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ENVIRONMENTALISM AND THE WISCONSIN CONSTITUTION

JASON J. CZARNEZKI*

With its abundance of natural resources and due to the state's strong environmental policies, Wisconsin has "enjoyed a reputation as a state rich in natural beauty and recreational opportunities." Yet, despite the state's strong environmental protections, some based upon constitutional principles, this Article addresses whether Wisconsin's environmental constitutional provisions can be improved upon. This Article attempts to evaluate the existing environmental provisions in the Wisconsin Constitution, and considers, looking at a variety of options and sources, whether the state should proceed forward with any changes, minor or major, to environmental law in the Wisconsin Constitution. This Article considers expansion of the public trust doctrine to allow for greater public access and to protect biodiversity and groundwater, inclusion of an environmental policy statement to symbolize the state's environmental ethic or inclusion of a stronger affirmative right to a healthy environment, creation of a mechanism to improve standing in environmental cases, and the tradeoffs between environmental protection and economic growth.

I. INTRODUCTION

Wisconsin has "more than 15,000 inland lakes, 33,000 miles of rivers and streams, 5.3 million acres of wetlands, 471,329 acres of state forests, and a location alongside the Mississippi River, Lake Michigan, and Lake Superior."¹ The founder of Earth Day, Governor Gaylord Nelson, and Aldo Leopold, author of *A Sand County Almanac*, called Wisconsin home. With its abundance of natural resources and traditionally strong

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1. Jodi Habush Sinykin, *At a Loss: The State of Wisconsin After Eight Years Without the Public Intervenor's Office*, 88 MARQ. L. REV. 645, 647 (2004) (citing David Johnson & Laura Chern, *Walking on Water*, WIS. NAT. RESOURCES, June 1998, at 6; Wis. Dep't of Tourism, *Wisconsin Tourism Facts*, http://agency.travelwisconsin.com/PR/Tourism_Facts/Facts.shtm).

environmental policies,² Wisconsin has “enjoyed a reputation as a state rich in natural beauty and recreational opportunities.”³ The Wisconsin legislature has passed a multitude of statutes protecting the state’s environment and natural resources,⁴ adding statutory reinforcement to the environmental provisions in the Wisconsin Constitution,⁵ and Wisconsin courts have upheld limitations on the rights of private owners to change the essential natural character of their land.⁶

Yet, despite these environmental protections based upon constitutional principles, can Wisconsin’s environmental constitutional provisions be improved upon? Anytime one questions whether to amend or replace a foundation of jurisprudence, it must be done with deliberate care and caution. Only five states have constitutions older than Wisconsin (Massachusetts, New Hampshire, Vermont, Maine, and Rhode Island).⁷ This is not to say the existing document cannot be improved upon, but it is to say the existing document has value that should not be lost. For example, the Wisconsin judicial system has already created important precedents about the state’s public trust in waterways that must be maintained.⁸

This Article, as a necessary preliminary inquiry, attempts to evaluate the existing environmental provisions in the Wisconsin Constitution. Once one can see what already exists, then one can begin to consider, by looking at a variety of options and sources (e.g., other state constitutions), whether the state should proceed forward with any changes, minor or major, to environmental law in the Wisconsin Constitution. Part II summarizes and evaluates the Wisconsin Constitution’s environmental provisions, focusing on the public trust of the state’s waterways and the right to hunt and fish. Part III provides

2. Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 892–93 (1996) (describing Wisconsin as one of five states with the strongest environmental policies and programs despite the lack of environmental provisions in its constitution).

3. Sinykin, *supra* note 1, at 647.

4. See, e.g., WIS. STAT. chs. 23 (Conservation), 26 (Protection of Forest Lands And Forest Productivity), 27 (Public Parks and Places of Recreation), 28 (Public Forests), 29 (Wild Animals and Plants), 30 (Navigable Waters, Harbors and Navigation), 160 (Groundwater Protection Standards), 280 (Pure Drinking Water), 281 (Water and Sewage), 283 (Pollution Discharge Elimination), 285 (Air Pollution), 287 (Solid Waste Reduction, Recovery and Recycling), 291 (Hazardous Waste Management) (2005–2006).

5. See *infra* Part II.

6. See, e.g., *Just v. Marinette County*, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972).

7. Gordon B. Baldwin, *Celebrating Wisconsin’s Constitution 150 Years Later*, 1998 WIS. L. REV. 661, 661.

8. See *infra* Part II.A.

suggestions for environmental provisions that should be debated in any re-drafting of the Wisconsin Constitution, such as expansion of the public trust doctrine, the rebirth of the public intervenor, an environmental policy provision, and a fundamental right to a clean and healthy environment. Considering the environmental provisions of other states and the case law interpreting these provisions, it evaluates the consequences of any such changes and additions. Finally, Part IV discusses the implicit tradeoffs in environmental law, focusing on how constitutional provisions might balance economic growth and resource development with preservation and conservation, especially where those values may conflict and require compromise (e.g., hunting, recreation, tourism).

II. WISCONSIN'S ENVIRONMENTAL CONSTITUTIONAL PROVISIONS

The Wisconsin Constitution contains a number of provisions that affect, to varying degrees, environmental law and land use, broadly defined. The constitution details financial provisions related to forests and minerals,⁹ creates the Commission of Public Lands,¹⁰ establishes jurisdiction of rivers and lakes providing the foundation for the public trust doctrine,¹¹ and contains the recently enacted right to hunt and fish amendment.¹² The former two provisions affect land use planning. The Board of Public Lands Commissioners controls the appraisal and sale of state land, and “[t]he selection of three constitutional officers [to serve on the board] was designed as a check upon the legislative enthusiasm to sell land.”¹³ The general finance provisions provide for the taxation of forests and minerals, and authorize the legislature, using monies from the treasury or taxes, to acquire and preserve state forests.¹⁴ The latter two provisions are the document’s major environmental provisions—the focus of this Part II—that impact Wisconsin’s waterways and the use of the state’s environmental resources.

9. WIS. CONST. art. VIII, § 1 (“Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislation shall prescribe.”); *see also id.* art. VIII, § 10.

10. *Id.* art. X, § 7.

11. *Id.* art. IX, § 1.

12. *Id.* art. I, § 26.

13. 65 Op. Wis. Att’y Gen. 28, 29 (1976).

14. WIS. CONST. art. VIII, §§ 1, 10; *see also* Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73, 244 (2002).

A. The Public Trust Doctrine and Jurisdiction of Rivers and Lakes

Article IX, section 1, of the Wisconsin Constitution provides that “the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well as to the inhabitants of the state as to the citizens of the United States.”

This provision embodies the public trust doctrine in Wisconsin, protecting public use rights in navigable waters. The provision has not been amended since its enactment in 1848, when the provision’s language was borrowed from the Northwest Ordinance of 1787 and the Wisconsin Enabling Act, the federal statute authorizing the Territory of Wisconsin to organize as a state.¹⁵ The public trust doctrine “posits that some resources are subject to a perpetual trust that forecloses private exclusion rights.”¹⁶ The public trust doctrine, which finds its roots in Roman law and English common law,¹⁷ was incorporated into the law of the American colonies and future territories, and was recognized by the U.S. Supreme Court’s 1892 decision in *Illinois Central*.¹⁸ Under the equal footing doctrine, when Wisconsin entered the Union, the beds of the navigable waters, which had been held in trust by the federal government, were transferred to the state.¹⁹

The state, serving as trustee, holds title to navigable waters in trust for the citizens of the state and the nation. The boundary of the trust associated with the beds of navigable waters is the ordinary high-water mark.²⁰ The waterways protected by the doctrine have been broadened past commercial use²¹ to include any waterway capable of recreational

15. JACK STARK, *THE WISCONSIN STATE CONSTITUTION: A REFERENCE GUIDE* 177 (Reference Guides to the State Constitutions of the United States, No 28, G. Alan Tarr series ed., 1997).

16. Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 800 (2004).

17. Erin S. Koch, *Finding a Positive Right for the Public Trust in Wisconsin*, 8 WIS. ENVTL. L.J. 137, 147 (2002) (citing JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 514 (2d ed. 1991)); Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 *ECOLOGY L.Q.* 135, 141 n.4, 212 (2000) (citing HELEN ALTHAUS, *PUBLIC TRUST RIGHTS* 23 (1978) (“By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea.”)).

18. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1982).

19. *See id.* at 457–58 (states were given title to lake beds when they were admitted to the Union); *see also* *Pollard v. Hogan*, 44 U.S. 212 (1845).

20. *State v. Trudeau*, 139 Wis. 2d 91, 101, 408 N.W.2d 337, 341 (1987).

