

U.S. STATE CONSTITUTIONS AND ENVIRONMENTAL PROTECTION: DIAMONDS IN THE ROUGH

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Creating fundamental rights and enshrining them in a constitution as the highest law of the land was a revolutionary American concept. Since *Marbury v. Madison*, the role of courts as the final arbiter of those rights has been a central tenant of our constitutional democracy, an essential ingredient of a society based on rule of law.¹ The second half of the twentieth century witnessed a blossoming of judicial enforcement of federal constitutional rights, particularly in protecting the accused and providing equal protection and substantive due process rights for minorities, women, and others. These rights, along with more traditional rights like free speech, religion, and due process are at the core of our civil society. While the strength of constitutional rights swings with the shifting majorities on the court, their basic tenants seem beyond question. Americans love their Constitution, protect their rights under it, and flock to the courts when they perceive those rights are infringed upon. We expect courts to enforce constitutional rights, and citizens and legislatures alike abide by the outcomes.

In our federal system, state constitutions often transcend the U.S. Constitution, embracing the Bill of Rights and more, and establishing and protecting rights and duties in areas of governance reserved to the states. Unlike the federal Constitution, which has no provision for environmental protection,² nearly one half of our state constitutions have textual rights or policy statements protecting natural resources and/or the environment.³ Many of the clearest statements of environmental rights were enacted in the last 40 years, as our nation began to recognize environmental protection as a legal and political norm. Protecting the environment was important to civil society, just like the other protections we elevate to constitutional right status.

This essay explores the difficulties in effectively enforcing environmental constitutional rights in the courtroom. While the focus is on state courts,

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¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

² Efforts to find an environmental right in the U.S. Constitution have not been successful, though some argue that the Posterity Clause and the Ninth Amendment provide a basis for such a right. See *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 535 (S.D. Tex. 1972).

³ James May & William Romanowicz, *Environmental Rights in State Constitutions*, in *PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW* 306, 306 (James May ed., 2011). Professor James May summarized U.S. state constitutions in 2011 and concluded “nearly one-half of U.S. states explicitly recognize either some variation of an environmental concern as an overarching state policy or purport to provide a basic civil right to a quality environment.” *Id.* at 306. The number of constitutions that define environmental protection as a right is a smaller subset, perhaps 8-10 states depending on how one views the provisions. *Id.* at 307.

hopefully the lessons from these courts can inform attorneys and non-governmental organizations (NGOs) in other countries that are grappling with these same issues. Constitutional rights are ultimately defined by judges, so strategic case selection and excellent lawyering matter.

The enforcement of environmental rights has a checkered history in the U.S. As Professor Barton Thompson concluded, “[s]tate courts also have helped ease most of the constitutional provisions into relative obscurity by holding that the provisions are not self-executing, by denying standing to private citizens and groups trying to enforce the provisions, or by establishing relatively easy standards for meeting the constitutional requirements.”⁴ Why is this so? Are environmental rights different than other constitutional rights? And, as a corollary, what can we learn from the instances when state courts have elevated environmental constitutional rights to the same status as other constitutional rights? I will try to answer these questions from a litigator’s perspective and see what lessons (or lack thereof) can be gleaned from our forty-year state-level experiment of securing environmental rights in state constitutions.

I. A TALE OF TWO STATES: ILLINOIS AND MONTANA

Illinois and Montana contrast what can go wrong and what can go right when constitutional environmental rights are litigated. Both constitutional provisions were enacted in the early 1970s, as the environmental movement rose to prominence in the United States.⁵ Both arguably enshrined environmental protection as a positive right and duty. Yet the Illinois constitutional environmental rights have been, in Professor Thompson’s words, eased into “relative obscurity.”⁶ Montana’s rights, on the other hand, were initially given a robust life as fundamental, on par with other traditional fundamental rights.⁷

The Illinois Constitution provides a clear statement of environmental rights and duties. Article XI Sections 1 and 2 provide in part:

The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this

⁴ Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003); see also Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 847 (1990).

⁵ The flurry of federal environmental legislation in the early and mid-1970s is remarkable. A partial recitation of those laws includes the National Environmental Policy Act, 42 U.S.C. § 4321 (2012) (enacted in 1970); Clean Air Act, 42 U.S.C. § 7401 (2012) (enacted in 1970); Clean Water Act, 33 U.S.C. § 1251 (2012) (enacted in 1972); Endangered Species Act, 16 U.S.C. § 1531 (2012) (enacted in 1973); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (2012) (enacted in 1976); and National Forest Management Act, 16 U.S.C. § 1600 (2012) (enacted in 1976). State constitutional environmental provisions should be viewed as signs of the times, poignantly symbolized by the first Earth Day in 1970.

⁶ Thompson, *supra* note 4, at 158.

⁷ *Id.*

and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.⁸

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.⁹

Illinois was one of the first states to establish a constitutional environmental right. Enacted in 1970, the dawning of Earth Day, the constitutional convention's proceedings provide evidence to enact an enforceable right with teeth.¹⁰ The societal context of these provisions, plus their plain language, evidence an intent to create substantive, enforceable rights. The Illinois courts have largely felt otherwise, leaving the constitutional rights "emasculated" in the words of one seasoned Illinois environmental litigator.¹¹

In the forty years since the provision was enacted, Illinois courts have determined that the environmental rights are not "fundamental,"¹² that citizens lack standing to enforce them even when government actions threaten direct environmental harm,¹³ and that it is perfectly acceptable for the legislature to enact laws regulating the environment that immunize agencies from judicial review of their decisions, even when those decisions directly affect human health and the environment.¹⁴ In case after case, Illinois courts have consistently refused to give substantive effect to the constitution's plainly worded environmental rights.¹⁵

The Illinois court's willingness to frustrate the intent of the framers who clearly stated that environmental statutes should be subject to constitutional scrutiny violates an important canon of constitutional interpretation, that courts must give effect to the intent of the framers.¹⁶ The *Glisson* court's

⁸ ILL. CONST. art. XI, § 1.

