

**Debate: Amend the Oregon Constitution to  
Protect the Environmental Rights of Future Generations?**

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On the 50<sup>th</sup> anniversary of Earth Day, we recognize that humanity's collective responsibility to future generations has been the focus of global concern since Earth Day 1970. This concern has given rise to an enormous array of mechanisms to make the world better for our children and our children's children:

- domestic environmental legislation in virtually every nation, state, and province
- international, multilateral, and bilateral treaties on scores of environmental topics,
- on-going development of customary international environmental law,
- the global attempt to embed sustainability within economic development efforts,
- a shift in the focus of national governments to the broader issue of human development, witnessed to by the adoption of 17 United Nations Sustainable Development Goals, including several environmental goals, and
- embedding environmental rights within national, state, and provincial constitutions.

The last mechanism is our topic today.

In Oregon, we tend to pride ourselves on being on the progressive, cutting edge on environmental issues, pointing to Oregon's system of land use planning, the bottle bill, public access to beaches, and other righteous claims to fame. Yet, we have fallen behind other American states and the rest of the world on incorporating environmental rights into our Oregon Constitution. This debate explores the pros and cons of amending the Oregon Constitution to protect environmental rights, including those of future generations.

We have formulated a proposed constitutional amendment to frame the debate. Then, after first setting the stage about the issue, these materials provide references to:

- cases discussing whether the US Constitution guarantees such right,
- state and federal cases establishing public trust duties concerning the environment,
- state constitutions including such rights as well as their courts' interpretive effort,
- provisions in other national constitutions and their courts' efforts to interpret such provisions, and
- international recognition of environmental protection as human rights.

## **Outline of Proposed Amendment to Oregon Constitution**

### **Section 1 Policy**

It is the policy of the state of Oregon to ensure that present and future generations of Oregonians may enjoy the health, social, cultural, aesthetic, spiritual, educational and recreational benefits provided by the natural resources of the state.

### **Section 2 Scope of State Ownership of Public Natural Resources**

- Recognizes that the following public natural resources are owned by the people in common:
  - Waters of the state, including navigable waters
  - Ambient air
  - Fish and other aquatic animals
  - Wildlife, both game and non-game
  - Submerged lands beneath navigable waters
  - Forest and agricultural lands held by the state, including surface and subsurface estates.
  - Property interests in other public natural resource lands (including surface and subsurface estates in fee simple, easements, leases, etc.) held by the state for recreational, educational, or other public use (e.g. state parks, wildlife refuges, conservation easements, forest highway buffers).
- Excludes those lands for which the state conveyed title to the federal government, municipalities, or individual persons prior to January 1, 2020, and includes lands acquired after that date.
- Defines “state” to include the State of Oregon, state officers and agencies, counties, and other subunits of the state.

### **Section 3 Public Trust Responsibilities**

- Articulates that those public natural resources are held by the state in trust for the benefit of the people
- Prevents the alienation of public natural resources lands except where the Governor proposes alienation, after conduct of a full environmental impact assessment, upon a determination that (1) alienation is in the public interest and (2) the lands to be alienated no longer provide social, cultural, aesthetic, spiritual, educational and recreational benefits to the people. Requires both houses of the Legislature concur with the Governor’s proposal by concurrent resolution.

- Requires the state take affirmative action sufficient to sustain and enhance the overall health, social, cultural, aesthetic, spiritual, educational and recreational benefits from public natural resources owned by the state.

#### **Section 4    Trespass and Public Nuisance**

- Declares that any action substantially diminishes or impairs water quality, air quality, or fish and wildlife constitutes a trespass against state property and a public nuisance.
- Requires the state to prevent third party actions that substantially diminish or impair water quality, air quality, or fish and wildlife populations.

#### **Section 5    Constitutional Right to a Safe, Clean, Healthy and Sustainable Environment**

- Recognizes that sections 2, 3, and 4 create a constitutional right for all residents of the state to enjoy a safe, clean, healthy and sustainable environment.

