit v. City of Philadelphia, the Pennsylvania Supreme Court confirmed the exercise of that authority.300 In fact, Philadelphia amended and strengthened its historic preservation ordinance subsequent to the adoption of, and in apparent reliance on, Article I, Section 27.301 The Pennsylvania Supreme Court has used Section 27 in several other cases to support the

296. Richard J. Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 IOWA L. REV. 631, 655–56 (1986) (discussing cases in which public trust doctrine has been used to support exercise of governmental authority).

297. Nat’l Wood Preservers, Inc. v. Commonwealth Dep’t of Env’t Res., 414 A.2d 37, 44 (Pa. 1980). The court also cited Georgia v. Tenn. Copper Co., 206 U.S. 230, 237-38 (1907): (T)he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain . . . . It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted . . . . that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened . . . , that the crops and orchards on its hills should not be endangered . . . .

Id.

298. PA. CONST. art. I, § 27.

299. See First Presbyterian Church of York v. City Council of the City of York, 360 A.2d 257, 258 (Pa. Commw. Ct. 1976) (upholding the denial of demolition permit for historic building and assuming, because the church did not argue otherwise, that the statute and local ordinance on which the denial was based were within the government’s police power).


application of police power in cases where the application of that power had been questionable.  

Similarly, Section 27’s public trust clause, as previously indicated, imposes a duty on the Commonwealth, including local governments, to “conserve and maintain” public natural resources for the benefit of present and future generations. It thus follows that they have a police power responsibility to exercise that authority, and are constitutionally constrained from operating otherwise. The Pennsylvania Supreme Court’s decision in Robinson Township is a further example of how the Amendment clarifies and extends the police power. The legislature’s preemption of that authority, the plurality said, violates Article I, Section 27 because “the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.”

B. Guidance in Interpretation of Legislation and Other Legal Documents

Because constitutional environmental rights and public trust provisions are applicable to state and local legislative bodies, it follows that legislative actions within the scope of these provisions are, or should be, fulfilling the legislature’s duties, whether or not the legislature identifies implementation of these provisions as one of its purposes. As explained in Part II of this Article, a court may hold a legislative act unconstitutional for violating one of these provisions. But there is another class of cases where there may be doubt about the meaning of a particular statutory provision. If so, that doubt should be resolved in a way that most protects constitutional rights. What is true of legislation is also true of other legal documents.

In several cases, the Pennsylvania Supreme Court has followed that rule in construing statutes. In National Wood Preservers, for instance, the court upheld a state order to clean up water pollution (pentachlorophenol


303. PA. CONST. art. I, § 27.

304. Robinson Twp. v. Commonwealth, 83 A.3d 901, 978 (Pa. 2013) (holding that the legislature operated unconstitutionally when it deprived local governments of their zoning authority to decide where shale gas operations may be located).

305. Id. at 977; see also Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 HARV. C.R.-C.L. L. REV. 1, 36–44 (2012) (arguing that local governments should have ability to enforce constitutional rights).

306. Dernbach, supra note 185, at 156–64.
and fuel oil) from a company’s operations. The company argued that the statute on which the order was based did not apply to the company. The state supreme court disagreed, explaining how its text and purposes supported the order. It then explained that “any contrary or narrower reading” of the statute would not only frustrate the legislature’s objective of cleaning up waterways, it would also “frustrate the Legislature’s fulfillment of its obligation under Article I, section 27 of the Pennsylvania Constitution.”