⁹ *Id.* at art. XI, § 2.

¹⁰ For example, the Illinois Constitutional Convention's proceedings speak of both the environmental right and to the idea that citizens should be able to enforce it: that the governance power over an individual's "standing" to assert violations of his right [to a healthful environment] through established routes of redress, may "not be exercised so as to effectively deprive the individual of his standing." 6 Illinois Constitutional Convention Record of Proceedings 702, 705 (1972).

¹¹ Telephone Interview with Albert Ettinger, Attorney (Mar. 4, 2014).

¹² Ill. Pure Water Comm., Inc., v. Dir. of Pub. Health, 470 N.E.2d 988, 992 (Ill. 1984).

¹³ *Glisson v. City of Marion*, 720 N.E.2d 1034, 1045 (Ill. 1999).

¹⁴ *City of Elgin v. Cnty. of Cook*, 660 N.E.2d 875, 880, 884 (Ill. 1995); *White Fence Farm, Inc. v. Land & Lakes Co.*, 424 N.E.2d 1370, 1376-77 (Ill. 1981).

¹⁵ Professors May and Romanowicz concluded that the *Glisson* decision would cause the Illinois constitutional provisions to "lay[] fallow" until the Illinois Court changes course. May & Romanowicz, *supra* note 3, at 314-15.

¹⁶ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Of course Justice Scalia's efforts to divine intent are not shared by all. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 76 (2010). However, interpreting the intent of state constitutions can be less contentious than interpreting our federal one because recent

denial of standing is hard to fathom given the plain language and intent of Article IX Section 2 of the Illinois Constitution. The court appeared to confuse the jurisdictional requirements for standing and injury in fact with the real issue of whether Article XI only protected human health, not wildlife and the natural environment.¹⁷

As a result of the consistent efforts of Illinois courts to find virtually no substantive role in Illinois' environmental constitutional rights, public interest attorneys are forced to use these provisions as mere collateral proof that they can challenge an administrative decision based on other legal principles.¹⁸ A pending case challenging approval of a gravel pit in a sensitive area, *Sierra Club v. Office of Mines & Minerals*, illustrates how the court's precedent has weakened the state's constitution.¹⁹ The state argues that issuance of the gravel permit is beyond any form of judicial review even if there are serious procedural and substantive problems with the permit.²⁰ Plaintiffs allege serious harm to health, property and a beloved state park.²¹ Using the textual right to a clean and healthful environment would be a logical way to attack the legislative and agency efforts to eliminate any citizen recourse, but that is no longer an option. Instead, plaintiffs must seek redress under common law writ of certiorari and due process theories with the constitutional environmental rights providing background authority.²²

Montana provides a much different approach to interpreting what a constitutional right to a "clean and healthful" environment means. Montana's environmental rights are found in both Article II, the "Bill of Rights," which grants a right to a "clean and healthful environment," and in Article IX, which imposes a corresponding duty on the state and all citizens to maintain and improve the environment.²³ Like Illinois, Montana enacted its constitutional

constitutions like Illinois and Montana have detailed contemporary constitutional convention transcripts. Intent aside, the starting point for interpretation is the plain language. *See, e.g., Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 945-46 (Pa. 2013).

¹⁷ *Glisson*, 720 N.E.2d at 1039. The court framed the issue on appeal as to whether Glisson had standing to enforce the Illinois Endangered Species Act, a question of statutory standing. *Id.* The court then proceeded to find that Glisson lacked standing to enforce the constitution and determined that wildlife protection is not included in the reach of Article II. Therefore Glisson lacked standing to enforce it. *Id.* at 1045. The court's analysis is misplaced; Glisson clearly had an injury in fact to confer standing. What the court should have done is rule that despite his standing, the claim failed because the constitutional right inures to the protection of health, not wildlife. That way, the court could have done justice to the plain language and the framers' intent, which it is bound to do, and at the same time preserved its authority to interpret what the phrase "clean and healthful" meant in the context of the pending lawsuit. *Id.* at 1042.

¹⁸ Plaintiffs' Response to Defendant's Motions to Dismiss at 24, *Sierra Club v. Office of Mines & Minerals*, No. 12MR1021 (Cir. Ct. 7th Jud. Dist. 2013), *aff'd* No. 4-14-0405, 2015 Ill. App. Ct. WL (4th Dist. Mar. 5, 2015) [hereinafter Plaintiffs' Response].

¹⁹ *Id.*

²⁰ *Id.* at 9.

²¹ *Id.* at 6.

²² *Id.* at 25, 27.

²³ MONT. CONST. art. II, § 3 (stating "[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . ."); *Id.* at art. IX, § 1 (stating (1) The state and each person shall maintain and improve a clean and healthful

environmental rights in the early 1970s. Like Illinois, the constitution creates a textual right and duty in plain terms.²⁴ Unlike Illinois, the Montana Supreme Court gave heft to the textual right in its first major interpretation, with lasting effects on both the state's jurisprudence and the conduct of its administrative agencies.²⁵

In *Montana Environmental Information Center* ("MEIC") *v. Department of Environmental Quality*, the court found the right to a clean and healthful environment fundamental, granted citizens standing to enforce it,²⁶ and applied strict scrutiny to overturn a statute that exempted ground water pump tests for new mines from environmental review.²⁷ The case concerned groundwater pump tests for a huge new gold mine.²⁸ The pump tests would have discharged large quantities of groundwater with high concentrations of heavy metals into the Blackfoot River, a famed trout fishery.²⁹ The tests were exempt by statute from any water quality or environmental review.³⁰

The court relied heavily on the detailed transcripts of the Constitutional Convention, which, in the court's view, left no doubt that environmental rights were as important as other fundamental rights.³¹ The Montana court also lowered the burden of proof by applying precautionary principle language in finding that plaintiffs did not have to prove harm, only the threat of harm

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).

