Hastings Law Journal

Volume 74 | Issue 1 Article 5

12-2023

The Unfulfilled Promise of Environmental Constitutionalism

Amber Polk

The Unfulfilled Promise of Environmental Constitutionalism

AMBER POLK[†]

The political push for the adoption of state-level "green amendments" in the United States has gained significant traction in just the last couple of years. Green amendments add an environmental right to a state's constitution. Five such amendments were made in the 1970s in Pennsylvania, Montana, Hawaii, Massachusetts, and Illinois. This Article looks in depth at the case law that has developed the contours of these constitutional environmental rights in the wake of the political revival of environmental constitutionalism in the United States. I distill two lessons from this jurisprudence. First, constitutional environmental rights are interpreted by the courts as procedural rights, not substantive rights. Second, in interpreting constitutional environmental rights, courts look to other legal doctrines to define the content and scope of the constitutional environmental right, generally on the basis of the constitutional language. I argue that because these rights are interpreted as procedural rights, they fail to effectuate the paradigm shift that we should expect from a rights-based environmentalism, and so the promise of environmental constitutionalism remains unfulfilled.

[†] Assistant Professor of Law, Florida International University College of Law. I thank Buzz Thompson, Greg Ablvasky, Norm Spalding, Ralph Brubaker, Jason Mazzone, Michael Moore, Heidi Hurd, Lesley Wexler, Rob Kar, Eric Johnson, Kenworthy Bilz, Michael Motala, Sophia Kras, Michael Rosenblum, Deirdre Harshman, Matthew Harshman, Jacob Brindley, and the FIU Law faculty for their helpful comments on versions of this Article. The Article also benefited from being presented at the Legal Research in Progress (LRIP) Workshop at Stanford Law School. All errors and omissions are my own.

TABLE OF CONTENTS

INTRODUCTION 125
I. A BRIEF HISTORY OF ENVIRONMENTAL CONSTITUTIONALISM 126
II. ENVIRONMENTAL RIGHTS OF THE STATES 129
A. PENNSYLVANIA 130
1. The Constitutional Text 130
2. The Case Law 130
B. MONTANA 138
1. The Constitutional Text 138
2. The Case Law 139
C. HAWAII 148
1. The Constitutional Text 148
2. The Case Law 148
D. MASSACHUSETTS 155
1. The Constitutional Text 155
2. The Case Law 156
E. ILLINOIS 161
1. The Constitutional Text 161
2. The Case Law 161
III. LESSONS FROM THE STATES 165
A. PROCEDURAL, NOT SUBSTANTIVE, RIGHTS 165
B. BORROWING FROM OTHER LEGAL DOCTRINE 170
IV. THE UNFULFILLED PROMISE 174
V. LESSONS FOR THE STATES 176
CONCLUSION 179

INTRODUCTION

"Each person shall have a right to clean air and water, and a healthful environment."[1] On November 2, 2021, New York voters ratified this constitutional amendment, adding it to the New York Bill of Rights. As the first state to add an environmental right to its constitution in more than forty years,[2] New York has received significant praise for this environmental achievement.[3] The ratification of a new "green amendment" reflects a revival of political interest in environmental constitutionalism in the United States, an idea first debated during the modern environmental movement of the 1960s and 1970s,[4] and recently resurrected in a recent landmark decision by the Pennsylvania Supreme Court.[5]

This political revival of environmental constitutionalism raises several crucial questions. Who holds and can enforce such rights? What do they require or forbid, and against whom? Does it matter that they are constitutional (as opposed to, for example, statutory) rights? What environmental outcomes can they secure? Do answers to any of these questions affect where our environmental movement should focus its energy? While there has been some work done on the international stage to begin answering these questions, not nearly as much has been done in the United States.

The task of this Article, therefore, is to begin answering these questions for the United States. In doing so, I argue that the current state of environmental constitutionalism in the United States is far weaker for achieving environmental goals than the political discourse around the movement would suggest. To defend this claim, I begin in Part I with a brief history of environmental

---

1. N.Y. CONST. art. I, § 19.

2. Prior to 2021, the most recent ratification of a state constitutional environmental right was by Hawaii in 1978. *See* HAW. CONST. art. XI, § 9.

3. *See, e.g.*, *Environmental Rights Amendment Passes in New York*, EARTHJUSTICE (Nov. 3, 2021), https://earthjustice.org/news/press/2021/environmental-rights-amendment-passes-in-new-york.

4. *See generally, e.g.*, A.E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972) (reviewing the state constitutional environmental rights trend of the early 1970s and supporting the expansion of state constitutional environmental rights); Ferdinand F. Fernandez, *Due Process and Pollution: The Right to a Remedy*, 16 VILL. L. REV. 789 (1971) (arguing that we should not look to either statutory or common law for addressing environmental problems, but instead to state constitutions and the Federal Constitution, namely the Due Process Clauses of the Fifth and Fourteenth Amendments); John S. Winder, Jr., *Environmental Rights for the Environmental Polity*, 5 SUFFOLK U. L. REV. 820 (1971) (advocating for the recognition of an environmental right grounded in the Ninth Amendment as well as elsewhere in the law).

5. Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013); *see also* MAYA K. VAN ROSSUM, THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT 249 (2017). Van Rossum has served as the Delaware Riverkeeper since 1996 and as the leader for the Delaware Riverkeeper Network since 1994. She was one of the named plaintiffs in *Robinson Township* and advocates for other state constitutional environmental rights in the United States on the basis of the *Robinson Township* victory. *See id.* at 221–48; *see also* Barry E. Hill, *Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where Do We Go from Here?* 49 ENV'T L. REP. 10362, 10362 (2019) (advocating for environmental constitutionalism through constitutional environmental rights amendments in the United States).

constitutionalism to contextualize where the United States sits relative to the international environmental constitutionalism movement. In Part II, I examine in detail the jurisprudence that has developed the legal contours of five state constitutional environmental rights in the United States. It is this case law that sheds light on the details of what a constitutional environmental right is and can be. In Part III, I identify two broad lessons that can be learned from this case law. First, constitutional environmental rights are largely procedural rights that do not secure entitlement to substantive environmental outcomes. Second, courts look to other legal doctrines to fill out the contours of these constitutional environmental rights. In Part IV, I discuss how the development of environmental constitutionalism has failed to effectuate the paradigm shift we would expect from the constitutionalization of substantive environmental rights. This failure is why the promise of environmental constitutionalism remains largely unfulfilled. Finally, in Part V, I provide pragmatic advice, derived from what we learn in Parts II and III, to state legislators looking to constitutionalize an environmental right.

I. A BRIEF HISTORY OF ENVIRONMENTAL CONSTITUTIONALISM

Environmental constitutionalism makes its aim the constitutionalization of environmental rights.[6] The push to constitutionalize environmental rights in the United States is not a recent phenomenon. It was part of the response to the environmental "awakening"[7] of the 1960s. In 1962, Rachel Carson's *Silent Spring* alerted the public to the significant harms that indiscriminate chemical use by the chemical industry had on all living things in nature.[8] In 1967, the world witnessed the *Torrey Canyon* spill off the coast of England.[9] In 1969, the Cuyahoga River caught fire.[10] By the late 1960s, dead fish lined the shores of Lake Erie, prompting proclamations of the lake's "death" because its waters had become so polluted.[11] In response, at the end of the 1960s, there were calls for legal reform to address environmental pollution. Included in that response were

6. *See* Hill, *supra* note 5; VAN ROSSUM, *supra* note 5, at 221–48; TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 9 (2005) (grounding constitutional environmental rights in the notion of a human right to an adequate environment). *See generally* ERIN DALY & JAMES R. MAY, IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES (Erin Daly & James R. eds., 2018); JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2014); DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT (2011).

7. BOYD, *supra* note 6, at 10.

8. *Id.*

9. Bethan Bell & Mario Cacciottolo, *Torrey Canyon Oil Spill: The Day the Sea Turned Black*, BBC NEWS (Mar. 17, 2017), https://www.bbc.com/news/uk-england-39223308.

10. Michael Rotman, *Cuyahoga River Fire*, CLEVELAND HIST., https://clevelandhistorical.org/items/show/63 (last visited Dec. 5, 2022).

11. Alan Edmonds, *Death of a Great Lake*, MACLEAN'S, Nov. 1, 1965, at 28.

several attempts to add an environmental rights amendment to the Federal Constitution.[12] While those attempts failed, the discussions they facilitated lead to the adoption of constitutional environmental rights in the constitutions of five states: Pennsylvania (1971),[13] Montana (1972),[14] Hawaii (1978),[15] Massachusetts (1972),[16] and Illinois (1970)[17] ("original states"). Two contemporary scholars have even labeled this period as the time when "the United States was at the vanguard of environmental constitutionalism."[18] As history would have it, the United States did not remain in that vanguard for very long.

The environmental awakening of the 1960s simultaneously called for an international response to the problem of environmental pollution and degradation.[19] That response took the form of the world's first eco-summit held in Stockholm, Sweden, in 1972. The result of that summit, the Stockholm Declaration, produced the "most innocuous"[20] of resolutions which ultimately ignited the international environmental constitutionalism movement:[21]

---

12. *See* Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063, 1068 (1992) (recounting several efforts in the late 1960s to add an environmental rights amendment to the Federal Constitution). Perhaps the most notable attempt to add an environmental rights amendment to the Constitution was proposed by Senator Gaylord Nelson of Wisconsin before the first Earth Day in 1970. H.R.J. Res. 1321, 90th Cong. (1968) ("Every person has the inalienable right to a decent environment. The United States and every state shall guarantee this right.").

13. PA. CONST. art. I, § 27.

14. MONT. CONST. art. II, § 3; *id.* art. IX, § 1.

15. HAW. CONST. art. XI, § 9.

16. MASS. CONST. art. XLIX, *amended by* MASS. CONST. art. XCVII.

17. ILL. CONST. art. XI, § 2. Some commentators include Rhode Island in this list. *See, e.g.*, Barry E. Hill, *Environmental Rights, Public Trust, and Public Nuisance: Addressing Climate Injustices Through State Climate Liability Litigation*, 50 ENV'T L. REP. 11022, 11029–30 (2020); Art English & John J. Carroll, *State Constitutions and Environmental Bills of Rights*, *in* THE BOOK OF THE STATES 3–18 (2015), http://knowledgecenter.csg.org/kc/system/files/English%20Carroll%20 2015.pdf. I exclude Rhode Island because Rhode Island's constitutional language and case law make it clear that the essence of the environmental right contained in Article I, Section 17 is an individual "privilege right," not a "claim right," which is what we see in the five original states. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 68 (1913) (distinguishing between claim and privilege rights). The nature of Rhode Island's privilege right is that individuals assert entitlements to use Rhode Island's fisheries and shores as they please, challenging government restrictions on that manner of use. *See, e.g.*, Riley v. R.I. Dep't Env't Mgmt., 941 A.2d 198, 208 (R.I. 2008) (upholding state catch restrictions on certain species targeted by the fishing industry as not violating the "rights of fishery"); Town of Middletown v. Wehrley, No. N3 98-281A, 2000 WL 343902, at *2–3 (R.I. Super. Ct. Mar. 24, 2000) (upholding the banning of horseback riding on the beach during the summer months as not violating the "privileges of the shore"). The original five constitutional environmental rights are in essence claim rights, where courts are faced with determining the content, scope, and force of an alleged duty borne by the government or private party. *See generally infra* Part III.

18. MAY & DALY, *supra* note 6, at 65.

19. BOYD, *supra* note 6, at 12.

20. Oliver A. Houck, *A Case of Sustainable Development: The River God and the Forest at the End of the World*, 44 TULSA L. REV. 275, 305 (2008).

21. *See* MAY & DALY, *supra* note 6, at 66 (calling the Stockholm Conference "the sentinel spark of environmental constitutionalism").

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.[22]

At the time of the Stockholm Declaration, there were no national constitutional environmental rights.[23] Portugal (1976) and Spain (1978) were the first to recognize the right to live in a healthy environment in their constitutions.[24] And by 2011, ninety-two nations had recognized a substantive environmental right in their constitutions.[25] What started as somewhat "idiosyncratic" is now "routine" in constitutions around the world.[26]

During this four-decade-long global trend toward environmental constitutionalism, the five U.S. constitutional environmental rights remained relatively dormant in American environmental law.[27] That has changed significantly in the last ten years, not only because of developments in Pennsylvania, but also because of developments in Montana and Hawaii. Environmental constitutionalism in the United States has emerged from a long hiatus. The jurisprudential developments of these state constitutional environmental rights have produced sharper contours of the ever-elusive content and meaning of a constitutional environmental right.[28] They have also grounded

---

22. U.N. Conference on the Human Environment, *Stockholm Declaration and Action Plan for the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

23. *See* BOYD, *supra* note 6, at 47.

24. *Id.* at 62.

25. *Id.* at 59, 63.

26. *See* MAY & DALY, *supra* note 6, at 66. Furthermore, in October 2021, the United Nations Human Rights Council passed a first-of-its-kind resolution recognizing a clean, healthy, and sustainable environment as a human right. Human Rights Council Res. 48/13 (Oct. 8, 2021). Such a resolution is another step toward affirming the human rights basis for constitutional environmental rights around the world. *See* HAYWARD, *supra* note 6, at 36 (arguing that constitutional environmental rights are grounded on human rights to an adequate environment).

27. The United States has not been alone in its resistance to environmental constitutionalism. Such resistance appears to be the norm among common-law nations. *See* BOYD, *supra* note 6, at 60 (noting that his compiled statistics "indicate that there is ongoing resistance among common-law nations to the constitutional recognition of the right to a healthy environment"). However, the United States goes one step further:

> The United States appears to be the only nation that expressly denies the existence of the right to a healthy environment in both domestic and international law. The US argues that if the right is in fact part of customary international law, it does not apply to Americans because the US government has persistently objected to its recognition.

Id. at 91.

28. *See* MAY & DALY, *supra* note 6, at 30 (noting "the difficulty of defining the scope of the environmental right"); *see also* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 406 (2012) ("By adjudicating cases, courts make constitutional rights."); RICHARD A. POSNER, OVERCOMING LAW 235 (1995) ("Everyone professionally

a political movement working toward expanding "green amendments" to other state constitutions, including New York,[29] New Jersey,[30] Iowa,[31] Kentucky,[32] Maine,[33] New Mexico,[34] Oregon,[35] Vermont,[36] Washington,[37] and West Virginia.[38]

In light of these recent developments in environmental constitutionalism in the United States, we sit at an important juncture for reviewing the movement's legal successes and limits. There is significant jurisprudence developing each right in each of the five original states. This creates an opportunity to conduct a rich comparison of the contours of the environmental rights across those states, beyond the bare constitutional language or isolated opinions.[39] To sketch the contours of these rights, I will examine the cases that have interpreted them. It is to this task I turn next.

II. ENVIRONMENTAL RIGHTS OF THE STATES

Each of the five original states has its own constitutional text and case law developing its constitutional environmental right. Because the original states have developed their constitutional environmental rights independently of one another, this Part discusses each state in a separate Subpart. For ease of reference, within each state, I address the constitutional text separately from the case law. It is important to recognize that none of the original states have the same constitutional text. This is particularly relevant for states looking to propose a green amendment, as the constitutional text plays an important role in determining the contours of the constitutional environmental right. Finally, I

involved with law knows that, as Holmes put it, judges legislate 'interstitially,' which is to say they make law, only more cautiously, more slowly, and in more principled, less partisan, fashion than legislators.").

29. N.Y. CONST. art. I, § 19.

30. Assemb. Con. Res. 80, 219th Leg., Reg. Sess. (N.J. 2020).

31. H.R.J. Res. 12, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).

32. H.B. 107, 2021 Leg., Reg. Sess. (Ky. 2021).

33. S. 196, 130th Leg., 1st Reg. Sess. (Me. 2021).

34. H.R.J. Res. 2, 55th Leg., 2d Reg. Sess. (N.M. 2022).

35. S.J. Res. 5, 81st Leg. Assemb., Reg. Sess. (Ore. 2021).

36. S. 9, 2019–2020 Gen. Assemb., Reg. Sess. (Vt. 2020).

37. H.R.J. Res. 4205, 67th Leg., Reg. Sess. (Wash. 2021).

38. H.R.J. Res. 25, 84th Leg., 1st Reg. Sess. (W.V. 2019). For completeness, I note that a constitutional environmental rights amendment was also proposed in Maryland, see H.B. 517, 2020 Leg., Reg. Sess. (Md. 2020), but was withdrawn by its sponsors less than two months later. *Legislation HB0517*, MD. GEN. ASSEMBLY, https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB0517?ys=2020RS (last visited Dec. 5, 2022).