#### **Section 6    Remedies**

- Allows any person residing in the state to bring suit seeking declaratory and injunctive relief against the state for failure to perform its duties under sections 3 and 4.
- Allows any person residing in the state to bring suit seeking declaratory and injunctive relief, and special damages, against any person for actions that substantially diminish or impair water quality, air quality, or fish and wildlife populations.
- Grants the state legislature authority to provide additional remedies to assure compliance with sections 3, 4, and 5, including provisions for attorneys' fees, expert witness fees, and costs.

## **I. Protecting the Environment**

### **A. Critical to protecting public health**

1. WHO reports that 23% of all global deaths are linked to the environment. That's roughly 12.6 million deaths a year.  
<http://srenvironment.org/sites/default/files/2018-10/prevention-diseases.pdf>
2. Pollution causes 9 million premature deaths each year around the globe, which amounts to 16 percent of all global deaths. Exposures to contaminated air, water and soil kill more people than a high-sodium diet, obesity, alcohol, road accidents, or child and maternal malnutrition. They are responsible for three times as many deaths as AIDS, tuberculosis, and malaria combined, and for nearly 15 times as many deaths as war and all forms of violence.  
<http://srenvironment.org/sites/default/files/2018-10/pollution-health.pdf>
3. Welfare losses due to pollution are estimated at \$4.6 trillion per year — 6.2 percent of global economic output. In the United States, investment in pollution control has returned \$200 billion each year since 1980 (\$6 trillion total). The claim that pollution control stifles economic growth and that poor countries must pollute to grow is false. <http://srenvironment.org/sites/default/files/2018-10/pollution-health.pdf>

### **B. Widely regarded as top priority**

4. Pew Research Center reports that protecting the environment is widely regarded as a top priority in the US. As of January 2020, nearly as many Americans say protecting the environment should be a top policy priority (64%) as say this about strengthening the economy (67%). Members of both parties are more likely to rate protecting the environment a top priority than did so a year ago, though this continues to be a much higher priority for Democrats than Republicans. The share that rates dealing with global climate change as a top priority (52%) is 14 percentage points higher than just three years ago. Today, similar shares rate climate change and improving the job situation (49%) as top policy priorities for the President and Congress. Three years ago, 68% said jobs were a top priority, compared with just 38% who named climate change. <https://www.people-press.org/2020/02/13/as-economic-concerns-recede-environmental-protection-rises-on-the-publics-policy-agenda/>

## **II. The US Constitution**

### **A. US Supreme Court**

The US Supreme Court has not addressed whether the US Constitution protects individuals from government action that allows environmental degradation endangering their lives, health or property.

### **B. 9<sup>th</sup> Circuit**

**1. *Juliana v. United States*, 947 F3d 1159 (9<sup>th</sup> Cir. 2020), *pet rehearing en banc pending* (3/16/20).** (dismissing the prominent climate change case that alleged the federal government has allowed and promoted fossil fuel pollution, which causes climate disruption violating plaintiffs’ substantive due process and equal protection rights. A split panel reversed the district court decision to try the case on grounds that plaintiffs’ lacked standing to sue, without reaching the merits of the plaintiff’s constitutional and public trust claims).

A group of young people, a nonprofit association of young environmental activists, and a purported guardian for future generations represented by Our Children’s Trust brought an action for declaratory and injunctive relief against United States, the President, and federal officials, alleging defendants were continuing to permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation. These actions allowed carbon dioxide emissions to escalate and leading to harmful climate change. Defendant claimed these actions violated substantive due process, equal protection, the Ninth Amendment, and the public trust doctrine. Industry associations intervened as defendants.

The defendants moved to dismiss. The district court (Judge Ann Aiken, Oregon) denied that motion, ruling that the plaintiffs stated a claim for infringement of a Fifth Amendment due process right to a “climate system capable of sustaining human life.” The court defined that right as one to be free from catastrophic climate change that “will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem.” The court also concluded that the plaintiffs had stated a viable “danger-creation due process claim” arising from the government’s failure to regulate third-party emissions. Finally, the court held that the plaintiffs had stated a public trust claim grounded in the Fifth and the Ninth Amendments.