The Hawaii Supreme Court has applied that rule to administrative orders. “[I]f an administrative order is reasonably susceptible to an interpretation that would not meet the agency’s public trust obligations and one that would properly fulfill those duties, we are obligated to adopt the latter.” In 1991, the state’s Land Use Commission issued an order prohibiting a resort from irrigating its golf course with “potable” water from a high-level groundwater aquifer, and required the resort to “utilize only alternative non-potable sources of water (e.g., brackish water, reclaimed sewage effluent) for golf course irrigation requirements.” In 2017, the Commission issued an order to the effect that brackish water that meets safe drinking water standards is nonetheless “nonpotable.” The effect of the latter order was to allow such water to be used for irrigation of the golf course. The state supreme court held, among other things, that the 2017 order violated the Land Use Commission’s constitutional public trust obligation because brackish water that meets drinking water standards is “potable.” The Land Use Commission, the court said, has a constitutional public trust obligation to protect and preserve water, particularly drinking water, for present and future generations. As the court noted, the condition in the 1991 order “serves to protect and preserve the waters of Lāna‘i for domestic use by prohibiting the Resort from irrigating its golf course with water that

308. Id. at 40.
309. Id. at 40–41.
310. Id. at 41.
312. Id. at 1156.
313. Id. at 1157–58.
314. Id. at 1159–60, 1160 (“Brackish water is . . . ‘potable’ if it is suitable for drinking under county water quality standards and ‘non-potable’ if it is not.”).
315. Id. at 1169.
316. Id.
would otherwise be used as drinking water.”

The Commission’s new interpretation of “potable,” the court reasoned, would not adequately “preserve and protect” the drinking water supply for future generations because “‘brackish’ water may become needed for domestic use.”

C. According Quasi-Constitutional Status to Statutes and Regulations

As previously explained, the Hawaii Constitution recognizes a right to a “clean and healthful environment,” but it expressly assigns to the legislature the responsibility of determining what that term means. The drafters of this provision believed that authorizing courts to decide the boundaries of the right “could lead to confusion and inconsistencies.” This provision, the state’s supreme court has explained, gives “flexibility to the definition of the right over time,” enabling it to be “reshaped and redefined through statute, ordinance and administrative rule-making procedures.”

This provision, Article XI, Section 9, has the effect of giving a kind of constitutional status to statutory and regulatory protections. It does not convert statutes and regulations into constitutional provisions, but it gives them an additional degree of authority that they would not otherwise have. Article XI, Section 9 does that in at least three specific ways. First, as previously explained, it authorizes a right of action under statutes “relating to environmental quality” even when the statutes themselves do not provide that right of action. Second, as also previously explained, it provides a constitutional due process right to an opportunity to be heard under these statutes prior to a government action that may adversely affect statutory protections.

Third, and more broadly, when statutes and regulations provide a certain level of environmental or public health protection, the public then has a constitutional right to that level of protection. Thus, the Hawaii Supreme Court has concluded that the right to a “clean and healthful

317. Id. at 1161.
318. Id. at 1161–62.
321. In re Application of Maui Elec. Co., 408 P.3d 1, 13 (Haw. 2017); see also Org. of Police Officers v. City & Cnty. of Honolulu, 494 P.3d 1225, 1243 n.21 (Haw. 2021) (“By contrast, the privacy right is to be implemented, not defined, by the legislature.” (emphasis omitted)).
323. Id. at 12–13.
environment’... subsumes a right to a life-sustaining climate system” because the legislature has adopted a zero-emissions target and taken other measures to reduce greenhouse gas emissions. In re Maui Elec. Co., 506 P.3d 192, 202 n.15 (Haw. 2022); see also In re Application of Maui Elec. Co., 141 P.3d 1, 5, 22 (Haw. 2017) (holding that Haw. Const. art. XI, § 9, includes the right to be protected “from the effect of greenhouse gas emissions”).


