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Taking the Pennsylvania Constitution Seriously When It Protects the Environment

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Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27

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This Article has two parts. The second part, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II—Environmental Rights and Public Trust*, will appear in the 104th volume of the *Dickinson Law Review*, issue number one.

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We shall not cease from exploration
 And the end of all our exploring
 Will be to arrive where we started
 And know the place for the first time.

—T.S. Eliot¹

I. Introduction

The public enthusiasm for environmental protection that swept the country in the early 1970s was premised on the view that ecological degradation is an unacceptable price for social and economic progress. To ensure protection, many argued, the environment should be recognized in state constitutions as well as the United States constitution. On May 18, 1971, Pennsylvania citizens overwhelmingly approved such a provision.² Article I, Section 27 of the Pennsylvania Constitution provides:

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.³

More than a quarter century later, the promise of Article I, Section 27 has been realized more by the enactment and implementation of legislation and regulations addressing specific problems

1. *Little Gidding*, in *FOUR QUARTETS* 59 (1943).

2. The vote was 1,021,342 in favor and 259,979 opposed. See Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123 (1990). Four other proposed constitutional amendments were included in the referendum. Two were adopted, but by much smaller margins, and two were defeated. See *id.* at 123-24 n.2. No candidate for statewide office that day received as many votes. See *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 596 n.1 (Pa. 1973) (Jones, C.J., dissenting).

3. PA. CONST. art. I, § 27. Two other environmental amendments had been adopted earlier. The first amendment authorized the state to create debt and issue bonds for \$70 million for land acquisition of state parks and other conservation, recreation, and historic preservation purposes. See *id.* art. VIII, § 15. The second amendment authorized the state to create debt and issue bonds for \$500 million for, among other things, "the conservation and reclamation of land and water resources of the Commonwealth, including the elimination of acid mine drainage, sewage, and other pollution from the streams of the Commonwealth" *Id.* art. VIII, § 16.

than by the Amendment itself. Franklin Kury, the author and chief legislative sponsor of the Pennsylvania Amendment has conceded that it is "still largely untested as an environmental protection tool."⁴ As its early supporters feared, the Amendment seems to have more symbolic than substantive value, inscribed on plaques and quoted in speeches, but rarely used in decision making.

While the first major judicial decision was supportive of the Amendment, a subsequent decision greatly diminished its importance. In the first decision, *Commonwealth v. National Gettysburg Battlefield Tower*,⁵ the courts held that the Amendment created a self-executing public right, but that construction of an observation tower overlooking the Gettysburg Civil War battlefield would not violate that right.⁶ Shortly thereafter, in *Payne v. Kassab*,⁷ the commonwealth court developed a three-part test for applying the Amendment that utterly ignores the constitutional text,⁸ but which has been widely used ever since. The test is so weak that litigants using it to challenge environmentally damaging projects are almost always unsuccessful. Undercut but not overruled by *Payne*, the *Gettysburg Tower* decision has seen little use.

In another series of cases, however, the supreme court has used the Amendment to support decisions to uphold statutes or ordinances whose constitutionality or applicability is challenged on other grounds. In one of these cases, *United Artists' Theater Circuit, Inc. v. City of Philadelphia*,⁹ the supreme court used the Amendment to uphold the constitutionality of a historic preservation ordinance that was challenged by a landowner as a taking of private property without compensation in violation of the state constitution.¹⁰ Cases such as *United Artists'* suggest that environmental principles and values may only be capable of complete

4. Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution*, in 1 PENNSYLVANIA ENVIRONMENTAL LAW AND PRACTICE § 2-3, at 26 (Joel R. Burcat & Terry L. Bossert eds. 1998). As a former member of the Pennsylvania House of Representatives, Mr. Kury drafted and sponsored the amendment that became Article I, Section 27. See *id.* § 2-1 n.1.

5. 13 Adams County L.J. 45 (jurisdiction), 75 (opinion of the court), 135 (supplemental opinion of the court) (C.P. Adams County 1971), *aff'd*, 302 A.2d 886 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973).

6. See *id.*

7. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

8. See *id.* at 94.

9. 635 A.2d 612 (Pa. 1993).

10. See *id.* at 620.

protection if they are of equal legal status to the other values and principles identified in the constitution.¹¹

However tentatively, such cases recognize that Article I, Section 27 matters because it does something that statutes and regulations cannot do; it makes environmental and historic protection part of the constitutional purpose of state government. This two-part Article explains how the Amendment accomplishes that purpose and what it should mean for Pennsylvania, and suggests the value of similar inquiries under other state and national constitutions.

My starting point is that Article I, Section 27 is constitutional law, and is no less so than other provisions of the state constitution simply because it pertains to the environment. This Article suggests a framework for applying the Amendment in Pennsylvania, building on parts of the state's experience, criticizing other parts, and suggesting approaches that have not yet been tried. We should not be bound by the way that prior cases under Article I, Section 27 were litigated and judged if we see new ways of understanding and applying the Amendment.

The role of constitutional provisions in environmental protection is likely to continue to grow in importance. More than two-thirds of state constitutions contain provisions concerning natural resources and the environment, and all state constitutions written since 1959 have such provisions.¹² Nearly all national constitutions adopted or revised since 1972 have included a constitutional right to a decent environment.¹³ The United States Constitution contains no such provision, although proposals for such an amendment continue to surface.¹⁴

Pennsylvania's experience is particularly important in understanding such provisions because Article I, Section 27 is the most

11. These cases do not suggest that the Amendment's values are superior to those stated elsewhere in the constitution.

12. See Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 865, 871 (1996).

13. See Dinah Shelton, *Challenges to the Future of Civil and Political Rights*, 55 WASH. & LEE L. REV. 669, 682 (1998).

14. See WILLIAM H. ROGERS, ENVIRONMENTAL LAW § 1.5 (1994 & Supp. 1998) (summarizing proposals and suggested existing constitutional sources). But see J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245 (1999) (arguing that the U.S. Constitution should not contain an environmental amendment). Prof. Ruhl's argument, however, is not addressed to state amendments. See *id.* at 252 n.22.

prominent environmental amendment to a state constitution.¹⁵ The *Gettysburg Tower* case was recently described as “undoubtedly the best known of any state court opinion which has construed the meaning of a state environmental constitutional provision.”¹⁶ Indeed, the Pennsylvania Amendment has been recommended for consideration in other national constitutions.¹⁷ Pennsylvania’s Amendment also provides a rich source of experience for understanding such provisions.

Environmental amendments to state or national constitutions are attractive, however, only if they can be applied in a meaningful way.¹⁸ That, in turn, requires a coherent and practical framework for interpreting them. The Pennsylvania cases interpreting Article I, Section 27, unfortunately, do not provide that framework. These cases generally do not recognize the constitutional status of Article I, Section 27, only inconsistently recognize the Amendment as a source of government authority, and do not impose any meaningful restraint on government power.

As Part I of this Article explains, the Amendment has been less than fully effective for four basic reasons. First, it is treated as a single indivisible rule even though it contains two separate rules. Second, Article I, Section 27 has been understood as categorically anti-development, as potentially putting a halt to most if not all human activities. Third, much more attention has been given to the creation of citizen rights than to the governmental responsibilities on which those rights are primarily based. Finally, and perhaps most importantly, there has never been a generally accepted explanation for why Article I, Section 27 even matters given the predominant role of legislation and administrative regulation

15. See ROGERS, *supra* note 14, § 1.5 (describing Article I, Section 27 as the “best known” of state environmental amendments). The Amendment is discussed at length in numerous articles about environmental amendments to state constitutions. See, e.g., Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 141-47 (1997); Bruce Ledewitz, *The Challenge of, and Judicial Response to, Environmental Provisions in State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 33 (1991). Article I, Section 27 is also discussed in environmental law textbooks. See, e.g., ZYGMUNT J.B. PLATTER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1023-29 (2d ed. 1998).

16. Gallagher, *supra* note 15, at 141.

17. See, e.g., Elizabeth F. Brown, Comment, *In Defense of Environmental Rights in East European Constitutions*, 1993 U. CHI. L. SCH. ROUNDTABLE 191, 215 (suggesting East European countries adopt constitutional provision similar to Pennsylvania’s).

18. Shelton, *supra* note 13, at 683-84.

concerning environmental protection and natural resources conservation.

This part of the Article suggests an interpretative framework for understanding the Amendment that responds directly to these four reasons. That framework begins with the recognition that the Amendment creates two separate constitutional rules—one concerning the public's right to clean air, pure water, and the preservation of certain environmental values; and the other creating a public right in the conservation and maintenance of public natural resources.

Second, Article I, Section 27 gives the environment the same legal protection that other provisions of the state constitution give to individual property rights. The Amendment, when balanced by provisions protecting property rights, is thus not anti-development. Rather, it is directed toward environmentally sustainable development.

Third, Article I, Section 27 needs to be understood primarily on the basis of governmental responsibilities. While citizen rights are an essential part of the Amendment, such rights should be directed primarily at enforcement of the government's duties.

Finally, when legislation or administrative regulation provides as much protection as Article I, Section 27, or even more protection, there is no need for judicial enforcement of the Amendment. Where legal gaps exist, however, courts should enforce the substantive rules contained in the Amendment. Courts should also use Article I, Section 27 to support the application of other legal rules. These four premises create a framework for understanding the environmental rights and public trust parts of the Amendment, which will be discussed in detail in Part II of this Article.

This interpretative framework is new in the sense that it explains Article I, Section 27 in significantly different ways than we have understood it. Yet this framework is also based primarily on the text, legislative history, and purposes of the Amendment. It attempts to capture the original understanding of Article I, Section 27, informed by subsequent experience with the Amendment and with environmental protection. After nearly three decades, it is time to revisit Article I, Section 27 and know it—as if for the first time.

II. A Two-Part Amendment

A. *Environmental Rights and Public Trust*

A basic principle of legal reasoning is that each rule that might be applicable to a particular factual situation should be discussed separately.¹⁹ Separate discussion ensures a clear discussion of each rule and also ensures that differences in the text and purpose of each rule are honored. Article I, Section 27 has two separate parts; it creates a public right in a decent environment, and it creates a separate public right in the conservation and protection of "public natural resources."²⁰ The two parts differ in scope, in the type of public rights they create, and in the responsibilities they articulate for the state. Because these two parts contain separate legal rules, it is impossible to analyze the Amendment in a useful manner unless each part is discussed separately. However, Article I, Section 27 is almost always quoted in its entirety and analyzed as an undivided whole.²¹ The Amendment is thus more often understood as expressing a vague environmental sentiment than as expressing constitutional law.

The distinction is made evident by dividing the Amendment into these two parts, and numbering them as if they were separate paragraphs:

(1) 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.

(2) Pennsylvania's public natural resources are the common property of all the people, including generations yet to

19. See JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 108-13 (2d ed. 1994) (emphasizing the importance of discussing each issue and sub-issue separately).

20. PA. CONST. art. I, § 27; see also ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 175 (1985) ("If the courts were to accept the clear language of the section as expressing two separate concepts, it would result in a more logical and orderly application of the section, and would permit a more accurate application of the principles of constitutional construction and of trusts."); Kury, *supra* note 2, at 143-47; Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. BAR ASS'N Q. 421, 425 (1970). Broughton's article is also printed in 1970 Pa. Legislative Journal-House 2272 (April 14, 1970).