The district court certified its order for appeal, and the Ninth Circuit reversed. The panel majority (Hurwitz, Murguia) did not dispute the plaintiffs’ central claim that the government had contributed to rising carbon emissions, which has led to severe environmental damage:

The record leaves little basis for denying that climate change is occurring at an increasingly rapid pace ... and establishes that the government’s contribution to climate change is not simply a result of inaction...Copious expert evidence establishes that this unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth’s climate if unchecked.

The panel majority held, however, that even if the asserted constitutional rights exist (something it said reasonable jurists could differ), plaintiffs lacked standing to sue because their claimed injuries are not redressable by an Article III court.

There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or

implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of 'competing social, political, and economic forces,' which must be made by the People's 'elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.'" Thus, plaintiffs impermissibly asked the courts to engage in "a broad range of policymaking....given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades.

The court explained:

federal courts 'have no commission to allocate political power and influence' without standards to guide in the exercise of such authority... Absent those standards, federal judicial power could be 'unlimited in scope and duration,' and would inject 'the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role.'

The passionate, fiery dissent by Judge Staton deserves a read. She decried the majority's unwillingness to address an existential threat to the nation that plaintiffs allege is as substantial as the Civil War, one that the political branches have largely ignored and accelerated. She indicated the climate change issues are within the court's authority to redress, even if only partially, and warned, "Waiting is not an option." She noted:

If plaintiffs' fears, backed by the government's own studies, prove true, history will not judge us kindly...When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?

## 2. **Stop H-3 v. Dole**

Thirty years ago, the Ninth Circuit came close to recognizing a federal constitutional right to a clean and healthy environment when it reviewed an equal protection claim against a legislative waiver that allowed construction of a highway through a Hawaiian park, suggesting without deciding that the important right might be subject to intermediate scrutiny. In *Stop H-3 v. Dole*, 870 F. 2d 1419, 1430 (9th Cir. 1989), the court stated

We agree that it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if

we continue our heedless exploitation of this planet's natural resources. The centrality of the environment to all of our undertakings gives individuals a vital stake in maintaining its integrity.

However, we need not decide here whether the importance of a healthful environment gives rise to a right of constitutional magnitude. Even assuming, *arguendo*, that enjoyment of a healthful environment is an important right for purposes of equal protection analysis, section 114 satisfies the requirements for validation of legislation under the intermediate level of scrutiny appellants urge this court to apply.

This case was decided in a context where the Ninth Circuit's sister circuits had all rejected claims of a constitutional right to a clean and healthy environment. *Concerned Citizens of Neb. v. United States Nuclear Reg. Comm'n*, 970 F.2d 421, 426–27 (8th Cir. 1992); *BAM Historic Dist. Ass'n v. Koch*, 723 F.2d 233, 237 (2d Cir. 1983); *Gasper v. La. Stadium & Exposition Dist.*, 577 F.2d 897, 898 (5th Cir. 1978); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971). Some recent commentators have suggested that constitutional jurisprudence has evolved to the point that constitutional right to a healthy and clean environment ought to be recognized. For example, Caleb Hall argued that right is deeply rooted in history and on a par other rights recognized by the evolved law of substantive due process. Caleb Hall, *A Right Most Dear: The Case for a Constitutional Environmental Right*, *Tulane Environmental Law Journal*, 30 :85-109 (2016). See also Robert Percival, "Greening" the Constitution—*Harmonizing Environmental and Constitutional Values*, 32 *ENVTL. L.* 809, 812 (2002); Erin Delay, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, 17 *Int'l J. Peace Stud.* 71, 79 (2012) (citing David Boyd, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 47-67 (2012)); Janelle Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection through State and Federal Constitutions*, 11 *Int'l Legal Persp.* 185, 217–18 (2001).