39. *See* Leong, *supra* note 28 ("[R]ights made in a single context are distorted by the idiosyncrasies of that context. Any context emphasizes certain interests and circumstances at the expense of others, and when rights are made only in a single context, those interests and circumstances deform the right over time. By contrast, rights made in multiple contexts are richer, more balanced, and more comprehensive."). *See generally* David R. Boyd, *The Implicit Constitutional Right To Live in a Healthy Environment*, 20 REV. EUR. CMTY. & INT'L ENV'T L. 171 (2011) (providing an overview of various countries that have recognized an implicit right to a healthy environment without an in-depth review of the jurisprudence developing the scope and content of the right).

discuss each state's case law chronologically to demonstrate how the constitutional environmental right developed over time.

A. PENNSYLVANIA

1. The Constitutional Text

Pennsylvania's constitutional environmental right is located in Article I, Section 27 of the Pennsylvania Constitution. It states:

> 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.[40]

Article I contains Pennsylvania's declaration of "inherent and indefeasible" rights,[41] which means that the environmental right contained in Section 27 is a fundamental right in Pennsylvania.[42] The right is also "inherent in man's nature and preserved rather than created by the Pennsylvania Constitution."[43]

2. The Case Law

The first case to test the Section 27 right in Pennsylvania was also the case that established the right's legal impotence from its ratification in 1971 until the Pennsylvania Supreme Court revamped the right in 2013. The first *Payne v. Kassab* (*Payne I*) case involved a dispute over a street-widening project on River Street in Wilkes Barre, Pennsylvania, that would encroach upon a historical common area, known as the River Common.[44] Relying on their Section 27 rights, the plaintiffs sought to enjoin this street-widening project because of the alleged "negative impact it w[ould] have on the historical, scenic, recreational and environmental values of . . . the River Common."[45] In opposition to the government's motion to dismiss, the plaintiffs urged the Commonwealth Court "to read Article I, Section 27 in absolute terms."[46] However, the court observed that "it becomes difficult to imagine any activity in the vicinity of River Street that would not offend the interpretation of Article I, Section 27 which plaintiffs

40. PA. CONST. art. 1, § 27.

41. *Id.* § 1.

42. *See* Robinson Twp. v. Commonwealth, 83 A.3d 901, 947 (Pa. 2013).

43. *Id.* at 948.

44. *See* Payne v. Kassab (*Payne I*), 312 A.2d 86, 89–92 (Pa. Commw. Ct. 1973), *aff'd on other grounds*, 361 A.2d 263 (Pa. 1976).

45. Payne v. Kassab (*Payne II*), 361 A.2d 263, 264 (Pa. 1976).

46. *Payne I*, 312 A.2d at 94.

urge[d] upon [it].”[47] Unwilling to interpret the constitutional environmental right in absolute terms, the court defaulted to a position of “controlled development” rather than “no development,” and announced a three-part balancing test for evaluating Section 27 claims.[48]

On appeal, the Pennsylvania Supreme Court did not address the Commonwealth Court’s balancing test, nor did it address the question of whether the right is self-executing, on the ground that it had no reason “to explore th[at] difficult terrain.”[49] However, the court did observe a couple of important points. First, Section 27 “speaks in no such absolute terms” as urged by the plaintiffs in the lower court decision. Second, while the commonwealth has duties to conserve and maintain public natural resources for the benefit of all, the commonwealth “is also required to perform *other duties*, such as the maintenance of an adequate public highway system, also for the benefit of all the people.”[50] The court therefore concluded that “[i]t is manifest that a balancing must take place.”[51] The nature of such balancing, in the case of the River Common, was to avoid using it altogether for highway purposes unless there was no feasible alternative, thereby minimizing the environmental or ecological harm from such use.[52]

A lesson from *Payne I* and *II* is that a constitutional environmental right poses a challenge to courts in terms of determining the right’s force among other duties borne by the government, particularly when the complainant demands a particular substantive environmental outcome. The *Payne* courts refused to treat the right as absolute, which would necessitate a categorical ban of the highway-widening project. Yet the only alternative they saw to recognizing an absolute right was to implement a balancing test, where the environmental duty was no more important than numerous other, less fundamental governmental duties. The practical result of *Payne I* and *II* is that Section 27 cases were evaluated under the three-part balancing test articulated by the Commonwealth Court for the next

47. *Id.*

48. That balancing test considered (1) whether there was compliance with all applicable statutes and regulations relevant to the protection of the commonwealth’s public natural resources, (2) whether the record demonstrated a reasonable effort to reduce the environmental incursion to a minimum, and (3) whether the environmental harm that would result from the challenged decision or action so clearly outweighed the benefits to be derived therefrom that to proceed further would be an abuse of discretion. *Id.*

49. *See Payne II*, 361 A.2d at 272–73. The doctrine of self-execution has to do with the question of whether the constitutional language provides a complete and enforceable rule that a court could implement without the aid of legislative enactment. *See* Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution*, 17 HARV. ENV’T L. REV. 333, 333 (1993). Because Pennsylvania and Hawaii have recently found the right to be self-executing, I do not focus on that issue in this Article.

50. *Payne II*, 361 A.2d at 273 (emphasis added).

51. *Id.*

52. *Id.*

forty years,[53] and the right was never really vindicated as a right, let alone a fundamental right until the Pennsylvania Supreme Court's decision in *Robinson Township v. Commonwealth*.

In *Robinson Township*, seven municipalities, an environmental organization, and a physician brought suit for a declaration that major provisions of a recently enacted state oil and gas statute, Act 13,[54] were unconstitutional. While the plaintiffs challenged numerous Act 13 provisions in *Robinson Township*, I focus on those provisions struck down pursuant to Section 27.[55] Act 13 preempted local governments from passing ordinances or making zoning decisions regarding any oil and gas activity in their jurisdictions.[56] Oil and gas drilling operations were made matters of statewide concern and uniformity, subject to the direction and control of the legislature. In terms of protecting waterways from fracking wells, Act 13 provided only "modest oil and gas well restrictions in reference to sensitive water resources." But even that imposed no real duty on the oil and gas industry, as they were "entitled to automatic waivers of setbacks" upon submission of a "sufficient plan" to the Department of Environmental Protection.[57]

Only after the *Robinson Township* plurality determined that (1) the case was justiciable, (2) the plaintiffs had standing,[58] (3) the controversy was ripe for

53. *See* Robinson Twp. v. Commonwealth, 83 A.3d 901, 966 (Pa. 2013) ("In subsequent cases implicating Section 27 challenges, the Commonwealth Court has generally applied its *Payne* test to a wide array of factual circumstances. . . . More importantly, the *Payne* test appears to have become, for the Commonwealth Court, the benchmark for Section 27 decisions in lieu of the constitutional text.").

54. The history of Act 13 is pretty sordid. Act 13 came about in response to local opposition to horizontal hydraulic fracturing ("fracking") on the Marcellus Shale, which sits primarily in central New York, Pennsylvania, and West Virginia. *See* VAN ROSSUM, *supra* note 5, at 6–8. In New York, communities "invoked their municipal authority to ban fracking town by town." *Id.* at 6. In Pennsylvania, such local bans were not clearly established as legal under state law, but most localities were electing to invoke their zoning powers to limit the location of fracking wells. *Id.* at 6–7. According to van Rossum, "[i]n response, the industry got busy in the halls of the state capitol in Harrisburg. Pitching drilling and fracking as a job-creating engine for the state, they covered up the environmental, public safety, and community devastation that was already resulting." *Id.* at 7. Perceiving receptiveness from the Pennsylvania legislature, the oil and gas industries themselves wrote Act 13 and delivered it to state legislators, many of whom did not even read it. *Id.* at 8. Despite significant grassroot efforts to block the bill, in February 2012, it was passed by the legislature, and shortly thereafter, it was signed into law by Pennsylvania Governor Tom Corbett. *Id.*

55. While I limit my discussion to matters decided in 2013, after remand, the case went back up to the Pennsylvania Supreme Court in 2016 to address the severability of statutory provisions, a medical gag rule, and the provision in Act 13 conferring the power of eminent domain on private oil and gas entities, none of which were challenged under Article I, Section 27. *See generally* Robinson Twp. v. Commonwealth, 147 A.3d 536 (Pa. 2016).

56. *See Robinson Twp.*, 83 A.3d at 970 ("The General Assembly's stated intent in Act 13 is to preempt and supersede 'local regulation of oil and gas operations regulated by the [statewide] environmental acts, as provided in [Chapter 33].'").

57. *Id.* at 973.

58. Standing is one of two major legal doctrines (the other being self-execution) that have been focal points of debate in the push to expand legal rights to address environmental problems. Because standing has been

review, and (4) judicial review of the Act did not violate the separation of powers doctrine or constitute a political question—none of which are trivial issues[59]—did the court begin its (re)development of a substantive jurisprudence of the Section 27 environmental right. As an initial matter, Section 27 contains two separate rights of the people. The first "right," contained in the first clause, is a traditional fundamental right of the people that limits governmental power. The second "right," contained in clauses two and three, is related to the notion of a "public trust," though it was not developed by the court along the lines of the so-called "public trust doctrine."[60] These two rights are distinct legal doctrines with the public trust clauses dominating the Section 27 jurisprudence.

With respect to the first clause of Section 27, which declares a substantive right of Pennsylvanians to clean air and pure water, and the preservation of natural, scenic, historic, and aesthetic values of the environment, the *Robinson Township* plurality determined that the right imposes an obligation on all levels of state government to refrain from "unduly infringing upon or violating the 'right.'"[61] The government cannot "unreasonably impair the right," and the benchmark for deciding whether government action unreasonably impairs the right to "clean water" and "pure air" is to treat the right as a "bulwark against actual or likely degradation of, *inter alia*, [state] air water and quality."[62] Despite this language indicating the high importance of the right, the plurality limited its force by concluding that the right does not call for a "stagnant landscape," "the derailment of economic or social development," or "for the sacrifice of other fundamental values."[63] The right is "on par with" other fundamental rights in Article I, and the plurality recognized that this "parity may serve to limit" the invocation of the environmental right against the government in cases where it conflicts with property rights, for example.[64] Finally, conceding that the "development promoting the economic well-being of the citizenry obviously is a legitimate state interest," the plurality concluded that the right simply prevents "unreasonable degradation of the environment" in pursuit of those ends and promotes "sustainable property use and economic development."[65]

The second and third clauses of Section 27 constitute Pennsylvania's "public trust doctrine," although the *Robinson Township* plurality interpreted the clauses through the lens of private trust principles. The second and third clauses

established in Pennsylvania, Montana, and Hawaii in several cases, I do not focus on the issue (which varies among the states).

59. 83 A.3d at 916–30.

60. For a discussion of the common-law public trust doctrine, see generally Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

61. 83 A.3d at 951–52.

62. *Id.* at 951, 953.

63. *Id.* at 953.

64. *Id.* at 953–54.

65. *Id.* at 954.

create a public trust, where (1) the people of Pennsylvania are the trust's settlors; (2) the commonwealth, at all levels of government, is the trustee; and (3) the people of Pennsylvania, including future generations, are the trust's beneficiaries.[66] The people, including future generations, have rights correlative to the commonwealth's duties as trustee with respect to the trust corpus. The trust corpus is a "narrower category of 'public' natural resources than [those contained in] the first clause," and it includes "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."[67]

In accordance with principles of private trust law at the time Section 27 was ratified,[68] the commonwealth as trustee has duties to comply with the terms of the trust; in other words, "to conserve and maintain" the public natural resources of Pennsylvania, as well as the fiduciary duties that are imparted on all trustees, such as the duties of prudence, loyalty, and impartiality.[69] Whereas the commonwealth's duties under clause one are entirely negative, the commonwealth's trustee duties under clauses two and three are both negative and positive.[70] As to the commonwealth's negative duty as trustee, the commonwealth must "refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action."[71] As to the commonwealth's positive duty as trustee, it must "act affirmatively to protect the environment, via legislative action."[72] These trustee duties of the commonwealth "do not require a freeze of the existing public natural resource stock."[73] They "are tempered by legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development."[74] In determining the scope of the trustee's duties to the present generation as opposed to future generations, the plurality relied on the trustee's duty of impartiality, which does not demand equal treatment, but only equitable treatment in light of the beneficiaries' interests. Section 27 "offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or

66. *Id.* at 954–56.
67. *Id.* at 955.
68. *Id.* at 956.
69. *Id.* at 957.
70. *Id.* at 957–58.
71. *Id.* at 957. This is technically both a negative and affirmative duty, as the commonwealth is itself obligated to not unreasonably degrade the trust corpus or prevent private parties from unreasonably degrading the trust corpus.
72. *Id.* at 958.
73. *Id.*
74. *Id.*

insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term."[75]

In applying these newly articulated contours of the constitutional environmental right, the plurality interpreted the constitutional challenge to Act 13 to "implicate primarily the Commonwealth's duties as trustee" under clauses two and three.[76] The concerns with the challenged provisions of Act 13 can be distilled into two categories: (1) the degradation of the trust corpus, and (2) the disparate impacts between trust beneficiaries. First, the preemption of a local government's ability to enact land-use measures and eliminate current land-use restrictions "fundamentally disrupted" citizens' expectations concerning the environment in which they were living, including habitability and ownership interests and expectations. Such actions failed to respect the fact that protection of environmental values is "a quintessential local issue that must be tailored to local conditions."[77] Because Act 13's preemption of local land governance permitted "industrial oil and gas operations as a use 'of right' in every zoning district throughout the Commonwealth, including in residential, commercial, and agricultural districts,"[78] it "alter[ed] existing expectations of communities and property owners and substantially diminishe[d] natural and aesthetic values of the local environment, which contribute significantly to a quality of environmental life in Pennsylvania."[79] Accordingly, it degraded the corpus of the trust. Second, this preemption of local land governance that permitted industrial uses in all zoning districts ignored the fact that "some properties and communities will carry much heavier environmental and habitability burdens than others."[80] Act 13's "blunt approach fail[ed] to account for th[e] constitutional command" to "treat all beneficiaries equitably in light of the purposes of the trust,"[81] causing disparate impacts among the trust beneficiaries contrary to the trustee's duty of impartiality. Accordingly, the preemption provisions of Act 13 failed to pass constitutional muster, even though the court acknowledged that the Commonwealth made a "compelling policy argument[]" that Act 13 provided economic and energy benefits pursuant to its duty to provide for the general welfare.[82]

As to the oil and gas industry's entitlement to automatic waivers of setbacks under Act 13, the court concluded that that provision was unconstitutional on the same two grounds as the preemption provisions. Because

75. *Id.* at 959.
76. *Id.* at 974.
77. *Id.* at 977, 979.
78. *Id.* at 979.
79. *Id.*
80. *Id.* at 980.
81. *Id.*
82. *Id.* at 981.

the waiver-of-setbacks scheme lacked "identifiable and readily-enforceable environmental standards for granting well permits or setback waivers," it failed to "conserve and maintain" the waters of the commonwealth.[83] Additionally, it was "non-responsive to local concerns," which would cause "a disparate impact upon beneficiaries of the trust," and was therefore "irreconcilable with the trustee's duty of impartiality."[84]

As a plurality opinion, *Robinson Township* had a brief period of uncertainty as to its precedential value until the Pennsylvania Supreme Court took up its next Section 27 case in 2017 in *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF II*).[85] *PEDF II* is another citizen suit that challenged several state statutes reallocating revenue derived from leasing state forest and park lands for oil and gas extraction.[86] The revenue at issue included gas-well rents, royalties, and bonus payments, paid from the oil and gas companies to the Commonwealth to search for and extract natural gas from state lands.[87] The constitutional challenge regarding the allocation of this revenue is well-summarized by Professor John Dernbach:

> Three legislative amendments to the state fiscal code between 2008 and 2014 redirected a total of $335 million that would have been used for conservation purposes under the [Lease Fund Act] to the general fund, where it is appropriated for a variety of state government purposes. In addition, the Legislature prevented [the Pennsylvania Department of Conservation and Natural Resources,] DCNR[,] from spending any [Lease Fund Act] royalties without prior legislative authorization. Finally, the Legislature began using [Lease Fund] revenue to support the overall budget of DCNR, rather than obtaining that budget money from the general fund and using [Lease Fund] money for conservation purposes related to oil and gas extraction.[88]

In deciding this case, the Pennsylvania Supreme Court resolved several questions left open by the *Robinson Township* opinion. First, the *PEDF II* majority explicitly rejected the three-part *Payne* balancing test that had been used by lower courts to evaluate Section 27 challenges for forty years and had been left in legal limbo by the *Robinson Township* plurality.[89] Second, the *PEDF II* court adopted the Section 27 jurisprudential principles articulated in *Robinson Township*.[90] This eliminated the possibility that the careful environmental rights jurisprudence developed by the *Robinson Township* plurality would be eroded

83. *Id.* at 983–84.