21. Among the dozens of decided cases, the only obvious exceptions are *Commonwealth v. National Gettysburg Battlefield Tower, Inc.* and *Payne v. Kassab*. Even for these two, however, the courts' analysis does not always clearly distinguish the two parts. See *infra* Part II.B.

come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Constitutional interpretation, of course, begins with the text of the Amendment. Different but similar sounding words and phrases ordinarily signal different meanings, especially if they are contained in the same paragraph.²² If the drafters intended a particular word or phrase to have the same meaning throughout, they would have used the same word or phrase.²³ Because different words and phrases are used to articulate the scope, public rights, and governmental responsibilities of each part, it is only logical to conclude that the two parts of the Amendment are different and therefore should be separately analyzed.

The two parts of Article I, Section 27 are different in scope. The first part refers to four different "values of the environment," as well as "clean air" and "pure water." The second part, however, refers to the state's "public natural resources," and later identifies the state as the trustee for "these resources." The two sentences in the latter part are obviously related, one declaring the resources to be common public property, and the other requiring the state to conserve and maintain them. The public trust part of the Amendment makes no reference to environmental values, to air or water, or even to the environment. The first part, similarly, makes no reference to "public natural resources," or even "resources."

When the two parts overlap, they both apply.²⁴ To the extent that air and water have not been privately appropriated, they are subject to both environmental rights and the public trust doctrine. Natural, scenic, historic, and esthetic values of the environment that

22. See WOODSIDE, *supra* note 20, at 175.

23. See, e.g., *Novicki v. O'Mara*, 124 A. 672, 673 (Pa. 1924) ("A change in language in separate provisions of a statute is *prima facie* evidence of a change of intent."). The Pennsylvania Supreme Court routinely cites statutory construction rules when interpreting the state constitution. See *Cavanaugh v. Davis*, 440 A.2d 1380 (Pa. 1982). The practice is reasonable because constitutional amendments originate in the legislature. See PA. CONST. art XI, § 1.

24. See WOODSIDE, *supra* note 20, at 180. It is likely that all "public natural resources" contain at least some "natural, scenic, historic and esthetic values of the environment." At a minimum, it would seem obvious that "public natural resources" would have some "natural" values. As a result, there is likely no category of resources or values for which there is a public trust responsibility but no environmental right in the public under the first part of the Amendment. On the other hand, not all state property constitutes natural resources.

are on public lands are also subject to both parts of the Amendment.

The public rights contained in the two parts are also different. The Amendment's first part creates a right in the public to clean air, pure water, and the preservation of certain values. The second part of Article I, Section 27 articulates the public's property right to the state's public natural resources, and establishes a public right to have those resources conserved and maintained for the benefit of future generations.²⁵ These rights are different, and the difference is perhaps most evident when the scope of the two parts overlaps. Air and water are not simply to be conserved and maintained; the public has a right to these resources in "clean" and "pure" form. Similarly, the conservation and maintenance requirements for public natural resources are supplemented by an obligation to protect the public's right to preservation of the natural, scenic, historic, and esthetic values of the environment. As a result, Article I, Section 27 creates two public rights, not one.

Finally, the governmental responsibilities in both parts of the Amendment are also different. The public trust part of Article I, Section 27 expressly requires the state to "conserve and maintain" public resources "for the benefit of all the people." By contrast, the public rights contained in the first part carry no express corresponding governmental responsibility. To the extent that such a responsibility exists, it must be implied. Quite plainly, the articulation of those rights would be meaningless unless the government had some duty to protect them. But the nature of that duty is not specified.

These differences in public rights, scope, and governmental responsibility are reinforced by the legislative history of the Amendment. Legislative history is relevant in determining the meaning of a constitutional provision, even when the text is unambiguous.²⁶ In accordance with the state constitution, Article I, Section 27 was passed by both houses of the legislature in one session, then passed by both houses in the next legislative session, before being submitted to the voters for approval.²⁷ The textual

25. See, e.g., Broughton, *supra* note 20, at 422; Kury, *supra* note 2, at 124.

26. See *In re Determination of Priority of Comm'n Among Certain Judges of the Superior Court and Commonwealth Court*, 427 A.2d 153, 156-57 (Pa. 1981); *In re Martin's Estate*, 74 A.2d 120, 122 (Pa. 1950); *Zemprelli v. Thornburgh*, 407 A.2d 102, 109 (Pa. Commw. Ct. 1979).

27. See PA. CONST. art. XI, § 1.

changes made to the Amendment in the legislative process indicate that Article I, Section 27 was understood to have two separate parts. To begin with, the environmental rights part of the Amendment went through the process unchanged, while the public trust part of the Amendment was changed in four ways.²⁸ This difference in legislative attention suggests that the two parts were understood from the outset as having separate meanings.

This difference in meanings of the two parts is reinforced by two of the specific amendments that were adopted. In its original form, the public trust part of the Amendment declared that "Pennsylvania's natural resources" were the "common property of all the people."²⁹ The absence of "public" before "natural resources," however, suggested that the Amendment might convert private property containing natural resources into the people's "common property." The Amendment's drafters believed that such a result would likely violate the constitutional prohibition against the taking of private property for public use without just compensation.³⁰ The language was thus changed to "Pennsylvania's public natural resources."³¹ As a result, the state's public trust responsibilities under Article I, Section 27 are limited to public property or things that are subject to the public trust.³² In making this change, moreover, the legislature made no parallel change to the first part of the Amendment.

On the other hand, the "values of the environment" in the environmental rights part can occur on both public and private property, and there is nothing in the text to suggest otherwise. While both parts of Article I, Section 27 apply to public property, the environmental rights part of the Amendment also applies to private property. Values in this context are not property but

28. See H.B. 958, Printer's Nos. 1105, 1307, 2860, 168th Pa. Sess. (Pa. 1969) (original bill and two bills showing amendments); H.B. 31, Printers Nos. 32, 54, 169th Pa. Sess. (Pa. 1971) (second session bill, with no additional amendments). In addition to the two changes described *infra* in the text, the legislature deleted two parts of the public trust provisions. It removed a requirement that public trust resources be protected "in their natural state." Compare H.B. 958, Printer's No. 1105, with H.B. 958, Printer's No. 1307. It also removed a list of protected natural resources. Compare H.B. 958, Printer's No. 1307, with H.B. 958, Printer's No. 2860.

29. H.B. 958, Printer's No. 1105.

30. See Broughton, *supra* note 20, at 425.

31. Compare H.B. 958, Printer's No. 1105 (original language), with H.B. 958, Printer's No. 2860 (amended language).

32. See Broughton, *supra* note 20, at 424.

principles or qualities that are intrinsically valuable.³³ Private lands can, and often do, contain environmental features with significant natural, scenic, historic, and esthetic values.

A legislative change in the state's public trust responsibilities also suggests that the two parts were understood as having separate meanings. As originally introduced, the Amendment required the state, as trustee, to "preserve and maintain" public natural resources.³⁴ The Amendment's first sentence, of course, calls for the "preservation" of certain values. As originally introduced, these two parts of the Amendment might thus have been understood as having a similar meaning, or at least as being logically related. State officials, however, were concerned that use of the word "preserve" in the public trust part of the Amendment might be construed by courts to prevent the harvesting of renewable resources (e.g., logging on state forest land).³⁵ In response to that concern, the legislative committee considering the Amendment changed the phrase to "conserve and maintain."³⁶ This change is particularly significant because the same state officials also suggested that the word "preservation" in the Amendment's first sentence be changed to "conservation."³⁷ Of course, that suggestion was not accepted.³⁸ Such legislative history provides further evidence that the Amendment has two distinct parts. This history also reinforces a more fundamental point—the text matters.

B. Gettysburg Tower and Payne

Two early cases recognized a distinction between the environmental rights and public trust parts of the Amendment, although even these cases blended the two parts somewhat. Since that time, however, the distinction has generally been overlooked.

In the first case, *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,³⁹ the Attorney General sought an injunction to prevent the construction of a 307-foot observation tower on

33. See WOODSIDE, *supra* note 20, at 177 (citing two dictionaries). "These are 'values' in which the people are given a right, which the officials may not violate, but without perverting the terms they cannot be held as trust property by a trustee." *Id.*

34. H.B. 958, Printer's No. 1105.

35. See Broughton, *supra* note 20, at 424. The principal state official expressing this concern was Dr. Maurice K. Goddard, Secretary of the Department of Forests and Waters.

36. *Id.*; H.B. 958, Printer's No. 2860.

37. See Broughton, *supra* note 20, at 424 n.8.

38. See *id.*

39. 302 A.2d 886 (Pa. Commw. Ct. 1973).

private land just outside the Gettysburg National Military Park.⁴⁰ Although the National Park Service, which administers the park, evidently lacked the legal authority to block the tower, it had negotiated an agreement with the company to locate the tower slightly further from the battlefield and visitor center.⁴¹ The state claimed that the Amendment prohibited the construction of the tower because it would interfere with the experience of park visitors, even though it would provide many visitors with a better view of the battlefield than they could get from the ground.⁴²

The state's claim was based on the environmental rights part of the Amendment, not the public trust part.⁴³ Because the land on which the tower would be built was privately owned,⁴⁴ the Attorney General could not argue that this land was the common property of the people. Furthermore, because the park is owned and managed by the federal government, the Attorney General could not argue that it was part of the state's "public natural resources" under the public trust part of the Amendment. Rather, the state argued that the tower's visibility throughout the Gettysburg Battlefield would interfere with the public right to preservation of the natural, scenic, historic and esthetic values of that environment.⁴⁵ The public's right to the preservation of those values, the Attorney General claimed, imposed a substantive limitation on such private development.⁴⁶

The trial court held that the Amendment's first sentence is self-executing—that is, the people have a right to clean air, pure water, and the preservation of certain environmental values, regardless of whether the legislature has enacted supporting

40. *See id.* at 887.

41. *See id.* at 888-89 (summarizing agreement), 891 n.4 (citing trial court holding that tower was not subject to federal regulation because it was outside park); *see also* *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 598 n.3 (Pa. 1973) (Jones, C.J., dissenting) (quoting testimony of National Park Service director that the purpose of the agreement was to "minimize to the extent that we could, within the authorities available to us, the adverse impact of this tower on Gettysburg Park").

42. *See Gettysburg Battlefield*, 311 A.2d at 588-89.

43. *See Gettysburg Battlefield*, 302 A.2d at 892.

44. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams County L.J. 75, 77 (C.P. Adams County 1971) ("The site is on privately owned wooded land to the rear of a motel-restaurant complex.").

45. *See id.* at 83-86.

46. *See id.* The purpose of the lawsuit, of course, was to prevent construction of the tower.

legislation.⁴⁷ The court also held, however, that the state had failed to prove that the proposed tower would violate these public rights.⁴⁸ Both the commonwealth court⁴⁹ and supreme court⁵⁰ affirmed these holdings. The case was tried and decided, in sum, on the premise that the first sentence of the Amendment prohibited interference with the values it identifies.