### III. The Public Trust Doctrine in American Law

The public trust doctrine gives states control or ownership of many resources within their borders including water, air, submerged lands, fish and wildlife, as a trustee on behalf of their residents. The first federal court decision affirming the PTD was *Martin v. Waddell* (1842), in which the U.S. Supreme Court held that the public held a common right to fish in tidal waters because they and their underlying lands were owned by the state for the common use by the people. *The Daniel Ball* (1871) established that all navigable in fact waters, whether inland or tidal, are subject to the public trust for purposes of navigation, commerce, and fishing. These waters are owned by the state subject to the federal navigational servitude. States also own the submerged lands beneath these waters. *Shively v. Bowlby* (1894). The state cannot alienate these resources under federal law. *Illinois Central Railroad Co. v. Illinois* (1892).

The states' ownership of wildlife as a matter of federal law under *Geer v. Connecticut* (1920) was muddied by *Hughes v. Oklahoma* (1964) and *Kleppe v. New Mexico* (1976), but as a matter of state law, wildlife is owned by the state subject to the public trust. Most states consider fish & wildlife to be publicly owned resources, subject to the public trust. Overall, at least 41 states claim ownership of wildlife under constitutional and statutory provisions.

At least two states have constitutional provisions addressing wildlife.

**Alaska:** "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Article 8, §3. The state "intended to engraft certain trust principles guaranteeing access to the fish, wildlife, and water resources of the state," *Owsich v. State of Alaska, Guide and Licensing Control Board* (AK 1988).

**Louisiana:** the state must "protect, conserve, and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people."

Statutory language varies between claiming ownership by the state and ownership by the people of the state. Statutes placing ownership in the "people" is a stronger indication that wildlife is a public trust resource. Oregon state law asserts state ownership over all water and wildlife.

*Chernaik v. Brown*, 295 Or App 584 (2019), *rev. granted*, is the climate change case brought against the state by the same individual plaintiffs from *Julianna v. US* (see page 4 above). Plaintiffs sought declaratory judgment that the State had violated its duty to protect public trust resources from climate change. The Oregon Court of Appeals declined plaintiffs' invitation to define the scope of the state's public trust resources under state common law. Instead, it limited its holding to determining that the Oregon common-law public-trust doctrine did not impose a fiduciary obligation on the State to affirmatively protect public-trust resources from climate change impacts. The appellate court concluded that the doctrine was "rooted in the idea that the state is restrained from disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources" and found the State had no duty to "affirmatively act to protect public-trust resources from the effects of climate change." The appellate court directed the trial court to enter declaratory judgment in favor of the State. The Oregon Supreme Court granted review, held oral arguments in November 2019, and the decision is pending.

*Julianna v. United States*, 947 F3d 1159 (2020), *pet rehearing en banc pending* (climate change case discussed more fully above at page 4). The district court held that plaintiffs' public trust claim stated a cognizable claim against the federal government. The Ninth Circuit panel reversed on the sole ground that plaintiffs lacked standing to sue.