21. *Olson v. Merrill*, 42 Wis. 203, 212 (1877) (discussing the saw-log test for navigability).

interests,²² so long as the waterway is “navigable in fact.”²³ Navigable waterways also include those waterways that are not continually navigable²⁴ and even artificial waterways so long as they are connected to natural navigable waters.²⁵ The doctrine protects a significant amount of the state’s waterways and water resources to be used for public purposes.²⁶ In *Diana Shooting Club v. Husting*, the Wisconsin Supreme Court recognized the public nature of navigable waters and held that the state’s navigable waters “should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation.”²⁷ And in *Nekoosa-Edwards Paper Co. v. Railroad Commission*,²⁸ the court recognized that navigable waters “have ceased to be navigable for pecuniary gain,” and that with population increase, the waters will be used for a variety of additional recreational purposes such as sailing, rowing, canoeing, bathing, and skating.²⁹

The constitutional provision serves as authority for legislative and administrative action. The Wisconsin Department of Natural Resources (“DNR”) serves as the administrative agency that enforces the public trust, mostly through statutes passed by the legislature to protect the resources held in trust.³⁰ Chapter 30 of the Wisconsin Statutes, for example, establishes limitations on building structures on or near the

22. See *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492, 498 (1983).

23. *Vill. of Menomonee Falls v. Dep’t of Natural Res.*, 140 Wis. 2d 579, 586, 412 N.W.2d 505, 508 (1987).

24. See *Olson*, 42 Wis. at 212; *DeGayner & Co. v. Dep’t of Natural Res.*, 70 Wis. 2d 936, 945, 236 N.W.2d 217, 221 (1975).

25. *Klingeisen v. Dep’t Natural Res.*, 163 Wis. 2d 921, 929, 472 N.W.2d 603, 605 (Ct. App. 1991).

26. For a general discussion of Wisconsin’s Public Trust Doctrine, see ROBERT KITE, WIS. LEGISLATIVE REFERENCE BUREAU, VOL. IV, NO. 4, THE PUBLIC TRUST DOCTRINE (2004), available at <http://www.legis.state.wi.us/LRB/pubs/consthi/04consthiIV4.htm>; STARK, *supra* note 15, at 176–80; Paul G. Kent, *The Public Trust Doctrine in the Twenty-First Century: Challenges and Opportunities*, in WISCONSIN’S WATERS: A CONFLUENCE OF PERSPECTIVES 37–50 (Curt Meine ed., 2003); Jack Stark, *A Comparison of the Wisconsin and Iowa Constitutions*, 31 RUTGERS L.J. 1019, 1022–26 (2000); John Quick, Comment, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105 (1994).

27. 156 Wis. 261, 271, 145 N.W. 816, 820 (1914).

28. 201 Wis. 40, 228 N.W. 144 (1930).

29. *Id.* at 47, 228 N.W. at 147.

30. *Hilton v. Dep’t of Natural Res.*, 2006 WI 84, ¶¶ 19–20, 293 Wis. 2d 1, ¶¶ 19–20, 717 N.W.2d 166, ¶¶ 19–20 (internal citations omitted) (“The legislature has the primary authority to administer the public trust for the protection of the public’s rights, and to effectuate the purposes of the trust. . . . The legislature has delegated to the DNR the duty of enforcing the state’s environmental laws.”).

beds of navigable waterways and altering the landscapes of state waterways.³¹ However, the public trust doctrine not only protects the public's rights to use the state's waterways physically by mandating public access and limiting roadblocks to navigation,³² but it also protects against environmental and aesthetic degradation. The public trust doctrine has provided for the protection of shoreland and wetlands areas through shoreland zoning ordinances,³³ preserved aesthetic beauty,³⁴ limited the discharge of fill into navigable waters,³⁵ stopped development that would harm fish spawning and nursery habitat, water quality, and aquatic plants,³⁶ halted the draining of major lakes,³⁷ and helped to promote clean, unpolluted waters.³⁸

B. The Right to Hunt and Fish Amendment

Recently enacted via the constitutional amendment process in April 2003, article I, section 26, of the Wisconsin Constitution states: "The people have the right to fish, hunt, trap, and take game subject only to

31. See, e.g., WIS. STAT. §§ 30.13 (wharves, piers, swimming rafts), 30.12 (structures and deposits), 30.19 (grading on the bank, ponds), 30.20 (dredging) (2005–2006).

32. The public trust doctrine states that one cannot impede navigability by building a bridge, *Barnes v. City of Racine*, 4 Wis. 474 (1854), breakwater, *Hixon v. Pub. Serv. Comm'n*, 32 Wis. 2d 608, 146 N.W.2d 577 (1966), or dam, *Att'y Gen. v. City of Eau Claire*, 37 Wis. 400 (1875); *Wis. River Improvement Co. v. Lyons*, 30 Wis. 61 (1872). The public trust doctrine includes navigable waters and the shores appurtenant to ensure public access and free use of the waters. *State v. Town of Linn*, 205 Wis. 2d 426, 445, 556 N.W.2d 394, 402 (Ct. App. 1996). However, if the state uses its statutory authority to create public access over the private property of riparian owners that have "exclusive privileges of the shore for the purposes of access to [their] land and the water," then compensation may be required. *Doemel v. Jantz*, 180 Wis. 225, 234, 193 N.W. 393, 397 (1923); see also *Zinn v. State*, 112 Wis. 2d 417, 426–27, 334 N.W.2d 67, 72 (1983).

33. *Just v. Marinette County*, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972); see also *State v. Trudeau*, 139 Wis. 2d 91, 101, 408 N.W.2d 337, 341 (1987).

34. In *Clafin v. Department of Natural Resources*, 58 Wis. 2d 182, 193, 206 N.W.2d 392, 398 (1973), the court upheld the removal order of a boathouse stating, "The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy." See also *City of Madison v. State*, 1 Wis. 2d 252, 83 N.W.2d 674 (1957).

35. *Hixon*, 32 Wis. 2d at 631, 146 N.W.2d at 589 (stating that fill must be limited so that the body of water is not "eaten away").

36. *Sterlingworth Condo Ass'n v. Dep't of Natural Res.*, 205 Wis. 2d 710, 556 N.W.2d 791 (Ct. App. 1996).

37. *Priewe v. Wis. State Land & Improvement Co.*, 103 Wis. 537, 552–53, 79 N.W. 780, 782–83 (1899) (overturning legislative enactment that authorized draining of Muskego Lake and holding that the lake must be restored).

38. *Reuter v. Dep't of Natural Res.*, 43 Wis. 2d 272, 280, 168 N.W.2d 860, 863 (1969) (holding that before any water regulation permit could be issued, water quality impacts must be considered).

reasonable restrictions as prescribed by law.” While other states also have a constitutional right to hunt or fish,³⁹ Wisconsin provided for a right to hunt and fish via the public trust doctrine and the common law prior to the existence of the amendment—raising the question of why the amendment was necessary at all. In *Willow River Club v. Wade*, the Wisconsin Supreme Court held that the right to fish is a public right and riparian owners cannot prevent fishing in navigable waters,⁴⁰ and, in *Diana Shooting Club v. Husting*, it held that the public trust doctrine includes the right to hunt on the state’s waterways and wetlands.⁴¹

The amendment eliminates the possibility that hunting or fishing could be banned in Wisconsin, ending any concern that animal rights activists or preservationists would succeed in outlawing hunting and fishing.⁴² But absent this unlikely initiative, the right to hunt has been primarily litigated elsewhere by individuals trying to avoid state or municipal regulation,⁴³ or it has been used as a defense against a state prosecution for violating hunting or fishing regulations.⁴⁴ These strategies have been unsuccessful. Courts have upheld reasonable hunting and fishing regulations,⁴⁵ and a hunter or fisherman does not have a valid defense in invoking his right to hunt under Wisconsin’s article I, section 26, if the law he or she has violated is a reasonable restriction on the right.⁴⁶

In *Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Department of Natural Resources*,⁴⁷ a citizens group brought action seeking the court’s declaration that hunting season on mourning doves was invalid. After affirming the DNR’s express authority to adopt such regulations, the court addressed the recently passed right to hunt amendment. The court stated that “[t]he 2003 amendment does not impose any limitation upon the power of the state or DNR to regulate hunting, other than that any restrictions on hunting must be

39. See, e.g., CAL. CONST. art. I, § 25 (right to fish); VT. CONST. ch. II, § 67 (right to hunt and fish).

40. *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273 (1898).

41. *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816, 820 (1914).

42. See James A. Swan, *The Right to Hunt: How to Say It—and Keep It*, NAT’L REV. ONLINE, Nov. 19, 2002, <http://www.nationalreview.com/swan/swan111902.asp>.

43. See, e.g., *Orion Sporting Group, LLC v. Bd. of Supervisors*, 68 Va. Cir. 195 (2005).

44. See, e.g., *Ala. Dog Hunters Ass’n v. State*, 893 So. 2d 1224 (Ala. Civ. App. 2004).

45. *State v. Bontrager*, 683 N.E.2d 126, 132 (Ohio Ct. App. 1996); *State v. Warden*, 901 P.2d 900 (Or. Ct. App. 1995).