84. *Id.* at 984.

85. 161 A.3d 911 (Pa. 2017).

86. *Id.* at 916.

87. *Id.* at 920.

88. *Id.* at 925 (quoting John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENV'T. L. 463, 488 (2015)).

89. *Id.* at 930.

90. *Id.*

in future cases as non-binding. Third, the *PEDF II* court confirmed that the public trust provisions of Section 27 right were self-executing and did not require implementing legislation.[91]

In resolving the dispute, the determinative legal principle was that under Pennsylvania trust law, proceeds from the sale of trust assets are part of the trust principal, remain part of the corpus of the trust, and can only be used in accordance with the trust's purpose.[92] In the case of the oil and gas revenues at issue in *PEDF II*, the only question then was whether the royalties, rents, and bonus payments from the oil and gas leases constituted "sales of trust assets," and whether the diversion of those revenues by the challenged legislation put trust assets toward ends inconsistent with the trust's purpose, including purposes that were not "conserving and maintaining" the public natural resources.[93] The *PEDF II* court found that the royalty payments constituted a sale of the environmental trust's assets and that those royalties were being "spent in a multitude of ways entirely unrelated to the conservation and maintenance of our public natural resources" under the challenged legislation.[94] Therefore, the court held that the legislation was facially unconstitutional.[95] The classification of rents and bonus payments under 1971 Pennsylvania trust law was remanded to the Commonwealth Court for initial determination.[96]

These three cases, *Payne*, *Robinson Township*, and *PEDF II*, constitute the overarching framework of Pennsylvania's constitutional environmental jurisprudence at this time. The Commonwealth Court continues to fill in the details of this framework as Section 27 cases are brought before it.[97] For example, in addressing challenges to regulations under the remaining provisions of Act 13, the Commonwealth Court determined that playground owners are not Section 27 trustees, and that no state agency can elevate playground owners to that status.[98] The Commonwealth Court has also held, in an unreported opinion, that mandamus is an available remedy under Section 27 when challenging

91. *Id.* at 937.

92. *Id.* at 935.

93. *See id.* at 939 (emphasis omitted) ("[T]he legislature violates Section 27 when it diverts proceeds from oil and gas development to a non-trust purpose without exercising its fiduciary duties as trustee.").

94. *Id.* at 937.

95. *Id.* at 938.

96. *Id.* at 939. On remand, the Commonwealth Court held that the rental and bonus payments did not constitute income generated from trust assets. *See* Pa. Env't Def. Found. v. Commonwealth, 214 A.3d 748, 773 (Pa. Commw. Ct. 2019). This holding was reversed by the Pennsylvania Supreme Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 255 A.3d 289, 293 (Pa. 2021).

97. *See generally* John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 WIDENER COMMONWEALTH L. REV. 147 (2020) (discussing recent Commonwealth Court cases involving Article I, Section 27).

98. Marcellus Shale Coal. v. Dep't of Env't Prot., 193 A.3d 447, 485 (Pa. Commw. Ct. 2018).

agency inaction regarding contamination clean up.[99] Perhaps most important, however, is the fact that "[i]n the cases decided thus far, the Commonwealth Court has rejected all Section 27 challenges to local government decisions permitting shale gas development."[100] This means that *Robinson Township* only commanded that the state government could not wholly usurp local governments' decision-making authority with respect to oil and gas drilling in Pennsylvania. Indeed, the Commonwealth Court upheld, under Section 27, one locality's decision to allow "oil and gas well operations in all zoning districts so long as it satisfie[d] enumerated standards designed to protect the public health, safety, and welfare."[101] This development calls into question the role of constitutional environmental rights in setting substantive environmental standards as opposed to merely playing a role in citizen participation in self-governance. This is a reoccurring theme in several other states' jurisprudence that I will revisit in Part III. For now, I transition to Montana's constitutional environmental right and its attendant jurisprudence.

B. MONTANA

1. The Constitutional Text

Montana's constitutional environmental right is located in two different constitutional provisions. Article II, Section 3 states: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment. . . . In enjoying these rights, all persons recognize corresponding responsibilities."[102] Article IX, Section 1 states:

> (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 prevent unreasonable depletion and degradation of natural resources.[103]

99. Del. Riverkeeper Network v. Pa. Dep't of Env't Prot., No. 525 M.D. 2017, 2018 WL 3554639, at *2–3, *5–6 (Pa. Commw. Ct. June 4, 2018). The Commonwealth Court recently denied the plaintiff's motion for partial summary judgment in this case. Del. Riverkeeper Network v. Pa. Dep't of Env't Prot., No. 525 M.D. 2017, 2021 WL 3354898, at *1 (Pa. Commw. Ct. Aug. 3, 2021). This case will be the first to decide the scope of the Pennsylvania Department of Environmental Protection's positive substantive environmental duty to clean up a pollution site, including the speed with which such cleanup is required. *See infra* Part IV.A.

100. Dernbach, *supra* note 97, at 169.

101. Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 679 (Pa. Commw. Ct. 2018).

102. MONT. CONST. art. II, § 3.

103. *Id.* art. IX, § 1.

The Article II, Section 3 environmental right is an inalienable and fundamental right.[104] Article IX of the Montana Constitution contains seven sections, all of which are devoted to addressing the management of Montana's natural resources. Contrary to Article II, Article IX does not speak of fundamental or inalienable rights. This is a discrepancy that the Montana Supreme Court had to address in developing its constitutional environmental rights jurisprudence.

2. The Case Law

Montana's constitutional environmental right received a brief glance from the Montana Supreme Court in 1979[105] but otherwise remained in relative obscurity until the court revived it in 1999. In *Montana Environmental Information Center v. Department of Environmental Quality* (*MEIC*), three environmental coalitions filed suit over an exploration license for gold mining that the Montana Department of Environmental Quality ("DEQ") granted to a private mining company.[106] The plaintiffs alleged that DEQ had illegally amended the exploration license "to allow for the discharge of groundwater containing high levels of arsenic and zinc into the shallow aquifers of the Blackfoot and Landers Fork rivers," without performing the statutorily required non-degradation review.[107] The plaintiffs further argued that to the extent such a review was exempted under another section of the statute ("exemption statute"), such a statutory provision violated their constitutional environmental rights provided in Article II, Section 3 and Article IX, Section 1.[108]

On appeal, the Montana Supreme Court had to decide (1) whether the plaintiffs had standing to challenge the exemption statute, and, if so, (2) whether the exemption statute implicated either Article II, Section 3 or Article IX, Section 1.[109] The court did not focus long on the standing question. Although Montana's standing doctrine requires that a plaintiff show injury distinguishable from injury to the public generally, such injury need not be exclusive to the plaintiff.[110] Reasoning that the plaintiffs would be more particularly affected by the water discharges permitted by the exploration license because the plaintiffs

104. Mont. Env't Info. Ctr. v. Dep't of Env't Quality (*MEIC*), 988 P.2d 1236, 1246 (Mont. 1999).

105. *See* Kadillak v. Anaconda Co., 602 P.2d 147 (Mont. 1979), *superseded by statute*, MONT. CODE ANN. § 75-1-102 (2015), *as recognized in* Park Cnty. Env't Council v. Mont. Dep't Env't Quality, 477 P.3d 288 (Mont. 2020). The *Kadillak* court was tasked with interpretating the Montana Environmental Policy Act and refused to give constitutional status to the statutory provision at issue on the basis of the constitutional environmental right. *See id.* at 138.

106. 988 P.2d at 1237.

107. *Id.* at 1237–38.

108. *Id.* at 1238.

109. *Id.* at 1242.

110. *Id.*

fished and recreated in those waters, the court concluded they had standing.[111] The court also noted concern over "effectively immuniz[ing] the statute from constitutional review" if standing were denied.[112]

In addressing the question of implication, the court had to develop its environmental rights jurisprudence in two ways. First, it had to reconcile the right in Article II, Section 3 with the right in Article IX, Section 1, because in Montana, fundamental constitutional rights are subject to strict scrutiny review while other state constitutional rights are subject to "middle-tier" scrutiny review.[113] While this rule would entail strict scrutiny for Article II, Section 3 analysis and middle-tier scrutiny for Article IX, Section 1 analysis, the court determined that the constitutional environmental right, as embodied in those two "interrelated and interdependent" constitutional provisions, is a fundamental right, and that "any statute *or rule* which implicates that right must be strictly scrutinized."[114] Perhaps because of the plain language of Article IX, Section 1, the court concluded that both state *and private action* implicating either constitutional provision must be evaluated under strict scrutiny review.[115]

Second, in articulating when the environmental right is implicated, the court determined that the plaintiffs were *not* required to show "that public health is threatened or that current water quality standards are affected to such an extent that a significant impact has been had on either of the Landers Fork or Blackfoot rivers."[116] Looking to the framers' intent, the court concluded that the constitutional environmental right "provide[s] language and protections which are both anticipatory and preventative."[117] Beyond this, the *MEIC* court provided no general information for concluding when the environmental right *is* implicated. In deciding *MEIC*, the court determined that the environmental right was implicated by the challenged exemption statute because (1) the proposed pumping tests under the exploration license "would have added a known carcinogen such as arsenic to the environment in concentrations greater than the concentrations present in the receiving water," and (2) DEQ had concluded that discharges containing carcinogenic parameters greater than the concentrations of those parameters in the receiving water has a significant impact, statutorily requiring non-degradation review.[118] We can hardly distill a generalizable implication test for future cases from the court's reasoning here.

---

111. *Id.* at 1243.

112. *Id.* at 1242.

113. *Id.* at 1244–45.

114. *Id.* at 1246.

115. *Id. But see id.* at 1250 (Leaphart, J., concurring) ("The conclusion that we will apply strict scrutiny analysis to private action is dicta which, I submit, may well prove unworkable in the future.").

116. *Id.* at 1249 (majority opinion).

117. *Id.*

118. *Id.*

Finally, while the lower court had not performed any scrutiny analysis because it found the environmental right was not implicated, the *MEIC* court resolved the case by declaring the exemption statute as-applied rather than facially unconstitutional, because the environmental right "arbitrarily exclude[d] certain 'activities' from non-degradation review with regard to the nature or volume of the substances being discharged."[119] This is no scrutiny analysis at all.[120]

While *MEIC* was a relatively groundbreaking decision at the time because it held the environmental right in Montana's constitution to be a fundamental right, a comprehensive rights jurisprudence remained lacking until very recently. After the *MEIC* decision, the Montana Supreme Court developed its environmental rights jurisprudence in a series of smaller, scattered matters. In 2001, the court gave the environmental right some contour in the context of the legal obligations of private parties.[121] In *Cape-France Enterprises v. Estate of Peed*, two private parties had entered into a contract for the sale of a tract of land upon which the buyers planned to build a motel or hotel.[122] During the process of surveying and subdividing the property, the seller became aware of potential pollution issues with the groundwater supply for the property.[123] A test well would need to be drilled to determine whether the pollution situation exposed the seller to extensive treatment costs as well as potential costs for spreading the pollution.[124] Faced with this potential financial liability "of an unquantifiable nature,"[125] the seller sued to rescind the contract.[126] The lower court held, and the Montana Supreme Court agreed, that the seller could rescind the contract on the basis of mutual mistake of fact, impossibility, and impracticability of performance grounds.[127]

While *Cape-France* appears to be a fairly routine contract case, the Montana Supreme Court injected the constitutional environmental right into its analysis as the "decisive" factor.[128] The court explicitly noted that Article IX, Section 1 applies the environmental right's "protections and mandates," as

119. *Id. But see id.* at 1250 (Leaphart, J., concurring) ("I do not see how the Court can logically avoid declaring that the statute is unconstitutional on its face.").

120. One contemporary commentator described it as such: "The Supreme Court in *MEIC* had rendered a decision of monumental significance to the citizens of this state without fulfilling what ought to be even the minimum standards of judicial decision making." John L. Horwich, *MEIC v. DEQ: An Inadequate Effort To Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 MONT. L. REV. 269, 270 (2001).

121. *See* Cape-France Enters. v. Est. of Peed, 29 P.3d 1011 (Mont. 2001).

122. *Id.* at 1013.

123. *Id.*

124. *Id.*

125. *Id.* at 1016.

126. *Id.* at 1012.

127. *Id.* at 1014, 1016.

128. *Id.* at 1016.

discussed in *MEIC*, to private action.[129] The court then concluded that the contract required the seller to violate the Montana Constitution by requiring the seller to drill the test well.[130] Because there was "substantial evidence that [drilling a test well] m[ight] cause significant degradation of uncontaminated aquifers and pose serious public health risks," the seller could not comply with both its constitutional duty and the terms of the contract.[131] Furthermore, the court concluded that mandating specific performance of the contract would involve the state in violating the public's Article II, Section 3 environmental right.[132] Accordingly, the contract was unlawful and could be rescinded.[133]

The next developments in the constitutional environmental right came in 2007 through a pair of cases decided within two weeks of each other, which sought to establish the existence of a constitutional tort pursuant to the environmental right in Article II, Section 3 and Article IX, Section 1.[134] The first case, *Sunburst School District No. 2 v. Texaco, Inc.*, was a pollution case where the defendant Texaco had operated a gasoline refinery just outside the town of Sunburst, Montana, that had heavily polluted the surrounding soil and subsurface groundwater during the first half of the twentieth century.[135] The pollution was known to Texaco as early as 1955, and for a variety of reasons, Texaco made minimal cleanup efforts over the years.[136] Texaco finally proposed a cleanup solution of "monitored natural attenuation" ("MNA") in 2003 to remediate the groundwater, which was contaminated with a known carcinogen, benzene.[137] A cleanup based on MNA meant that Texaco would simply monitor "the level of benzene in the groundwater with the expectation that the environment w[ould] naturally degrade the benzene over a period of [twenty to one hundred] years" to safe levels.[138] This option would cost Texaco approximately $1 million, instead of potentially more than $30 million dollars, to perform active remediation.[139] DEQ, which was tasked with approving Texaco's remediation plan, proposed the MNA for public comment in 2003.[140]

Sunburst's litigation against Texaco in this case started two years prior in 2001 and alleged numerous causes of action, including trespass, strict liability

129. *Id.* at 1017.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *See* Shammel v. Canyon Res. Corp., 167 P.3d 886 (Mont. 2007); Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079 (Mont. 2007).
135. 165 P.3d. at 1083.
136. *Id.* at 1083–84.
137. *Id.* at 1084.
138. *Id.*
139. *Id.*
140. *Id.*

for abnormally dangerous activity, public nuisance, wrongful occupation of property, constructive fraud, and violation of the constitutional environmental right.[141] What matters for the purposes of this Article is that when the case went to trial and the jury awarded damages against Texaco, the trial "court instructed the jury to award damages if Texaco had violated Sunburst's constitutional right to a clean and healthful environment."[142] The jury awarded the plaintiffs a single amount of $226,000 for private nuisance, public nuisance, and constitutional tort, among other damages not relevant for our purposes.[143]

On appeal, Texaco argued that Montana's constitutional environmental right did not support a cause of action for money damages—in other words, that the right was not self-executing—thus challenging the $226,000 damages award.[144] By adhering closely to the "long-standing principle that courts should avoid constitutional issues wherever possible,"[145] the *Sunburst* court resolved Texaco's claim without addressing the question of whether Montana's constitutional environmental right is self-executing.[146] In doing so, the court relied on an earlier, non-environmental rights case where it concluded that "the absence of any other remedy supported the establishment of a constitutional tort."[147] The court then reasoned that because the plaintiffs had adequate statutory or common-law remedies, the trial court had erred in directing the jury to award damages for a constitutional tort under the environmental right provisions.[148] The Montana Supreme Court affirmed this conclusion in *Shammel v. Canyon Resources Corp.*, decided two weeks after *Sunburst*.[149] Thus, Article II, Section 3 and Article IV, Section 1 do not create an independent cause of action for a constitutional environmental tort when a claimant has other remedies available.[150]

---

141. *Id.*

142. *Id.* at 1085.