²⁴ The Montana right is in Article II and the duty is in Article IX. MONT. CONST. art. II, § 3, art. IX, § 1. In the Illinois Constitution, Article IX Section 1 provides a "duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations." Ill. Const. art. XI, § 1. Section 2 of that same article provides the right: "[e]ach person has the right to a healthful environment." *Id.* at art. XI, § 2.

²⁵ See generally *Mont. Env'tl. Info. Ctr. ("MEIC") v. Dep't of Env'tl. Quality*, 988 P.2d 1236 (Mont. 1999).

²⁶ *Id.* at 1243, 1246.

²⁷ In the court's words:

[T]he right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute *or rule* which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.

Id. at 1246. The decision also "conjoined" the fundamental right in Article II with the duty to protect the environment in Article IX. *Id.*

²⁸ *Id.* at 1237-38.

²⁹ *Id.* at 1238.

³⁰ *Id.* at 1239.

³¹ Again in the court's words: "[W]e conclude that the delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *MEIC* at 1249.

to invoke the Constitution: “[o]ur constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked.”³² Thus, in its first major interpretation, the Montana court created a fundamental right on par with other rights in the Article II Bill of Rights section of the state constitution.

Two years later, the Montana court, in dicta, elaborated on the affirmative duties created by Articles II and IX when it refused to enforce contract provisions between private parties that would have required drilling a well through a contaminated aquifer, spreading the contamination.³³ The court further explained that the constitutional duty to protect the environment includes not only private parties, but extends to all state officials, including judges, who would be abdicating their constitutional responsibilities by using their power to enforce a contract, otherwise legitimate, that portended harmful pollution of groundwater.³⁴

While the *MEIC* decision was not well-received in all quarters,³⁵ it represented a profound change in Montana environmental law. Such strong words, by a unanimous court with a diverse background, changed the legal and political landscape by establishing environmental protection as a fundamental right.³⁶

A recent case shows that the constitutional right has limits. In 2012, conservation groups challenged the State Land Board’s decision to lease half a billion tons of coal on state lands.³⁷ Known as Otter Creek, the sale enabled the lone bidder to develop its adjacent coal holdings, promising the largest new coal mine in the U.S.³⁸ The state legislature previously exempted coal sales from environmental review at the lease stage.³⁹ The state planned on conducting its review only after the company paid and the state spent an \$85,000,000 bonus bid, conducted millions of dollars of studies, and submitted a plan of operation years after the lease was approved.⁴⁰ Plaintiffs argued that forestalling environmental review until the project was on the verge of approval meant that the precautionary purposes of the environmental rights would be meaningless, and that “big picture” impacts like climate change could be easily overlooked.⁴¹ The supreme court found that plaintiffs’ rights

³² *MEIC*, 988 P.2d at 1249.

³³ *Cape France Enters. v. Estate of Peed*, 29 P.3d 1011, 1017 (Mont. 2001).

³⁴ *Id.* In the court’s words: “Moreover, for a court to mandate specific performance of the contract at issue on the record here, would not only be to require a private party to violate the Constitution—a remedy that no court can provide—but, as well, would involve the state itself in violating the public’s Article II, Section 3 fundamental rights to a clean and healthful environment, and in failing to maintain and improve a clean and healthful environment as required by Article IX, Section 1.” *Id.*

³⁵ See John L. Horwich, *Montana’s Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 331-32 (1996).

³⁶ *MEIC*, 988 P.2d at 1246.

³⁷ *N. Plains Res. Council v. Mont. Bd. of Land Comm’rs*, 288 P.3d 169, 171 (Mont. 2012).

³⁸ *Id.*

³⁹ *Id.* at 172.

⁴⁰ *Id.* at 171, 175.

⁴¹ *Id.* at 172.

were not implicated by the Montana Environmental Policy Act (“MEPA”) exemption because future environmental review was required before the project could proceed, and thus refused to apply the same strict scrutiny analysis that it applied in the *MEIC* case.⁴²

Still, the *MEIC* case remains good law. The Montana court’s powerful interpretation of the constitutional right to a clean and healthful environment, in the author’s experience, affects agency decisions, thwarts legislative efforts to give polluters and developers statutory breaks from environmental laws, and infuses public debate on environmental issues.⁴³ Having a substantive environmental right helps foster a cultural norm where environmental protection is on par with other normative values.

II. WHAT CAN WE LEARN FROM THE EXPERIENCE OF THE STATES?

Justice Brandeis famously opined that a benefit of our federalism is that the states can serve as laboratories of democracy,⁴⁴ creating and testing legal principles across a wide swath of the geographical and political spectrum of our country. Certainly, we have the benefit of a wide variety of state experiments with constitutional environmental rights. While Monday-morning quarterbacking of the case strategies of others is a time-honored and risky business in our profession, lessons can be drawn from the moil of state constitutional law. What went right in Montana and wrong in Illinois is evident in decisions from other states.

Three points oblige discussion. First, bad decisions arise from weak factual predicates, often NIMBY-based⁴⁵ opposition to local projects. Good decisions have an obvious public interest focus and often ask courts to assess the constitutionality of legislative acts rather than void individual projects. Second, successful cases touch directly upon important human health issues, with water concerns paramount. A “clean and healthful environment” means to most people, judges included, protecting human health, not trees or animals. Third, to the extent that judges can be convinced to fuse the public trust doctrine with constitutional premises, excellent decisions can result. Environmental protection increasingly has an intergenerational equity

⁴² *N. Plains Res. Council*, 288 P.3d at 173-74.