#### IV. American State Constitutional Provisions Protecting the Environment

As summarized by the Pennsylvania's highest court,

The decision to affirm the people's environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American constitutional law. In addition to Pennsylvania, Montana and Rhode Island are the only other states of the Union to do so. *See* Pa. Const. art. I, § 27 (1971); Mt. Const. art. II, § 3 (1889); R.I. Const. art. I, § 17 (1970). Three other states—Hawaii, Illinois, and Massachusetts—articulate and protect their citizens' environmental rights in separate articles of their charters. *See* Hi. Const. art. XI, §§ 1, 9 (1978); Ill. Const. art. XI, §§ 1, 2 (1971–72); Ma. Const. amend. 49 (1972). Of these three states, Hawaii and Illinois, unlike Pennsylvania, expressly require further legislative action to vindicate the rights of the people. By comparison, other state charters articulate a “public policy” and attendant directions to the state legislatures to pass laws for the conservation or protection of either all or enumerated natural resources. *See, e.g.,* Ak. Const. art. VIII, §§ 1–18 (1959); Colo. Const. art. XXVII, § 1 (1993); La. Const. art. IX, § 1 (1974); N.M. Const. art. XX, § 21 (1971); N.Y. Const. art. XIV, §§ 1–5 (1941); Tx. Const. art. XVI, § 59 (1917); Va. Const. art. XI, §§ 1–4 (1971). Some charters address the people's rights to fish and hunt, often qualified by the government's right to regulate these activities for the purposes of conservation. *See, e.g.,* Ky. Const. § 255A (2012); \*\*963 Vt. Const. Ch. II, § 67 (1777); Wi. Const. art. I, § 26 (2003). Still other state constitutions simply authorize the expenditure of public money for the purposes of targeted conservation efforts. *See, e.g.,* Or. Const. art. IX–H, §§ 1–6 (1970); W.V. Const. art. VI, §§ 55, 56 (1996). Finally, many of the remaining states do not address natural resources in their organic charters at all. *See, e.g.,* Nv. Const. art. I, § 1 et seq.

*Pennsylvania Env'tl. Def. Found. v. Commonwealth*, 161 A3d 911 (Pa 2017) (quoting *Robinson Twp., Washington Cty. v. Com.*, 83 A3d 901 (Pa 2013)).

### **A. Hawaii Constitution**

Article XI, § 9: “Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.” Section 7: “The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people. ...” Section 3: “The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing. ...” Section 1: “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.”

Article XI, §§ 1 and 7 “adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i” and is self-executing in this regard. Regarding water, all water is part of the public trust, and leaving water in its natural state is a valid use under the trust; “the state has a...duty to ensure the continued availability and existence of its water resources for present and future generations,” and at the same time “a duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state.” So the duty of conservation “may not readily translate into substantive results.” Thus, “[c]ontrary to the Commission's conclusion that the trust establishes resource protection as ‘a categorical imperative and the precondition to all subsequent considerations,’ we hold that the Commission inevitably must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law.” *In re Water Use Permit Applications*, 9 P3d 409 (Haw 2000). When it comes to applications for private use of water, the government must “begin with a presumption in favor of public use, access, and enjoyment,” hold private commercial uses to a “higher level of scrutiny,” and make decisions “with a level of openness, diligence, and foresight commensurate with the high priority [public rights in a resource] command under the laws of” Hawaii. “Additionally, the applicant must demonstrate the absence of a practicable alternative water source” and “implement reasonable measures to mitigate” any negative impact on public uses, and the government must monitor to ensure those measures are implemented. *Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kauai*, 324 P3d 951 (Haw 2014). *See also Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 363 P3d 224 (Haw 2015) (duty applies to land uses also); *Kelly v. 1250 Oceanside Partners*, 140 P3d 985 (Haw 2006) (duty applies to state and all its subdivisions); *Ching v. Case*, 449 P3d 1146 (Haw 2019) (whether government meets its Section 1 obligations is not a political question; courts can resolve it).

Article XI, § 3, regarding agricultural lands, is not self-executing, so it has no teeth beyond what the legislature enacts. *Sierra Club v. D.R. Horton-Schuler Homes, LLC*, 364 P3d 213 (Haw 2015); *Save Sunset Beach Coal. v. City & Cty. of Honolulu*, 78 P3d 1 (Haw 2003).

Article XI, § 9, is self-executing, establishes a substantive right to a clean and healthful environment that is protected by due process (and thus requires that governmental bodies include affected parties in decision-making), and creates a private right of action to enforce Hawaii’s environmental laws against public and private parties. However, the section 9 right is “defined by existing law relating to environmental quality” and thus can be “reshaped and redefined through statute, ordinance and administrative rule-making procedures”; it is “not inflexibly fixed.” As such, “this right is not a freestanding interest in general aesthetic and environmental values,” but must be grounded in a “source granting [the plaintiff] a substantive legal right to enforcement of environmental laws.” *In re Application of Maui Elec. Co., Ltd.*, 408 P3d 1 (Haw 2017). *See also Clarabal v. Dept. of Educ.*, 446 P3d 986 (Haw 2019) (indicating that the right to a clean and healthful environment is “solely defined by legislative enactments”).