Because the Attorney General was seeking an injunction, and because the court believed those values to be somewhat subjective, the court of common pleas required the state to demonstrate irreparable harm to the natural, scenic, historic, and esthetic values of the Gettysburg environment by clear and convincing evidence.⁵¹ The trial court held that the state failed to meet that burden.⁵² The state's witnesses were eminent historians, architects, and theologians, as well as state and federal park administrators.⁵³ They testified that the tower would intrude on the pastoral serenity and reverence of the battlefield scene, and would interfere with an understanding of the human scale of the battle that a tourist can get only by walking through the battlefield itself.⁵⁴ The company's witnesses—the tower designer, a county commissioner, and an environmental education consultant—depicted the park experience in strikingly different terms.⁵⁵ The environmental education consultant testified that “most of the visitors to the Park stay only a short time, are not academicians and desire a rapid view of the

47. *See id.* at 79-80.

48. *See id.* at 82.

49. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886 (Pa. Commw. Ct. 1973).

50. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973).

51. *See Gettysburg Tower*, 13 Adams County L.J. at 136-37.

52. *See id.* at 86.

53. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 889 (Pa. Commw. Ct. 1973).

54. *See id.* at 889-90. Among the state's witnesses was historian Bruce Catton. The court noted that Mr. Catton believed that to fully experience the battle, it is

[N]ecessary for one to go on the field in person, to brood while there, to translate oneself into the 1860's [sic] and to feel the spirit and courage that animated the men who fought there. It is his opinion that the tower would jar a person so experiencing the battlefield back into the present day and so diminish the historic and cultural values.

Id. at 889-90. Several of the state's witnesses, however, acknowledged that the tower would have some educational value. *See id.* at 890.

55. *See id.* at 891.

site and a quick understanding of the battle.”⁵⁶ The consultant also explained that the tower would help educate tourists about the battle and was not inconsistent with a variety of other commercial activities near the battlefield.⁵⁷

In denying the requested injunction, the common pleas court examined evidence of potential harm to every amenity identified in the Amendment’s first sentence—clean air, pure water, and the natural, scenic, historic, and esthetic values of the environment.⁵⁸ The court first held that the tower would not irreparably damage the scenic and esthetic values of the area.⁵⁹ The court found that the tower, while conspicuous, would not “transform the scene of present-day Gettysburg.”⁶⁰ Referring to evidence that sensitivity to such matters varies from person to person, the court stated that it would not enjoin “activities because they adversely affect the peculiar sentiments or feelings of some but not all.”⁶¹ The tower’s effect on natural values, the court held, had to be judged by its effect on those values as they currently existed.⁶² The court concluded “that the historic Gettysburg area has already been raped” by development.⁶³ Because of that development, the court was not convinced that the tower’s construction would irreparably damage the area’s natural values.⁶⁴

56. *Id.*

57. *See id.* These activities include “a junkyard, motels, restaurants, fast food establishments, souvenir stands, an amusement park, gasoline service stations, commercial museums and exhibits and a variety of advertising signs and billboards.” *Id.* As I know from visiting the battlefield, a Kentucky Fried Chicken outlet is visible from the rock wall where Union troops stopped Colonel Pickett’s famous charge. Witnesses also testified that the tower would economically benefit the community by attracting more tourists. *See id.*

58. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams County L.J. 75, 83-86 (C.P. Adams County 1971).

59. *See id.* at 84.

60. *Id.* The court added that towers in other areas, such as the Eiffel Tower in Paris, had not caused “notable damage to either scenic or aesthetic values.” *Id.* & n.6.

61. *Id.* at 84.

62. *See id.*

63. *Gettysburg Tower*, 13 Adams County L.J. at 85. As the court explained:

A major highway bisects the fields of Pickett’s Charge. A Stuckey’s restaurant, a motel, and an ice cream parlor face the Peach Orchard. A souvenir stand flourishes near a government observation tower opposite the Eisenhower farm. These are but a few examples. The Federal government’s only recourse in the past has been to purchase these sites as funds become available. Then, of course, new ventures start elsewhere in equally offensive locations.

Id.

64. *See id.* at 84-85. The court also held that the tower should be judged by any social, economic, or educational value it may have, and noted that even some of the state’s

Finally, the state's claim that the tower would adversely affect the unique historic values of the park was fatally compromised by the agreement between the National Park Service and the defendants. The Park Service has legal responsibility to manage the military park "for the benefit of all the people of the United States,"⁶⁵ the court reasoned, suggesting that Park Service decisions on such matters were thus entitled to great deference. Because the Park Service evidently decided in signing the agreement that the proposed tower would not cause irreparable harm, the court of common pleas was unwilling to question that decision.⁶⁶

The common pleas court found that the proposed tower "will have no noticeable effect whatever on the air or water of the Gettysburg area," and "will not irreparably damage the natural, historic, scenic or esthetic values of the environment of the Gettysburg area."⁶⁷ By distinguishing between air and water, on one hand, and the four identified values, on the other, the trial court indicated that the tower would noticeably but not irreparably damage Gettysburg's natural, scenic, historic, and esthetic values. The commonwealth court and the supreme court affirmed the trial court's decision that the Amendment's first sentence did not prohibit construction of the tower.⁶⁸

The second case, which tested the state's public trust responsibility under Article I, Section 27, is *Payne v. Kassab*.⁶⁹ In *Payne*, private citizens and college students brought an original action in commonwealth court against the state, the city of Wilkes-Barre, and certain state and city officials to prevent the widening of a city

witnesses thought the tower would have educational value. *See id.* at 83-84. This point is perhaps more relevant to the tower's effect on historic values because the tower would help paying customers learn about the battle.

65. *Id.* at 85 (citing 16 U.S.C. §§ 1, 3 (1994 & Supp. III. 1997)).

66. *See id.* at 85-86 (criticizing the Park Service for taking a "two-sided approach" to the tower, signing the agreement but continuing to question its impact in other ways); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 14 Adams County L.J. 52 (C.P. Adams County 1972) (mem.) (refusing to reconsider its prior opinion and continuing to criticize the Park Service for the same reason); *see also* JAMES A. GLASS, *THE BEGINNINGS OF A NEW NATIONAL HISTORIC PRESERVATION PROGRAM, 1957 TO 1969* 62 (1990) (explaining this problem as a result of conflicting organizational and legal roles within the Park Service that were changed as a result of Gettysburg Tower).

67. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams County L.J. 75, 78 (C.P. Adams County 1971).

68. *See supra* notes 49-50.

69. 312 A.2d 86 (Pa. Commw. Ct. 1973).

street to a four-lane highway approximately two-thirds of a mile in length.⁷⁰ Among other things,⁷¹ the plaintiffs argued that the Amendment prevented the use of part of a public park for a street-widening project.⁷² The street passed through one side of River Common, which the state legislature had dedicated as a public common in the first half of the nineteenth century.⁷³ River Common was 21.7 acres in size and consisted mostly of a park and open space area with “numerous walkways and grass lawns abutted by many trees and plants.”⁷⁴ The proposed street widening project would slice .59 acres from the park along the project’s length, slightly less than three percent of River Common’s total acreage.⁷⁵ The project would eliminate some large trees that eventually would be replaced, and would also require the relocation of a walkway.⁷⁶

The *Payne* facts are thus quite different from those in *Gettysburg Tower*, which involved the use of private land and a claim that the use would infringe on the public’s right to protection of certain values. The River Common project affected both parts of the Amendment, although it concerned primarily the state’s public trust responsibilities. The subject of the suit was city-owned land that was being converted from park to road purposes, and the court focused most of its attention on the diversion of 0.59 acres from public commons to public road. There is little doubt, the commonwealth court found, that this land constitutes part of the state’s public natural resources.⁷⁷ The public trust nature of this

70. See *id.* at 90. The street varied in width from three to four lanes, or thirty feet to forty-six feet, along the length of the project. See *id.* at 90-91.

71. The plaintiffs also claimed that use of River Common for the street widening project violated public trust law concerning the proper use of land that has been legislatively dedicated as a commons and violated state transportation laws. See *id.* at 94-95.

72. See *id.* at 93-94.

73. See *id.* at 89-91.

74. *Payne*, 312 A.2d at 91. River Common also included the Luzerne County Courthouse, see *id.* at 88 & n.1, and part of River Street. See *id.* at 91.

75. See *Payne v. Kassab*, 361 A.2d 263, 269 n.11 (Pa. 1976).

76. See *Payne*, 312 A.2d at 92. Despite all of these changes, the court made findings indicating that the project would not adversely affect the scenic, natural, historic, and esthetic values of the common. See *id.* at 92-93. Specifically, the court found that “the project will not significantly alter the River Common.” *Id.* at 93.

77. Although the land is owned by the city of Wilkes-Barre, the city is a subdivision of the state. In addition, the land was dedicated as a commons by the state legislature. The city has a public trust responsibility under Article I, Section 27 for such land. Under Article I, Section 27, the state also has a trust responsibility for such lands. In affirming the commonwealth court, the supreme court said there is “no doubt that the property here

case under Article I, Section 27 is reinforced by the plaintiffs' parallel claim that use of the commons for the street-widening project would violate the common law of public trust for land that has been dedicated as a commons.

In response to plaintiffs' claims that the text of Article I, Section 27 imposed a limitation on the project, a defendant, the Pennsylvania Department of Transportation, had filed briefs proposing that a three-part test be used in lieu of the constitutional text.⁷⁸ Conveniently, the test required nothing more of the agency than its existing statutes.⁷⁹ The commonwealth court adopted that test as a "realistic and not merely legalistic" means of deciding whether the Amendment has been violated. The court stated:

The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?⁸⁰

The court then applied that test to the street-widening project at issue.⁸¹ The court first analyzed whether the state had complied with the applicable state transportation statute, which prohibited highway construction through public parks or historical sites unless there is no feasible and prudent alternative to the use of such land, and unless the facility is planned and constructed to minimize the harm to the park or historical site.⁸² This statute, which was based on a comparable federal statute, was one of the most stringent environmental statutes then in effect.⁸³ The court

involved is public property, a 'public Common', [sic] and that it is possessed of certain natural, scenic, historic and esthetic values." *Payne*, 361 A.2d at 272.

78. See Kury, *supra* note 2, at 127-28.

79. See *Payne*, 361 A.2d at 273 n.23.

80. *Payne*, 312 A.2d at 94.