46. *Wis. Citizens Concerned for Cranes & Doves v. Dep’t of Natural Res.*, 2004 WI 40, ¶ 46, 270 Wis. 2d 318, ¶ 46, 677 N.W.2d 612, ¶ 46.

47. *Id.* ¶ 1, 270 Wis. 2d 318, ¶ 1, 677 N.W.2d 612, ¶ 1.

reasonable.”⁴⁸ The court declined to go further and specify a test for determining reasonableness for state hunting regulations, but elaborated on the origins of the right to hunt and fish amendment, finding that “the . . . amendment was intended to codify the common law right to hunt that existed prior to its adoption.”⁴⁹ The court continued:

In *State v. Nergaard*, 124 Wis. 414, 420, 102 N.W. 899 (1905), this court declared that the citizens of the state have a common law right to hunt and fish game as they see fit in the absence of state regulations, so long as they do not infringe private rights. . . .

The language of the 2003 constitutional amendment closely parallels the language in *Nergaard*, providing that the people of this state have the right to take game, subject to reasonable regulations.⁵⁰

Thus, the right to hunt and fish is little more than a codification of a right that is limited by reasonable DNR regulations. The DNR “has broad authority as custodian of Wisconsin’s wildlife to . . . maintain a balance between conserving and exploiting the state’s wildlife.”⁵¹ The right to hunt and fish amendment appears to have little substantive effect, and may be an unnecessary provision in the state constitution, as the provision may be used to unsuccessfully challenge the reasonableness of every season, catch limit, and designated area where hunting is allowed, adding to the administrative burden of state government. Ironically then, the right to hunt and fish has created additional administrative costs inhibiting the state’s wildlife management efforts that seek to conserve the very natural resources used by hunters and fishermen.

48. *Id.* ¶ 46, 270 Wis. 2d 318, ¶ 46, 677 N.W.2d 612, ¶ 46.

49. *Id.* ¶ 45, 270 Wis. 2d 318 ¶ 45, 677 N.W.2d 612, ¶ 45.

50. *Id.* ¶¶ 45–46, 270 Wis. 2d 318, ¶¶ 45–46, 677 N.W.2d 612, ¶¶ 45–46.

51. *Id.* ¶ 23, 270 Wis. 2d 318, ¶ 23, 677 N.W.2d 612, ¶ 23 (citing *Barnes v. Dep’t of Natural Res.*, 184 Wis. 2d 645, 660, 516 N.W.2d 730, 737 (1994)).

III. MISSING ENVIRONMENTAL PROVISIONS IN WISCONSIN'S CONSTITUTION?

This Part III, considering Wisconsin legal history and the constitutions of other states,⁵² offers suggestions for environmental provisions that should be debated in any re-drafting of the Wisconsin Constitution. It considers expansion of the public trust doctrine, the addition of an environmental policy provision, the inclusion of a fundamental right to a clean and healthy environment, and the rebirth of the public intervenor and other ways to broaden standing.

A. Expansion of the Public Trust Doctrine

There are clear advantages to constitutionalizing the public trust doctrine⁵³—the public trust in navigable waters effectively protects commercial and recreational use, scenic beauty, and environmental quality.⁵⁴ To this end, perhaps the public trust doctrine in Wisconsin should be made more explicit rather than relying on the “common highways and forever free” language taken from the Northwest Ordinance. That said, there may be advantages to maintaining the precedent of existing language.⁵⁵

However, whereas Wisconsin currently limits its public trust doctrine to navigable waters, any constitution convention should consider expanding the doctrine. The Pennsylvania Constitution, for example, proclaims that the state’s “natural resources are the common property of all people, including generations to come.”⁵⁶ Article XI, section 1, of the Hawaii Constitution states that “All public natural resources are held in trust by the State for the benefit of the people.”

Either through legislative action mandated by the constitution itself or through additional constitutional language, an expanded public trust

52. One could rely on not only state constitutions, but also the constitutions of foreign countries. See Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT’L LEGAL PERSP. 185 (2001).

53. Thompson, *supra* note 2, at 908 (“State constitutions therefore should incorporate a basic public trust doctrine.”).

54. See *supra* Part II.A.

55. If the provision was not included in a new Wisconsin Constitution, it may nevertheless survive as the Northwest Ordinance and Wisconsin Enabling Act remain viable following passage of a state constitution because they provide conditions upon which the State of Wisconsin was permitted entrance to the Union. Cf. *Branson Sch. Dist. v. Romer*, 161 F.3d 619, 634 (10th Cir. 1998).

56. PA. CONST. art. 1, § 27.

doctrine could take on a variety of forms. First, the public trust doctrine could contain a broader public access provision. Existing doctrines are “too narrow both in their focus on navigation and fishing and in their application just to navigable waterways and foreshore.”⁵⁷ The doctrine could include a broader set of lands such as public parks, forests, and undeveloped areas.⁵⁸ Any constitutional convention should then ask, in determining whether to expand the public access prong of the public trust doctrine, what lands should be included and what types of rights the public should enjoy in these protected lands.

For example, the Wisconsin Supreme Court’s decision in *Doemel v. Jantz* resulted in the public not being able to access exposed beds of the Great Lakes below the ordinary high-water mark.⁵⁹ Compare this to the decision of the Supreme Court of Michigan in *Glass v. Goeckel*, where the court held that the public does have a right of access to these areas.⁶⁰ In addition, the Wisconsin legislature has limited public access to shore areas along a stream.⁶¹ Perhaps a new constitution could, by itself or by requiring legislative action, take steps to assure greater public access along all lakes and streams, including the Great Lakes.⁶²

Second, the state could hold wildlife resources in trust for the benefit of its citizens in an effort to maintain biodiversity.⁶³ The scope of the public trust doctrine in other states has expanded to include more resources,⁶⁴ and courts have recognized that states “have the right and the duty . . . to preserve the public’s interest in natural wildlife resources.”⁶⁵ Several commentators have suggested that incorporating wildlife into the public trust is a legally sound and beneficial approach.⁶⁶

57. Thompson, *supra* note 2, at 888.

58. *See id.*

59. 180 Wis. 225, 193 N.W. 593 (1923); *see also supra* note 32; *infra* text accompanying notes 178–79.

60. 703 N.W.2d 58 (Mich. 2005).

61. WIS. STAT. § 30.134 (2005–2006).

62. *See generally* Editorial, *Lake Michigan Beaches; What is a “Public Use”?*, MILWAUKEE J. SENTINEL, Apr. 20, 2006, at 16A.

63. *See, e.g.,* Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181 (1994).

64. *See* Darren K. Cottriel, Comment, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235, 1263–65 (1996).

65. *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980).

66. *See, e.g.,* Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 731 (1989); Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1317 (1974).

While neither the Wisconsin Constitution nor case law provides for the protection of wildlife to retain biodiversity, other states have undertaken measures to include wildlife in the public trust. Alaska has arguably given wildlife the greatest trust protection,⁶⁷ though for public use⁶⁸ as opposed to preservation of the resource.⁶⁹ While the Alaska Supreme Court has held that its constitutional provision does not explicitly create a public trust, the court has placed wildlife resources into a category “analogous” to a public trust⁷⁰ known as the common use clause.⁷¹ The Alaska Supreme Court ruled that because wildlife is essential to the economy of the state, it warrants inclusion in the common use clause.⁷²

North Carolina has placed wildlife within the public trust by statute. The North Carolina statutes provide for the “enjoyment of the wildlife resources of the State [by] all of the people of the State.”⁷³ The legislative intent was to occupy the conservation and wildlife resources fields “to the exclusion of all local ordinances.”⁷⁴ The legislature named the North Carolina Wildlife Resources Commission as trustee of wildlife resources.⁷⁵

Through judicial action, the California Court of Appeals held that the public trust provides for the protection of trout within the state’s

67. Meyers, *supra* note 66, at 730–31.

68. ALASKA CONST. art. VIII, § 3 (“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”).

69. See, e.g., *Owsichek v. State*, 763 P.2d 488, 498 (Alaska 1988) (striking down statutes that gave guides the right to hunt in designated areas exclusively).

70. *Brooks v. Wright*, 971 P.2d 1025, 1033 (Alaska 1999) (“Article VIII does not explicitly create a public trust; rather, we have used the analogy of a public trust to describe the nature of the state’s duties with respect to wildlife and other natural resources meant for common use.”).

71. See *Owsichek*, 763 P.2d at 494.

72. *Metlakatla Indian Cmty. v. Egan*, 362 P.2d 901, 915 (Alaska 1961) (“The fisheries of Alaska, although pitifully depleted, are still its basic industry. The economy of the entire state is affected, in one degree or another, by the plentitude of the salmon in a given season. The preservation of this natural resource is vital to the state and of great importance to the nation as a whole.”).