143. *Id.*

144. *Id.* at 1092.

145. Cape-France Enters. v. Est. of Peed, 29 P.3d 1011, 1018 (Mont. 2001) (Leaphart, J., concurring).

146. *Sunburst*, 165 P.3d at 1093.

147. *Id.* (citing Dorwart v. Caraway, 58 P.3d 128, 137 (Mont. 2002)).

148. *Id.* Because the jury instructions substantially reflected the jury instructions proposed by Texaco, the court also concluded that no remand was required on the $226,000 damages award. *Id.* at 1094–95. It is important to note that the court's reasoning in *Sunburst* reflects a logical error known as denying the antecedent. *See* Brett Gaul, *Denying the Antecedent*, *in* BAD ARGUMENTS: 100 OF THE MOST IMPORTANT FALLACIES IN WESTERN PHILOSOPHY 46–47 (Robert Arp et al. eds., 2018). Even if the lack of availability of adequate remedies at statutory or common law entails that finding a constitutional tort is appropriate, it does not follow that the availability of adequate remedies at statutory or common law entails that finding a constitutional tort is inappropriate. *See id.*

149. Shammel v. Canyon Res. Corp., 167 P.3d 886, 888 (Mont. 2007) ("[W]here adequate alternative remedies exist under the common law or statute, the constitutional right . . . does not support a cause of action for money damages between two private parties.").

150. *See id.*

Five years after the decisions in *Sunburst* and *Shammel*, the Montana Supreme Court was called again to develop its constitutional environmental right, this time in the context of Montana's Environmental Policy Act ("MEPA") and the underdeveloped strict scrutiny analysis suggested in *MEIC*.[151] *Northern Plains Resource Council v. Board of Land Commissioners* involved a dispute over what government actions were required under MEPA prior to executing leases with a private coal company to strip mine state lands for coal.[152] As a general matter, "MEPA is essentially procedural and does not demand any particular substantive decisions."[153] MEPA simply "requires State agencies to review, through an EIS [Environmental Impact Statement], major actions that significantly affect the quality of the human environment so that the agencies may make informed decisions."[154] Thus, the issue in *Northern Plains* was whether the State Land Board, responsible for executing the coal lease at issue, was exempt from conducting an EIS prior to executing the coal lease under the theory that MEPA's provision allowing such an exemption was unconstitutional under Article II, Section 3 and Article IX, Section 1.[155]

The *Northern Plains* court simultaneously reaffirmed and muddled some matters addressed in *MEIC*. First, the court reaffirmed that the right to a clean and healthful environment is a fundamental right and that any statute that impacts that right is subject to strict scrutiny.[156] The court also reaffirmed its strict scrutiny framework by specifying that strict scrutiny requires "the State to provide a compelling interest for" the exemption provision's existence.[157] But the court muddled the issue of which level of scrutiny applies to Article IX, Section 1 challenges by concluding that "'middle-tiered' scrutiny is not called for here, because the statute does not adversely impact constitutional rights provided for outside of Article II, such as the provisions of Article IX . . . ."[158]

Despite all this discussion, the court decided *Northern Plains* on implication, not strict scrutiny, grounds. In essence, because the leases at issue only granted the coal-mining company the exclusive right to apply for state permits to actually commence mining activities,[159] "the act of issuing the leases did not impact or implicate the right to a clean and healthful environment . . . ."[160] Yet again, the *Northern Plains* court provided no general framework for evaluating when the environmental right is implicated.

151. N. Plains Res. Council v. Mont. Bd. of Land Comm'rs, 288 P.3d 169 (Mont. 2012).
152. *See id.* at 171–72.
153. *Id.* at 173.
154. *Id.* MEPA, therefore, parallels the federal National Environmental Policy Act. 42 U.S.C. § 4321 *et seq.*
155. 288 P.3d at 172.
156. *Id.* at 174.
157. *Id.*
158. *Id.*
159. *Id.* at 173.
160. *Id.* at 174.

In December 2020, the Montana Supreme Court finally performed a more complete implication and scrutiny analysis of a statute challenged under Article II, Section 3 and Article IX, Section 1.[161] *Park County Environmental Council v. Montana Department of Environmental Quality* involved another citizens' challenge to a mining exploration license granted by DEQ to a private mining company.[162] On appeal, the court determined, and DEQ conceded, that the environmental impact analyses were insufficient in several respects under MEPA.[163] The relevant issue in the case was the matter of appropriate remedies for a MEPA violation, specifically the status of the exploration license while the case was remanded to DEQ to conduct the proper environmental impact analyses.[164] Of crucial importance was the fact that MEPA had been amended in 2011 by the Montana legislature to prohibit equitable relief for MEPA violations.[165] It was those amendments that the *Park County* plaintiffs challenged as violating the environmental right contained in Article II, Section 3 and Article IX, Section 1.

With respect to its implication analysis, the *Park County* court developed two lines of thought. First, the court reexamined the text and history of the environmental right amendments and again emphasized the "preventative" nature of the right.[166] The court recognized the importance of the remedy of equitable relief to prevent potential harm,[167] and relying on the constitutional text, concluded that "equitable relief must play a role in the constitutional directive."[168] Second, the court determined that MEPA, although enacted a year prior to the ratification of the constitutional environmental right, "serves a role in enabling the Legislature to fulfill its constitutional obligation to prevent environmental harms infringing upon Montanans' right to a clean and healthful environment."[169] Considering the 2011 MEPA amendments in light of these two conclusions, the court determined that the amendments "constituted a significant departure from MEPA as it existed since its enactment less than a year prior to

161. Park Cnty. Env't Council v. Mont. Dep't of Env't Quality, 477 P.3d 288 (Mont. 2020).

162. *See id.* at 294–95.

163. *Id.* at 302.

164. *Id.*

165. *Id.*

166. *See id.* at 303–04 (noting "the constitutional text's unambiguous reliance on preventative measures" indicates that "Montanans have a right . . . to be free of [environmental harm] in the first place" and that "[t]he delegates' adamant statements during the convention informed [the court's] conclusion that these provisions were meant to be 'both anticipatory and preventative'").

167. *See id.* at 304 ("[W]e note that equitable relief, unlike monetary damages, can avert harms that would have otherwise arisen.").

168. *Id.*

169. *Id.* at 305; *see also id.* at 306 ("The undeniable proximity in time and substance between these two lawmaking efforts informs our conclusion that the constitutional obligations at issue encompass the forward-looking mechanisms found within MEPA.").

Montana's constitutional Convention."[170] The 2011 amendments made DEQ's MEPA error "essentially irreversible" with "the cost of that error accru[ing] to Montanans' constitutionally-guaranteed environmental rights."[171] Therefore, the 2011 amendments to MEPA implicated the constitutional environmental rights provisions.[172] While this provides more detail regarding implication than *MEIC*, it still falls short of providing any general framework for evaluating whether a statute implicates the constitutional environmental right in Montana.

Turning to the strict scrutiny analysis, none of the parties even contested that the 2011 MEPA amendments were "narrowly tailored to further a compelling government interest."[173] Yet the court went on to determine that they were unconstitutional under Article II, Section 3 and Article IX, Section 1.[174] The interesting part of the court's scrutiny analysis was therefore not in applying strict scrutiny to the challenged statute, but in refusing to balance the constitutional environmental right against the defendant mining company's alleged property rights, which are also found in the Montana Constitution.[175] The court noted that MEPA itself does not restrict the mining company's use of its private property.[176] Instead, the underlying substantive environmental statute governing mining and reclamation in Montana, the Metal Mine Reclamation Act ("MMRA"), restricts the use of private property for mining.[177] The court then noted that government regulation of the mining industry had never been held to unduly burden private property rights.[178] Therefore, vacating the exploration permit while DEQ conducted a proper MEPA analysis amounted to nothing more than requiring the mining company to "undergo the same wait now it should have experienced before," and thus "[t]here [wa]s no argument that simply waiting for DEQ to properly review and act upon an application constitutes an infringement of property rights."[179] While there was no balancing of property rights against the constitutional right in *Park County*, because no property rights were burdened, the court distinguished in dicta that "[b]alancing may be appropriate when a case presents an irreconcilable conflict between the co-equal rights of the parties."[180] In sum, the court held the 2011 amendments to be facially unconstitutional.[181]

170. *Id.* at 306.
171. *Id.* at 307.
172. *Id.* at 307–08.
173. *Id.* at 309.
174. *Id.*
175. *See* MONT. CONST. art. II, §§ 3, 17, 29.
176. *Park Cnty.*, 477 P.3d at 308.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 309–10.

The most recent Montana constitutional environmental right case was decided in early 2021.[182] There, the Montana Supreme Court reaffirmed the principle that determined *Northern Plains* and further explained the importance of the nature of available remedies at issue in *Park County*. *Clark Fork Coal v. Montana Department of Natural Resources & Conservation* is a complicated, twenty-year-long environmental case spanning both federal and state environmental litigation.[183] In short, the challenged statute excluded the citizen-plaintiffs from raising certain water quality objections to parts of a "beneficial use" water permit issued under the Montana Water Use Act ("MWUA") in connection with plans for a mining operation. Raising such an objection would trigger a statutory requirement on the permit-holder to show the safety of the proposed water discharges, but only DEQ or a local water quality district could raise the objection pursuant to the relevant statute.[184] The plaintiffs alleged that this deprived them of "an adequate remedy to protect affected area surface waters from degradation by advance review."[185]

First, in further developing *Park County* on the issue of remedies, the court concluded that the environmental right did not entitle the plaintiffs "to any particular type or means of remedy."[186] The court looked to other statutes, in particular MEPA and the MMRA, to evaluate whether the plaintiffs, through DEQ, had an opportunity to object to the proposed water discharges prior to the discharges occurring.[187] Second, appealing to the rationale in *Northern Plains*, the court found that MEPA review under the MMRA would be triggered prior to the occurrence of any of the water discharges described in the "beneficial use" permit.[188] Indeed, the beneficial use permit did not authorize any mining-related activity that could degrade the waters at issue.[189] Because the plaintiffs still possessed independent MEPA and MMRA remedies for advance environmental review and protection of the waters subject to the beneficial use permit, their environmental right was not implicated, and strict scrutiny analysis of the statute limiting the class of objectors to DEQ and local water quality districts did not apply.[190]

Montana's case law demonstrates the challenge that a constitutional environmental right might pose for a court. Unlike the Pennsylvania Supreme Court, which could look to the trust language in its constitutional provision, the

182. *See generally* Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation, 481 P.3d 198 (Mont. 2021).
183. *See id.* at 201–12.
184. *See id.* at 217.
185. *Id.*
186. *Id.* at 218.
187. *Id.* at 219.
188. *Id.* at 221.
189. *Id.* at 223.
190. *Id.* at 223–24.

Montana Supreme Court lacks similar textual guidance upon which it can rely to develop the contours of its constitutional environmental right. Implication and scrutiny analysis are certainly available doctrines to import into the environmental rights analysis, but it is difficult to articulate a generalized test for when government (or private) action implicates the environmental right. This is all the more troubling when we consider that implication, at least in the Montana case law thus far, is generally determinative of the environmental rights challenge. Furthermore, while Montana treats its constitutional environmental right as a fundamental right, the Montana Supreme Court, like the Pennsylvania Supreme Court, clearly anticipated future conflicts between the environmental right and other important rights (such as property rights).

The case law in Pennsylvania and Montana demonstrates the relevance of how the constitutional environmental right is drafted. Hawaii has yet a third way of drafting a constitutional environmental right, which has resulted in a third kind of environmental rights jurisprudence.

C. HAWAII

1. The Constitutional Text

Hawaii's constitutional environmental right is contained in Article XI, Section 9 of the Hawaiian Constitution and states:

> 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.[191]

Article XI of the Hawaiian Constitution contains provisions governing the "Conservation, Control and Development of Resources," so the environmental right is not among the state's fundamental rights in Article I.[192]

2. The Case Law

As early as the 1980s, the Hawaii legislature seemed to recognize that Section 9 "ha[d] given the public standing to use the courts to enforce laws intended to protect the environment."[193] However, that right had little efficacy

191. HAW. CONST. art. XI, § 9.

192. *See id.* art. I, § 2 ("All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.").

193. Kahana Sunset Owners Ass'n v. Maui Cnty. Council, 948 P.2d 122, 124 (Haw. 1997) (quoting Act 80, § 1, 1986 Haw. Sess. Laws 104, 104).

until the Hawaii Supreme Court revitalized it in a land-use case in 2010.[194] In *County of Hawaii v. Ala Loop Homeowners*, a new charter school acquired agriculturally zoned land upon which it intended to build its new campus.[195] A dispute arose between the charter school and neighboring residents regarding whether the charter school was required to obtain a "special use permit" under state law, Hawaii Revised Statutes Chapter 205 ("Chapter 205").[196] The Section 9 issue that went up to the Hawaii Supreme Court was whether the neighboring residents had a private right of action to enforce the Chapter 205 permit requirement against the charter school.[197]

As a preliminary matter, the Hawaii Supreme Court examined an earlier lower court decision that addressed the Chapter 205 private right of action issue.[198] In *Pono v. Molokai Ranch, Ltd.*, the Hawaii Intermediate Court of Appeals ("ICA") applied a three-factor test to conclude that Chapter 205 did not provide a private right of action for individual enforcement.[199] The ICA reasoned that (1) Chapter 205 does not explicitly provide for a private right of action; (2) there was no indication of legislative intent, either explicit or implicit, to provide a private right of action to enforce Chapter 205; and (3) recognizing a private right of action would not be consistent with the purposes of Chapter 205.[200] The *Ala Loop* court reaffirmed the *Pono* three-factor test for determining whether the *legislature* intended to create a private right of action, but also concluded that the *Pono* court erred by failing to examine whether the *state constitution* created a private right of action to enforce Chapter 205.[201]

After establishing this distinction, the Hawaii Supreme Court went on to address three matters for determining whether the *state constitution* granted the *Ala Loop* plaintiffs a private right of action to enforce Chapter 205's permit requirements. First, the plain language of the Hawaii constitutional right defines the content of the right in terms of state statutory "law relating to environmental quality," so the court had to determine whether Chapter 205 is a "law relating to environmental quality" and therefore within the scope of the constitutional environmental right.[202] Because the stated purpose of Chapter 205 is "to preserve, protect and encourage the development of land in the State for those

194. *See generally* Cnty. of Haw. v. Ala Loop Homeowners, 235 P.3d 1103 (Haw. 2010), *abrogated on other grounds by* Tax Found. v. State, 439 P.3d 127 (Haw. 2019).

195. *Id.* at 1105.

196. *Id.*

197. *Id.* at 1115.

198. *See* Pono v. Molokai Ranch, Ltd., 194 P.3d 1126, 1149–52 (Haw. Ct. App. 2008), *abrogated by Ala Loop*, 235 P.3d 1103.

199. *Id.*

200. *Id.*

201. *Ala Loop*, 235 P.3d at 1120.

202. *Id.* at 1121; *see also id.* at 1122 ("[A]rticle XI, section 9 does not itself define the substantive content of the right to a clean and healthful environment, but rather leaves it to the legislature to determine.").

uses to which they are best suited for the public welfare," and because the provisions of Chapter 205 "expressly require consideration of issues relating to the preservation or conservation of natural resources," the court determined that Chapter 205 is a "law relating to environmental quality."[203]

Second, the court had to address the more general question of whether the Section 9 right is self-executing, or whether it requires implementing legislation.[204] To evaluate this issue, the court looked to the plain language of the provision as well as the constitutional history of the amendment.[205] The court reasoned that the constitutional language, providing that the right is "subject to reasonable limitations and regulation as provided by law," does not suggest legislative action is needed before the right can be enforced.[206] As to the provision's constitutional history, the court noted that the Constitutional Committee stated that "this important right deserves enforcement and has removed the standing to sue barriers" and "adds no new duties but does add potential enforcers."[207] The court also noted that the Hawaii legislature seemed to believe that the right is self-executing,[208] a conclusion supported by much scholarly writing.[209] Hence, the court found that Section 9 is self-executing.[210]

Third, and finally, the Hawaii Supreme Court had to determine whether there were any provisions in Chapter 205 by which the legislature imposed "reasonable limitations and regulations" on the right, preventing private parties from bringing a cause of action.[211] The charter school claimed that section 205-12 delegated enforcement of Chapter 205 to the counties, thereby precluding a private right of action.[212] In setting the parameters of what constitutes "reasonable limitations," the court rejected the charter school's position, relying on the constitutional history, which demonstrated that the framers intended that private enforcement would complement, not supplant, government enforcement of the right.[213] Thus, the Hawaii Supreme Court concluded that the neighboring landowners had a private right of action—also confusingly called "standing" by the court[214]—to enforce the Chapter 205 permit requirement against the charter school.