81. See *id.* at 94-96.

82. See *id.* at 94-95.

83. See Department of Transportation Act of 1966 § 4(f), 49 U.S.C. § 1653(f) (codified as amended at 49 U.S.C. § 303 (1994)). The Supreme Court had earlier held that the "feasible and prudent alternative" language prohibited the federal government from constructing a highway through a public park unless no other alternative was feasible and prudent. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971)

concluded that the state followed this requirement as well as various procedural requirements in that act.⁸⁴ In addition, the court found that the planting of new trees to replace trees that were cut down for the project, relandscaping of the affected area, and preservation of historic features all demonstrated a reasonable effort to minimize the project's adverse consequences.⁸⁵ Finally, the court balanced the improvement in traffic movement that the project would bring against the loss of roughly three percent of the park's land area, and decided that the benefits of the project outweighed its costs.⁸⁶

In affirming the commonwealth court's decision, the supreme court recognized the plaintiffs' claim as being anchored primarily in the public trust part of the Amendment.⁸⁷ The court's opinion refers to the "trusteeship of the State,"⁸⁸ the "trust established by Art. I, § 27,"⁸⁹ and the state's "duties as trustee under the constitutional article."⁹⁰ Indeed, the supreme court expressly distinguished *Gettysburg Tower* by stating that the "property here is public property," not private property.⁹¹ "There can be no question," the court stated, "that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them."⁹² The court then explained that the safeguards provided by the state transportation statute "vouchsafe that a breach of the trust" established by the Amendment "will not occur" if state agencies comply with those safeguards.⁹³ Because the statute "was complied with, we have no hesitation in deciding that the appellee Commonwealth of Pennsylvania has not failed in its duties as trustee" under Article I, Section 27.⁹⁴ Compliance with the legislation, in sum, greatly reduced the project's impact on public natural resources. As a result, the state

84. See *Payne*, 312 A.2d at 94-95.

85. See *id.* at 95.

86. See *id.* at 96.

87. See *Payne v. Kassab*, 361 A.2d 263, 272-73 (Pa. 1976).

88. *Id.* at 273.

89. *Id.*

90. *Id.*

91. *Id.* at 272.

92. *Payne*, 361 A.2d at 272.

93. *Id.* at 273.

94. *Id.*

had not violated its constitutional duty to conserve and maintain those resources. Rather than apply the commonwealth court's three-prong test, the supreme court merely observed in a footnote that the commonwealth court had used it to determine compliance with the Amendment.⁹⁵

The *Payne* test applies only to the public trust part of the Amendment. The commonwealth court's test is explicitly anchored in the public trust part of Article I, Section 27, as evidenced by the reference in the first prong to "public natural resources." The *Payne* test contains no reference to the public right to clean air, pure water, or preservation of the natural, scenic, historic, or esthetic values of the environment. The supreme court in *Payne* distinguished, and did not overrule, *Gettysburg Tower*.

Unfortunately, the *Payne* test has not been limited to the public trust part of the Amendment. With little or no judicial analysis or explanation, the *Payne* test has become an all-purpose test for applying Article I, Section 27.⁹⁶ In using the *Payne* test, the courts rarely distinguish between public and private resources, between values and resources, or between the public trust and the right to a decent environment. Some cases decided under the *Payne* test do not even involve public natural resources; rather, they concern natural, scenic, historic, and esthetic values.⁹⁷ Indeed, the Amendment's text tends to be less important to lawyers and judges than the text of the *Payne* test.

The paramount role of the *Payne* test in analyzing both parts of the Amendment can be explained in two ways. First, it can be said that the court did not explicitly limit its analysis to the public trust part of the Amendment, and that the test thus applies to both parts of the Amendment.⁹⁸ A street widening project that involves the cutting of mature trees and the loss of public park land

95. See *id.* at 272 n.23.

96. See Kury, *supra* note 2, at 132-41 (discussing cases applying the *Payne* test).

97. See, e.g., *Del-AWARE, Unlimited, Inc. v. Commonwealth, Dep't of Env'tl. Resources*, 508 A.2d 348 (Pa. Commw. Ct. 1986) (esthetic impacts of a proposed pumping station on a state park and surrounding historic district); *Pennsylvania Env'tl. Mgt. Servs., Inc. v. Commonwealth, Dep't of Env'tl. Resources*, 503 A.2d 477, 479-80 (Pa. Commw. Ct. 1986) (holding that the visibility of a proposed landfill to a nearby inn and residences as well as an interstate highway is appropriately considered as part of aesthetic and scenic values, and that agricultural value of land on which landfill would be located is appropriately considered part of natural values).

98. The plaintiffs appear to have separately alleged violations of each part of the Amendment. See *Payne*, 361 A.2d at 272-73.

arguably involves both the right to preservation of environmental values and the conservation of public natural resources.

The case is best understood, however, as involving a failure by the courts to discuss and rule separately on each of the Amendment's two parts. The commonwealth court made detailed findings indicating that the environmental rights protected by the Amendment would not be interfered with, although it did not rule on that issue.⁹⁹ The court also focused on the transfer of 0.59 acres of park for street widening, which appears to implicate the public trust part of the Amendment more than the environmental rights part.¹⁰⁰ The public trust issue, of course, predominated in the courts' analysis.

The second reason the commonwealth court's *Payne* test has come to be seen as an all-purpose test for the Amendment lies in the way that it logically undercuts *Gettysburg Tower*. The state as owner and trustee is in a stronger position to control the use of public natural resources than the state as regulator of uses on private property. When the state is doing the work itself, it should more likely achieve the desired result than when it attempts to get that result by compelling others. In addition, state regulation of private property is subject to a variety of constitutional limitations, particularly the takings and due process clauses.¹⁰¹

By depriving the public trust part of the Amendment of any substantive content, however, the *Payne* test reverses this analysis. The state's responsibility for publicly owned resources—the resources over which it has greatest control—is not to conserve them or preserve their values, but rather to manage their degradation under the *Payne* test. The *Payne* test allows environmental degradation to occur if the state has made a reasonable effort to minimize the environmental incursion, and if a project's benefits outweigh its environmental costs.¹⁰² Meanwhile, under *Gettysburg*

99. See *supra* note 76.

100. The loss of 0.59 acres to street widening is not necessarily inconsistent with the preservation of certain values in the environment. It is possible, for example, to plant the remaining area with more or healthier trees. The environmental rights part of the Amendment, after all, focuses on values in the environment, not the resources on which those values are based. Because the public trust part of the Amendment is based on public natural resources, however, it is more obviously implicated by the loss of park land for the street-widening project.

101. See U.S. CONST. amends. V, XIV; PA. CONST. art. 1 §§ 1, 9, 10.

102. Of course, reducing the rate and magnitude of environmental degradation is still a significant accomplishment. Many state entities have used the *Payne* test in various ways.

Tower, the Attorney General has the right to challenge private activities that interfere with clean air, pure water, and the preservation of certain values. The most powerful judicial expression of support for Article I, Section 27, in other words, has come in a case in which the state's legal responsibility is normally more limited.

As a result, the ability of the state and perhaps citizens to vindicate environmental rights under *Gettysburg Tower* is compromised. If the claim is based on public natural resources, it is subject to the *Payne* test. If the claim is not based on public natural resources, it may still be subject to the *Payne* test because the commonwealth court has applied that test to the values identified in the first part of the Amendment. Even if an environmental rights claim not based on public natural resources could be separated from the *Payne* test, it would confront a logical dilemma. Why should the public have a right to preservation of natural, scenic, historic, and esthetic values that derive from private land when the public does not appear to have that right if those values are on public property? Because there is no defensible answer to that question, the *Payne* case undermines the authority of *Gettysburg Tower* even though it does not overrule it. Obviously, the two parts of the amendment need to be harmonized. But that cannot properly be accomplished unless the two parts of the amendment are analyzed and understood separately.

III. Sustainable Development, Not Anti-Development

A. *Origins of Anti-Development Perception*

The factual situations underlying *Gettysburg Tower* and *Payne*, as well as the claims made by the plaintiffs, helped convince Pennsylvania courts that the Amendment is categorically anti-development. In retrospect, these cases may not have been the best cases to educate the courts about the value of Article I, Section 27. When new laws are passed, citizen litigants and the

See Kury, *supra* note 4, § 2-2.3 (explaining the use of the *Payne* test by the governor, the Pennsylvania Department of Environmental Protection, the Pennsylvania Department of Transportation, the Public Utility Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Game Commission, the Pennsylvania Historical and Museum Commission, and municipalities). Article I, Section 27 requires, however, that public natural resources be conserved and maintained for the benefit of all people, including those in future generations. Future generations are unlikely to regard a degraded environment as one that has been conserved and maintained simply because it might have been degraded more.

government often bring easier cases first. If successful, they often use their prior victories to provide a foundation for winning more difficult cases. Here, by contrast, courts were confronted from the outset with two cases that pushed the extreme boundaries of the Amendment. Two months after the voters approved Article I, Section 27, the state in *Gettysburg Tower* challenged a private landowner's unregulated use of its own land.¹⁰³ Then, citizens and others in *Payne* used the Amendment to challenge the diversion of three percent of a public commons for a road-widening project whose effects were already subject to significant environmental regulation. Instead of educating the courts about how the Amendment makes sense, these cases frightened the courts into thinking that the Amendment could stop all development.

A brief review of *Gettysburg Tower* and *Payne* demonstrates the devastating effect of the claims made on behalf of the Amendment against these two proposals. After the trial court denied the state's requested injunction in *Gettysburg Tower*, the state appealed, arguing that "some injury to the values entitled to preservation by Article I, Section 27" was sufficient to justify an injunction, not "great injury."¹⁰⁴ In rejecting that view, the commonwealth court stated that the government's claim was impractical:

It is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment. If the standard of injury to historic values is to be that expressed by the Commonwealth's witnesses as an "intrusion" or "distraction", [sic] it becomes difficult to imagine any activity in the vicinity of Gettysburg which would not unconstitutionally harm its historic values.¹⁰⁵

The *Payne* case built on and elaborated this concern by addressing the effect of Article I, Section 27 on conventional development. The commonwealth court in *Payne* began its analysis by citing its own conclusion in *Gettysburg Tower* that the government's claim about the Amendment would bring all development to a halt, even though the *Gettysburg Tower* court rejected that claim about the Amendment.¹⁰⁶ "Likewise," the *Payne* court

103. See *supra* Part II.B.

104. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 895 (Pa. Commw. Ct. 1973).

105. *Id.* at 895.

106. See *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

said, "it becomes difficult to imagine any activity in the vicinity of River Street that would not offend the interpretation of Article I, Section 27 which the plaintiffs urge upon us."¹⁰⁷ The court continued:

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 to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources *rather than no development*.¹⁰⁸

The court then stated its three-part test for determining compliance with the Amendment.¹⁰⁹ Concern over the Amendment's anti-development potential was also expressed in subsequent cases.¹¹⁰

B. The Amendment Embodies Conservation or Sustainable Development

An analysis of the Amendment, rather than the claims made by litigants about the Amendment, demonstrates that the anti-development characterization is erroneous. Article I, Section 27 is not anti-development; it supports what was then called conservation and what we now call sustainable development. "The conservation of natural resources is the key to the future," wrote Gifford Pinchot, who had been a Pennsylvania governor as well as the first

107. *Id.*

108. *Id.* (emphasis added). The court added that "[j]udicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic." *Id.*

109. *See id.* at 94-96.