⁴³ This opinion, subjective and decidedly unscientific, is based on 30 years of experience with state agencies, courts, the state legislature, NGOs, and industry representatives. Indicative of the powerful effect that the *MEIC* decision holds, the conservative Republican-dominated legislature regularly seeks to amend or appeal the environmental provisions. In the 2011 Legislature, House Bill No. 292 sought to pass a constitutional amendment that inserted the words “economically productive” after “clean and healthful.” H.R. 292, 62nd Leg. (Mont. 2011), available at http://leg.mt.gov/bills/2011/hb0299/HB0292_2.pdf. It was vetoed by Governor Bullock and never presented to the voters.

⁴⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

⁴⁵ NIMBY is an acronym for “Not In My Backyard.” The term is used to describe citizens that oppose proposed projects in their neighborhood or town that are believed to be unsightly, dangerous or otherwise undesirable. Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495, 495 (1994).

component, and framing issues as part of a larger public trust responsibility makes that posture clear.

III. LITIGATING ON THE FACTS AS MUCH AS THE LAW

The adage “bad facts make bad law”⁴⁶ comes to bear on the cases discussed herein. Cases with bad legal results often have weak factual predicates. The weak decisions in Illinois, early Pennsylvania cases, and other states as discussed in this essay bear that out.⁴⁷ The strong decisions in Hawaii, Montana and now Pennsylvania show the converse to be true: good facts can make good law.⁴⁸

Focusing on specific projects of local import, without significant public policy implications, is not a good approach to enforcing constitutional environmental rights. The early cases in Illinois, Pennsylvania and other states prove the point. Asserting constitutional protection for lamprey eels and Indiana crawfish as part of a clean and healthful environment in the *Glisson* case stretches the Illinois constitution’s plain language.⁴⁹ Plaintiffs in that case attempted to stop a local dam project based mostly on impacts to wildlife.⁵⁰ Stopping the dam was undoubtedly important to local residents but does not appear to be an issue of state-wide importance. Public health was not threatened. The NIMBY aspect seems evident. Professor Dernbach made a similar point in his analysis of the seminal early Pennsylvania constitutional rights cases, *Gettysburg Tower* and *Payne v. Kassab*.⁵¹ Constructing a large tower on private land near a famous battlefield and widening a street through a park were undoubtedly pressing issues for the people affected by them, but they do not present compelling facts upon which to develop new constitutional rights.⁵² In both cases plaintiffs sought to halt individual projects of largely local import without any pollution or adverse health impacts.⁵³

⁴⁶ The original adage is “hard cases make bad law.”

⁴⁷ See *infra* Part III.

⁴⁸ *Id.*

⁴⁹ *Glisson v. City of Marion*, 720 N.E.2d 1034, 1038 (Ill. 1999).

⁵⁰ *Id.*

⁵¹ John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretive Framework for Article I Section 27*, 103 DICK. L. REV. 693, 704, 707 (1999).

⁵² *Id.* at 715.

In retrospect these cases may not have been the best cases to educate courts about the value of Article I Section 27. When new laws are passed citizens and governments often take the easy cases first... Here by contrast courts were confronted from the outset by two cases that pushed the extreme boundaries of the Amendment.

Id. at 714-15.

⁵³ *Payne v. Kassab* is particularly instructive, as the offensive action involved taking of half an acre of a public parkway. *Payne v. Kassab*, 312 A.2d 86, 86, 94 (Pa. Commw. Ct. 1973). The plaintiffs sought an expansive reading of the constitutional right that, in the court’s view, would make it “difficult to imagine any activity in the vicinity of River Street that would not offend the

Decisions in other states support the premise that bad facts make bad law. In an early Michigan case, the court denied relief to litigants seeking to use the constitution's environmental provisions to attack an eminent domain effort taking a few acres of plaintiffs' property.⁵⁴ In Virginia, private litigants also tried to use the Virginia constitution's environmental provision⁵⁵ to attack an eminent domain proceeding, arguing that the constitution mandated an environmental impact statement for taking a few acres of plaintiff's property.⁵⁶ Another early Virginia case tried unsuccessfully to use the same provision to save historic buildings.⁵⁷ These cases all have NIMBY components, where plaintiffs ask the court to apply the constitution to stop a particular project in their locale, rather to address an important public health or pollution issue.⁵⁸

Successful cases often tie constitutional environmental rights to strong public interest facts relating to human health and well-being. The Montana court in *MEIC* was worried about adding carcinogens to the Blackfoot River, itself holy water in Big Sky Country, the namesake of Norman Mclean's "A River Runs Through It."⁵⁹ Moreover, a real and pressing policy question added to the case: how far could the legislature go in exempting activities from any non-degradation review under the state Clean Water Act? The case framed an issue that frequently confronts courts in the constitutional realm and allows them to exercise their appropriate judicial function by finding that the legislature over-stepped its bounds of constitutional authority. Thus, the court was presented with both a compelling set of facts with a tie to public health and an important policy decision framed as testing the limits of the

interpretation of Article I, Section 27 which plaintiffs urge upon us." *Kassab*, 312 A.2d at 86, 94. However, not only did the plaintiffs' weak factual predicate result in a loss, the court created much greater collateral damage by imposing a new and very high burden on those seeking to use the Constitution's environmental rights in the future. *Id.*

⁵⁴ *Mich. State Highway Comm'n v. Vanderkloot*, 220 N.W.2d 416, 419 (Mich. 1974). While plaintiffs lost the case, the Court did hint that the environmental rights were important, and relied on the fact that the legislature had enacted other laws to protect the environment. *Id.* at 426.