---

203. *Id.* at 1121–22.
204. *See id.* at 1122.
205. *Id.* at 1125–27.
206. *Id.* at 1125.
207. *Id.* (quoting H. 10-77, 1st Proc. of the Const. Convention of 1978, at 689–690 (Haw. 1980)).
208. *Id.* at 1127 (citing Act 80, § 1, 1986 Haw. Sess. Laws 104, 104).
209. *Id.* at 1128 (listing scholarly articles concluding that Article XI, Section 9 is self-executing).
210. *Id.* at 1129.
211. *Id.* at 1129–30.
212. *Id.* at 1129.
213. *Id.* at 1130.
214. *Id.* at 1137.

The next major development of the Hawaii constitutional environmental right occurred in the mid-2010s, when environmental groups started to intervene in electricity cases on the basis of Section 9.[215] Three electricity cases advanced a different theory of the Section 9 right than that in *Ala Loop*. *Ala Loop* was about private citizens becoming enforcers of environmental statutes through a private right of action established by Section 9. In the electricity cases, the Section 9 right was invoked in the context of due process claims and private citizens' claims to intervene in administrative proceedings.

The first electricity case, *In re Application Maui Electric Co.* (*MECO*), involved the execution of a new power purchase agreement ("PPA") between Maui Electric, an electric utility company, and Hawaiian Commercial & Sugar Company ("HC&S"), an electricity producer.[216] Under the relevant Hawaii statute, Maui Electric could recover the costs of electricity production from consumers under a PPA so long as the agreement was approved by the Public Utilities Commission ("PUC").[217] Under the proposed PPA, Maui Electric would continue to purchase electricity from an HC&S plant that burned a number of fossil fuels, including coal and petroleum.[218] The Sierra Club moved to intervene in the PUC proceedings concerning the proposed PPA on behalf of itself and its members:

> Sierra Club asserted a *fundamental due process right to participate in a hearing* on the grounds that the [PPA] would impact Sierra Club's members' health, aesthetic, and recreational interests. Sierra Club also asserted its organizational interest in reducing Hawaii's dependence on imported fossil fuels and advancing a clean energy grid.[219]

The PUC denied Sierra Club's motion to intervene,[220] and the ICA dismissed Sierra Club's appeal.[221]

Because Hawaii courts only have jurisdiction to review PUC decisions pursuant to a statute, Sierra Club's due process claim had to be analyzed within a statutory jurisdictional analysis.[222] Because the jurisdictional issue adds complexity, I focus only on the court's due process analysis, which occurred within the jurisdictional analysis. The Hawaii Supreme Court ultimately concluded that Sierra Club had asserted a due process right grounded in Section 9 and was entitled to a hearing on the basis of that right.[223]

---

215. *See generally In re* Application Maui Elec. Co., Ltd. (*MECO*), 408 P.3d 1 (Haw. 2017); Matter of Gas Co., 465 P.3d 633 (Haw. 2020); Matter of Haw. Elec. Light Co., Inc., 445 P.3d 673 (Haw. 2019).

216. 408 P.3d at 5.

217. *Id.*

218. *Id.*

219. *Id.* at 6 (emphasis added).

220. *Id.* at 7.

221. *Id.* at 8.

222. *See id.* at 9–10.

223. *Id.* at 23.

First in its due process analysis, the court determined that Sierra Club had a protected property interest, a benefit to which it was legitimately entitled, based on the substantive right to a clean and healthful environment established by Section 9 and "defined by existing law relating to environmental quality."[224] Hawaii Revised Statutes Chapter 269 ("Chapter 269"), which required the PUC to recognize the need to reduce reliance on fossil fuels when carrying out its duties, was the relevant "law relating to environmental quality."[225] In coming to this conclusion, the court made three observations. First, the Hawaii legislature amended Chapter 269 in 2011 to make it mandatory for the PUC to recognize the need to reduce reliance on fossil fuels when carrying out its duties.[226] Second, the court concluded that the legislative history demonstrated that "a primary purpose of the amended law was to require the Commission to consider the hidden and long-term costs of reliance on fossil fuels . . . ."[227] Lastly, the court noted that Chapter 269 also prescribed renewable portfolio standards, leading to the conclusion that it was "precisely the type of 'law relating to environmental quality'" to which Section 9 refers.[228] As a note of caution, however, and in response to the dissent's arguments, the court warned that the Section 9 "right is not a freestanding interest in general aesthetic and environmental values."[229]

Second in its due process analysis, the court determined that Sierra Club was entitled to a hearing on its due process right. The Hawaii Supreme Court used a three-factor analysis similar to that employed by federal courts to determine whether the administrative procedures comported with constitutional due process.[230] Those factors are: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail."[231] Notably, in addressing the private interest factor, the court stated that the private interest was the Section 9 right, which includes "that explicit consideration be given to reduction of greenhouse gas emissions in Commission decision-making" as provided in Chapter 269.[232] In essence, the Hawaii Supreme Court continued developing the theory of *Ala Loop*, where the constitutional environmental right is a mechanism

224. *Id.* at 13; *see also id.* ("This substantive right is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process.").

225. *Id.* at 15.

226. *Id.* at 14.

227. *Id.* at 15.

228. *Id.*

229. *Id.* at 16.

230. *See id.* at 17; *see also* Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

231. *MECO*, 408 P.3d at 17.

232. *Id.*

for individuals to hold governmental bodies, as opposed to private parties, to their statutory environmental duties.

Having established the due process analysis, the court still had to decide whether Sierra Club had standing as part of the court's jurisdictional analysis. I only mention this because the standing analysis under Hawaii's jurisdictional analysis for reviewing agency actions is different from what the court called "standing" in *Ala Loop*. This highlights a distinction between cases brought directly to assert a private right of action grounded in the Section 9 right (with that right defined by statute) and those brought more indirectly through a due process claim. In sum, the court concluded that Sierra Club had standing to bring its due process claim, and thus the court had jurisdiction to review the PUC's actions.[233] The court then remanded the case to the ICA for further proceedings.[234]

Two similar, quite recent electricity cases soon followed the *MECO* decision.[235] The first, *Matter of Hawaii Electric Light Co.* (*HELCO*) involved Life of the Land ("LOL"), an environmental nonprofit seeking to intervene in the PUC's proceedings regarding the approval of an amended PPA between Hawaii Electric Light Company ("HELCO") and Hu Honua Bioenergy, LLC ("Hu Honua").[236] The terms of the PPA would obligate Hu Honua to construct a new biomass facility and would obligate HELCO to purchase electricity from that facility.[237] The PUC approved the PPA without a hearing.[238] LOL was granted limited participant status during the PUC's proceedings; however, LOL claimed that PUC failed to consider greenhouse gas emissions in deciding to approve the PPA and denied LOL due process in protecting its interest in a clean and healthful environment by limiting LOL's status in the proceedings.[239]

As in *MECO*, the Hawaii Supreme Court addressed the due process issue within its jurisdictional analysis, since *HELCO*, Hu Honua, and the PUC argued that the court lacked jurisdiction to review the PUC's decision to approve the PPA.[240] The court's analysis largely parallels its analysis in the *MECO* decision, because LOL sought to protect its property interest in a clean and healthful environment as defined by Chapter 269.[241]

After concluding it possessed jurisdiction to review the PUC's approval of the PPA, the court examined the merits of LOL's appeal. In its discussion, the

233. *Id.* at 23.

234. *Id.*

235. *See* Matter of Gas Co., 465 P.3d 633 (Haw. 2020); Matter of Haw. Elec. Light Co., Inc., 445 P.3d 673 (Haw. 2019).

236. 445 P.3d at 677.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 683–94.

241. *Id.* at 688.

court looked at whether the PUC had fulfilled its statutory duties under Chapter 269 to explicitly consider the reduction of greenhouse gas emissions.[242] Ultimately, the court concluded that the PUC did not demonstrate "express consideration" of the reduction of greenhouse gas emissions in its evaluation of the PPA, nor did the PUC address the hidden and long-term environmental and public health costs of reliance on energy produced at the biomass facility under the PPA.[243] On this ground, the Hawaii Supreme Court remanded the case to the PUC to fulfill its statutory duties by considering the reduction in greenhouse gas emissions in evaluating the PPA.[244] The court also concluded that LOL was entitled to a hearing on its right to a clean and healthful environment.[245]

The most recent electricity case taken up by the Hawaii Supreme Court, *Matter of Gas Co.*, involved another PPA approved by the PUC and the intervention of LOL and Ka Lei Maile Ali'I ("KLM") in the proceedings.[246] The PPA at issue would have passed the cost of two recently established liquid natural gas projects onto consumers as part of the electricity producer's move away from synthetic natural gas.[247] As it had under the facts of *HELCO*, the PUC denied LOL and KLM's motion to intervene but allowed them to participate on a limited basis during its evaluation of the PPA.[248] After addressing the standing issue,[249] the court evaluated whether PUC fulfilled its statutory duties under Chapter 269. The novel claim in *Gas Co.* was that the PUC was not required to consider greenhouse gas emissions outside of the state of Hawaii under Chapter 269.[250] The Hawaii Supreme Court disagreed.[251] In further refining the contours of the PUC's statutory duties, the court found that the plain language of Chapter 269 did not limit the PUC's consideration of greenhouse gas emissions to only those occurring in Hawaii,[252] determining that the statute's primary purpose was to require the PUC to consider "hidden and long-term costs" of using fossil fuels.[253] The PUC "disregarded any possible [greenhouse gas] emission leakage from imported" liquid natural gas, and such disregard was contrary to law.[254]

242. *Id.* at 695.
243. *Id.* at 696.
244. *Id.* at 697.
245. *Id.* at 698.
246. *See* 465 P.3d 633, 636 (Haw. 2020).
247. *Id.*
248. *Id.*
249. *Id.* 645–46. As it turns out, Hawaii has two different standing tests, both of which are different than the "standing" analysis performed in *Ala Loop*. One test is for when an appellant has been entirely denied participation in the agency proceedings; the other test is for when an appellant has been granted limited participation in the agency proceeding but appeals the denial of full intervenor status. *See id.*
250. *See id.* at 647.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 648.

This failure by the PUC also violated LOL and KLM's due process rights, because LOL and KLM's limited participation status prevented them from being heard on the matter of out-of-state greenhouse gas emissions incidental to the importation of liquid natural gas.[255]

These three cases open a significant avenue for citizen involvement in the electricity sector in Hawaii, although that involvement is limited to holding the PUC to its statutory duties rather than commanding a particular outcome from the PUC with respect to any particular PPA. It is also unclear how the Hawaii Supreme Court will handle a (likely inevitable) argument from the PUC that a fossil-fuel-oriented PPA is still overall "in the public interest." That is to say, as the Pennsylvania Supreme Court has put it, the PUC has duties to act in the interests of general welfare, duties that may conflict with denying a fossil-fuel-oriented PPA. We do not know how the Hawaii Supreme Court will address such a defense of a PPA, which is fossil-fuel- and greenhouse-gas-emission intensive. To the extent these seem like climate victories, only time will tell whether they will produce positive, substantive environmental outcomes.

Pennsylvania, Montana, and Hawaii present three different kinds of "successful" constitutional environmental rights jurisprudences. The nature of each right depends significantly on the respective constitutional text. The remaining two states, Massachusetts and Illinois, do not have similarly "successful" constitutional rights jurisprudence, though some familiar themes will arise.

D. MASSACHUSETTS

1. The Constitutional Text

The most verbose of the state constitutional environmental rights, Massachusetts' right reads:

> 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

255. *Id.* at 650–51.

> 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.[256]

The constitutional environment right is contained in the Articles of Amendment as Article XCVII, so it is not part of Massachusetts' fundamental and inalienable constitutional rights.

2. The Case Law

The first time the Supreme Judicial Court of Massachusetts took a serious look at Article XCVII was in *Opinion of the Justices to the Senate* in 1981.[257] At that time, the Massachusetts legislature was considering enacting a bill to provide "immediate certainty 'as to titles to certain lands lying within the city of Boston, and bordering on or near the waters of the commonwealth.'"[258] One important legal effect of the proposed bill was to extinguish vestigial rights of the commonwealth in certain tidelands that benefitted private landowners, so as to improve the marketability of those private titles and aid the efforts to rejuvenate Boston.[259] The constitutional rights question posed to the Massachusetts Justices was whether the bill required a two-thirds vote by the legislature pursuant to the final clause of the constitutional environmental rights provision.[260]

In the 1981 opinion, the court made two determinations regarding the scope of the two-thirds clause. First, the language of the two-thirds clause applies to "lands and easements" taken or acquired by the commonwealth for the environmental purposes articulated in the constitutional right *prior to the ratification* of the constitutional right.[261] To determine that a constitutional amendment has retroactive effect goes in part to recognizing the supremacy of the constitution. Second, the court determined that the two-thirds clause applies only to lands and easements, and not to lesser property interests.[262] Thus, the court concluded that to the extent the proposed bill would extinguish vestigial

256. MASS. CONST. art. XCVII. Article XCVII of the Massachusetts Constitution amended Article XLIX. *See id.* art. XLIX, *amended by id.* art. XCVII. While the text of the constitutional right is located in Article XLIX, the Supreme Judicial Court of Massachusetts refers to the constitutional provision as Article XCVII, so that is the terminology I adopt for this Article. *See id.*

257. 424 N.E.2d 1092, 1107 (Mass. 1981).

258. *Id.* at 1096.

259. *See id.* at 1096–98.

260. *See id.* at 1107.

261. *Id.*

262. *Id.*

rights that qualified as easements, a two-thirds vote of the legislature would be required; otherwise, the two-thirds clause would not apply.[263]

Since 1981, the development of the Massachusetts constitutional environmental right has been largely limited to determining what "lands and easements" means in the two-thirds clause. In 1987, the Massachusetts Appeals Court determined that a one-year seasonal permit, revocable by the issuing agency at will, to carry out a cross-country skiing program on state lands under the supervision of the state agency did not constitute a disposition of lands or easements requiring a two-thirds vote of the legislature.[264] In 2005, it was determined that when private parties exercise their easement rights over commonwealth land—rights established in the deeds granting the land to the commonwealth—there is no disposition of lands or easements requiring a two-thirds vote of the legislature.[265] In another 2005 decision, the court also determined that when a town acquires lands as general corporate property under the deed, a later town vote to put those lands to conservation purposes with no further legal action (e.g., the recording of such purposes) does not make the sale of those lands subject to the two-thirds vote requirement under the constitutional environmental right.[266]

In essence, the two-thirds-clause analysis requires determining whether land or an easement is acquired for "the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources,"[267] and whether the land is being "disposed of" by some government action. The Supreme Judicial Court of Massachusetts gave the former element a thorough examination in 2013 in *Mahajan v. Department of Environmental Protection*. There, the Department of Environmental Protection ("DEP") issued a license pursuant to statutory authority to the Boston Redevelopment Authority ("BRA") to redevelop a section of land owned by the BRA on the seaward end of Long Warf in Boston, the "project site."[268] The BRA took title to the project site in 1970 pursuant to its eminent domain powers as part of an urban renewal plan.[269]

The court was faced with the question of whether that 1970 taking was a taking for Article XCVII purposes. Importantly, the court rejected an earlier attorney general opinion that concluded that "the vast majority of land taken for any public purpose" could become subject to Article XCVII and the two-thirds

263. *Id.* at 1108.
264. *See* Miller v. Comm'r of Dep't of Env't Mgmt., 503 N.E.2d 666, 667–68 (Mass. App. Ct. 1987).
265. *See* Haugh v. Simms, 835 N.E.2d 1131, 1137–38 (Mass. 2005).
266. *See* Bd. of Selectmen v. Lindsay, 829 N.E.2d 1105, 1108–10 (Mass. 2005).
267. Mahajan v. Dep't of Env't Prot., 984 N.E.2d 821, 827 (Mass. 2013).
268. *Id.* at 823.
269. *Id.* at 824–25.