## **B. Illinois Constitution**

Article XI, Sections 1 & 2: “The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.” and “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.”

The Illinois Supreme Court has said that, under these provisions, “[e]nvironmental protection is a cornerstone of the 1970 Illinois Constitution.” *Cty. of Will v. Pollution Control Bd.*, 135 NE3d 49 (Ill 2019). But the case law doesn’t show the provisions to have any teeth. *See Helping Others Maintain Env’tl. Standards v. Bos*, 406 941 NE2d 347 (Ill App 2010) (“While section 2 refers to individuals being able to enforce their right to a healthful environment, that section did not create any new causes of action but instead eliminated the need to show a special injury as is traditionally required in environmental nuisance cases. Thus, article XI does not provide plaintiffs with an independent basis to seek review of the Department’s decision.”) (citations omitted); *Prairie Rivers Network v. Illinois Pollution Control Bd.*, 781 NE2d 372 (Ill App 2002) (permits for landfill construction and discharge of pollutants cannot be attacked as violating constitutional environmental provisions because the relevant statutes permit the public to participate in the permitting process); *Glisson v. City of Marion*, 720 NE2d 1034 (Ill 1999) (environmental provisions do not give people standing to sue to enforce state endangered species act by seeking to block construction of dam that would destroy two species’ habitat; “The primary concern of the drafters of article XI was the effect of pollution on the environment and human health. The right to a ‘healthful environment’ was therefore not intended to include the protection of endangered and threatened species.”); *Illinois Pure Water Committee, Inc., v. Director of Public Health*, 470 NE2d 988 (Ill 1984) (rejecting notion that constitutional environmental provisions create a “fundamental” right to a healthful environment, and declining to subject statutes affecting the environment to heightened scrutiny).

### **C. Massachusetts Constitution**

Article XLIX: “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. ...”

Few cases have considered this provision. Those that have give it no teeth. *See Enos v. Sec’y of Env’tl. Affairs*, 731 NE2d 525 (Mass 2000) (constitutional environmental provision did not give landowners standing to challenge state government’s decision that local government’s environmental impact statement complied with state environmental protection act, with regard to construction of sewage treatment plant).

#### **D. Montana Constitution**

Article II, § 3: “All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.” Article IX, § 1: “(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (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.”

*Montana Environmental Information Center v. Department of Environmental Quality*, 988 P.2d 1236 (Mont 1999). The Montana Supreme Court, after a lengthy review of the 1972 Constitutional Convention, held that a state statute, to the extent that it “arbitrarily excludes certain ‘activities’ from nondegradation review...violates those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution.” The court also concluded that those provisions of the constitution “are both anticipatory and preventative.” Further, the court stated that it “will apply strict scrutiny to state or private action which implicates either constitutional provision.” A concurring opinion opined that the statute at issue was facially unconstitutional and that applying a strict scrutiny test to private action “is dicta which, I submit, may well prove unworkable in the future.”

*Cape-France Enterprises v. Estate of Peed*, 29 P3d 1011 (Mont 2001). In this case, the Montana Supreme Court allowed a party to rescind a contract where performance would likely harm the environment. In *Cape-France*, a vendor of real estate rescinded the sales contract on the property after subdivision became impractical because it was suspected the groundwater under the property was contaminated. The court concluded that the contract could be rescinded on the basis of impracticability and illegality. Prior to creating a subdivision, the owners would be required to drill a test well and the test well itself could exacerbate the ground water pollution. The court stated that the “decisive point” is that “In light of these two provisions of Montana’s Constitution, it would be unlawful for Cape-France, a private business entity, to drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks. As already noted, a contract may be rescinded where the object of the contract is unlawful.”