73. N.C. GEN. STAT. § 113–133.1 (2006).

74. 51 Op. N.C. Att’y. Gen. 85 (1982) (“The unmistakable meaning of these provisions is that the Legislature has reserved the regulation of wildlife resources to itself and has thus preempted the entire field to the exclusion of all local ordinances except those which have only a ‘minor and incidental’ impact on wildlife conservation (e.g., an ordinance prohibiting the discharge of firearms from public roads).”).

75. N.C. GEN. STAT. § 143–247 (2006).

waters.⁷⁶ The court noted that “[w]ild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state.”⁷⁷ Similarly, Illinois has placed wildlife within the public trust,⁷⁸ though the court balanced the public benefits of constructing a bridge with the costs to wildlife.⁷⁹ The court ruled that the “legislature may reallocate property from one public purpose to another without violating the public trust doctrine.”⁸⁰

Third, to what extent should the application of the public trust doctrine be expanded under the existing constitutional provision to groundwater as pollution or overuse (e.g., through high-capacity wells) might adversely impact traditional navigable waters? While it is likely that groundwater is “plainly outside the scope” of the plain language of Wisconsin’s existing public trust provision,⁸¹ any new constitution should consider a provision dealing with groundwater withdrawal and creating an affirmative duty on the legislature (supported by a citizen suit provision) to enact further groundwater legislation.

While Wisconsin, as discussed above, has historically emphasized the importance of protecting state waters, citizens can still *use* this resource. Thus, the Wisconsin Supreme Court ruled that landowners may remove groundwater for a beneficial use as long as the use is reasonable.⁸² In 2003, the Wisconsin legislature passed new legislation requiring permits for wells that withdraw greater than 100,000 gallons per day.⁸³ Under the legislation, the DNR must undertake an environmental review of any of these high-capacity wells that are located in “groundwater protection areas,” that may have a significant environmental impact on a spring, or that will have a water loss of more than ninety-five percent of the amount of water withdrawn.⁸⁴

However, increasing demand for Wisconsin’s groundwater will likely call for increased control and regulation of the state’s groundwater

76. *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 255 Cal. Rptr. 184, 211 (Ct. App. 1989).

77. *Id.*

78. *Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984).

79. *Id.* at 1028.

80. *Id.*

81. *Kent*, *supra* note 26, at 43.

82. *State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 302, 217 N.W.2d 339, 350–51 (1974).

83. WIS. STAT. § 281.34 (2005–2006).

84. *Id.*; *see also* WIS. LEGISLATIVE COUNCIL, ACT MEMO: 2003 WISCONSIN ACT 310, HIGH CAPACITY WELLS (May 17, 2004), *available at* http://www.legis.state.wi.us/lc/act_memo/2003/act310-ab926.pdf.

resources. Development, including condominiums, lake homes, and hotels in Wisconsin, has threatened the state's water resources.⁸⁵ As landowners convert natural areas to suburban environments, wetlands and shorelines degrade,⁸⁶ and groundwater demand will increase due to the need to fill swimming pools and supply hotels and homes.⁸⁷ Southeastern Wisconsin counties have experienced a decline in groundwater availability and an increase of pollution in the supply.⁸⁸ As a result, some have even proposed purchasing water from other counties with access to Lake Michigan water.⁸⁹ Because the supply of groundwater is limited, Wisconsin may wish to exert far greater control over the diminishing resource.

Although the legal connection between the existing public trust doctrine and groundwater does not presently exist, the ecological connection is strong. Surface waters and groundwater are connected; the pollution of surface water causes groundwater pollution.⁹⁰ In addition, depleting surface water results in a corresponding decrease in groundwater.⁹¹ As scientists have discovered the complexity underlying surface and groundwater resources, public officials have called for greater control.⁹² The Wisconsin legislature has relied upon the DNR to "protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private."⁹³ Placing groundwater within the public trust would give the DNR greater control over the complexity of groundwater resources and the interconnections between groundwater and surface water.

To summarize, climate change, recreation and residential demands, pollution, and pressure to export Great Lakes water are all challenges to water resource decisions.⁹⁴ The importance and complexity of groundwater resources demands greater control by the DNR. Altering the Wisconsin Constitution to place groundwater within the public trust

85. See Scanlan, *supra* note 17, at 173–74.

86. *Id.*

87. See *id.*

88. Darryl Enriquez, *Selling Water to Waukesha Could Be Liquid Gold Mine*, MILWAUKEE J. SENTINEL, July 22, 2006, at 1A.

89. *Id.*

90. See Kent, *supra* note 26, at 39.

91. Joseph Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269, 270–71 (2003).

92. Kent, *supra* note 26, at 42.

93. WIS. STAT. § 281.11 (2005–2006).

94. Kent, *supra* note 26, at 42.

doctrine would elevate the priority of groundwater withdrawal in the legislature and the executive branch.⁹⁵

Finally, the constitution might provide for a method to expand trust lands. A portion of the sale of public lands in Wisconsin goes towards a Common School Fund.⁹⁶ An alternative approach exists where Wisconsin can instead retain ownership of these lands and use them as land trusts.⁹⁷ Due to the temptation to sell public lands for immediate revenues,⁹⁸ the provision should place limitations and checks on the ability to sell off public lands. The Board of Commissioners of Public Lands ("BCPL"), as currently designed in the Wisconsin Constitution, does not provide adequate protection from the removal of lands from the public trust. Instead, a revised state constitution, with expanded trust lands, would require an independent commission, wholly separate from the legislature, that would manage lands to benefit the lands themselves.

Should lands currently held as a part of the School Fund or other additional lands be placed in a land trust, the BCPL would likely be an insufficient check on the sale or exchange of the lands. Case law in Wisconsin reveals that the procedure of sale by the BCPL, as well as the determination of which lands to sell, is subject to legislative interference.⁹⁹ An effective land trust provision would shield commissioners from the discretion of lawmakers, and, if a newly created land trust is to be managed according to principles of preservation and conservation, a new constitutional provision should appoint at least one

95. See *id.* at 43.

96. WIS. CONST. art. X, § 2.

97. A constitutional convention would have to address whether the benefits of preservation through land trusts outweigh the decrease in educational funding. Alex Sienkiewicz, *A Battle of Public Goods: Montana's Clean and Healthful Environment Provision and the School Trust Land Question*, 67 MONT. L. REV. 65, 77 (2006) ("Rising education costs thus diminish the effect of the state's funding contributions. As education costs to school districts rise, the state share of funding will diminish as a percentage of total school district budgets, unless, of course, trust land revenue generation is increased at a rate commensurate with rising education costs.").

98. *Id.* at 86 ("The Land Board [in Montana] is composed completely of elected officials. The political dynamic that favors short-term revenue maximization would be tempered by diversifying the Board's membership.").

99. See, e.g., *State ex rel. Owen v. Donald*, 160 Wis. 21, 103–10; 151 N.W. 331, 358–60 (1915) (recounting the early history of legislative interference in the disposition of swamp land in the state trust funds); *State ex rel. Sweet v. Cunningham*, 88 Wis. 81, 84–85, 57 N.W. 1119, 1121 (1894) (discussing a statutory prohibition on the sale of land that had once been withdrawn from sale by the commissions, unless the commissioners re-offer and regularly advertise the sale); *State ex rel. Parsons v. Comm. of Sch. & Univ. Lands*, 9 Wis. 213, 215 (1859) (holding that the commission cannot sell land when the state lacks title to the land).

individual knowledgeable about conservation and preservation goals and practices.

If a land trust were established, the commission would require guidelines directing it when to hold on to lands and when to sell lands. Currently, the constitution authorizes the BCPL to sell lands unless it deems the sale to be economically detrimental.¹⁰⁰ Surely, the secretary of state, treasurer, and attorney general comprising the BCPL¹⁰¹ are able to predict when a land sale would not be of benefit financially. However, these individuals arguably do not possess the knowledge to independently determine when lands held in a land trust may be disposed of. Allowing the legislature to tell the BCPL when the sale is appropriate may well result in the sale of ecologically beneficial lands for economic gain. A commission in charge of managing lands held for conservation and preservation objectives should be managed by persons who have an interest in and an understanding of natural resource preservation and management.

An enlarged public trust doctrine in Wisconsin would arguably improve environmental quality and access. More specifically, including wildlife and groundwater in the trust may play a role in conserving those resources in the state. However, a provision in the constitution that includes those resources will likely lack the specificity required for proper judicial interpretation and legislative policymaking. Without more specificity, Wisconsin courts will have difficulty interpreting the provision; as a result, courts may construe such a provision too narrowly.¹⁰² Thus, while an expanded public trust doctrine may serve as the basis to improve environmental quality and access, the doctrine, absent complex and cumbersome constitutional provisions, still depends on legislative and administrative action to add specificity to its scope,¹⁰³ or alternatively on increased judicial policy-making.