⁵⁵ Article 12 § 1 of the Virginia Constitution states:

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

VA. CONST. art. XI, § 1. While not a declaration of a fundamental right, this language could be interpreted to have substantive effect. Instead these cases gave it little independent effect.

⁵⁶ *Rudder v. Wise Cty. Redevelopment & Hous. Auth.*, 249 S.E.2d 177, 178 (Va. 1978).

⁵⁷ *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 676 (Va. 1985) (holding that an environmental protection provision in the Virginia constitution is not self-executing).

⁵⁸ *See also Lohmeier v. Gallatin Cty.*, 135 P.3d 775, 775-76, 778 (Mont. 2006), a case involving a group of local citizens challenging the creation of a water and sewer district as part of a new subdivision.

⁵⁹ *Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1249 (Mont. 1999).

legislature's ability to eliminate environmental review from a whole class of polluting activities.

The recent *Robinson Township*⁶⁰ case is similar to *MEIC* because it too has a strong public interest, non-NIMBY factual predicate, and presented a policy issue of compelling importance. The case was brought by a number of townships who were unable to impose local restrictions on fracking because the legislature attempted to preempt the entire field of fracking regulation at the state level.⁶¹ The potential for serious and widespread impacts from the sudden onslaught of natural gas development in rural areas is, to put it mildly, a major public health and pollution issue in Pennsylvania, especially in the context of protecting water quality. Add to that the statewide policy implications of legislative curtailment of the role of local governments in protecting communities in the face of widespread resource development, and the groundwork for the successful result in *Robinson Township* seems apparent. Public health issues such as water quality resonate.⁶²

Finally, the melding of constitutional environmental rights with the public trust doctrine creates an engaging line of argument. As one commentator previously noted, constitutional rights either explicitly or implicitly "share some affinity with the ancient common law doctrine of the public trust."⁶³ Properly understood and applied, the public trust doctrine can transform an ancient sovereign responsibility into a judicially-enforceable right.⁶⁴ And like constitutional rights, the public trust doctrine, properly argued, rests at the pinnacle of government responsibility and judicial authority. Like constitutional rights, the public trust doctrine can override statutorily created rights and impose obligations on legislators. Fusing traditional public trust doctrine arguments with constitutional provisions makes both principles seem reasonable and enforceable.

Consider constitutionally based public trust doctrine cases involving water. The most powerful decisions such as *Mono Lake* and *Waibole Ditch* effectively conjoined textual constitutional provisions with traditional public trust principles.⁶⁵

⁶⁰ See generally *Robinson Twp. v. Pennsylvania*, 83 A.3d 901 (Pa. 2013).

⁶¹ *Id.* at 915, 918-19.

⁶² Public health is not a talisman for success. In *Illinois Pure Water Committee, Inc.*, plaintiffs challenged municipal fluoridation of public drinking water on public health grounds. Ill. Pure Water Comm., Inc. v. Dir. of Pub. Health, 470 N.E. 2d 988, 988-89 (Ill. 1984). Putting aside the sometimes emotionally-charged nature of the fluoridation issue, the case smacks of bad lawyering, driven by experts who were deeply invested in the desired outcome, a fact noted by the court. See *id.* at 990-91.

⁶³ Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1173 (1997).

⁶⁴ See Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 202 (1980).

⁶⁵ Both cases were also premised on strong, undeniable factual predicates: the destruction of significant ecosystems resulting from over-zealous private (as opposed to public) human use of water lending credence to the arguments made in the preceding section, that strong public interest facts are quite helpful. See, e.g., *In re Water Use Permit Applications*, 9 P.3d 409, 451-52, 454 (2000).

For example, an important Hawaiian case on environmental constitutional rights, *Waibole Ditch*,⁶⁶ focused mostly on the state's duty as trustee for natural resources (water in particular) under Article IX section 1.⁶⁷ The court read the various constitutional provisions as intertwined with the public trust doctrine and further buttressed by the constitutional rights of native Hawaiians.⁶⁸ Still, the Hawaiian court has found environmental rights enforceable on their own:

While the [environmental] right is “subject to reasonable limitations and regulation as provided by law,” that provision does not suggest that legislative action is needed before the right can be implemented. Put another way . . . the right exists and can be exercised even in the absence of such [reasonable] limitations.⁶⁹

More recently the court has continued to affirm its role as the final arbiter of constitutional rights and the public trust doctrine: as a right granted under the state's constitution, “the ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state.”⁷⁰ The Hawaiian court's melding of public trust and constitutional provisions was further buttressed by the important public policy issues posed in the case: can private development interests dewater streams with important ecological and native Hawaiian values?⁷¹ Again, the case's strong factual predicate lends credence to the strong constitutional holding.

The most profound melding of constitutional environmental rights and the public trust doctrine came recently in *Robinson Township*, with its far-reaching discussion of the topic.⁷² The Pennsylvania Constitution provides a textual basis to do so; however, the court took the public trust discussion to new heights in the context of state constitutional law.⁷³ For the court, the “environmental public trust was created by the people of Pennsylvania [in Section 27 of the Constitution] as the common owners of the Commonwealth's public natural resources.”⁷⁴ The court used both traditional trust analysis and modern public trust cases like *Mono Lake* to impose fiduciary duties to manage trust resources for present and future generations.⁷⁵ Such a result imbues environmental rights with intergenerational responsibilities and appropriately applies well-established trust law principles.

In sum, trying to corral lawyers, even public interest lawyers, into waiting for the “right” case to test constitutional limits is akin to herding cats. However, litigators would be wise to examine the lessons offered by the cases

⁶⁶ *In re Water Use Permit Applications*, 9 P.3d at 425.

⁶⁷ HAW. CONST. art. XI, § 1. Hawaii also gives its citizens a constitutional right to a clean and healthful environment in Article IX Section 9. *Id.* art. XI, § 9.