*Sunburst v. Texaco*, 165 P3d 1079 (Mont 2007). The court concluded that, where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment under Article II, Section 3 and Article IX, Section 1, of the Montana Constitution does not support a cause of action for money damages between two private parties.

*Shammel v. Canyon Resources Corp.*, 167 P3d 886 (Mont 2007). The Montana Supreme Court affirmed a district court ruling that a "proven violation of the constitutional right to a clean and healthful environment does not authorize a distinct, constitutionally based cause of action in tort between two private parties for money damages." The court held that "Where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment does not authorize a distinct cause of action in tort for money damages between two private parties."

Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History And Future of Montana's Environmental Provisions*, 64 Mont L Rev 157 (2003).

## **E. Pennsylvania Constitution**

Article I, § 27 ("Environmental Rights Amendment"): "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."

In *Pennsylvania Env'tl. Def. Found. v. Commonwealth*, 161 A3d 911 (Pa 2017), the court largely adopted the pioneering analysis of the Environmental Rights Amendment that had been urged in a plurality opinion in *Robinson Twp., Washington Cty. v. Com.*, 83 A3d 901 (Pa 2013). The court explained in *PEDF* that, under the Environmental Rights Amendment, "the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties," and "the Commonwealth must act affirmatively via legislative action to protect the environment." The court held that the state holds natural resources in trust for the public, and revenue obtained from exploitation of natural resources must be spent on conservation and maintenance of natural resources.

In *Robinson Township*, a plurality of the Pennsylvania Supreme Court struck down much of an Oil and Gas Act as violative of the Environmental Rights Amendment, terming the Act a "blanket accommodation of industry and development" that constituted an "unprecedented" "displacement of prior planning, and derivative expectations, regarding land use, zoning, and enjoyment of property." The Act permitted "industrial uses as a matter of right in every type of pre-existing zoning district," overriding pre-existing guidelines "which offer strict limitations on industrial uses in sensitive zoning district"; the Act was therefore "incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life."

Many other decisions limit the impact of *PEDF* and *Robinson*. See *Feudale v. Aqua Pennsylvania, Inc.*, 122 A3d 462 (Pa Commw Ct 2015), *aff'd*, 135 A3d 580 (Pa 2016) (Environmental Rights Amendment does not impose duties or obligations on private parties, and did not invalidate sale of timber on public land where state kept environmental impact to a minimum); *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A3d 677 (Pa Commw Ct 2018) (en banc), *appeal den*, 208 A3d 462 (Pa 2019) (holding, over dissent, that

Environmental Rights Amendment did not require municipalities to adopt specific limits on oil and gas drilling; the Amendment “does not impose express duties on the political branches to enact specific affirmative measures to promote” the environment; it merely requires the government to “reasonably account” for the environment); *Cf. Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm’n*, 895 F3d 102 (DC Cir 2018) (holding that Pennsylvania’s Environmental Rights Amendment did not create any substantive due process right under federal constitution; rejecting challenge to fact that Federal Energy Regulatory Commission derives its funding from industries it regulates and thus caters to them); *City of Longmont v. Colorado Oil & Gas Ass’n*, 369 P3d 573 (Colo 2016) (holding local fracking ban preempted by state law, and rejecting reliance on *Robinson Township* because Colorado has no constitutional provision like Pennsylvania’s Environmental Rights Amendment).

## **F. Rhode Island Constitution**

Article I, § 17: “The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.”

Most decisions interpreting this provision concern “rights of fishery” and “privileges of the shore” – usually cases involving fishers trying to catch more fish, or people trying to recreate at the beach, with the court upholding various restrictions on fishing imposed as conservation measures, and requiring beach access. The only post-1970 case that hints at something broader is *In re Request for Advisory Opinion from House of Representatives (Coastal Res. Mgmt. Council)*, 961 A2d 930, 943 (RI 2008) (legislature must adopt a “feasible mechanism for carrying out the important ‘duty’ that article 1, section 17 imposes on the legislature”).