110. In one, the Department of Environmental Resources and private citizens challenged the Public Utility Commission's approval of a right-of-way for an electric transmission line, arguing that the Commission was constitutionally obliged to prohibit the transmission line "if it will have any effect on the interests enumerated in Article I, Section 27." *Commonwealth, Dep't of Env'tl. Resources v. Commonwealth, Pub. Util. Comm'n*, 335 A.2d 860, 864 (Pa. Commw. Ct. 1975). The court rejected "the absolute interpretation urged upon us here" as potentially limiting all development, and held that the applicant was only required to show compliance with the *Payne* test, and only if someone challenging the application showed that the interests protected by Article I, Section 27 would be adversely affected. *See id.* at 864-65. Similar reasoning was employed in *Commonwealth, Dep't of Env'tl. Resources v. Commonwealth, Dep't of Transp.*, 335 A.2d 860, 864 (Pa. Commw. Ct. 1975) (challenging the location of electronic transmission lines); and *Bucks County Bd. of Comm'rs v. Commonwealth, Pub. Util. Comm'n*, 313 A.2d 185, 191-92 (Pa. Commw. Ct. 1973) (challenging a petroleum pipeline).

director of the United States Forest Service.¹¹¹ “The very existence of our nation, and of all the rest, depends on conserving the resources which are the foundations of its life.”¹¹² Similarly but more broadly, sustainable development has been defined as “socially responsible economic development” that protects “the resource base and the environment for the benefit of future generations.”¹¹³ The nations of the world endorsed sustainable development at the 1992 United Nations Conference on Environment and Development as a response to growing global poverty and environmental degradation.¹¹⁴ Its basic premise is that human activity should and can be planned and conducted not only to “coexist with healthy ecosystems but actually [to] enhance them.”¹¹⁵

The text, legislative history, constitutional status, and referendum approval of the Amendment all support the conclusion that Article I, Section 27 furthers conservation or sustainable development—and is emphatically not anti-development. The public trust part of the Amendment obliges the state to conserve and maintain public natural resources for the benefit of all people. This part of Article I, Section 27 provides a classic expression of conservation because it expressly links natural resources protection to human use and enjoyment of resources. Similarly, the environmental rights part of the Amendment gives the people the right to the preservation of certain values in the environment without giving them the right to the preservation of specific features on which those values are based. Thus, people can make use of the environment so long as they preserve its values. The rights to clean air and pure water

111. GIFFORD PINCHOT, *BREAKING NEW GROUND* 324 (1947).

112. *Id.*; see also generally SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959); JOHN F. REIGER, *AMERICAN SPORTSMEN AND THE ORIGINS OF CONSERVATION* (rev. ed. 1986).

113. United Nations Conference on Environment and Development, Agenda 21, ¶ 8.7, U.N. Doc. A/CONF.151/26 (1992) [hereinafter Agenda 21].

114. See generally John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1 (1998) (explaining the concept of sustainable development, particularly at the national level). The concept of sustainable development is contained in two texts that the world's nations endorsed at the conference—Agenda 21, a blueprint for sustainable development, and the Rio Declaration on Environment and Development, a set of principles to guide national and international efforts toward sustainable development. See *id.* at 21-23.

115. J. Baird Callicott, *The Wilderness Idea Revisited: The Sustainable Development Alternative*, in *ECOLOGICAL PROSPECTS: SCIENTIFIC, RELIGIOUS AND AESTHETIC PERSPECTIVES* 37, 38 (Christopher Key Chapple ed. 1994).

are arguably the most extreme parts of the Amendment. But more than three decades of pollution control laws has shown that economic development is compatible with, and even requires, cleaner air and purer water.¹¹⁶ Moreover, constitutional provisions are rarely interpreted in absolute terms.

The legislative history also demonstrates an intent to allow human use of renewable resources. As originally drafted, for example, the state's public trust duty was to "preserve and maintain" protected resources "in their natural state."¹¹⁷ However, the legislature modified this duty. It deleted "in their natural state," so that the state was only obligated to "preserve and maintain" public trust resources.¹¹⁸ Then, as already noted, it changed "preserve" to "conserve."¹¹⁹

Article I, Section 27 also fosters sustainable development by giving constitutional parity to environmental protection and development. An important principle of constitutional interpretation is that the provisions of the constitution should be read so as to give effect to each.¹²⁰ The state's constitution is "an integrated whole," and courts thus are to give effect "to all of its provisions whenever possible."¹²¹ When an environmental provision is written into the constitution, all constitutional decision making concerning other provisions must be reconciled with the Amendment whenever possible. That creates an obligation by the state to ensure that consideration and protection of constitutional values concerning the environment are made part of all state decision making. Thus, individual constitutional provisions do not trump other constitutional provisions; they are to be harmonized if possible.¹²² By protecting private property, for example, the due

116. See REPORT OF THE PENNSYLVANIA 21ST CENTURY ENVIRONMENT COMMISSION 42 (1998) [hereinafter REPORT OF THE 21ST CENTURY COMMISSION] (indicating that the control of point source discharges of water pollutants "has significantly improved water quality but not necessarily overall aquatic ecosystem quality"); see also *id.* at 51-52 (noting improvements in air quality over past quarter century and future challenges).

117. H.B. 958, Printer's No. 1105, 168th Pa. Sess. (Pa. 1969).

118. *Id.*, Printer's No. 1307.

119. See *supra* notes 34-38 and accompanying text.

120. See, e.g., *Cavanaugh v. Davis*, 440 A.2d 1380, 1381-82 (Pa. 1982).

121. *Id.* at 1381.

122. The constitution thus fosters integrated decision making, which is an essential element of sustainable development. In part, integrated decision-making is the simultaneous and coherent consideration of economic, environmental, and social factors in making a particular decision. See Agenda 21, *supra* note 113, ¶ 8.4 ("The primary need is to integrate environmental and developmental decision-making processes."); see also WORLD COM-

process and takings provisions of the state constitution¹²³ reward human efforts to use and develop such property. Because these provisions give constitutional status to property rights, the constitution had a bias in favor of conventional development before the amendment was adopted.¹²⁴ Article I, Section 27 does not trump property rights provisions. Indeed, the Amendment's history demonstrates a concerted effort to ensure that its text could not be used for that purpose. Because Article I, Section 27 is placed in the state constitution, however, it obliges the state and other decision makers to reconcile environmental protection and property rights. Thus, Article I, Section 27 moves the state constitution from an orientation toward conventional development at the environment's expense to one of environmentally sustainable development.¹²⁵

The referendum approval process for Article I, Section 27 also supports this conclusion. One basic principle of constitutional interpretation is that constitutional amendments should be read to reflect the views of the ratifying voters.¹²⁶ The people who voted

MISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 62 (1987) [hereinafter OUR COMMON FUTURE] ("The common theme throughout this strategy for sustainable development is the need to integrate economic and ecological considerations in decision making.")

In this respect, sustainable development is not a new issue but a broader and more comprehensive way of analyzing and acting on all issues. Just as environmental problems cannot be separated from economic and social issues, social and economic goals cannot be considered separately from the environment. Integrated decision-making also means that the various decisions affecting particular social, environmental, and economic goals should actually further those goals.

123. See PA. CONST. art. 1 §§ 1, 9, 10.

124. See Thompson, *supra* note 12, at 905.

125. This middle approach is essential in Pennsylvania. Virtually every square inch of land in the state has been logged, farmed, mined, paved, or built upon over the past several centuries. The state's waters have been fished, dredged, dammed, and used for waste disposal in the same period. Indeed, the Amendment was broadly intended to ensure that future development would not continue the environmental destructiveness that has occurred historically. See FRANKLIN L. KURY, NATURAL RESOURCES AND THE PUBLIC ESTATE: A BIOGRAPHY OF ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION 1-4 (1985). As indicated by some of the cases decided under Article I, Section 27, in fact, past development requires restoration of the environment, not just prevention of future incursions. See, e.g., *Commonwealth v. Barnes & Tucker Co.*, 371 A.2d 461 (Pa. 1977), *appeal dismissed sub non.*, *Barnes & Tucker Co. v. Pennsylvania*, 434 U.S. 807 (1977); *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308 (Pa. 1973). On the other hand, the enormous economic productivity and social well-being of the state depend upon the ability of individuals and corporations to lawfully pursue their own ends.

126. When faced with different interpretations of the same provision, courts are to favor a natural reading that avoids contradictions and difficulties in implementation, completely

for Article I, Section 27 surely did not expect their vote to result in major reversals in their standard of living. Otherwise, they would have voted against it. Nor, one must believe, did they think their vote was meaningless. If they did, they would not have bothered to vote at all. The voters sought instead a reconciliation of social and economic development with environmental and natural resources protection. They wanted continuing social and economic opportunities, in sum, but they also wanted to see environmental progress.

The Amendment's focus on values and resources indicates some kind of governmental and perhaps even private obligation to consider and protect resources and values holistically. Statutes and regulations may protect some resources and values but not others, or may not provide sufficient protection. More basically, the constitution focuses on what we need to protect, not the statutory or regulatory means that are used to provide that protection. Thus, while the state may improve the effectiveness of particular regulatory programs, or the private sector may improve the efficiency with which energy or materials are used, the Amendment asks a fundamental question about such efforts: are they resulting in protection of the resources and values identified in Article I, Section 27? All too often, for example, improvements in efficiency or effectiveness are offset by a greater level of polluting activity, meaning that these improvements in technique are not preventing deterioration of environmental quality.¹²⁷ Indeed, a major strength of Article I, Section 27 is that it forces us to focus on the health of the environment itself. Because environmental conditions are never static or unchanging, moreover, the only sure way to support the environment is to protect and even restore it.

Sustainable development seems more possible now than it did three decades ago. Environmental laws adopted in the past several decades provide evidence that environment and development goals are necessarily related. In the 1970s, Congress enacted legislation

conforms to the intent of the framers, and reflects the views of the ratifying voter. *See, e.g., Zemprelli v. Daniels*, 436 A.2d 1165, 1170-71 (Pa. 1981).

127. Perhaps the most well-known example is automobile pollution. The improvements in emissions controls on newer vehicles are substantially offset by increases in vehicle miles traveled and number of automobiles. *See* ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 763 (2d ed. 1996).

to control air pollution,¹²⁸ water pollution,¹²⁹ coal mining,¹³⁰ and other environmental problems.¹³¹ The conservation laws of earlier decades have also improved our forests, reduced soil erosion, and helped to protect our water supplies. Reductions in environmental contamination have contributed to human health and better quality of life, and have occurred along with growing prosperity.¹³²

Article I, Section 27 forces us to go further, and to imagine and work for a Pennsylvania in which there is clean air and pure water; a Pennsylvania where we preserve the natural, scenic, historic, and esthetic values of the environment, and a state that conserves and maintains public natural resources for the benefit of present and future generations.¹³³ While Article I, Section 27

128. See Clean Air Act Amendments of 1970, codified as amended at 42 U.S.C. §§ 7401-7671q (1994).

129. See Federal Water Pollution Control Act of 1972, codified as amended at 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997).

130. See Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1994 & Supp. III 1997).

131. See, e.g., Resource Conservation and Recovery Act of 1976, codified as amended at 42 U.S.C. §§ 6901-6992k (1994).

132. A "prosperous economy, a healthy citizenry and a better environment are directly linked to each other. To make progress in any one area, Pennsylvania must strive for simultaneous excellence in all." REPORT OF THE 21ST CENTURY COMMISSION, *supra* note 116, at 12. Indeed, in his second inaugural address, Governor Tom Ridge specifically linked environmental protection to job creation. See Governor Thomas J. Ridge, *1999 Inaugural Address*, reprinted in ENVIRONMENTAL PROTECTION UPDATE, Jan. 22, 1999, at 28.