Simple inclusion of these more expansive public trust provisions will force legislative and administrative action to deal with concerns of overuse of groundwater or destruction of biodiversity. Yet, the state could further expand the public trust provision in the constitution to

100. See WIS. CONST. art. X, § 7; *Sweet*, 88 Wis. at 83, 57 N.W. at 1120–21.

101. WIS. CONST. art. X, § 7.

102. See Jason J. Czarnecki, *Shifting Science, Considered Costs, and Static Statutes: The Interpretation of Expansive Environmental Legislation*, 24 VA. ENVTL. L.J. 395, 396 (2006).

103. *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492, 498 (citing *Ashwaubenon v. Pub. Serv. Comm'n*, 22 Wis. 2d 38, 49, 125 N.W.2d 647, 653 (1963)) (“The primary authority to administer [the] trust for the protection of the public’s rights rests with the legislature, which has the power of regulation to effectuate the purposes of the trust.”).

create a self-executing¹⁰⁴ legal right.¹⁰⁵ This right would impose a “duty upon the state to act in the interest of the public trust and allow[] individuals to bring a cause of action against the state for the disregard or misapplication of that duty.”¹⁰⁶ In other words, the provision would be more than a policy statement requiring further legislation.¹⁰⁷

Would such a forceful and affirmative duty for legislative action under the public trust doctrine actually lead to better environmental policy and protection? With greater citizen standing, might the provision shift the burden of proof for an agency to prove affirmatively that it is doing everything it can to protect the public trust?¹⁰⁸ How does one justify such constitutional breadth when judges may lack the necessary expertise in environmental matters?¹⁰⁹ Would the provision simply be symbolic? What is the scope of the legislative duty¹¹⁰ and how would it be enforced? At some point, expansion of the public trust doctrine begins to look like an environmental policy provision or individual right to a healthy environment. These concerns, addressed below, apply to any such expansion.

104. Many constitutional provisions are not self-executing in that they do not forbid, authorize, or require any behavior, and instead are dependent upon legislative action. Jack Stark, *Enigmatic Grants of Law-Making Rights and Responsibilities in the Wisconsin Constitution*, 81 MARQ. L. REV. 961, 965–66 (1998); see also Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 175–76 (2005). Even for fundamental federal constitutional rights, Congress had to pass 42 U.S.C. § 1983 before plaintiffs could sue for damages for the violation of constitutional rights. While some environmental constitutional provisions are self-executing (in Illinois, Hawaii, and New York), Klee, *supra* at 176, they, in my view, merely broaden standing, but do not shed light on the scope of environmental rights. See ILL. CONST. art. XI, § 2; HAW. CONST. art. XI, § 9; N.Y. CONST. art. XIV, § 5; see also PA. CONST. art. I, § 27, interpreted in *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973); Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 185 (1993) (citing *Mont. Wilderness Ass'n v. Bd. of Health & Env'tl. Sci.*, 559 P.2d 1157 (Mont. 1976)).

105. See Koch, *supra* note 17.

106. See *id.* at 138.

107. See *id.* at 142.

108. See *id.* at 165.

109. See *id.* at 165–66.

110. See *id.* at 166 (“The major difficulty in interpreting Section 1 as a positive right is the nonexistence of any limitations on that positive right.”).

B. Environmental Goals and Environmental Rights

While some states have no environmental provisions at all in their constitutions (e.g., Connecticut, Delaware, Kentucky, and Maryland), over one third of the states have constitutions that contain a wide variety of broad provisions setting forth goals to maintain a healthy environment and protect the state's natural resources,¹¹¹ and four states—Hawaii, Illinois, Montana, and Pennsylvania—have constitutions that explicitly establish environmental rights and call for state action to support those rights.¹¹² However, “none of the five states with the strongest environmental policies and programs (California, Connecticut, New Jersey, Oregon, and Wisconsin) has environmental policy provisions in its constitution.”¹¹³ Does this suggest that environmental policy or rights provisions are unnecessary, or might they help shape a state's environmental ethic and provide a means to enforce the goal of a healthy environment?

As noted elsewhere,¹¹⁴ the examples from other states vary considerably, from simply authorizing the legislature to protect the environment,¹¹⁵ to encouraging legislation by stating environmental policy goals,¹¹⁶ to going as far as creating explicit environmental rights¹¹⁷ or imposing environmental responsibilities on citizens.¹¹⁸ If Wisconsin chooses to re-draft its constitution, it must consider adding an environmental policy statement or including a right to a healthful environment, and must determine the strength of any such provision.

1. An Environmental Policy Provision

According to Stanford Law Professor Barton “Buzz” Thompson, “searching for some minimal and fundamental environmental goal is an attractive, but ultimately futile, endeavor.”¹¹⁹ Nevertheless, while a

111. See Thompson, *supra* note 2, at 923 tbl.3.

112. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 161 (2003) (citing HAW. CONST. art XI, §§ 1, 7, 9; ILL. CONST. art. XI, §§ 1–2; MONT. CONST. art. XI, §§ 1–3; PA. CONST. art. I, § 27).

113. Thompson, *supra* note 2, at 892–93.

114. *Id.* at 871–73.

115. See, e.g., GA. CONST. art III, § 6, ¶ 2(a)(1).

116. See, e.g., VA. CONST. art. XI, § 1.

117. See, e.g., HAW. CONST. art XI, § 9.

118. See, e.g., ILL. CONST. art XI, § 1.

119. Thompson, *supra* note 2, at 895; see also Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1171 (1997) (“Since the earliest environmental provisions were enacted, however, commentators have almost universally

broad environmental policy statement may be unhelpful due to a lack of judicially manageable standards, he also recognizes that an environmental policy provision in the constitution can be effectively symbolic, helping to create an environmental ethic within the state.¹²⁰ Constitutional intervention can also be necessary to deal with long term concerns such as sustainability¹²¹ and “depletion of exhaustible resources, . . . endangerment of species, [and] global climate change.”¹²² Not including an environmental policy provision allows states with otherwise strong environmental ethics to fail to reflect a policy norm and leave the constitution with a pro-development bias,¹²³ allows legislatures to slight the environment in favor of economic interests,¹²⁴ and potentially neglects the interests of future generations.

The problem with any environmental policy provisions is the difficulty in providing substantive standards for judicial review. What is the scope of the provision? “[J]ust what does such a provision require a defendant to do, or refrain from doing?”¹²⁵ Alternatively, some state constitutions contain detailed provisions that resemble legislative statutes or administrative regulations. This type of constitutional hyper-legislation should be avoided.¹²⁶ Despite providing explicit standards, these provisions make it difficult for state governments to change policies in light of changed conditions.¹²⁷

Including a broad environmental policy statement may have symbolic value, but it forces courts to help shape complex state

lamented their ineffectiveness.”); Thompson, *supra* note 112, at 158 (“Such environmental provisions have had little consequence in most of the states that have adopted them.”).

120. *Accord* Thompson, *supra* note 2, at 903 (“At least in theory, incorporation of general values into a state constitution also can help define and promote community identity and understanding within a state.”).

121. A sustainability clause may benefit future generations. Sustainable yield and development is the concept that “the possibilities for economic growth are limited both by natural resource quality and by the assimilative capacity of the environment,” and is based in “intergenerational equity—that is, the current generation must not compromise the ability of future generations to meet their ‘material needs’ and to enjoy a healthy environment.” Sandra S. Batie, *Sustainable Development: Challenges to the Profession of Agricultural Economics*, 71 AM. J. AGRIC. ECON. 1083, 1084 (1989).

122. *See* Thompson, *supra* note 112, at 198.

123. *See* Thompson, *supra* note 2, at 905.

124. *See id.* at 891, 893.

125. Bruce Ledewitz, *The Challenge of, and Judicial Response to, Environmental Provisions in State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 33, 59 (1991).

126. Thompson, *supra* note 2, at 915–18.

127. *See id.* at 867.

environmental policy, which they are ill-equipped to do.¹²⁸ As courts are rightfully reluctant to do so, in terms of having direct substantive impact, “environmental policy provisions have played an increasingly marginal role in those states where they are found.”¹²⁹

2. A Right to a Healthful Environment

At least seven state constitutions recognize individuals’ right to a healthful environment, including Hawaii, Illinois, Massachusetts, New York, Montana, Pennsylvania, and Rhode Island.¹³⁰ If a healthful environment is deemed extremely important, it has been argued that perhaps it should not be subject to democratic derogation, absent constitutional amendment.¹³¹ If Wisconsin were to consider a constitutional provision granting a self-executing right to a healthful environment, the constitutional convention must consider potential models for the text’s language and address how courts can create judicially manageable standards and ensure enforcement of the affirmative right.