vote requirement.[270] The court distinguished between land taken *that incidentally serves* the Article XCVII purpose and land taken *for those purposes*.[271] To clarify the latter's meaning, the court recognized that the constitutional language was derived from the doctrine of "public prior use," which states that "public lands devoted to one [and only one] public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion."[272] The court ultimately concluded that just because the urban renewal plan simply called for a variety of vague uses, some of which were consistent with Article XCVII purposes, that did not mean that the land was taken *for* Article XCVII purposes.[273] Accordingly, the taking did not trigger the two-thirds clause.[274]

The court further concluded that the license issued to the BRA from DEP did not constitute a "disposition" within the meaning of Article XCVII, either.[275] This conclusion was based on the fact that the statute under which the license was issued specified that the grant of a license did not convey a property right, and that the license was largely a certification that the project complied with statutory rules rather than a transfer of legal control of the land at issue.[276]

More recently, the court decided a case where the two-thirds clause was triggered, reaffirming the public prior use doctrine as the appropriate standard for determining when Article XCVII applies.[277] In *Smith v. City of Westfield*, the land at issue was a municipal parkland which had not been taken under eminent domain, nor was there any recordation of restriction on the use of the land with the registry of deeds.[278] The City of Westfield wanted to build an elementary school on the parkland, which had been a public park for more than sixty years.[279] The court had to address the issue of whether a recordation of conservation for Article XCVII purposes was necessary to bring a parcel of land within the scope of the two-thirds clause, and if not, how such designations should be determined.[280]

First, the court clarified its prior holdings in *Board of Selectmen of Hanson v. Lindsay* and *Mahajan*. In short, neither a town vote (as in *Selectmen of Hanson*) nor an urban renewal project (as in *Mahajan*) is sufficient to manifest

270. *Id.* at 828–29.
271. *Id.*
272. *Id.* at 830 (quoting Robbins v. Dep't of Pub. Works, 244 N.E.2d 577, 579 (Mass. 1969)).
273. *Id.* at 830–33.
274. *Id.* at 834.
275. *Id.* at 833.
276. *Id.*
277. *See* Smith v. City of Westfield, 82 N.E.3d 390 (Mass. 2017).
278. *Id.* at 392.
279. *Id.* at 392–93.
280. *Id.* at 396–97.

an intent to reserve land forever as a public park.[281] However, in *City of Westfield*, because the city took federal funds "to rehabilitate the playground with the statutory proviso that, by doing so, the city surrendered all ability to convert the playground to a use other than public outdoor recreation without the approval of the Secretary [of the Interior]," the court determined that there was intent to reserve the playground as a public park.[282] Therefore, a two-thirds vote of the legislature was required for the city to convert the playground to an elementary school. Such a requirement, however, did not "prohibit[] the construction of the new school"; it "merely order[ed] the [c]ity to comply with the law before it proceed[ed]."[283]

While the Massachusetts cases have revolved around developing the two-thirds clause of the Massachusetts constitutional environmental right, two other cases have also addressed the right more generally. In the first case, *Enos v. Secretary of Environmental Affairs*,[284] the plaintiffs were residents who lived near a site proposed for the construction of a new sewage facility.[285] The Massachusetts Secretary of Environmental Affairs had issued a certificate of compliance for the construction of the new sewage facility, which the plaintiffs sought to have declared invalid, alleging that it would "impair their use and enjoyment of their properties and of the Eel River, diminish the value of their properties, and impair the function of their private septic systems and wells."[286]

The certificate was issued after the Secretary had undertaken the statutorily required Massachusetts Environmental Protection Act ("MEPA II") assessment, which requires all state agencies to "review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and . . . use all practicable means and measures to minimize the damage to the environment."[287] The court was called on to decide whether the plaintiffs had standing to challenge the Secretary's MEPA II assessment of the sewage treatment project.[288] The *Enos* decision concluded that there was no duty owed directly to the plaintiffs that would establish their standing to challenge the Secretary's MEPA II assessment.[289] There was no legislative intent to allow the plaintiffs standing, and the court also expressed concern that "[t]o grant standing based on MEPA[II]'s ultimate goal of the protection of the environment would allow suit in almost every project within MEPA[II]'s jurisdiction, based on

281. *Id.* at 402.
282. *Id.*
283. *Id.* at 395.
284. 731 N.E.2d 525 (Mass. 2000).
285. *Id.* at 527.
286. *Id.*
287. *Id.* at 528.
288. *Id.*
289. *Id.* at 532.

generalized claims by plaintiffs of injury such as loss of use and enjoyment of property."[290] The court summarily rejected the plaintiffs' standing arguments predicated on their constitutional environmental right in Article XCVII in a footnote.[291]

The final and most interesting case from Massachusetts attempted to use the constitutional environmental right to improve substantive environmental quality in the most direct manner of any of the environmental constitutionalism cases in this Article. It is a federal district court case brought by a pro se plaintiff on account of high levels of lead in the drinking water in the schools in the Amherst-Pelham Regional School District.[292] The pro se plaintiff had a grandson who attended school in the district, and the plaintiff himself had visited his grandson's school.[293] The plaintiff claimed that the lead levels in the school drinking water violated his[294] right "to clean water" under Article XCVII.[295] Rather than seeking monetary damages, the plaintiff sought declaratory and injunctive relief "requiring [the] Defendant [school district] to provide bottled water to schools, install lead-free water supply lines in contaminated schools, conduct periodic lead testing, and perform an independent assessment of the extent of students' and others' lead exposure."[296]

As to the plaintiff's state constitutional environmental rights claim, the district court had to decide whether the constitutional environmental right provided a private right of action.[297] After a thorough review of Massachusetts precedent on Article XCVII, the district court concluded that there was no indication from the Supreme Judicial Court of Massachusetts that Article XCVII provides a private right of action to enforce the substantive environmental rights clause of Article XCVII.[298] Because federal courts typically do not extend state law beyond what is supported by existing authority, the district court concluded that there was no private right of action for the pro se plaintiff to enforce his right "to clean water" under Article XCVII.[299] While the constitutional environmental rights claim was decided on federalism principles, this is a crucial example of how the substantive language of the environmental right may be

290. *Id.* at 530.

291. *Id.* at 532 n.7.

292. Hootstein v. Amherst-Pelham Reg'l Sch. Comm., 361 F. Supp. 3d 94 (D. Mass. 2019).

293. *Id.* at 99–101.

294. *Id.* at 101–02. The court did not allow the pro se plaintiff to bring any claims on behalf of his grandson. *Id.*

295. *Id.* at 101.

296. *Id.*

297. *Id.* at 113–14.

298. *Id.* at 114.

299. *Id.* at 114–15. While this seems like a loss, the pro se plaintiff also brought a Fourteenth Amendment due process bodily integrity claim under 42 U.S.C. § 1983, which the court determined was "plausibly stated" in the complaint. *Id.* at 112.

invoked in the future, particularly in Pennsylvania and Montana, where their constitutions contain substantive rights language akin to Massachusetts'.

The development of Massachusetts' constitutional environmental right has been along much narrower lines—think the two-thirds clause—than the development of Pennsylvania, Montana, and Hawaii's constitutional environmental rights. The fifth and final constitutional environmental right in Illinois has even less development, primarily because the Illinois Supreme Court has found the right to be extremely limited.

E. ILLINOIS

1. The Constitutional Text

The Illinois constitutional environmental right is contained in Article XI, Section 2 of the Illinois Constitution, which states: "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."[300] The right is not listed among Illinois' fundamental rights.[301]

2. The Case Law

The first case to consider the Section 2 right was the 1978 case *Landfill, Inc. v. Pollution Control Board*.[302] There, the plaintiff challenged the Illinois Pollution Control Board's ("PCB") adoption of a rule authorizing third parties to initiate permit-revocation proceedings, because third parties had sought to have the plaintiff's landfill permit revoked.[303] The PCB adopted this rule pursuant to its statutory authority under the Illinois Environmental Protection Act ("IEPA"), and claimed that because the issuance of permits can infringe on third parties' Section 2 environmental right, those third parties are "entitled by due process to a hearing on the allowance of permits."[304] The Illinois Supreme Court was not persuaded by the PCB's due process argument, because the IEPA authorized citizen suits against alleged violators of the IEPA.[305] The court determined that a citizen's IEPA remedy was statutory and thus permitted filing a new complaint against the polluter, not an action before the PCB challenging

300. ILL. CONST. art. XI, § 2.
301. *See id.* art. I.
302. 387 N.E.2d 258 (Ill. 1978).
303. *Id.* at 259–60.
304. *Id.* at 265.
305. *See id.*

the agency's performance of its statutory duties.[306] The court's reading of the Section 2 right only became more restricted as the cases progressed.

Next, in 1984, the Illinois Supreme Court explicitly rejected the claim that the constitutional environmental right is a fundamental right.[307] In *Illinois Pure Water Committee, Inc. v. Director of Public Health*, the plaintiffs challenged a statute that required drinking water to be fluorinated.[308] The plaintiffs claimed that fluorinating drinking water violated their Section 2 environmental right to a healthful environment, that the right was fundamental, and therefore the fluorination statute should be subject to a higher level of scrutiny upon judicial review.[309] Noting that the plaintiffs provided no support for the contention that the Section 2 right is a fundamental right, the court declined to subject the fluorination statute to a higher level of scrutiny review.[310]

The next decision further limiting the Section 2 right came in 1995.[311] In *City of Elgin v. County of Cook*, several cities and villages sought to challenge a "balefill permit" issued to and by the defendants that would approve the construction of a new landfill to handle solid waste from approximately 950,000 Cook County residents.[312] In the final legal issue addressed by the Illinois Supreme Court, the citizens alleged that preliminary construction activities for this landfill facility would constitute a violation of their Section 2 environmental right.[313] The court concluded that Section 2 did not create "any new cause of action but, rather, d[id] away with the 'special injury' requirement typically employed in environmental nuisance cases."[314] Hence, in Illinois, there must be a cause of action *prior to* any invocation of the constitutional environmental right.

This conclusion was applied by the First District Appellate Court two years later in a case between private parties over the sale of land.[315] In *NBD Bank v. Krueger Ringier, Inc.*, the plaintiffs sought to recover in tort the costs they incurred investigating, cleaning, removing, and restoring petroleum-contaminated soil on a parcel of property they purchased from the defendants.[316]

306. *Id.* This case is structurally similar to the electricity cases in Hawaii, albeit with a different outcome. *See supra* Part III.C.2. The PCB adopted a rule to allow citizens to intervene in PCB permitting procedures on the grounds that citizens have a due process right to intervene based on the state constitutional environmental right. Unlike the Hawaii Supreme Court, however, the Illinois Supreme Court disagreed and concluded that PCB's rule was not permissible.

307. *See generally* Ill. Pure Water Comm., Inc. v. Dir. of Pub. Health, 470 N.E.2d 988 (Ill. 1984).

308. *Id.* at 989.

309. *Id.* at 989–91.

310. *Id.* at 992.

311. *See generally* City of Elgin v. Cnty. of Cook, 660 N.E.2d 875 (Ill. 1995).

312. *Id.* at 878–80.

313. *Id.* at 890–91.

314. *Id.* at 891.

315. NBD Bank v. Krueger Ringier, Inc., 686 N.E.2d 704, 709 (Ill. App. Ct. 1997).

316. *Id.* at 706.

The plaintiff suffered economic loss in having to remediate the purchased property, and one of the plaintiff's theories of liability in tort was a claim for a "constitutional tort" pursuant to Article XI, Section 2. Applying *City of Elgin*, the First District concluded that the constitutional environmental right "does not create any new causes of action, but merely eliminated the 'special injury' requirement typically mandated in environmental nuisance cases."[317] Because the plaintiff had failed to advance a viable theory of action in tort, Section 2 did not "create a mechanism by which plaintiffs c[ould] recover against [the] defendant for the damages" sought in the complaint.[318]

The final nail in the coffin for the Illinois constitutional environmental right was hammered down two years later, in 1999.[319] In *Glisson v. City of Marion*, the plaintiff filed suit against the City of Marion and its mayor to halt the construction of a dam on Sugar Creek, claiming that the project threatened the essential habitat for two species protected under the Illinois Endangered Species Act ("IESA"), the brook lamprey and the Indiana crayfish.[320] The plaintiff further alleged he would "suffer 'intense harm' as a result of the dam and reservoir project because he is a naturalist who enjoys and uses Sugar Creek for 'food gathering, recreation, spiritual, and educational activities,' and because his lifestyle is 'intertwined with and dependent on the natural world in general and Sugar Creek.'"[321] On appeal to the Illinois Supreme Court, the singular issue was whether the plaintiff had standing to maintain an action against the defendants for an alleged violation of the IESA.[322]

As a general matter, standing in Illinois requires that the "claimed injury . . . be actual or threatened.[323] It must be (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief."[324] Less technically, Illinois standing requires that "the plaintiff be a member of the class designed to be protected by the statute, or one for whose benefit the statute was enacted, and to whom a duty of compliance is owed."[325] The plaintiff claimed that Article XI, Section 2 granted him standing, because the two endangered species were necessary to the maintenance of his "healthful environment," and thus the proposed dam would injure his legally cognizable interest in a "healthy environment."[326]

317. *Id.* at 709.
318. *Id.* at 710.
319. *See generally* Glisson v. City of Marion, 720 N.E.2d 1034 (Ill. 1999).
320. *Id.* at 1036.
321. *Id.* at 1038.
322. *Id.* at 1039.
323. *Id.* at 1040 (citing Greer v. Ill. Hous. Dev. Auth., 524 N.E.2d 561, 575 (Ill. 1988)).
324. *Id.*
325. *Id.* (citing Lynch v. Devine, 359 N.E.2d 1137 (Ill. App. Ct. 1977)).
326. *Id.* at 1041.

The Illinois Supreme Court, in its first investigation into the constitutional history of the Section 2 right, was faced with a tension between the plain language of the right and the intent of the framers. As the court details in *Glisson*, the General Government Committee, which proposed the environmental right at the 1970 constitutional convention, was clearly focused on the issue of environmental pollution and its direct effects on human life.[327] The court acknowledged that the Committee intended the environmental right to be a fundamental right, contrary to the court's finding in *Illinois Pure Water Committee, Inc.* in 1984.[328] The Committee had also emphasized that the Section 2 right was not intended to create any new remedies, but to remove the "special injury" requirement for standing in order to allow individual opportunity to prove a violation of the right, even though the violation may have been a public wrong.[329] The Committee's understanding was confirmed during its discussion of Section 2 at the constitutional convention.[330] On this basis, the Illinois Supreme Court concluded that the constitutional environmental right was a response to the problem of environmental pollution and its effect on human health.[331] Therefore, "[t]he protection of endangered and threatened species does not fall within the intended scope of a person's right to a 'healthful environment.'"[332] Even faced with the argument from amici curiae that protection of endangered species is necessary for a "healthful environment," the court was not persuaded and ultimately concluded that the plaintiff did not have standing to bring an IESA action under Article XI, Section 2.[333]

The *Glisson* dissent made a very simple, but powerful point: nothing in the plain language of the constitutional text, which ought to control over convention or committee history, limits the Section 2 right to pollution cases.[334] Under the plain meaning of the constitutional language, the dissent would have held that Section 2 authorizes private actions to enforce the IESA.[335] Unfortunately, Illinois' constitutional environmental right has not been reevaluated since the *Glisson* decision in 1999 and is therefore only applicable in the narrow context of public pollution cases. The *Glisson* case makes the Illinois constitutional environmental right by far the least effective in making environmental gains of the five rights discussed in this Article.

327. *Id.* at 1042.
328. *Id.*
329. *Id.* at 1043.
330. *Id.*
331. *Id.* at 1044.
332. *Id.*
333. *Id.* at 1044–45.
334. *Id.* at 1045–46 (Harrison, J., dissenting).
335. *Id.* at 1047.

At this stage, it is important to recognize just how diverse the five constitutional environmental rights really are. The nomenclature of "environmental constitutionalism" is therefore a bit misleading, as there is no obvious one thing that a constitutional environmental right aims for or achieves. Notably, however, and as I will discuss in Parts III and IV, all of the state constitutional environmental rights contain substantive environmental rights language.

III. LESSONS FROM THE STATES

While the five original states have five very different constitutional environmental rights, this Part proposes two lessons to take away from their constitutional environmental rights jurisprudence. Those lessons are: (1) that constitutional environmental rights have been interpreted primarily as procedural, not substantive, rights, and (2) that courts ignore the substantive rights language in the constitutional text in favor of other language, which is then given its content through other legal doctrines. These lessons are best understood as descriptive claims regarding how courts interpret constitutional environmental rights provisions. I discuss the normative importance of these lessons in Part IV.