133. Cf. Eric T. Freyfogle, *Illinois Life: An Environmental Testament*, 1997 U. ILL. L. REV. 1081, 1082 ("One aim of environmentalism is . . . to stimulate our communal imagination, to encourage us to consider what the land might look like if it really were healthy, and how we and our descendants might better flourish if we inhabited such a land.").

Both the Amendment and sustainable development seek to foster intergenerational equity. The most commonly used definition of sustainable development specifically includes this idea; present development must not compromise "the ability of future generations to meet their own needs." OUR COMMON FUTURE, *supra* note 122, at 43. The gist of that responsibility is to ensure that future generations inherit an environment that is of at least equal quality to the present environment. Intergenerational equity is based on the moral obligation of each generation "to future generations to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present generation." EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 37 (1989). Intergenerational equity also captures the politically accepted norm that each generation should enjoy a better life than the previous one.

The text of Article I, Section 27 expressly and implicitly incorporates the principle of intergenerational equity. The public trust part of the Amendment declares "Pennsylvania's public natural resources" to be "the common property of all the people, including generations yet to come." Similarly, the environmental rights part of the amendment

does not, and cannot, state the specific details for realizing that vision in particular parts of Pennsylvania in particular times, it creates a constitutional framework for achieving and maintaining such a vision.¹³⁴

IV. Government Responsibilities as the Primary Basis for Citizen Rights

Much of the early enthusiasm for the Amendment was based on the idea that it would enhance citizen access to judicial relief on environmental matters. Franklin Kury, the chief legislative sponsor of the Amendment, wrote that his hope in offering the Amendment was "that the declaration of environmental rights would be used by the courts on a case-by-case basis to develop a body of environmental rights law comparable to that developed by courts interpreting the Bill of Rights to the United States Constitution."¹³⁵ Because citizens could challenge environmental incursions in court, he explained, those who adversely affect the environment would have to modify their behavior.¹³⁶

This explanation contains two important truths. One is that the ability of citizens to bring judicial actions is a necessary element of any effective system for environmental protection. The other is that citizen claims under the Amendment must correspond to the obligations of the government and perhaps others. If citizens have a right to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment, then the government and perhaps others surely have an obligation not to interfere with those rights. If citizens have a right to the conservation and maintenance of public natural resources, then that right also defines the government's responsibilities for those resources.

Nearly three decades later, however, only one part of this equation is operative. Citizens have the ability to raise Article I, Section 27 claims under a great variety of circumstances, but a constitutionally-based understanding of the government's responsi-

provides a public right in the "preservation" of certain environmental values, a word that is meaningless if it refers only to the present generation.

134. Article I, Section 27 does not, however, speak to many of the national and international issues that sustainable development addresses. These include, but are not limited to, consumption of materials and energy, and financial assistance to developing countries. *See, e.g.,* Dernbach, *supra* note 114, at 42-50.

135. Kury, *supra* note 2, at 124.

136. *See id.* at 124.

bilities under Article I, Section 27 has been lost. The *Gettysburg Tower* case upheld the Attorney General's authority to protect environmental rights under the Amendment. Because the case was brought against a private landowner, though, and because the Attorney General does not have any general legal duty to bring cases protecting environmental rights, the case contains no express statement of the government's responsibilities for environmental rights.

While the *Payne* test suggests that the state has some responsibilities under the public trust part of the Amendment, the language of the test also suggests that these responsibilities exist only on a project-by-project basis. The test contains no statement of the government's overall responsibilities for public natural resources. Nor, under the *Payne* test, are citizens ordinarily able to make meaningful claims that the government should do anything that it is not already doing. Plaintiffs in court, and appellants challenging the issuance of pollution control permits, have almost never successfully used the *Payne* test to stop or change a project.¹³⁷ They have not been able to use the test, for example, to prevent a stream relocation project to remedy existing hazardous conditions,¹³⁸ to prevent the construction of pumping stations and other facilities to divert water from a stream to supply water for cooling a nuclear generating station,¹³⁹ or to overturn permits approved by the state Department of Environmental Resources.¹⁴⁰ In sum, while the Amendment provides citizens a basis for requesting judicial relief, it has not been used to impose meaningful responsibilities on government.

The Amendment has not worked like other provisions in the Bill of Rights, or the corresponding Declaration of Rights in the

137. See Kury, *supra* note 4, § 2-2.1 (citing more than a dozen projects for which Article I, Section 27 challenges were unsuccessful). But see *id.* § 2-2.3.4 (citing a Public Utility Commission denial of an application to construct a natural gas pipeline because applicant failed to demonstrate compliance with *Payne* test).

138. See *In re Condemnation for Legislative Route 58818*, 375 A.2d 1364 (Pa. Commw. Ct. 1977).

139. See *Del-AWARE Unlimited, Inc. v. Pennsylvania Pub. Util. Comm'n*, 513 A.2d 593 (Pa. Commw. Ct. 1986); *Del-AWARE Unlimited, Inc. v. Commonwealth, Dep't of Env'tl. Resources*, 508 A.2d 348 (Pa. Commw. Ct. 1986).

140. *Smartwood v. Commonwealth, Dep't of Env'tl. Resources*, 424 A.2d 993 (Pa. Commw. Ct. 1981) (sewage facilities plan approval). The Department of Environmental Resources was divided and renamed the Department of Environmental Protection by the Conservation and Natural Resources Act, PA. STAT. ANN. tit. 71, §§ 1340.101-.1103 (West Supp. 1998-99).

Pennsylvania Constitution,¹⁴¹ because it is unlike those provisions. The second and third sentences in the Amendment establish an affirmative governmental trusteeship for public natural resources for which there is no parallel in the United States Bill of Rights or the Pennsylvania Declaration of Rights. All other provisions of the Bill of Rights and Declaration of Rights are “negative rights;” they simply prevent the state from acting in certain ways.¹⁴² In addition, all of the other amendments in the Bill of Rights and Declaration of Rights are directed toward protection of individuals or their property. The two parts of the Amendment, taken together, are broader because they encompass individuals, private property, and the outdoor environment. This, coupled with the express or implied government responsibilities in the Amendment, suggests that the government has a much larger role in implementing this Amendment than other provisions of the Declaration of Rights.

As the text of Article I, Section 27 indicates, the government’s constitutional responsibilities are twofold. First, the state is obliged to conserve and to maintain public natural resources. Second, by providing a public right to clean air, pure water, and the preservation of certain environmental values, Article I, Section 27 also implies that the state has a duty not to interfere with that right. These responsibilities are the same from project to project, though their effect on individual projects will obviously vary depending on the projects themselves.

Remarkably, these responsibilities have been generally ignored. They are absent from the three-prong *Payne* test. Although a governmental duty not to interfere with the preservation of certain values can be inferred from *Gettysburg Tower*, no court has yet held that this duty exists. Nor have the courts recognized explicitly the state’s public trust responsibility for public natural resources. Yet these responsibilities provide the foundation for any allegation by citizens that their rights under the Amendment have been violated.

V. A More Constructive and Useful Judicial Role

The tendencies to treat Article I, Section 27 as an indivisible whole, to perceive it as anti-development, and to ignore the

141. See PA. CONST. art. I (Declaration of Rights), which includes Section 27.

142. See WOODSIDE, *supra* note 20, at 177-78.

government's responsibilities have led to a relatively minor role for the Amendment. Perhaps more important than these tendencies, however, is an understanding that the legislative and executive branches are more competent to address environmental matters than the courts. While there is much truth in that understanding, there still remains a substantial role for the courts.

A. Primary Responsibility in Legislative and Executive Branches

Almost three decades after Article I, Section 27 was adopted in 1971, legislation and administrative regulation, rather than the Amendment, carry out the greatest share of the state's environmental work. The number, complexity, and stringency of environmental statutes and regulations is much greater now than when the Amendment was first adopted.¹⁴³ The Amendment was adopted at the beginning of the modern environmental era in Pennsylvania as well as the United States. At the federal level, a significant number of major statutes were adopted, beginning in 1969.¹⁴⁴ Many of these statutes required states to adopt or upgrade legislation in order to continue operating their own environmental regulatory programs.¹⁴⁵ Thus, many Pennsylvania problems that might have been addressed through lawsuits under Article I, Section 27 were instead addressed by legislation as well as the development and implementation of administrative regulations. The existence of an alternative institutional means of addressing these problems, in turn, weakened the claim that the courts were necessary to vindicate public rights.

The language and subject matter of the Amendment also provide a basis for believing that the legislative and executive branches are better suited to make many decisions on these issues than the courts. The scientific and technical complexity of environmental problems, the existence of competing policies, and the economic and social consequences of environmental protection put resolution of most environmental matters outside the expertise

143. For a useful summary and explanation of most of those laws, see PENNSYLVANIA ENVIRONMENTAL LAW AND PRACTICE, *supra* note 4.

144. See J. William Futrell, *The History of Environmental Law*, in ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY § 1.2(I) (Celia Campbell-Mohn et al. eds., 1993); see also text accompanying notes 128-131.

145. See, e.g., John C. Dernbach, *Pennsylvania's Implementation of the Surface Mining Control and Reclamation Act: An Assessment of How "Cooperative Federalism" Can Make State Regulatory Programs More Effective*, 19 U. MICH. J.L. REF. 903 (1986).

and ordinary role of judges. In lawsuits under Article I, Section 27 that do not involve review of decisions made by administrative agencies, courts must decide these questions on their own. Performing that task in a competent manner can be daunting. In the absence of legislation or regulations, courts are often reluctant to make the difficult technical and policy calls that environmental decision-making requires.

The gap between many current development practices and the vision of sustainable development contained in Article I, Section 27 reinforces the need for legislation and regulations because it suggests the need for a coherent strategy for implementing the Amendment. The judiciary is not well positioned to provide or implement such a strategy. The other two branches are, however, particularly if they can work together. Significantly, it is well recognized that implementation of the sustainable development framework requires a concerted strategy, perhaps especially in the executive branch, but also with significant legislative support and participation.¹⁴⁶ This means that effective implementation of the Amendment will depend, in the final analysis, on a meaningful and continuing commitment by both the executive and legislative branches. Not only do they need to create and implement a coherent strategy, they must also fill in the details and authorize appropriate institutions to take necessary actions.

Finally, and perhaps most basically, the Amendment lacks the specificity necessary to precisely delineate appropriate behavior in the variety of contexts to which it will inevitably be applied. While it provides boundaries for that behavior, and contains some basic principles, legislative and administrative decisions will be needed to foster sustainable development in Pennsylvania.

These reasons lead to a basic question about the relevance of Article I, Section 27. The short answer is that it continues to be relevant, even essential, though perhaps not for the same reasons as originally envisioned. This answer is based on two mutually-reinforcing ways of interpreting the Amendment, and on judicial enforcement of these interpretations.