In addition, even if judicial standards and effective enforcement prove elusive, are there symbolic advantages to including a right to a healthful environment, or, despite the difficulty of judicial enforcement, will the environment be improved due to added political accountability in the legislative and executive branches if included in the constitution?¹³² Is the following empirical claim true?: “By making a healthy environment a constitutional right, the likelihood is increased that those who control and manage state power will be punished politically if the environment is damaged or not improved.”¹³³

The Pennsylvania and Montana Constitutions contain two of the broadest environmental rights provisions, with Montana as the undisputed leader.¹³⁴ Pennsylvania’s article I, section 27, states:

128. *See id.* at 863, 895.

129. *See id.* at 896.

130. *See* Cusack, *supra* note 104, at 181.

131. *See* Thompson, *supra* note 2, at 863, 883.

132. *See* Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT’L L. & POL’Y 1233, 1239–40 (1995).

133. *Id.* at 1240.

134. For further discussion of Montana’s environmental constitutional provisions, see Bryan P. Wilson, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627 (2004).

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.¹³⁵

However, due to judicial interpretation, as discussed below, the provision has proven to have "more symbolic than substantive value."¹³⁶ But, it does "make[] environmental and historic protection part of the constitutional purpose of state government,"¹³⁷ constitutionalizing the state's environmental ethic.

Montana's constitutional environmental provisions, undergirded by more robust language and judicial interpretation, serve as a better model. Montana's environmental rights provisions, arguably the strongest of any state, recognize the environmental interests of, and seek to improve the environment for, future generations,¹³⁸ provide for an "inalienable" "right to a clean and healthful environment,"¹³⁹ and mandate that the state legislature "provide adequate remedies for the protection of the environmental life support system from degradation,"¹⁴⁰ ending any pro-development bias in the state legislature. Article IX, section 1, provides in full:

- (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
- (2) The legislature shall provide for the administration and enforcement of this duty.
- (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to

135. PA. CONST. art. I, § 27.

136. John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 696 (1999).

137. *Id.* at 697.

138. *See* MONT. CONST. art. IX, § 1(1).

139. *Id.* art. II, § 3.

140. *Id.* art. IX, § 1(3).

prevent unreasonable depletion and degradation of natural resources.¹⁴¹

In addition, article IX of the Montana Constitution deals with reclamation of lands damaged by the taking of natural resources, water rights, and cultural resources.¹⁴²

However, it is article II, section 3, that is the key provision:

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.¹⁴³

There is a key difference between an environmental policy statement that merely permits the legislature to protect the environment or symbolizes a state's environmental ethic and an individual right to a healthy environment.¹⁴⁴ While courts are reluctant to enforce policy statements absent legislation,¹⁴⁵ an individual right should be self-executing—though often with difficulty due to a lack of judicially manageable standards.¹⁴⁶ Courts must establish a framework for interpreting constitutional rights to a healthy environment.

141. *Id.* art. IX, § 1.

142. *Id.* art. IX, §§ 2–4.

143. *Id.* art. II, § 3 (emphasis added).

144. See Cusack, *supra* note 104, at 197 (“Without specific language, provisions granting the individual right to a healthful environment are often mistaken for policy statements.”).

145. See *id.*

146. Professor Thompson also recognized the problem of judicial enforcement. Thompson, *supra* note 2, at 872 (“Of those provisions that mandate legislative action without creating separate environmental rights or duties, only New York’s [N.Y. CONST. art. XIV, § 5] addresses enforcement, permitting citizens to sue with the consent of the state’s supreme court; all others are silent regarding enforcement. Most of the constitutional provisions that create rights or duties in the citizenry explicitly authorize judicial enforcement, although they often authorize the legislature to limit or regulate the enforcement actions.” See, e.g., HAW. CONST. art. XI, § 9 (“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.”)). Both the Massachusetts and Pennsylvania constitutions are silent regarding enforcement, despite setting out explicit environmental rights. See MASS. CONST. art. XCVII, § 1; PA. CONST. art. I, § 27. Courts in these states, however, still have permitted suits challenging specific state actions for allegedly violating the constitutional rights. See,

The Montana courts have ruled that the state's constitution provides for a self-executing and fundamental right to a healthful environment that is judicially enforceable against public and private actors.¹⁴⁷ As it is a "fundamental" right, the Montana courts have held that the right is subject to strict scrutiny,¹⁴⁸ potentially revolutionizing judicial review for actions that impact the environment.¹⁴⁹ As Professor Thompson stated:

To see the potential ramifications of the strict scrutiny standard, imagine that an environmental group pushes in Montana for a higher ambient air quality standard for sulfur dioxide. The Montana Board of Environmental Review considers raising the standard, but ultimately decides that a higher standard is neither justified nor feasible. Scientists are split on the health risk posed by the current standard, and companies claim that they would have to close down if the standard were adopted. The environmental group sues. Under traditional judicial review, the environmental group probably would lose. The board has reached a reasonable factual determination under the applicable state statute. Under strict scrutiny, however, the board arguably would have the burden to show that company closures are a compelling state interest and that they justify the board's decision.¹⁵⁰

Yet, strict scrutiny for a right to a healthful environment is not automatic, and perhaps any constitution should specifically state the level of scrutiny or what factors courts must balance when assessing actions that impact natural resources and the environment. Absent such specificity, a court may follow suit with Montana, or alternatively, like Illinois, may fail to provide for a higher level of scrutiny.¹⁵¹

e.g., *Toro v. Revere*, 401 N.E.2d 853 (Mass. App. Ct. 1980); *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

147. *Cape-France Enters. v. Estate of Peed*, 29 P.3d 1011 (Mont. 2001).

148. *Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999) (holding that the right to a healthful environment was a fundamental right subject to strict scrutiny); *see also Cape-France*, 29 P.3d at 1016-17.

149. Thompson, *supra* note 112, at 176, 183.

150. *Id.* at 184.

151. *See Ill. Pure Water Comm., Inc. v. Dir. of Pub. Health*, 470 N.E.2d 988, 992 (Ill. 1984) ("Plaintiffs cite no authority for the proposition that sections 1 and 2 of article XI create a 'fundamental' right to a healthful environment, and do not explain why we should

Pennsylvania courts have developed a three-part test as their framework for determining whether an action violates the state's environmental constitutional provisions. The test is:

(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the [state's] 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 . . . so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?¹⁵²

The test has been called "so weak that litigants using it to challenge environmentally damaging projects are almost always unsuccessful."¹⁵³ That said, how else can courts deal with economic tradeoffs, discussed in Part IV, without some balancing of competing interests? Strict scrutiny dictates that environmental interests would usually win out, absent a compelling interest on the other side, while factor number three above suggests development or economic interest will nearly always prevail.

An alternative would be to simply employ cost-benefit analysis, but this often fails to capture the appropriate value of the environment¹⁵⁴ and still results in judicially created environmental policy. Instead, Wisconsin should consider creating a judicially enforceable default rule in favor of the environment,¹⁵⁵ while still permitting some balancing—*Do the economic and development benefits that will result from the project clearly outweigh the value of the environmental resources that will be damaged?* This question is consistent with Professor Joseph Sax's view of the most common environmental constitutional provision—the

subject statutes affecting the environment to a higher level of scrutiny. In the absence of more persuasive reasoning, we decline to do so.").

152. Dernbach, *supra* note 136, at 710 (citing *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976)).

153. *Id.* at 696, 712–13, 722–24 (discussing *Payne*, 312 A.2d 86).

154. Jason J. Czarnezki & Adrienne K. Zahner, *The Utility of Non-use Values in Natural Resource Damage Assessments*, 32 B.C. ENVTL. AFF. L. REV. 509, 512 (2005) ("[N]on-use values are frequently underestimated or ignored in determinations of how much polluters should pay for damages inflicted upon natural resources.").

155. Cf. Reed F. Noss, *Some Principles of Conservation Biology, As They Apply to Environmental Law*, 69 CHI.-KENT L. REV. 893, 898 (1994) ("Humility demands that we prefer erring on the side of preservation to erring on the side of development. Thus, humility demands a shift in burden of proof as discussed earlier.").

public trust doctrine. Sax thought the public trust doctrine “required courts to review with skepticism any government action that restricted or burdened public access to potentially any natural resource.”¹⁵⁶

C. *The Public Intervenor and Standing*

If a new Wisconsin Constitution were to contain an environmental policy provision or grant a right to a healthful environment, the document must also inform the breadth of the standing requirement.¹⁵⁷ Due to the complicated nature of both individual and associational standing in the environmental context,¹⁵⁸ a reworked constitution may consider making the public intervenor a constitutionally mandated officer, permitting lawsuits on behalf of the public interest and the environment.¹⁵⁹

In essence, Wisconsinites could constitutionalize the earlier state statute establishing the independent public intervenor to be located in the Wisconsin Department of Justice¹⁶⁰ or the DNR, or as an independent agency. Depending on other changes in the constitution

156. Kirsch, *supra* note 119, at 1175 (citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 556–57 (1970)).

157. Cf. Cusack, *supra* note 104.

158. Look no further than the federal court jurisprudence as to Article III standing and prudential standing requirements. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991).