⁶⁸ *In re Water Use Permit Applications*, 9 P.3d at 449-50.

⁶⁹ *Cty. of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1125 (Haw. 2010)

⁷⁰ *In re Water Use Permit Applications*, 9 P.3d at 409, 455.

⁷¹ *Kauai Springs, Inc. v. Planning Comm'n*, 324 P.3d 951, 975 (Haw. 2014).

⁷² *Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 958 (Pa. 2013).

⁷³ *Id.*

⁷⁴ *Id.* at 956.

⁷⁵ *Id.* at 956-59.

from different states. No one likes to lose a case, or worse, make bad law in the process. The strongest statements of constitutional environmental rights have come from cases with a strong factual predicate. These cases challenge statutes that restrict government's ability to protect public health. The public interest, rather than someone's private property, is at issue. Lawyers that argue constitutional violations caused by a sole project, often in one's backyard, are usually not successful. To the extent courts can be convinced to understand the importance of the public trust doctrine and its natural relationship with constitutional environmental rights, so much the better.

IV. WHY ARE CONSTITUTIONAL ENVIRONMENTAL RIGHTS HARDER TO ENFORCE?

I began this essay with the premise that Americans revere their constitutional rights. That statement appears to be less true for environmental rights. Unlike more traditional constitutional rights like freedom of speech and religion, asserting environmental rights can be framed, explicitly or implicitly, as an attack on free markets and economic prosperity. The same cannot be said for more traditional constitutional rights, which rarely conflict with free market capitalism. We all need due process, freedom from unreasonable searches, the right to speak our mind and worship as we please, even as we go about our business enterprises. None of these rights offend the neo-classical liberal economic theory that guides our economic life.

Conversely, environmental rights are often portrayed as threatening economic growth because they are un-American at heart, or that they create a zero-sum game between economic growth and environmental protection. Courts often accept this zero-sum paradigm, eschewing the equally plausible paradigm of sustainable development.⁷⁶

My point here is that the foundations of anti-environmentalism are deep and virulent in this nation,⁷⁷ and those seeking to enforce constitutional rights need to first be acutely aware of these public misconceptions, and then carefully frame their arguments in the context of constitutional balancing that accompanies the development of all constitutional rights. One can no more

⁷⁶ Dernbach, *supra* note 51, at 715-16.

⁷⁷ That the currents of anti-environmentalism run deep in my view is epitomized by efforts to personally vilify Rachel Carson: to use and abuse her work as a surrogate for attacking both government efforts to protect people from deadly chemicals and to sow continuous seeds of doubt about trusting scientific consensus. See generally RACHELWASWRONG.ORG, <http://rachelwaswrong.org> (last visited Mar. 9, 2015). The anti-Carson website is sponsored by the Competitive Enterprise Institute, a free-market purist organization. *About Us*, RACHELWASWRONG.ORG, <http://rachelwaswrong.org/about-us> (last visited Mar. 9, 2015). Dr. Michael Mann's recent book discussed the same vindictive, distorted, personal attacks on him and other climate scientists by climate-deniers and provides another example of how deep anti-environmentalism runs in this country. MICHAEL E. MANN, *THE HOCKEY STICK AND THE CLIMATE WARS: DISPATCHES FROM THE FRONT LINES* xvi (2012).

argue for the legitimacy of shouting “fire” in a crowded theater than one can argue that environmental rights demand absolute protection.⁷⁸

An important aspect of anti-environmentalism is the perception that environmental regulation is anti-capitalist and un-American. In *Merchants of Doubt*, Naomi Oreskes and Erik Conway explore the origins of modern anti-environmentalism which “echoed a common right-wing refrain in the early 1990s: that environmental regulation was the slippery slope to Socialism.”⁷⁹ For example, in 1992, noted columnist George Will encapsulated this view saying that environmentalism was a “green tree with red roots.”⁸⁰ Environmentalism is portrayed as anti-American, and that view is funded and espoused by well-healed organizations like the Cato Institute, Heartland Institute, and George C. Marshall Institute among others.⁸¹ As Oreskes and Conway note, anti-environmentalism even uses the federal constitution to prove its point: “Cold Warriors . . . invoked the preamble to the U.S. Constitution” to “secure the blessings of liberty,” and liberty demands unregulated economic activity.⁸²

Economist and Nobel Laureate Milton Friedman provided a doctrinal foundation to the view that free markets are essential to protect individual rights. In *Capitalism and Freedom*, Friedman advanced the argument that our constitutional democracy depends on the free market, and those who seek to regulate business activity threaten not only business interests, but the very foundations of our democracy.⁸³ Economic freedom is thus placed on the same pedestal as individual rights. Anti-environmentalists take the free-market-equals-free-society doctrine one step farther and deride environmental

⁷⁸ See *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973) for a perfect illustration of this point. The Court perceived plaintiff’s argument as requiring near absolute protection for the environment, and responded as follows: “We hold that Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources rather than no development.” *Id.* at 94.

⁷⁹ NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT* 134 (2010).

⁸⁰ *Id.* The authors build a convincing case linking anti-environmentalism with free-market purism by tracing the history of efforts to undermine regulation of tobacco, DDT, the ozone hole, and now climate change. *Id.* at 246. For more information, including a catalogue of documents used to substantiate their work, see Naomi Oreskes, *List of Key Documents*, *MERCHANTS OF DOUBT*, <http://www.merchantsofdoubt.org> (last visited Mar. 9, 2015).