A. PROCEDURAL, NOT SUBSTANTIVE, RIGHTS

The first lesson from the states is that courts interpret their constitutional environmental rights as essentially procedural, not substantive, rights. In the context of environmental constitutionalism, substantive environmental rights can be thought to entitle a claim holder to "a certain level of environmental quality."[336] They are usually written as something like the right to an "'adequate,' 'clean,' 'healthy,' 'productive,' 'harmonious,' 'sustainable,' environment."[337] However, it is not quite right to think of substantive environmental rights as claims *to a tangible thing* that is an adequate, healthy, clean, productive, harmonious, or sustainable environment. Substantive environmental rights are really claims *against others* to act—or refrain from acting—in certain ways that have the effect of producing a certain level of environmental quality.[338] In the case of *constitutional* substantive environmental rights, they should be claims against the government[339]—although Montana (*MEIC* and *Cape-France*), Hawaii (*Ala Loop*), and Illinois (its constitutional language) clearly indicate that they can also be claims against private parties.

336. BOYD, *supra* note 6, at 25.

337. *See* MAY & DALY, *supra* note 6, at 64.

338. *See id.* at 95 (viewing rights as "ways to structure relationships"); *see also* Hohfeld, *supra* note 17, at 26 (analyzing legal rights into four fundamental relations).

339. *See* BOYD, *supra* note 6, at 25.

The government may be obligated to "both refrain from taking or authorizing actions that impair citizens' right to a healthy environment and, where necessary, to take positive actions to ensure or safeguard citizens' right to environmental quality."[340] In the context of concrete environmental disputes, it is helpful to think of substantive environmental rights as claims that would entitle the right holder to some substantive environmental action or inaction, such as preventing the commencement of a proposed mining operation or requiring restoration of degraded public land.

Procedural environmental rights focus not on substantive environmental outcomes but on citizens' access to information, participation in decision-making, access to justice, and remedies for environmental harms.[341] An environmental procedural right is not an entitlement to actions that produce a particular environmental outcome. It is only a claim to a certain kind of participation in the process that will have or has had environmental effects. Procedural environmental rights are considered complementary to substantive environmental rights, since access to information, participation in decision-making, and access to the courts to demand a remedy are all crucial components of enforcing substantive environmental rights.[342] Erin Daly and James May go so far as to claim that procedural environmental rights may be "even more useful than substantive environmental rights because courts might be more inclined to use them to vindicate environmental interests while pushing the actual decision making to the political sphere."[343]

In applying this procedural-substantive distinction to the five original states, we see that all five constitutional environmental rights contain substantive environmental rights language in the constitutional text itself. In Pennsylvania, the language is "a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment."[344] In Montana, it is a "right to a clean and healthful environment";[345] in Hawaii, "the right to a clean and healthful environment, as defined by laws relating to environmental quality";[346] in Massachusetts, "the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic

340. *Id.*

341. *Id.* at 26; HAYWARD, *supra* note 6, at 87. The procedural-substantive rights distinction in environmental constitutionalism has not been as robustly defended or criticized as it has been in legal theory more generally. *See generally, e.g.*, Larry Alexander, *Are Procedural Rights Derivative of Substantive Rights?*, 17 L. & PHIL. 19 (1998) (arguing that procedural rights are derivative of substantive rights). I adopt the distinction as posited by the environmental constitutionalism movement at this time without further theorizing on the validity of the distinction.

342. *See* MAY & DALY, *supra* note 6, at 236; BOYD, *supra* note 6, at 26.

343. MAY & DALY, *supra* note 6, at 238.

344. PA. CONST. art. I, § 27.

345. MONT. CONST. art. II, § 3.

346. HAW. CONST. art. XI, § 9.

qualities of their environment";[347] and in Illinois, "the right to a healthful environment."[348] Yet the development of these rights in the case law has been along the lines of procedural rather than substantive rights.

Consider Pennsylvania. The first constitutional environmental rights case in Pennsylvania, *Payne*, addressed a quintessential substantive environmental rights claim.[349] The plaintiffs claimed that the government was not permitted to widen a particular road onto a particular historically and aesthetically valuable piece of public land, and resolution in favor of the *Payne* plaintiffs would have compelled the government to act in such a way as to produce a particular quality of environment: namely, not degrading the public land to construct a public road. However, the court refused to recognize such a substantive right.[350]

The environmental victories based on the Pennsylvania constitutional environmental right have come in the form of participation in self-governance by challenging state legislation. *Robinson Township* struck down portions of Act 13 that preempted local governments from regulating the location of fracking wells and that entitled the oil and gas industry to automatic waivers of setbacks for well locations near certain bodies of water.[351] This did not entitle the *Robinson Township* plaintiffs to the outright banning of fracking wells. Fracking wells may still be approved in residential neighborhoods,[352] and waivers of setbacks may still be granted to the oil and gas industry.[353] Similarly, in *PEDF II*, the court struck down legislative acts that allocated revenue derived from the public trust to non-trust purposes.[354] But such action does not produce any particular environmental outcome. The funds are required for "conservation" purposes, but there is no particular conservation that must occur and no timeline within which it must occur.

Montana's constitutional environmental rights jurisprudence is similar to Pennsylvania's in this regard. *MEIC* struck down a state statute allowing an exploration mining license to be automatically exempt from non-degradation review.[355] This did not mean that the proposed mining project would not satisfy non-degradation review, in which case the mining would commence. The plaintiffs' constitutional environmental right did not entitle them to a prohibition

347. MASS. CONST. art. XCVII.

348. ILL. CONST. art. XI, § 2.

349. *See supra* Part II.A.2.

350. *See supra* Part II.A.2.

351. *See supra* Part II.A.2.

352. *See* Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 701 (Pa. Commw. Ct. 2018).

353. The court's reasoning certainly seems to allow for the possibility of waivers of setbacks in the event the legislature articulates "identifiable and readily-enforceable environmental standards for granting well permits or setback waivers," which "conserve and maintain" the waters of the commonwealth. Robinson Twp. v. Commonwealth, 83 A.3d 901, 983 (Pa. 2013).

354. *See supra* Part II.A.2.

355. *See supra* Part II.B.2.

on the exploration mining activities. In *Park County*, we see the same theme. The 2011 MEPA amendments, which prohibited courts from enjoining a MEPA-deficient permit while the permit went through the proper MEPA review, were declared unconstitutional.[356] The plaintiffs were entitled to have the MEPA-deficient permit enjoined *while the permit went through proper MEPA review*. That is not the same as enjoining the proposed project, *tout court*. All that means is that the proper procedures for issuing the permit were not followed. The permit may still issue once all the proper procedures are followed. The plaintiffs are not entitled to a specific environmental outcome with respect to the proposed mining project on the basis of their constitutional environmental right. *Clark Fork* even went so far as to say that the procedural constitutional environmental right does not even guarantee plaintiffs' access to a particular means to be heard, just access to *some* means to be heard.[357]

The closest Montana came to recognizing a substantive environmental right would have been in the *Cape-France* case, where the court determined that the seller of land would violate the public's environmental right by drilling a water test well near a known pollution plume.[358] That result meant that the seller was obligated *not* to drill a test well and thereby *not* risk a serious negative environmental outcome. However, the court's reluctance to recognize the Montana constitutional environmental right as establishing a constitutional tort in *Sunburst*[359] and *Shammel*[360] puts doubt on how favorably the court would consider a substantive environmental rights claim like the one in *Payne*.

Hawaii is a little bit different than Pennsylvania or Montana, because Hawaii's constitutional environmental right has not been invoked to strike down state statutes. While the right has been claimed in two different ways, it is reasonable to consider both as procedural rather than substantive claims. The first way that the right has been claimed is exemplified by the *Ala Loop* decision: as an entitlement to enforce state environmental statutes. Notably, the *Ala Loop* plaintiffs only possessed an entitlement to require the charter school to go through the Chapter 205 permit process with the proper government body.[361] It was not an entitlement to stop building the school. More generally, this is a right that allows citizens to enforce state environmental laws, yet another kind of procedural right. The substantive outcome is determined by the content of the state law, not by the content of the environmental right.

The second way that the Hawaii constitutional environmental right has been claimed is exemplified by the electricity cases: as an entitlement to due

356. *See supra* Part II.B.2.
357. *See supra* Part II.B.2.
358. *See supra* Part II.B.2.
359. *See supra* Part II.B.2.
360. *See supra* Part II.B.2.
361. *See supra* Part II.C.2.

process considerations. In those cases, the Hawaii Supreme Court determined that the plaintiffs had a due process right based on their constitutional environmental right to be full participants in the PUC's PPA review and approval process.[362] By thus participating, the plaintiffs were able to hold the PUC to its statutory duties. Notably, however, the PUC's statutory duties do not instruct the PUC to reject any of the disputed PPAs outright. The failure of the PUC was that it did not *consider* the reduction of fossil fuels pursuant to its statutory duties. In other words, the PUC may consider everything it is statutorily required to consider, yet still approve the PPAs. The Hawaii constitutional environmental right does not entitle the plaintiffs to the termination of the disputed PPAs, which would constitute an entitlement to a particular environmental outcome.

While the Hawaii constitutional environmental right is therefore essentially procedural, it could have great value by giving citizens the power to enforce legislation aimed at producing particular environmental outcomes, especially if the government agencies tasked with enforcing environmental laws fail to do so. However, it is still the legislature and agencies that define the parameters of environmental regulation and how much degradation and pollution are acceptable under Hawaii law, not the environmental right as interpreted by the courts.

In Massachusetts, the procedural facet of the constitutional environmental right comes into focus because of the two-thirds clause. The language of the two-thirds clause is itself procedural. Only *if* the government wishes to dispose of such lands or easements is the approval of two-thirds of the legislature required. This amounts to a procedural safeguard on the government's management of conserved lands. The people, through their elected representatives, must approve any such dispositions by a margin of two to one. However, there is nothing that prohibits the government from disposing of lands or easements taken for conservation purposes.

Interestingly, Massachusetts offers the most substantive environmental rights claim in its constitutional environmental right jurisprudence as illustrated by the federal district court case in *Hootsein*,[363] where the pro se plaintiff claimed that his right to clean water had been violated by elevated lead levels in the drinking water of the Amherst-Pelham schools.[364] There, the plaintiff claimed an entitlement to a particular level of environmental quality in addition to demanding that the school district be required to provide it.[365] Unfortunately,

362. *See supra* Part II.C.2.
363. *See supra* Part II.D.2.
364. *See supra* Part II.D.2.
365. *See supra* Part II.D.2.

the district court did not find any support in Massachusetts state law supporting the plaintiff's claim to a substantive environmental right.[366]

Finally, Illinois' constitutional environmental right is so narrow that it is of limited value, and what value it has is by virtue of being a procedural, not substantive, right. All that the Illinois constitutional environmental right does is expand the doctrine of standing in environmental pollution cases by eliminating the special injury requirement for bringing a public pollution claim against a polluter. This expands access to the courts for seeking legal redress for environmental harms, but it in no way entitles a claimant to new or additional substantive environmental outcomes that do not already exist at law. The only effort to vindicate the Illinois constitutional environmental right as a substantive right came in *Illinois Pure Water Committee, Inc.* in 1984, where the plaintiffs sought to strike down a state statute requiring fluorination in drinking water.[367] Even if the plaintiffs had been victorious, however, striking down such a statute would not have prohibited fluorinating drinking water. It would have still permitted water districts to choose whether to fluorinate their drinking water, making it structurally similar to *Robinson Township* striking down Act 13.

B. BORROWING FROM OTHER LEGAL DOCTRINE

The courts tasked with interpreting these constitutional environmental rights have by and large focused on the constitutional language, which readily maps onto already established legal doctrines. And where such language is lacking, courts have looked to other established doctrines for interpreting the right. This means that courts have not articulated the boundaries of the substantive rights language contained within their respective constitutions. I do not go so far as to claim this is intentional avoidance, as I think the nature of the cases brought before the courts plays a role in what part of the constitutional text is most relevant. However, it is striking that for all the cases decided on the basis of these constitutional environmental rights, we have little idea of what the "right to clean water and air" or the "right to a healthy environment" really looks like in the eyes of the judiciary.

Despite this pattern of avoidance, Pennsylvania provides the most information regarding its substantive rights language. The *Robinson Township* plurality tells us that the state cannot unreasonably impair the substantive right, and that the substantive right is a bulwark against actual or likely degradation of air and water quality.[368] However, the court never returns to the substantive right to tell us what air and water quality the right entitles Pennsylvanians to. Instead, the majority of Pennsylvania environmental rights case law focuses on the public

366. *See supra* Part II.D.2.
367. *See supra* Part II.E.2.
368. *See supra* Part II.A.2.

trust language in the constitutional environmental right provision. Relying on that language allows the court to import duties well grounded in Pennsylvania private trust law into the contours of its environmental rights jurisprudence. The court is not tasked with declaring what would amount to entirely new duties for the government. Instead, once the government is recognized as a trustee by the plain language of the constitutional provision, the duties follow under established legal doctrine. Those duties have been invoked to evaluate the constitutionality of the exercise of government powers, such as passing legislation and amending zoning ordinances. It is possible such duties will be invoked more substantively in the future,[369] but it has not happened yet.

Montana is the lone state that does not have other constitutional language to rely on, and therefore must focus on the substantive environmental rights text in its constitutional provisions. Montana, however, still relies on another developed area of legal doctrine in interpreting its constitutional environmental right: the tiered scrutiny analysis that has been developed in federal constitutional law to evaluate federal laws that burden fundamental rights.[370] Because the Montana constitutional environmental right has been recognized as a fundamental right, turning to scrutiny analysis is a reasonable doctrinal choice for the court. It provides a well-accepted framework for evaluating exercises of governmental power that burden fundamental rights. However, it is important to recognize that federal scrutiny analysis typically occurs when a federal law is claimed to burden a fundamental privilege,[371] such as the privilege to travel interstate or the privilege to marry a person of the same or opposite sex. Montana is applying scrutiny analysis to what would appear to be a claim right, not a privilege right, based on its substantive constitutional environmental rights language.

I would posit that this is why Montana's implication analysis, within its scrutiny analysis, is so ungeneralizable. When a court is tasked with determining whether a privilege right is implicated by a law, the question is the sphere of action within which individuals are entitled to autonomy and whether the law affects that sphere of autonomy. When a court is tasked with determining whether a claim right is implicated by a law, we need to know the contours of the duty correlative to the claim right to evaluate whether the law permits actions inconsistent with that duty. In the case of Montana's constitutional environmental right, the Montana Supreme Court has not explicitly stated any

369. *See* Del. Riverkeeper Network v. Pa. Dep't of Env't Prot., No. 525 M.D. 2017, 2018 WL 3554639, at *9–10 (Pa. Commw. Ct. June 4, 2018) (refusing to hold that citizens categorically could not compel DEQ to undertake toxic waste remediation under Section 27). This case is still being litigated, but the trustee's duties may be interpreted substantively to require affirmative remediation of environmental degradation by the state.

370. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 858–59 (Erin Chemerinsky et al. eds., 6th ed. 2019).

371. *See* Hohfeld, *supra* note 17, at 32–33.

general principle that captures the government's substantive environmental duty under the constitutional text. If we were to try to distill such a general principle from the case law, it might be something like the following: where the government exercise of power permits actions that may cause environmental degradation, the right is implicated (*MEIC* and *Park County*), but where the government exercise of power only permits actions that are themselves permissions to seek further approval to commence an activity that may cause environmental degradation, the right is not implicated (*Northern Plains* and *Clark Fork*).

Even with such an attempted formulation, we still do not have a great grasp of the content of the government's substantive environmental duty, and as I discussed in Part II.A, the Montana Supreme Court has not interpreted Montana's environmental right as a substantive right, anyway. I believe this is why Montana's jurisprudence is the least cohesive of the five states. The language of the right is clearly substantive, and the court appeals to legal doctrine (i.e., scrutiny analysis) that works best when determining the substantive parameters of duties (or no-duties, in the case of privileges). The Montana cases reveal, however, what is essentially a procedural environmental right by striking down laws that only ensure proper procedures are followed but guarantee no substantive environmental outcomes.