146. See Dernbach, *supra* note 114, at 69-72.

B. Judicial Role in Enforcing Amendment

1. *Substantive Rules to Close Legislative or Administrative Gaps*—Article I, Section 27 is most obviously applied through substantive rules protecting environmental rights and the public trust. Understood in this way, the Amendment prevents the legislative and executive branches, and perhaps private citizens, from undermining public rights to public natural resources or a clean environment. This substantive approach provided the basic rationale for the Amendment. Article I, Section 27 was intended to ensure that the government protects natural resources and the environment, rather than encourage or support their degradation.¹⁴⁷ Because the ordinary political process had often failed to protect these rights, a constitutional rule was required to correct the process.¹⁴⁸ Substantive constitutional rules invalidate legislation, regulations, administrative agency actions, and other actions that are inconsistent with these rules. Such rules thus prevent the political process from adversely affecting environmental rights and the public trust, and may even encourage their protection. When statutes do protect the environment, substantive constitutional rules can also effectively prevent their repeal; the Amendment was intended in part to prevent backsliding.¹⁴⁹

The public trust part of the Amendment lends itself most obviously to this interpretation because the text says that the state has a duty to conserve and protect public natural resources. It is difficult to think of a more obvious way to enforce the public trust part of the Amendment than as a substantive duty.

The public trust part of the Amendment is also like a great many other amendments to the federal and state constitutions that specify the way in which governmental machinery should operate.¹⁵⁰ In a basic sense, this part of Article I, Section 27 is simply

147. See KURY, NATURAL RESOURCES AND THE PUBLIC ESTATE, *supra* note 125, at 1-2. Between the end of the Civil War and the mid 1960s, "the Pennsylvania legislature was dominated by the iron, steel, coal, and railroad interests," which ensured that laws limiting environmental exploitation were limited in scope or inapplicable to those interests. *Id.*

148. See Thompson, *supra* note 12, at 880-81, 884-87.

149. See KURY, NATURAL RESOURCES AND THE PUBLIC ESTATE, *supra* note 125, at 4 ("[A]ny student of history knows that political tides rise and fall. What one legislature passes, another may repeal or amend.").

150. See Ruhl, *supra* note 14, at 256-57; see also, e.g., PA. CONST. arts. II (basic rules concerning operations of legislature), III (basic rules for passage of legislation), IV (basic rules concerning operation of executive branch), V (basic rules concerning operation and

a rule for the management of certain public property. A substantive interpretation is thus neither novel or remarkable. Because a substantive interpretation would prevent the state from authorizing or allowing private appropriation or degradation of public natural resources, moreover, such an interpretation would be consistent with the Amendment's original purpose. Finally, and perhaps most importantly, the public trust part of the Amendment builds on pre-existing common law public trust rules that impose substantive duties on the government for its management of certain resources.¹⁵¹ Given the explicit recognition of this common law background in the development of the Amendment, the public trust part of the Amendment necessarily imposes substantive limitations on the use of public natural resources.

The environmental rights part of the Amendment also imposes a substantive limitation, as the *Gettysburg Tower* case indicates. The text states that the public has a right to clean air, pure water, and the preservation of certain values. What more basic way is there to protect these public rights than to prohibit substantial interference with them? This part of the Amendment, moreover, is similar to the Bill of Rights of the United States Constitution and the Pennsylvania Declaration of Rights in several important respects. Because this part of the Amendment and the Declaration of Rights create individual rights, and because these rights necessarily limit the ability of the government and perhaps others to infringe on them, it is logical and appropriate to treat the first sentence of the Amendment as imposing substantive limitations. Just like the public trust part of the Amendment, moreover, the environmental rights part was intended to prevent government from encouraging and supporting pollution and other damage to environmental values. Application of the first sentence as a substantive limit is thus consistent with, and even necessary to accomplish, the Amendment's purposes.

Substantive application of both parts of the Amendment is also similar to the manner in which common law rules now operate in environmental cases. Before environmental statutes became widespread, the common law provided a means of redress for citizens who were adversely affected by pollution. Although greater use of legislation and regulation over the past several

administration of courts).

151. See, e.g., Broughton, *supra* note 20, at 422-23.

decades has reduced the need for common law actions, common law rules still provide a minimum level of protection for the public. When there is no legislation, or when it is being inadequately enforced, public nuisance and other common law actions are available for public use.¹⁵² Similarly, although an explosion in environmental legislation and administrative regulations has weakened the claim that Article I, Section 27 is necessary to address imbalances in the political process,¹⁵³ gaps still exist. These include the absence of effective legislation for suburban sprawl and protection of biodiversity.¹⁵⁴ There is no reason why the constitution should play less of a substantive gap-filling role than the common law. Substantive enforcement of Article I, Section 27 is thus most appropriate when legislation and regulation is not protecting the public.

This approach to constitutional interpretation would fundamentally alter the way in which Article I, Section 27 is currently understood, and would make the Amendment's interpretation more consistent with that of other provisions in the constitution. It would make the constitution's text the test for the adequacy of legislation. If a statute provided the protection required by Article I, Section 27, then the statute and any action taken under it would presumably pass constitutional muster.

At present, however, many statutes administered by the Department of Environmental Protection and the Department of Conservation and Natural Resources specifically include a statement that they are intended to implement Article I, Section 27.¹⁵⁵

152. See PLATER ET AL., *supra* note 15, at 157-58.

153. Judicial deference to administrative decision making and the technical nature of many environmental decisions contribute to the weakening of that claim.

154. See generally REPORT OF 21ST CENTURY COMMISSION, *supra* note 116 (identifying these and other environmental problems requiring new or modified legislation). Subsidies, tax laws, and similar legislation may even be environmentally destructive, although they are much less visible to the public than regulatory statutes. See, e.g., *id.* at 16 (identifying expenditures on "water and sewer infrastructure and on roads" as significant contributors to sprawl).

155. See Dam Safety and Encroachment Act, PA. STAT. ANN. tit. 32, § 693.2(3) (West 1997); Wild Resource Conservation Act, PA. STAT. ANN. tit. 32, § 5302(1) (West 1997); Environmental Education Act, PA. STAT. ANN. tit. 35, § 7522(1) (West Supp. 1998-99); Hazardous Sites Cleanup Act, PA. STAT. ANN. tit. 35, § 6020.301(16) (West 1993); Land Recycling and Environmental Remediation Standards Act, PA. STAT. ANN. tit. 35, § 6026.102(4) (West Supp. 1998-99); Pennsylvania Safe Drinking Water Act, PA. STAT. ANN. tit. 35, § 721.2(b) (West 1993); Solid Waste Management Act, PA. STAT. ANN. tit. 35, § 6018.102(10) (West 1993); Pennsylvania Municipal Waste Planning, Recycling and Waste Reduction Act, PA. STAT. ANN. tit. 53, § 4000.102(b)(13) (West 1997); Oil and Gas Act, PA.

Other statutes, by contrast, do not. Pennsylvania courts have been more willing to uphold an agency decision that furthers Article I, Section 27 when such a finding is contained in the legislation.¹⁵⁶ In one case, in fact, the commonwealth court may have suggested legislative balancing satisfies the *Payne* test when the statutes at issue state an intent to implement Article I, Section 27.¹⁵⁷ Ostensibly, the courts are willing to reach these conclusions because the Amendment was considered in the drafting of some statutes but not in the drafting of others. But there is no evidence to support this conclusion; no categorical difference between the first and second group of statutes exists except for the statement of intent.

The protection of public values and resources under the Amendment, moreover, depends not on the legislature's intent but on the legislation's effect. The Clean Streams Law¹⁵⁸ and the Air

STAT. ANN. tit. 58, § 601.102(4) (West 1996); Pennsylvania Appalachian Trial Act, PA. STAT. ANN. tit. 64, § 802 (West Supp. 1998-99); Conservation and Natural Resources Act, PA. STAT. ANN. tit. 71, § 1340.101(a)(1) (West Supp. 1998-99).

156. See, e.g., *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1365-66 (Pa. 1986).

157. See *National Solid Wastes Management Ass'n v. Casey*, 600 A.2d 260, 264-65 (Pa. Commw. Ct. 1991). In this case, the governor issued an executive order imposing categorical substantive and procedural limits on municipal waste landfill and resource recovery facility operations. See *id.* at 261. The court held that the executive order constituted legislation, and that the governor lacked the authority under Article I, Section 27 to issue the executive order on his own. See *id.* at 265. Under the state constitution, legislation must be passed by both houses and either signed by the governor or passed by a two-thirds majority over his veto. See PA. CONST. art. II, § 1; art. IV, § 15. The executive order was not adopted in that manner, and it was not adopted through the rulemaking process of an administrative agency possessing properly delegated statutory authority. The court also held that the provisions of the executive order conflicted with existing legislation. See *Waste Management*, 600 A.2d at 265.

The court's holding that Article I, Section 27 does not provide the governor with power to exercise legislative authority is unobjectionable. However, the court then added, in dicta: "The balancing of environmental and societal concerns, which the Commonwealth argues is mandated by Article I, Section 27, was achieved through the legislative process which enacted Acts 97 and 101 [the two basic municipal waste regulatory statutes] and which promulgated the applicable regulations." *Id.*

This statement should not be taken at face value because it was not necessary to decide the case, because the statement was made in the context of a discussion of legislative authority, and because the court did not even attempt to explain how this legislation automatically met the *Payne* test. Moreover, the statement stands the constitution on its head because it makes legislation the defining measure of what the constitution means. Because the Pennsylvania constitution provides the standard against which legislation should be judged, legislation does not define what Article I, Section 27 means.

158. The Clean Streams Law, PA. STAT. ANN. tit. 35, § 691.4 (West 1993) (purposes do not include implementation of Article I, Section 27).

Pollution Control Act,¹⁵⁹ for example, contain no statement of intent to implement Article I, Section 27, even though the Amendment gives the public a specific right to clean air and pure water, and even though these are the two main Pennsylvania statutes that protect those rights.¹⁶⁰ To argue that these statutes do not further the purposes of the Amendment to a substantial degree would be absurd.¹⁶¹

This is not to say that lawsuits under Article I, Section 27 should provide a basis for second-guessing administrative decisions on highly technical matters. Rather, it suggests that Article I, Section 27 should be available to prevent the state from allowing or encouraging unmistakable environmental degradation, which should in turn prompt the adoption of legislation in areas where none now exists. In addition, the use of Article I, Section 27 as a substantive limitation on legislation would further the Amendment's purposes by preventing the legislature from encouraging or allowing environmental damage.

2. Principle-Reinforcing Rules to Support Legislative or Administrative Actions—Article I, Section 27 is also principle reinforcing. The substantive application of constitutional provisions necessarily reinforces the principles stated in those provisions, but there are other ways in which constitutional provisions are principle-reinforcing. Even when their substantive provisions are not being directly applied, they can help support or limit the application of other legal rules, provide a starting point for understanding how particular problems should be addressed, and provide a basis for determining how well the state is protecting the

159. Air Pollution Control Act, PA. STAT. ANN. tit. 35, §4002 (West 1993) (statement of policy does not refer to Amendment).

160. As a practical matter, the use or nonuse of Article I, Section 27 in environmental statutes is less a matter of government policy than of the preferences of the drafters.