326. Id.

327. Id. at 346.


331. Id. at 895 (indicating that the other three factors are the text of the state constitutional provision, its history, and related case law in other states).
held that Section 27 weighed against a decision that the ordinance effected a taking.\textsuperscript{332} Article I, Section 27, the court held, “reflects a state policy encouraging the preservation of historic and esthetic resources.”\textsuperscript{333} The court added that Section 27 reflects “a general public interest in preserving historic landmarks,” that no other practical means exists for preserving such landmarks, and that the ordinance neither deprives the owner of a profitable use nor constitutes a physical intrusion on the property.\textsuperscript{334}

Constitutional environmental provisions assign parity between environmental (including, where stated, historic and esthetic) protection and property. When there is a true clash between constitutional property rights and constitutional environmental rights, courts are obliged to find a way to effectuate both; one doesn’t merely trump the other.\textsuperscript{335} In constitutional terms, that is how development and environment are reconciled in the form of sustainable development.\textsuperscript{336}

\section*{IV. BASIS FOR SUITS AGAINST PRIVATE PARTIES}

While it is unusual for environmental rights amendments to authorize actions against private parties, at least one state does—Montana. In fact, Montana appears to recognize two different types of actions against private parties under its environmental rights provision. The first is derived not only from the right to a clean and healthful environment but also from accompanying language in the same provision stating that “the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations . . . .”\textsuperscript{337} In \textit{Cape-France Enterprises v. Estate of Peed}, Cape-France, which owned a large tract of land, entered a buy-sell agreement with Lola Peed and her granddaughter (together, Peed) for five acres of that tract so that they could build a motel or hotel.\textsuperscript{338} To subdivide the property, Peed was required to drill a well for water.\textsuperscript{339} But it turned out that a groundwater contamination plume from a nearby drycleaner was spreading underneath the Cape-France property, and drilling the necessary well would likely spread the contamination and create

\begin{itemize}
  \item \textsuperscript{332} United Artists’ Theater Cir., Inc., 635 A.2d at 620.
  \item \textsuperscript{333} \textit{Id.} (noting that the text of the state and federal provisions is similar, that the state generally follows federal case law on takings, and that no state had held a historic designation to be a taking).
  \item \textsuperscript{334} \textit{Id.} at 618–19.
  \item \textsuperscript{335} For a more complete explanation, see Dernbach, \textit{supra} note 38, at 717–22.
  \item \textsuperscript{336} \textit{Id.} at 718.
  \item \textsuperscript{337} \textit{Mont. Const.} art. IX, § 1.
  \item \textsuperscript{338} Cape-France Enter. v. Est. of Peed, 29 P.3d 1011, 1013 (Mont. 2001).
  \item \textsuperscript{339} \textit{Id.}
\end{itemize}
potential cleanup liability for Cape-France. Cape-France sued to rescind the agreement on the grounds of impossibility or impracticability, and the trial court granted that relief.

On appeal, Peed argued, among other things, that potential liability is an insufficient reason to rescind a contract. The Supreme Court said that argument “ignores an important—and, in fact, a decisive—point.” Because of what the Montana constitution provides about the right to a clean and healthful environment and the duty of each person to ensure that quality environment, “it would be unlawful for Cape–France, a private business entity, 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.” By reasoning that a private party could violate the state’s right to a clean and healthful environment, the court indicated that the constitutional provision could provide a basis for lawsuits against such parties.

In addition, the Montana Supreme Court recognizes that the state’s right to a clean and healthful environment authorizes lawsuits for damages against private parties but only where no common law cause of action is available to provide a remedy. The court has previously recognized tort actions for damages under other provisions of the state constitution. So this is simply an extension of prior case law. In a 2007 case, it affirmed the dismissal of an action brought by downstream landowners against a mining company, claiming contamination of their property and diminished water flows, and requesting damages for violation of their constitutional right to a clean and healthful environment. In that case, the court held, the plaintiffs failed to demonstrate that traditional tort remedies would not redress the damage to them. Still, the Montana Constitution provides a basis for a tort action for damages where no traditional tort remedy is available.