## **V. Other National Constitutions**

More than 160 countries have expressly embedded this right in their constitution or interpreted other rights within their national constitution to establish this right. See <https://www.constituteproject.org/>. A few of these constitutional provisions are reproduced below.

### **A. Ecuador**

The 2008 Ecuadorean constitution provides in Title 2, Chapter 7, articles 71 to 74, rights for the environment itself. A rough translation is pasted below. There are other chapters giving people rights to a clean environment (Title II, Chapter 2, section 2, articles 14 & 15) and giving protection to biodiversity and natural resources (Title VII, Chapter 2, sections 1-7, articles 395-415).

Art. 71. Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognition of rights for nature before public institutions. The application and interpretation of these rights will follow the related principles established in the Constitution. The State will motivate natural and juridical persons as well as collectives to protect nature; it will promote respect towards all the elements that form an ecosystem.

Art. 72. Nature has the right to an integral restoration. This integral restoration is independent of the obligation of natural and juridical persons or the State to indemnify the people and the collectives that depend on the natural systems. In case of severe or permanent environmental impact, including that caused by the exploitation of non-renewable natural resources, the State will establish the most efficient mechanisms for restoration, and will adopt adequate measures to eliminate or mitigate the harmful environmental consequences.

Art. 73. The State will apply precaution and restriction measures in all the activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles. The introduction of organisms and organic and inorganic material that can alter the national genetic heritage in a definitive way is prohibited.

Art. 74. The persons, people, communities and nationalities will have the right to benefit from the environment and from natural wealth that will allow wellbeing. The environmental services cannot be appropriated; their production, provision, use and exploitation, will be regulated by the State.

## **B. Germany**

Article 20a: "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

## **C. The Kingdom of Nepal**

Part 3, Article 30: "Right regarding clean environment. (1) Each person shall have the right to live in a healthy and clean environment. (2) The victim of environmental pollution and degradation shall have the right to be compensated by the pollutant as provided for by law. (3) Provided that this Article shall not be deemed to obstruct the making of required legal provisions to strike a balance between environment and development for the use of national development works." Part 4, Article 51(g) describes the government policy

regarding the “conservation, management and use of natural resources,” which includes: “The State shall pursue a policy of conserving natural resources,” “sustainable use in an environmentally friendly way,” and “sustainable use of biodiversity through the conservation and management of forests, fauna and flora, and by minimizing the negative impacts of industrialization and physical development by promoting public awareness on environmental cleanliness and protection.”

#### **D. Poland**

Article 5: “The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development.”

#### **E. South Africa**

Chapter 2, Section 24: “Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

### **VI. The International Human Right to a Safe, Clean, Healthy and Sustainable Environment (SCHS Environment)**

In 1972, the [United Nations](#) Conference on the Human Environment declared that:

[m]an 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.

(Principle 1 [UN Conference on the Human Environment, ‘Stockholm Declaration of the United Nations Conference on the Human Environment’](#) [‘Stockholm Declaration’])

The work of Special Rapporteur John Knox’s work (2012-2018) established that the human right to a SCHS Environment is implied and embedded within other international human rights obligations, including the right to health and life, the right to food, the right to clean water and sanitation, the right to livelihood, as well as the rights of children. For those unfamiliar with international human rights law, special rapporteurs play a unique role. The UN Human Rights Council asks special rapporteurs to articulate and refine the definition of various human rights as well as to monitor their implementation. The UNHRC mandate to Knox was to study “the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and to identify and promote best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking.” (SR Report 1)

While the US is not signatory to most of the human rights treaties that establish various human rights as treaty law ([treaty list](#)), the US is arguably obliged to respect this right to a SCHS environment as a matter of customary international law.

The Special Rapporteur has submitted two important reports that warrant review:

1. Report on Framework Principles on human rights and the environment -- and the human right to a SCHS environment. [Knox Framework Principles Report](#)
2. Report on Children's Rights and the Environment. [Knox Children's Rights Report](#)