⁸¹ See, e.g., RANDAL O’TOOLE, CATO INSTITUTE, POLICY ANALYSIS, *REDUCING LIVABILITY: HOW SUSTAINABILITY PLANNING THREATENS THE AMERICAN DREAM*, 18 (2013), available at http://object.cato.org/sites/cato.org/files/pubs/pdf/pa740_web.pdf. The Cato Institute derides the EPA as a “rogue” agency, “putting hundreds of thousands of Americans out of work,” claims that Arctic sea ice is “rebounding,” sea levels are “not rising,” and global warming is a “hoax,” and wants Americans to sign a petition against the EPA’s “war to scare America.” *Citizen’s Petition to Rein in the Environmental Protection Agency*, HEARTLAND INSTITUTE, <http://heartland.org/citizens-petition-rein-environmental-protection-agency> (last visited May 31, 2015).

⁸² ORESKES & CONAWAY, *supra* note 79, at 238.

⁸³ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 15 (Chicago Press rev. ed. 2002) (1962).

protection as un-American.⁸⁴ The label “eco-terrorism” is frequently used as a means to brand environmental activists, a powerful derogatory label in our post 9-11 world.⁸⁵

The other facet of anti-environmentalism that permeates American culture, the notion that environment vs. the economy is a zero sum game, is another widely held misperception. Former EPA Administrator and Governor of New Jersey Christine Todd Whitman labels the economy-versus-jobs paradigm as one of the “most persistent myths” that policy makers must confront.⁸⁶ The myth persists despite a plethora of statistics that debunk the myth and support the contrary proposition that environmental protection actually improves economic prosperity.⁸⁷ It is no wonder that environmental protection sits near the bottom of the list of issues that are important to American voters.⁸⁸

While I do not suggest that anti-environmentalism fully explains bad court decisions on state constitutions, the nature of environmental rights and the broad, decades-long attack upon them as “anti-American” suggests that environmental rights are more difficult to enforce than traditional constitutional rights because they are perceived to run counter to deeply held beliefs about economic growth and prosperity. Throw in a well-financed public campaign geared toward attacking environmentalism,⁸⁹ and it is not surprising that giving teeth to environmental rights is not easy.

The difficulty in enforcing environmental rights is further exacerbated, in my opinion, by the fact that thirty-eight states elect their judges for relatively short terms,⁹⁰ unlike the lifetime appointments for federal judges. Judges, like the rest of us, hold strong political views, read the papers, and watch television

⁸⁴ See e.g., FreeMarketAmerica, *If I Wanted America to Fail*, YOUTUBE (Apr. 20, 2012), https://www.youtube.com/watch?feature=player_embedded&v=CZ-4gnNz0vc (this “free-market” video, with over 2.7 million YouTube views, encapsulates the environmentalists as anti-American rhetoric).

⁸⁵ See e.g., Jay Byrne & Henry I. Miller, *Domestic Eco-Terrorism Has Deep Pockets. And Many Enablers.*, FORBES (July 10, 2013), <http://www.forbes.com/sites/henrymiller/2013/07/10/domestic-eco-terrorism-has-deep-pockets-and-many-enablers>.

⁸⁶ Christine Todd Whitman, *Environmental Protection and Economic Prosperity: Not a Zero-Sum Game*, in TACKLING THE CRITICAL CONUNDRUM: HOW DO BUSINESS, GOVERNMENT, AND MEDIA BALANCE ECONOMIC GROWTH AND A HEALTHY ENVIRONMENT? 33, 33 (John A. Riggs ed., Aspen Inst. 2004).

⁸⁷ *Id.* at 39 (discussing the Energy Star program that reduces greenhouse gas emissions, saves consumers money, and spurs technological innovation).

⁸⁸ Gallup polling for the 2012 election did not even identify environmental protection as an issue for the 2012 election cycle, while economic-related issues dominated polling results as the “top problem” the country faced. Lydia Saad, *Economy Is Dominant Issue for Americans as Election Nears*, GALLUP (Oct. 22, 2012), <http://www.gallup.com/poll/158267/economy-dominant-issue-americans-election-nears.aspx>.

⁸⁹ See e.g., Suzanne Goldenberg, *Secret Funding Helped Build Vast Network of Climate Denial Thinktanks*, THEGUARDIAN (Feb. 14, 2013), <http://www.theguardian.com/environment/2013/feb/14/funding-climate-change-denial-thinktanks-network>.

⁹⁰ AMERICAN BAR ASSOCIATION, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES (2002), http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf.

news. In my experience, most judges try to apply the law fairly and reasonably. However, elected state court judges are subject to ever-increasing political pressure. They must raise money and run what are increasingly becoming full-fledged political campaigns. Former Supreme Court Justice Sandra Day O'Connor, an ardent campaigner against money in judicial politics, believes that money in judicial elections is "one of the greatest threats to fair courts and that threat is increasing."⁹¹ In 2012, record amounts of "dark money" from PACs with a political agenda were spent on judicial races with substantial amounts from the Koch brothers and other free-market, anti-environmental donors.⁹²

Lawyers must be cognizant of cultural realities when bringing constitutional environmental claims. Legal arguments must be infused with strong policy arguments explaining how environmental rights are compatible with sustainable economic growth and reflect a growing understanding that civil society needs clean water as much as it needs free speech. Constitutional environmental rights represent deliberate choices of the framers and the citizens, who understood the need in the late twentieth century that environmental protection is a vital part of civil society.⁹³ Those constitutional choices should never be held hostage by those who create misperceptions about the economic impact of environmental regulation or challenge the patriotism of groups and individuals who aim to protect the environment. Yet that agenda is part of the backdrop within which constitutional environmental rights must be argued.

V. DIAMONDS IN THE ROUGH

Many states now have included constitutional provisions asserting rights, policy preferences, and/or public trust protection for the environment and natural resources. Worldwide, the number of constitutions that protect environmental rights is impressive and growing.⁹⁴ Increasingly, scholars call

⁹¹ Bill Rankin, *Ex-Justice Says Contested Elections Threaten Fair Judiciary*, ALTANTA JOURNAL-CONSTITUTION (Aug. 12, 2013), <http://www.ajc.com/news/news/local/ex-justice-says-contested-elections-threaten-fair-/nZMSC>.