340. Id. at 1013–14.
341. Id. at 1013, 1017.
342. Id. at 1016.
343. Id.
344. Id. at 1017.
345. Id.
346. Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079, 1093 (Mont. 2007). The court said it was important to “avoid constitutional issues wherever possible.”
347. Id.
349. Id. at 888.
350. The Gettysburg Tower decision in Pennsylvania, another dimension of which is discussed above, authorized the state to sue the developer of a private observation tower on private land near the Gettysburg Battlefield National Park where no prior state permit or other action was involved. Although the Attorney General lost, the Commonwealth Court
CONCLUSION

At the dawn of the modern environmental movement, when most of these constitutional environmental provisions were adopted, environmental and natural resources law had two principal sources. Much of it consisted of statutes and regulations that were insufficient to the task of environmental and natural resources protection. The other source was common law—public nuisance, intentional private nuisance, trespass, and various other causes of action that had evolved over centuries, and that courts often adapted to new circumstances, like industrial pollution.

In the half century or so since the modern environmental movement began, the statutes and regulations that existed then have been rewritten and expanded so much that this part of the legal landscape barely resembles what it was then. But the basic structure of the common law remains, albeit with newer cases.

The common law continues to be vital in the environmental protection effort. While common law rules are expressed in general terms, their generality allows them to be applied to new and different situations—often problems that the modern statutory and regulatory system has not yet reached. While that generality is a fundamental reason that new or modified statutes and regulations were necessary, it is also a strength of the common law. Among other things, it provides remedies for environmental harms or problems, many of which have arisen only recently, and that are not addressed adequately by environmental statutes and regulations, if

---

351. See MARY CHRISTINA WOOD, NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 49–67 (2014) (criticizing more recent environmental law as still inadequate).

352. See, e.g., Michael C. Blumm, A Dozen Landmark Nuisance Cases and Their Environmental Significance, 62 ARIZ. L. REV. 403 (2020).

Constitutional environmental rights and public trusts are in some ways analogous to the common law. They tend to require courts for their enforcement, and they are written in general terms. They are therefore flexible enough to be applied to new and emerging problems, such as climate change, that were not of widespread concern in the 1970s. But the gap filling role does not fully explain these or other cases discussed in this Article. These cases are possible because they are based on state constitutional law, not statutes or regulations. Constitutions play a role that the common law cannot play in environmental protection. They provide limits on the exercise of governmental authority. They provide a means of invalidating inconsistent statutes, regulations, and other laws. They have been used to improve access to the courts and strengthen and expand traditional public trust protections. They also provide many kinds of support for the exercise of governmental authority. And they can even provide the basis for legal actions against private parties.

Constitutional environmental provisions are at the apex in our hierarchy of environmental and natural resources laws. Their text often provides a stronger presumption of environmental protection than the common law. Because they have democratic origins, courts applying them as they are written cannot reasonably be challenged for engaging in judicial activism.

Constitutional environmental rights and public trusts thus provide part of the background framework for the complex and often messy day-to-day work of environmental protection. While they are not, and cannot be, a substitute for the wide variety of statutes and regulations governing that work, they can add value to that effort in a rich variety of ways.

354. A prominent and important recent example is the use of common law to address the human health and environmental problems from the dumping of the chemicals perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). See ROBERT A. BILOTT, EXPOSURE: POISONED WATER, CORPORATE GREED, AND ONE LAWYER’S TWENTY-YEAR BATTLE AGAINST DuPONT (2019). Bilott’s story is also the subject of a feature film, DARK WATERS (2019).

355. The common law also provides the remedy of damages, a remedy that is rarely if ever available under environmental and natural resources statutes. Similarly, damages are sometimes available for violation of constitutional provisions. For example, see supra Part IV.

356. Major public concern about climate change in the United States can be dated from 1988, which was then the hottest year on record. In that year, NASA scientist James Hansen presented testimony to a congressional committee, saying he was “99 percent sure” about the reality of global warming. CLIMATE CHANGE HISTORY, HISTORY.COM, https://www.history.com/topics/natural-disasters-and-environment/history-of-climate-change [https://perma.cc/PZ33-FVN3]; see also SPENCER R. WEART, THE DISCOVERY OF GLOBAL WARMING (2008).