159. See Sinykin, *supra* note 1; see also Christa Oliver Westerberg, *From Attorney General to Attorney Specific: How State v. City of Oak Creek Limited the Powers of Wisconsin's Chief Legal Officer*, 2001 WIS. L. REV. 1207, 1220. Citizens gained additional standing through the Public Intervenor Office as the office relied on the Citizen Advisor Committee consisting of nine citizens with solid environmental credentials to discuss environmental concerns and suggest where intervention was warranted. Sinykin, *supra* note 1, at 649. The office also advised citizens on using existing state and local law to protect families and property from environmental harm. *Id.* at 650. There are, however, other ways to reduce the standing requirement. Wisconsin's public trust doctrine itself gives citizens independent authority to challenge violations of the doctrine, *Borsellino v. Dep't Natural Res.*, 2000 WI App 27, 232 Wis. 2d 430, 606 N.W.2d 255 (1999), though there are obvious costs in exercising this authority—costs that would be mitigated with the creation of the Public Intervenor Office. Other states' environmental provisions have been interpreted to remove standing barriers. See, e.g., *Fielder v. Clark*, 714 F.2d 77, 80 (9th Cir. 1983); *City of Elgin v. County of Cook*, 660 N.E.2d 875 (Ill. 1996). There are also a number of economic reasons for expanding standing to allow for citizen enforcement clauses and easier standing requirements: it will create an incentive for firms to reduce pollution; force public agencies to meet their responsibilities; produce pressure to resolve problems; and halt or delay the worst abuses. See Donald R. Levi & Dale Colyer, *Economic Implications of Some Citizen-Initiated Legal Mechanisms for Solving Environmental Quality Problems*, 53 AM. J. AGRIC. ECON. 868, 868 (1971).

160. See WIS. STAT. § 165.07 (1993–1994) (renumbered to WIS. STAT. § 23.29 in 1995 and repealed in 1997).

providing remedial and public interest rights, the Public Intervenor Office may have an expanded role.

The Public Intervenor Office was created in 1967 by Wisconsin Governor Warren P. Knowles to protect public rights in natural resources and ensure democratic participation in environmental matters, though the office was eliminated, *de facto*, in the 1995–1996 state budget and permanently in 1997.¹⁶¹ Under the earlier Wisconsin statute, the public intervenor received notice of proceedings impacting navigable waters, air, pollution discharge permits, and could intervene on his or her own initiative,¹⁶² even to challenge the constitutionality of regulatory action.¹⁶³ A public intervenor is necessary to protect the environment where the attorney general may lack the authority or political will to challenge legislative or administrative action harming the environment, for the attorney general may have a duty to defend the constitutionality of state statutes.¹⁶⁴

With the existing (or a potentially expanded) public trust doctrine, or a new environmental right, a constitutionally mandated Public Intervenor could protect the environment from competing interests. With a new environmental policy statement, the Public Intervenor could provide support for environmental legislation, helping offset the problem of a lack of substantive standards in an environmental policy provision.¹⁶⁵ In the past the Wisconsin Public Intervenor helped see through passage of Wisconsin's DDT Ban, Acid Rain Legislation, and 1984 Groundwater Law.¹⁶⁶ The public intervenor also helped communities deal with local environmental concerns,¹⁶⁷ protect wetlands

161. Sinykin, *supra* note 1, at 647–48 (citing WIS. STAT. § 165.07 (1993–1994), repealed by 1995–1997 Budget Act, Act 27, § 4450(b) 1995 Wis. Sess. Laws 535, replaced with WIS. STAT. § 23.39 (1995–1996), repealed by 1997–1999 Budget Act, Act 27, § 783(x), 1997 Wis. Sess. Laws 49, 243).

162. Westerberg, *supra* note 159, at 1220 (citing WIS. STAT. § 165.07 (1993–1994)).

163. *Id.* at 1220 (citing WIS. STAT. § 165.075 (1993–1994)).

164. See *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 49–54, 232 Wis. 2d 612, ¶¶ 49–54, 605 N.W.2d 526, ¶¶ 49–54 (holding that the attorney general lacked the authority to challenge the constitutionality of the statute at issue). However, the attorney general's powers could be constitutionally modified.

165. Cusack, *supra* note 104, at 183 (citing Linda J. Bozung, *Resource Uses*, in RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 151, 153 (P.L.I. Litig. & Admin. Practice Handbook Series No. H4-4963, 1985) (“Problems arise, however, when the constitutional provision directs the legislature to maintain actively a healthful environment for the people but does not specifically state whether legislation is necessary before a party can sue to enforce the legislature’s obligation.”)).

166. See Sinykin, *supra* note 1, at 646.

167. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991).

and navigable waters,¹⁶⁸ and ensure the development of proper environmental impact statements,¹⁶⁹ while serving as a check on the actions of the DNR.¹⁷⁰

IV. ENVIRONMENTAL CONSTITUTIONALISM AND ECONOMIC DEVELOPMENT

Any constitutional provision dealing with the environment must balance the competing interests of economic growth and development with protection of natural resources and a healthy environment.¹⁷¹ “[T]he problem for the judge is that not only is environmentalism ‘in’ the state constitution, it is a value potentially at odds with the prevailing individualist orientation of American law.”¹⁷²

However, constitutional environmental provisions vary in the degree to which they recognize this tradeoff.¹⁷³ “Most state constitutions encourage the pursuit of environmental goals with no explicit recognition of potential tradeoffs.”¹⁷⁴ And if courts, like those in Montana, embrace a strict scrutiny approach for a right to a healthful environment, there is not much room for economic tradeoffs.¹⁷⁵ Some state constitutions recognize the tradeoff by recognizing the importance of environmental protection as well as the need to use nature’s resources.¹⁷⁶ “Overall, the courts interpreting these environmental provisions convert them into some sort of ‘rule of reasonableness’ that

168. See Sinykin, *supra* note 1, at 652.

169. *Id.* at 653–54 (citing Pub. Intervenor v. Dep’t of Transp., No. 91CV001869 (Dane County, Wis. Cir. Ct. May 13, 1991)).

170. See generally *id.* at 669. For example, in *Town of Two Rivers v. Department of Natural Resources*, 105 Wis. 2d 721, 315 N.W.2d 377 (Ct. App. 1981), the public intervenor challenged the DNR’s refusal to hold a public hearing regarding proposed waste disposal sites.

171. See *State v. Bernhard*, 568 P.2d 136 (Mont. 1977); *Federated Conservationists of Westchester County, Inc. v. Reid*, 377 N.Y.S.2d 380, 384 (Sup. Ct. 1975) (both recognizing that there is a tradeoff between individual property rights and public environmental rights).

172. Ledewitz, *supra* note 125, at 65.

173. Thompson, *supra* note 2, at 872–73.

174. Thompson, *supra* note 112, at 162.

175. See *id.* at 191.

176. Thompson, *supra* note 2, at 873 (“Some state constitutions, such as Hawaii’s, implicitly recognize the need for tradeoffs by emphasizing both the need to protect natural resources and the environment and, either in the same or a related section, the need to ‘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.’” HAW. CONST. art. XI, § 1. “A few constitutions place explicit limits on environmental goals. The Louisiana Constitution, for example, mandates a ‘healthful’ environment only ‘insofar as possible and consistent with the health, safety, and welfare of the people.’” LA. CONST. art. IX, § 1.).

minimizes harm to the environment and balances environmental harm against the legitimate rights of property.”¹⁷⁷

One can already see this tension between environmentalism and public use, broadly defined, and private interests and economic growth in existing Wisconsin law. For example, in enforcement of the public trust doctrine, there is a tension under Wisconsin law between the constitution’s public rights in navigable waterways with, first, private rights of riparian owners who, unlike the beds of all other navigable waters, own the beds under navigable streams,¹⁷⁸ and, second, the desire to convey trust property for broader public purposes than the traditional uses.

As noted earlier, in *Doemel*, the court held that a riparian owner has “exclusive privileges of the shore for purposes of access to his land and the water.”¹⁷⁹ This limits public access to the state’s water resources. In Wisconsin, unlike many states, owners of the bank of a navigable stream by purchase from the United States are owners of the stream in front of such purchase,¹⁸⁰ but their ownership rights are subject to the rights of the public to use the waterway as a public highway.¹⁸¹

Similarly, the state can authorize encroachments (and even convey lake bed land held in the public trust while still maintaining legal title) for public purposes.¹⁸² Such encroachments necessarily limit certain types of use and access to the state’s water resources at those locations. Thus development, in the form of piers, bridges, harbors and dams, among other things, can be upheld by public trust doctrine,¹⁸³ and chapter 30 of the Wisconsin Statutes allows the DNR to grant permits “in the public interest” absent a more detailed standard.¹⁸⁴ The state

177. Ledewitz, *supra* note 125, at 68 (citing *Save Ourselves, Inc. v. La. Envtl. Control Comm’n*, 452 So. 2d 1152 (La. 1984); *Hamilton v. Diamond*, 349 N.Y.S.2d 146 (App. Div. 1973); *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976)).