I do think it is possible for Montana's constitutional environmental right to be invoked in a substantive context and evaluated under scrutiny analysis. The challenge would have to be something like a challenge to a mining permit issued by DEQ on substantive grounds, not on procedural grounds. The claim would have to be that such a permit is impermissible as a substantive matter, not due to procedural infirmity. Such a claim would force the Montana Supreme Court to expand the boundaries of impermissibility in mining, even though the state has statutory law governing those boundaries (the MMRA). It is hard to believe that a court would take on that task for a variety of reasons, such as separation of powers and scientific expertise concerns.

Hawaii is unique in relying on other legal doctrine to fill in the contours of its constitutional environmental right, because Hawaii's constitutional text explicitly defines the constitutional right in terms of its statutory law. By defining the right referentially, the content of the right is indirectly set by the Hawaii legislature. The court is only tasked with developing an analysis for determining which Hawaii statutes fall within the scope of the constitutional right—which is likely much more appealing to a court than what Montana's courts could be called to do. This is the analysis that we see in *Ala Loop* (determining that Chapter 205 falls within the scope of the constitutional environmental right) and in the electricity cases (determining that Chapter 269 falls within the scope of the constitutional environmental right).

Hawaii also uses its constitutional environmental right to expand its due process doctrine. The constitutional environmental right, as defined by statutory law, can establish the property interest protected by due process, as seen in the three electricity cases. Hawaii citizens are legally entitled to their government adhering to its statutory environmental duties, which may permit participation and an opportunity to be heard in certain government procedures (i.e., a procedural right). Here, the constitutional environmental right is not looking *to* other doctrine for its content, but rather expanding the content of another right, namely the Hawaii due process right. Thus, Hawaii's constitutional environmental right is hardly a right on its own. Rather, it sits embedded in other legal doctrines that are the primary source of the meaning of the right.

Massachusetts' jurisprudence is similar to Pennsylvania's, focusing on one part of the constitutional text over other parts. The Supreme Judicial Court of Massachusetts has not interpreted the substantive environmental rights language contained in its constitutional text. Instead, the focus has been on the two-thirds clause and whether the government is attempting to dispose of lands or easements taken for constitutional conservation purposes. The *Opinion of the Justices to the Senate* makes clear that "lands" or "easements" are defined in traditional property law terms.[372] The remaining case law clarifies what it means for lands or easements to be "taken for" constitutional conservation purposes. This started mostly on an ad hoc basis in *Miller*, *Simms*, and *Selectmen of Hanson*.[373] By *Mahajan*, however, the court made clear that "take for" is to be interpreted through the "prior public use" common-law doctrine, because that is the background against which the constitutional amendment was approved.[374] *City of Westfield* reaffirms this understanding.[375] Rather than having to come up with doctrine from scratch, the court can rely on long-established preexisting legal principles.

Illinois' constitutional environmental right is so limited that it does not even exist independently of some other legally recognized cause of action, as we learn in *City of Elgin*.[376] There is no recognition of any new duties *tout court* pursuant to the Illinois constitutional environmental right. By altering the standing test in limited circumstances, there is only the minor expansion of the class of individuals who may enforce duties regarding pollution.

372. *See supra* Part II.D.2.
373. *See supra* Part II.D.2.
374. *See supra* Part II.D.2.
375. *See supra* Part II.D.2.
376. *See supra* Part II.E.2.

IV. THE UNFULFILLED PROMISE

This Article has provided a comprehensive overview of the state of environmental constitutional rights jurisprudence in the United States by focusing on how state supreme courts have defined the scopes of their respective constitutional environmental rights through the cases that have invoked those rights. I contend that although constitutional environmental rights have had their successes—and for that reason have environmental value—they ultimately fail to achieve the principled environmental goals that an environmental right should secure. In failing to execute a rights paradigm shift, the promise of environmental constitutionalism remains unfulfilled.

As an initial matter, it must be emphasized that the contemporary environmental constitutionalism movement is not particularly clear in what it thinks an environmental right should accomplish for the people.[377] What motivated the ratification of these five constitutional environmental rights was pollution and harm to human health caused by the massive dissemination of industrial chemicals into the environment.[378] But we continue to face serious matters of industrial pollution today. It is just that the pollution is hidden from the naked eye in the form of things like PFAS,[379] microplastics,[380] flame retardant chemicals,[381] and lead,[382] to name a few. For all the attention and "success" these constitutional environmental rights have claimed, they have not been invoked in the context of their original purpose and motivation.[383]

If contemporary environmental constitutionalism is simply about establishing participation in self-governance (Pennsylvania and Montana) and holding the state to its otherwise articulated legal obligations (Hawaii), then the

377. The movement has empiricists that are working on showing correlations between constitutional environmental provisions and better environmental outcomes. *See, e.g.*, Chris Jeffords & Joshua C. Gellers, *Implementing Substantive Constitutional Environmental Rights: A Quantitative Assessment of Current Practices Using Benchmark Rankings*, *in* IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES 34, 38 (Daly & May eds., 2018). But that does not solve the problem that there is no concept of a goal for the constitutionalization of environmental rights.

378. *See supra* Part I.

379. *See, e.g.*, Sharon Lerner, *Bad Chemistry*, THE INTERCEPT, https://theintercept.com/collections/bad-chemistry/ (last visited Dec. 5, 2022).

380. *See generally, e.g.*, Amit Hasan Anik, Shabiha Hossain, Mahbub Alam, Maisha Binte Sultan, Tanvir Hasnine & Mostafizur Rahman, *Microplastics Pollution: A Comprehensive Review on the Sources, Fates, Effects, and Potential Remediation*, ENV'T NANOTECH., MONITORING & MGMT., Dec. 2021.

381. *See, e.g.*, Rosemary Castorina, Asa Bradman, Heather M. Stapleton, Craig Butt, Dylan Avery, Kim G. Harley, Robert B. Gunier, Nina Holland & Brenda Eskenazi, *Current-Use Flame Retardants: Maternal Exposure and Neurodevelopment in Children of the CHAMACOS Cohort*, 189 CHEMOSPHERE 574, 574–75 (2017).

382. *See, e.g.*, Ryan Felton, Lisa Gill & Lewis Kendall, *We Sampled Tap Water Across the US—and Found Arsenic, Lead and Toxic Chemicals*, THE GUARDIAN (Mar. 31, 2021, 6:00 EDT), https://www.theguardian.com/us-news/2021/mar/31/americas-tap-water-samples-forever-chemicals.

383. This is with the exception of the *Hootstein* case in Massachusetts, which was dismissed on federalism principles. 361 F. Supp. 3d 94 (D. Mass. 2019); *see also supra* Part III.D.2.

constitutional environmental rights we have seen in the United States can do a lot of good and provide avenues to that goal. They establish a new entitlement to citizen participation in environmental governance. Additionally, procedural infirmities can still result in substantive environmental outcomes, especially when such infirmities impose additional costs on the environmentally harmful project, making such projects less profitable.[384]

However, procedural environmental rights are still fundamentally limited. Procedural environmental rights are capable of working well on their own only if there is a government in place that is responsive to its people. There has to be a body of politicians and government agents that listens to the concerns of the people and effectively translates those concerns into substantive environmental outcomes. For example, in the Hawaii electricity cases, the PUC failed to consider fossil fuel reduction in approving the challenged PPAs. There is nothing that indicates that those PPAs were impermissible or would be struck down by a court under Hawaii's constitutional environmental right if the PUC simply noted that it considered the need to reduce fossil fuel generation in approving the agreements. Thus illustrated, a procedural environmental right can still result in pollution and degradation being deemed permissible, because there is no substantive entitlement against pollution and degradation. There is no entitlement to stop a project that will—take your pick—increase carbon emissions and climate change impacts, irreparably damage a beautiful landscape, eliminate an important habitat for a locally endangered species, or put high levels of cancer-causing pollutants into a groundwater aquifer. Being heard does not mean that the listener will agree and do what is asked.

Because of this lack of entitlement to substantive outcomes, constitutional environmental rights have failed to effectuate the paradigm shift that rights-based language is supposed to convey in the environmental context. Often, though not invariably, the purpose of rights language is simply to limit the applicability of tradeoff reasoning. Rights communicate the elevation of certain interests to a categorical position where those interests are not traded to maximize social welfare, especially *where those interests are protected from demands that they be sacrificed*.[385] These constitutional environmental rights were ratified to elevate the interests of the citizens of each state *in the*

384. For example, while the *Glisson* court determined that the Illinois plaintiff did not possess any constitutional environmental right to halt the construction of the Sugar Creek dam, the dam was in fact never built due to environmentalists' continued efforts opposing the project. 720 N.E.2d 1034, 1036 (Ill. 1999); *See Field Notes Entry: Permit Denied for Lake on Sugar Creek in Southern Illinois*, U.S. FISH & WILDLIFE SERV. (June 27, 2007), https://www.fws.gov/FieldNotes/regmap.cfm?arskey=21944&callingKey=region&callingValue=3.

385. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 191–92 (1977). For a more recent discussion of the role of rights as "trumps" over utilitarian reasoning, see generally Jamal Greene, *The Supreme Court 2017 Term: Forward: Rights as Trumps*, 132 HAR. L. REV. 28 (2018).

environment itself above traditional tradeoff reasoning that is made on the basis of economic efficiency and the maximization of social welfare (which does not take into account distribution of such welfare). Yet, the rights have never been successfully invoked as an entitlement against (or requiring) certain actions that would respect this interest of the people in their natural world. To put it more bluntly, these rights do not shut down corporate exploitation of the environment. They only punt the question of "how much exploitation?" or "which exploitation?" to some other decisionmaker, whom we can reasonably anticipate will view the exploitation as socially desirable in many regards. If the environmental right does not have the force of a right per se in such a case, it fails to effectuate the paradigm shift a rights-based environmentalism aims for.

The weakness of the contemporary environmental movement is this unwillingness to contemplate the possibility that it should make categorical demands against certain environmentally harmful activities, regardless of their other social benefit. It buys into the illusion that somehow we can have our cake and eat it too. We can frack anywhere, if we just do enough to make it environmentally friendly. We can mine remote areas, if we just do enough to restore them when we are done. The point of a constitutional environmental right ought to be that some environmental harms are categorically prohibited, regardless of precautions, remediation efforts, and social benefit. We should not frack, nor should we wild areas for mining operations, regardless of precautions, remediations efforts, and social benefits. Whatever loss to social welfare prohibition requires is of no consequence to the determination of whether or not the activity is permissible. Until such a paradigm shift is achieved, the promise of environmental constitutionalism will remain largely unfulfilled, and it will never have the character of a true rights-based movement.

V. LESSONS FOR THE STATES

When I began work on this Article in late 2020, I did not anticipate that the moves in New York and New Jersey to constitutionalize an environmental right would spread like wildfire in 2021. Because it has, it is worth briefly touching on the new wave of constitutional environmental rights and providing some pragmatic advice for those proposing these state-level green amendments.

First, all of the constitutional environmental rights explored in this Article—including those pending or recently ratified in New York, New Jersey, Iowa, Kentucky, Maine, New Mexico, Oregon, Vermont, Washington, and West Virginia—contain substantive environmental rights language. While the substantive environmental rights language seems necessary to include in the constitutional text, I have argued in this Article that courts actually shy away from providing content to substantive constitutional environmental rights claims, so such language ends up being the least useful in constitutional text.

This means that the excitement over New York voters ratifying the green amendment[386] is overblown. Equally overblown are the negative reactions to New York's green amendment.[387] New York's constitutional environmental right is most similar to what we see in Montana. Given that jurisprudence, New York courts will likely also struggle to interpret the right in a principled way and will almost certainly not create any new substantive environmental entitlements held by the people. Without such entitlements, it is hard to see how the right will "devastate the state's economy"[388] or produce significantly positive environmental outcomes. Nonetheless, such language reflects the amendment's strong substantive rights language. Without such language, no substantive environmental rights claims can even be made. For that reason, it should still be included in all green amendments.

Second, advocates of environmental rights amendments must decide whether they will pursue the creation of a public trust in the constitutional text. Choosing to create the public trust allows courts to import private trust doctrine into their constitutional environmental rights jurisprudence, as we see in Pennsylvania; provides authority to judicial decisions; and allows judges to avoid the hard substantive rights questions (e.g., what level of lead in drinking water counts as "clean water"?). States can look to Pennsylvania's jurisprudence for guidance in the future if their rights amendment contains similar trust language. Furthermore, while I have argued that we have not seen much by way of substantive environmental outcomes on the basis of the substantive environmental rights language, the trustee's duties to not degrade the corpus of the public trust and to treat beneficiaries impartially may have potential to develop into substantive environmental claims. Whether they do depends on the claims brought in court and whether judges feel comfortable drawing substantive environmental lines that go against environmental agency decisions or corporate interests on the basis of private trust law.

New Jersey, Iowa, Kentucky, New Mexico, Oregon, Washington, and West Virginia have elected to incorporate public trust language into their proposed amendments. In a unique move, Maine has elected to remove the public trust language from its proposed amendment. Vermont's text mimics Pennsylvania's very closely, but lacks reference to the state as trustee. For clarity and to avoid avenues for challenge by would-be polluters (thereby delaying decisions on substantive grounds), Vermont's bill sponsors should make the creation of the trust clear, if that is their intent.

386. "Each person shall have a right to clean air and water, and a healthful environment." N.Y. CONST. art. I, § 19.

387. *See, e.g.*, James B. Miggs, *Why NY's Proposed 'Green Amendment' Could Devastate the State's Economy*, N.Y. POST (Oct. 20, 2021), https://nypost.com/2021/10/20/why-nys-proposed-green-amendment-could-devastate-states-economy/.

388. *Id.*

Notably, no state has followed the example set by Hawaii: to define the content of the constitutional environmental right by reference to the state's environmental statutes.[389] This is likely because the political attention has been focused on Pennsylvania. Hopefully this Article gives lawmakers another avenue to consider, one which I would contend may be quite powerful. Allowing citizens to become enforcers of state environmental laws, both against private parties and the government itself, is a very powerful tool that should not be strongly disfavored over the creation of a public trust.

Third, there is the question of whether the constitutional environmental right ought to be constitutionalized as a fundamental right—in other words, as a natural, inalienable, inherent, indefeasible right. As a reminder, Pennsylvania and Montana's constitutional environmental rights are fundamental rights, whereas Hawaii's is not. The status of the right as fundamental has not played an important, let alone determinative, role at this point. The value of recognizing the constitutional environmental right as a fundamental right, however, comes from the fact that it will be challenged against other legitimate government, private property, and liberty interests. We saw the Pennsylvania Supreme Court temper the environmental right by legitimate development in *Robinson Township*,[390] and we saw the Montana Supreme Court sidestep the clash between its environmental right and private property rights in *Park County*.[391] It is inevitable that a court will have to decide between these constitutional environmental rights, on the one hand, and development and private property, on the other hand, in the future. Recognizing the constitutional environmental right as a fundamental right can only help in those situations.

Fourth and finally, states should consider addressing several procedural issues in the constitutional text. This includes explicitly indicating who can enforce the constitutional environmental right and against whom the right may be claimed (i.e., the government, private parties, or both). It also includes explicitly stating that the right is self-executing and is meant to add to any other statutory or common-law right. These kinds of matters typically take several rounds of litigation for courts to resolve, so explicitly declaring them in the constitutional text can reduce delay in achieving whatever efficacy the right may be able to provide.

389. If it was not clear above, no state should follow Montana and New York and pass a green amendment with essentially bare substantive environmental rights language. Courts have limited tools for developing the contours of such a right into meaningful boundaries on environmentally harmful action. Pennsylvania's trust language and Hawaii's referential language at least give the courts law to rely on in crafting their rights doctrines.

390. *See* 83 A.3d 901, 959 (Pa. 2013).

391. *See* 477 P.3d 288, 307–08 (Mont. 2020).

CONCLUSION

The severity of our environmental crises should shock the conscience of any reasonable person. The fact that we have gotten to such a state, even though fifty years ago the people demanded we address our environmentally infirm ways, should make any reasonable person deeply angry. It is not surprising that the environmental movement would look to new strategies to address our current environmental crises, including environmental constitutionalism, given that the labyrinth of environmental statutory law has not stopped the reckless descent into environmental catastrophe.

However, the political movement needs to take a long, hard look at what is actually being achieved in court through constitutional environmental rights claims. This Article has argued that there has not been the expected rights-based paradigm shift catalyzed by environmental constitutionalism. This is because constitutional environmental rights are not being interpreted as entitlements to substantive environmental outcomes. Until they are, the promise of environmental constitutionalism will remain unfulfilled.

* * *