⁹² John Light, *Dark Money's New Frontier: State Judicial Elections*, MOYERS & COMPANY (Oct. 31, 2013), <http://billmoyers.com/2013/10/31/dark-moneys-new-frontier-state-judicial-elections>.

⁹³ Another observation about successful cases arises from this point: that some of the strongest cases, such as *Robinson Township* and *MEIC* demonstrate how convincing courts to look carefully at the constitutional convention transcripts can be an important ingredient for success. See *Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 944 (Pa. 2013). Original intent for constitutional environmental protection needs to be framed in the greening of America in the 1970s, a passion that infused broad segments of our nation. See *id.* at 906; *Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1245-46 (1999).

⁹⁴ See David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENVIRONMENT MAGAZINE (July-Aug. 2012), <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html> (Figure 1 is a global map showing that most nations have some form of environmental protection in their constitutions; notably missing is the U.S., Canada, China and Australia). Of course, the provisions vary widely in their

for recognition of a right to a clean and healthful environment to stand on an equal footing with more traditional human rights.⁹⁵ Constitutional provisions protecting the environment are diamonds in the rough, waiting for the right circumstances and skilled hands to make them shine. The lessons from our forty-year experiment are important because of the many states with such provisions. Both in the U.S. and globally, as attorneys and their clients seek to develop constitutional rights in national constitutions, the lessons from our past may help frame their arguments.

The profound statement by the Pennsylvania Supreme Court in *Robinson Township* demonstrates the continuing power of enshrining environmental protection at the constitutional level, and how the right case can achieve dramatic results. Judicial interpretations of constitutions have always evolved over time—whether pursuing a new understanding of the Second Amendment or finding that the true meaning of “equal protection” no longer means separate but equal. In that sense, the result in *Robinson Township* is understandable given the text of the Article I Section 27, its framer’s intent, and skillful presentation of a compelling case by counsel. But the scope and depth of the decision is stunning—truly a shining gem.

Alaska too has recently breathed life into a portion of its constitution requiring that natural resource decisions be made in the “public interest.”⁹⁶ In *Sullivan v. Resisting Environmental Destruction on Indigenous Lands* (“REDOIL”), the Alaskan supreme court, for the first time, applied portions of Article VIII of its state constitution, distinguishing contrary precedent and holding that a cumulative impacts analysis based on a “hard look” at the environmental impacts of oil and gas leasing in the Beaufort Sea was constitutionally mandated.⁹⁷ Article VIII mandates maximizing the use of public natural resources, as long as such use is in the “public interest.”⁹⁸ For the Alaskan court, the public interest demanded an assessment of cumulative impacts at later stages of a development.⁹⁹ While the decision is not a profound statement of environmental rights and the plaintiffs lost the case on the issue of whether future phases of development constitute a disposal of an interest in state land, triggering certain requirements of Article VIII, the decision is an important, constitutionally based approach to insure the public interest is considered in a conservative, development-dependent state.¹⁰⁰ The provisions

language and enforceability. But as a global norm, constitutionalizing environmental protection is real.

⁹⁵ See e.g., BURNS H. WESTON & DAVID BOLLIER, GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS xxi (2014). Weston and Bollier conceptualize environmental rights both as fundamental human rights and as a component of replacing a largely market and state-based governance of natural resources with commons-based governance. *Id.*

⁹⁶ See *Sullivan v. Resisting Envtl. Destruction on Indigenous Lands*, 311 P.3d 625, 629 (Ark. 2013).

⁹⁷ *Id.* at 636.

⁹⁸ ALASKA CONST. art. VIII, § 1.

⁹⁹ *Sullivan*, 311 P.3d at 637.

¹⁰⁰ *Id.*

of Article VIII contain other constitutional mandates that invoke the public interest in natural resources that are important to Alaskans.¹⁰¹ Even in Alaska, a state heavily dependent upon and often geared towards exploitation of natural resources, its constitution is a diamond in the rough, waiting for skilled hands to give it meaning in the context of protecting the public interest in resource-use decisions.

These cases demonstrate that despite the difficulties in enforcing environmental rights, we should not let these provisions lay fallow.

One additional point bears mention. Public interest lawyers will not be the only ones bringing cases asserting these rights. However, those lawyers have an obligation, along with their NGO clients, to stay abreast of pending cases and weigh in as amicus to use their expertise to help courts understand that environmental rights should not be treated differently than other constitutional rights. We can help dispel the zero-sum myth. We can help engineer “soft landings” for difficult cases.

In conclusion, this short walk through some state constitutions with environmental protection highlights the promises and pitfalls of constitutionalizing the environment. Successful cases involve public interest issues that relate directly to a clean and healthful environment. Clean water is always a good place to start. Good facts make it easier to create good law. Courts understand their role as the final arbiters of the constitution, a role easier to enforce when examining the constitutionality of a statute rather than a private or agency project. The concept of the public trust doctrine, with its generation-spanning obligations, shares a natural affinity with environmental rights, and can provide additional bases for understanding and interpreting environmental rights. Finally, understanding that environmental advocacy may be viewed differently than asserting other rights is critical. We must show courts how balanced interpretations of environmental rights can lead us away from the ill-conceived zero-sum game of development versus environmental protection and towards putting environmental rights on par with other human rights.

¹⁰¹ Telephone Interview with Brooke Bisson, Valerie Brown, & Nancy Wainwright, Trustees for Alaska (Mar. 28, 2014). Article VIII contains a number of other important protections for public rights in natural resources. *See Sullivan*, 311 P.3d at 629.