178. *Willow River Club v. Wade*, 100 Wis. 86, 95, 76 N.W. 273, 274 (1898).

179. *Doemel v. Jantz*, 180 Wis. 225, 234, 193 N.W. 393, 397 (1923).

180. *Wade*, 100 Wis. at 95, 97, 76 N.W. at 274 (citing *Shively v. Bowlby*, 152 U.S. 1 (1893)).

181. *Id.* at 97.

182. *State v. Pub. Serv. Comm.*, 275 Wis. 112, 117, 81 N.W.2d 71, 73 (1957); *see also Scanlan*, *supra* note 17, at 149.

183. *See, e.g., Captain Soma Boat Line v. Wis. Dells*, 79 Wis. 2d 10, 22, 255 N.W.2d 441, 446 (1977) (building a bridge); *Pub. Serv. Comm.*, 275 Wis. at 117, 81 N.W.2d at 73 (permitting fill in Lake Wingra to aid navigation and recreational enjoyment); *City of Milwaukee v. State*, 193 Wis. 423, 456, 214 N.W. 820, 832 (1927) (constructing piers that aid navigation).

184. *See, e.g., WIS. STAT. §§ 30.12(2); 30.123(4); 30.195(3); 30.20(7); 30.206* (2005–2006).

administrative agencies must deal with the complexities and balancing of competing interests in protecting the public trust—for environmental interests themselves can even fall along a spectrum from conservation, responsible and sustainable, yet utilitarian, use (the historical basis for environmental law in Wisconsin), to complete perseveration of nature from human destruction and exploitation.¹⁸⁵

With these competing interests, few constitutions have placed explicit limits on environmental goals.¹⁸⁶ While implementation of Wisconsin's public trust doctrine seeks to balance property rights and social costs against the environmental rights of the public at the agency level and the strict scrutiny approach should work in favor of environmental protection, Louisiana courts have transformed the healthful environment provision¹⁸⁷ into a ban on state actions that do not pass a cost-benefit test.¹⁸⁸ Courts do a cost-benefit analysis of the environmental costs weighed against the social and economic benefits, but also engage in a constitutionally derived environmental impact statement considering alternative sites, alternative projects, and mitigation measures.¹⁸⁹

Weighing the individual costs and benefits of a particular project is a daunting task. Yet it is possible to consider the "cumulative impacts" of permitting projects that may have adverse effects on natural resources.

Whether it is one, nine or ninety boat slips, each slip allows one more boat which inevitably risks further damage to the environment and impairs the public's interest in the lakes. The potential ecological impacts include direct impacts on water quality and sediment quality alteration, as well as direct and indirect influences on flora and fauna. For this very reason, the consideration of "cumulative impact" must be taken into account.¹⁹⁰

185. See, e.g., ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS 19–25 (2003).

186. Thompson, *supra* note 2, at 873.

187. LA. CONST. art. IX, § 1.

188. See Kirsch, *supra* note 119, at 1196–97.

189. See *id.* at 1197 (citing *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152 (La. 1984); *In re Dravo Basic Materials Co.*, 604 So. 2d 630, 632 n.1 (La. Ct. App. 1992)).

190. *Hilton v. Dep't Natural Res.*, 2006 WI 84, ¶ 28, 293 Wis. 2d 1, ¶ 28, 717 N.W.2d 166, ¶ 28 (quoting *Sterlingworth Condo. Ass'n v. Dep't Natural Res.*, 205 Wis. 2d 710, 721, 556 N.W.2d 791, 794–95 (Ct. App. 1996)).

While it is usually not possible to show that a specific shoreline development project will result in specific adverse impacts on ecology, tourism, and the economy, the cumulative impacts of many of these projects may have devastating ecological, recreational, and associated economic impacts.

Judicial cost-benefit balancing is an onerous task due to the difficulty of properly valuing natural resources.¹⁹¹ Valuation of natural resources requires reliance on contingent valuation¹⁹² to get at people's willingness to pay to protect natural resources and public areas, but no real framework exists for how this can work in constitutional interpretation. These complexities undergird the reasoning for leaving the resolution of the economic versus environmental tradeoffs within the so-called political branches of government through legislation and expert administrative agency regulation, as opposed to in the courts. Creating a Public Intervenor Office, as suggested earlier, might also ease the resolution of these tradeoffs as the office can make efforts to increase cooperation between environmentalists and industry, limiting some transaction costs in the tradeoff debate.¹⁹³

The tradeoff is a complicated one—for preservation and conservation can both harm and promote economic and industrial growth. For example, land conservation may affect economic growth either negatively by removing land from commercial uses or positively by attracting new business to the area.¹⁹⁴ In Wisconsin, while industries depend upon consumption of state natural resources, environmental protection can help promote the state's large tourism and recreational sports industries. Tourism is the state's second largest industry,

191. See Czarnezki & Zahner, *supra* note 154.

192. *Id.* at 521 (quoting *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 475 (D.C. Cir. 1989)) ("[Contingent valuation] 'set[s] up hypothetical markets to elicit . . . [the] economic valuation of a natural resource,' and is used when there are no adequate models of market behavior available to measure use or non-use values.").

193. *Cf.* Sinykin, *supra* note 1, at 659. If one engages in cost-benefit analysis, the low cost of maintaining the Public Intervenor Office versus the potential high cost of environmental degradation and the difficulty in the valuation of natural resources may warrant a constitutionally mandated office. The Public Intervenor Office was a "lean and economical state entity" comprising a small fraction of the state budget (.0015% of the \$15.5 billion 1994 state budget), less than a nickel per citizen. *Id.* at 648 (citing Wis. Stewardship Network, FAQ: Didn't Taxpayers Save Money by Eliminating the Intervenor's?, <http://www.wsn.org/issues/PIOsavemoney.html>; Arlen Christenson, Wis. Stewardship Network, The Vital Role of the Public Intervenor, <http://www.wsn.org/issues/PIOchristenson.html>).

194. See David J. Lewis et al., *Public Conservation Land and Employment Growth in the Northern Forest Region*, 78 LAND ECON. 245, 245-46 (2002).

accounting for \$5.7 billion in 1994 and up to \$11.7 billion in 2002.¹⁹⁵ The state's cabins, lodges, fishermen, hunters, and camping grounds all depend on the state's natural resources, and development can harm the natural resources upon which these industries rely.¹⁹⁶

Due to the administrative and technical difficulties in making substantive assessments of the relative "economic" impacts of preserving versus developing natural resources, agencies have sought to limit the review of the direct physical and economic impacts on individual property, to avoid discussion of "secondary socioeconomic impacts," and to discourage any judicial balancing by putting an economic value on natural resources.¹⁹⁷ Instead, the constitution might textually embrace the notion that private property owners do not have inherent rights to change the "essential natural character of their land" for development purposes.¹⁹⁸

V. CONCLUSION

Environmental law is an institutionalized tradeoff between, on the one hand, the public's environmental rights and natural resource protection, and, on the other, economic growth and development. This is not a simple tradeoff—industry depends upon natural resources in ways that both preserve and use the environment (e.g., scenic beauty and habitat for fish, and raw materials such as lumber and land). Any state constitution must consider whether and how to balance these interests. Constitutions nearly always recognize some protection of private property and individual rights, yet are environmentalism and public rights in natural resources adequately addressed? To adequately address these interests, Wisconsin might consider expansion of the public trust doctrine to allow for greater public access and to protect biodiversity and groundwater, including an environmental policy statement to symbolize the state's environmental ethic or including a

195. Sinykin, *supra* note 1, at 662 (citing WIS. DEP'T OF TOURISM, 2002 ECONOMIC PROFILES, available at http://agency.travelwisconsin.com/Research/EconomicImpact_Active/02countyprofiles.shtm); see also WIS. DEP'T OF TOURISM, ECONOMIC IMPACT OF EXPENDITURES BY TRAVELERS ON WISCONSIN CALENDAR YEAR 2005 (2006).

196. For example, shoreline development in Wisconsin may result in smaller and fewer fish. Emily Carlson, Univ. of Wis., *Scientists Assess Shoreline Development Impact*, Sept. 3, 2002, <http://www.news.wisc.edu/7775.html> (last visited Mar. 2, 2007). This could potentially impact the recreational fishing industry.

197. See *Wis.'s Envtl. Decade v. Dep't Natural Res.*, 115 Wis. 2d 381, 340 N.W.2d 722 (1983).

198. See generally *Just v. Marinette County*, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972).

stronger affirmative right to a healthy environment, and creating mechanisms to improve standing in environmental cases. Adding these provisions may, at minimum, balance interests between economics and the environment in the Wisconsin Constitution, and, at most, tip the balance of private and public decision making closer to environmentalism.