161. In fact, the Pennsylvania Supreme Court has held several times that the Amendment supports the interpretation and applicability of these two statutes. *See, e.g.,* Commonwealth, Dep't of Env'tl. Resources v. Locust Point Quarries, Inc., 396 A.2d 1205, 1209 (Pa. 1979) (air quality); Commonwealth, Dep't of Env'tl. Resources v. Bethlehem Steel Corp., 367 A.2d 222, 226 n.10 (Pa. 1976) (air quality); Commonwealth v. Harmar Coal Co., 306 A.2d 308, 317 (Pa. 1973) (water quality).

Nor are legislative statements of intent necessary to implement the Amendment. The environmental rights part of the Amendment is self-executing against private parties and the government; the public trust part of the Amendment is also self-executing. These concepts are developed in part II of this Article, which is forthcoming in Volume 104, issue one of the *Dickinson Law Review*.

environment. In these and other ways, the Amendment helps foster a direct dialogue between the public and all parts of government about the best means of protecting and supporting the principles it states.¹⁶² The repeated use and application of these principles over time, in fact, deepens public and governmental understanding of their meaning.¹⁶³

This principle-reinforcing approach does not appear to be the primary approach that the drafters of Article I, Section 27 had in mind, but it is attractive for several reasons. To begin with, constitutional provisions represent an enduring commitment to the values and principles they contain.¹⁶⁴ The constitutional requirement that proposed amendments pass both houses twice and then be approved in a public referendum¹⁶⁵ make it more difficult to amend the constitution than to adopt legislation.¹⁶⁶ The time and deliberation required for constitutional amendments suggest that Article I, Section 27 represents fundamental principles rather than mere policy preferences.¹⁶⁷

The need for principle-reinforcing interpretations has become more evident since the Amendment was adopted. Nearly three decades later, it is increasingly obvious that environmental protection is not a passing fad. If anything, it appears that efforts to protect environmental values and public natural resources will need to intensify.¹⁶⁸ The number and complexity of statutes and regulations have generated claims of overregulation and have sometimes made it difficult for both the public and lawyers to

162. See Thompson, *supra* note 12, at 880-881, 902-03. The values at issue are not necessarily those of the community itself, but rather those that the community has placed in the constitution. See Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 451-456 (1998).

163. The equal protection clause of the Fourteenth Amendment to the United States constitution is an excellent example.

164. See Jed Rubenfield, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1143-46 (1995).

165. See *supra* note 27 and accompanying text.

166. Legislation that has passed both houses, however, must first be presented to the Governor for approval. See PA. CONST. art. IV, § 15. There is no such requirement for constitutional amendments. See *id.* art. XI, § 1.

167. Thompson, *supra* note 12, at 882-84.

168. See generally REPORT OF 21ST CENTURY COMMISSION, *supra* note 116 (identifying land use, natural resources conservation, and human health as major challenges in environmental protection).

understand what is at stake.¹⁶⁹ The Amendment provides a directional compass over this complex landscape.

More basically, the Amendment states in effect that development and environmental protection should be made compatible, and obliges courts, other governmental decision-makers, and citizens to think about how to make development sustainable. How can the state protect property rights and simultaneously preserve the natural, scenic, historic, and esthetic values of the environment? How can the state use public resources and still conserve them for the benefit of future generations? Whatever limitations the courts may have in second-guessing policy decisions by the legislature and technical decisions by administrative agencies, they are uniquely qualified to recognize and safeguard important principles and values.¹⁷⁰ The distance between many current development practices and the practices required by the Amendment reinforces the role of an interpretative model that keeps the Amendment's principles in front of decision makers.

VI. Conclusion

This Article suggests a different framework for understanding and interpreting Article I, Section 27. First, and perhaps most basically, the text of the Amendment matters. The text contains two separate parts—environmental rights, which concerns actions on public and private property; and public trust, which applies only to publicly owned natural resources. Second, Article I, Section 27 requires the state to reconcile environmental protection and development goals, not to “balance” the environment away to foster economic development or use the environment to trump development. Third, the Amendment imposes limits on the ability

169. In 1995, for example, the Department of Environmental Resources began a regulatory basics initiative the object of which was to repeal any regulations that were more stringent than federal requirements unless they had a compelling justification. See Department of Environmental Protection, Proposed Amendments to Chapter 16 (Water Quality Toxics Management Strategy, 28 Pa. Bull. 4289, 4289 (Aug. 29, 1998)). The initiative suggested that federal law provided the primary source of state environmental values, except to the extent that DEP identified important values on a regulation-by-regulation basis. Although recourse to the Amendment would surely not answer each question of regulatory detail, the principles and values it contains would have provided a more useful starting point. See Executive Order 1996-1, 26 Pa. Bull. 856 (March 2, 1996), codified at 4 PA. CODE Ch. 1 (applying basic principles of regulatory basics initiative to all agencies).

170. See Schapiro, *supra* note 162, at 417 (citing ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 24-26 (1962)).

of the state to adversely affect the environment, and those limits need to be understood and recognized. Those limits, in turn, define what rights citizens have to judicial relief. Finally, even though the scope and detail of environmental legislation is much greater now than in 1971, Article I, Section 27 may still be applied where gaps exist. The Amendment can also be used to support the exercise of government authority for environmental protection.¹⁷¹

It is almost three decades since the beginning of the modern environmental era, when Article I, Section 27 was adopted. We have a much better understanding now of what we can achieve and of the daunting challenges that lie ahead. We are more likely to face those challenges successfully if we take Article I, Section 27 seriously, as constitutional law. That is, after all, the insight with which we started.

171. The second and final part of this Article will develop this framework in greater detail for each of the Amendment's major parts.

Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust

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I. Introduction

The first part of this Article¹ suggests a framework for understanding Article I, Section 27 of the Pennsylvania constitution.² This second and final part of the Article outlines ways in which that framework should be applied.

The framework described in the first part of the Article would change the way the Amendment has been viewed in fundamental ways. Article I, Section 27 contains two separate provisions or clauses—environmental rights and public trust.³ Because these provisions apply to different environmental resources or values, give different rights to the public, and reflect different understandings of the government's responsibilities, they must necessarily be analyzed separately. This reading of the Amendment is based on its text and legislative history, as well as conventional interpretative rules for the constitution.⁴ But it is quite different from virtually all recent cases, which tend to treat the Amendment as an undivided whole. The principle exceptions to this tendency to treat the Amendment as a single rule are also two of the most important cases, *Commonwealth v. National Gettysburg Battlefield Tower*,⁵

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

2. PA. CONST. art. I, § 27. Section 27 provides:

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.

Id.

3. The environmental rights clause is contained in the Amendment's first sentence: "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." *Id.*

The public trust clause is contained in the second and third sentences of Article I, Section 27: "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." *Id.*

4. See *Part I*, *supra* note 1, at 700-04.

5. 13 Adams County Legal J. 45 (jurisdiction), 75 (opinion of the court), & 134 (supplemental opinion of the court) (Pa. Com. Pl. 1971), *aff'd* 311 A.2d 588 (Pa. 1973); see also *Part I*, *supra* note 1, at 704-08 (discussing *Gettysburg Tower*).

and *Payne v. Kassab*.⁶ Even these cases, however, do not always clearly distinguish the two parts of the Amendment.

In addition, Article I, Section 27 fosters conservation or sustainable development. Contrary to claims made in many of the early cases, the Amendment is not anti-development.⁷ Once again, the text, legislative history, and constitutional interpretative rules all demonstrate that Article I, Section 27 was designed to protect the environment for human benefit and use. Rather than trumping or being trumped by the due process or takings clauses, the Amendment must be read in a way that gives meaning to both property rights and environmental protection.⁸

Another part of this framework is that governmental responsibilities under the Amendment's text provide the foundation for Article I, Section 27.⁹ Because constitutional provisions generally either limit the government's power or require the government to act in some way, this approach to Article I, Section 27 is well within traditional approaches to constitutional law. Once we understand the government's responsibilities, we also understand what relief citizens can seek. Unfortunately, the case law does not reflect a textually-based understanding of the government's responsibilities.¹⁰

The final part of this framework is a more constructive and useful role for the courts.¹¹ That role is premised on recognition that legislative and administrative decision making should continue to predominate in the environmental area for a variety of reasons. When such decisions provide at least as much protection as Article I, Section 27, judicial enforcement of the Amendment is unnecessary. Courts should nonetheless be willing to apply Article I, Section 27 substantively when gaps exist. Although this is a straightforward way to apply constitutional provisions, Pennsylvania courts have not yet applied the Amendment in this manner.¹² On the other hand, courts have used, and should continue to use, Article I, Section 27 to support or reinforce the exercise of

6. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd* 361 A.2d 263 (Pa. 1976); *see also Part 1, supra* note 1, at 708-12 (discussing *Payne*).

7. *See Part 1, supra* note 1, at 714-16.

8. *See id.* at 716-22.

9. *See id.* at 722-24.

10. *See id.*

11. *See id.* at 724-33.

12. *See Part 1, supra* note 1, at 727-31.

legislative or administrative authority to protect the principles identified in the Amendment.¹³

This four-piece framework provides the basis for the remainder of the Article. Section II of this Article addresses substantive applications of the Amendment, while Section III discusses principle-reinforcing applications.

Section II begins by examining one of the most basic issues in the implementation of Article I, Section 27—whether the Amendment creates self-executing substantive rules. The tendency to treat the Amendment as an undivided whole has masked the reality of at least three different self-executing applications of Article I, Section 27. Most prominently, the *Gettysburg Tower* case established a self-executing right by the government against private parties to protect the public's environmental rights. In that case, however, the supreme court's plurality suggested that the environmental rights part or clause of the Amendment is also self-executing against the government.¹⁴ Similarly, in *Payne*, the supreme court reasoned that the public trust part or clause of the Amendment—which also is directed against government—is self-executing.¹⁵ Because direct application of a constitutional provision to private behavior is unusual, and because constitutional provisions generally limit government, these latter two applications have enormous importance even though they have not been well recognized.

Section II then explains how courts might apply the substantive rules contained in each clause of the Amendment. The public trust clause requires an understanding of the trust corpus (publicly-owned natural resources), the trustee (state), the beneficiaries (the public, including future generations), and the substantive obligations of the trustee (to conserve and maintain these resources). Because the state's obligation to "conserve and maintain" public natural resources "for the benefit of all the people" is stated in the Amendment itself,¹⁶ this obligation should be the basic benchmark against which state decisions concerning management of these resources are judged. These responsibilities, moreover, apply to any government agency or municipality whose decisions affect

13. See *id.* at 731-33.

14. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 592 (Pa. 1973).

15. See *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976).

16. See PA. CONST. art. I, § 27.

public natural resources. The commonwealth court's three-part *Payne* test for applying the public trust clause,¹⁷ by contrast, ignores these constitutionally-stated responsibilities entirely, and should be eliminated (although the *Payne* holding need not be overruled).

The environmental rights clause is broader in scope than the public trust clause, protecting clean air and pure water, and requiring preservation of the natural, scenic, historic, and esthetic values of the environment. Courts should read the environmental rights clause to prohibit the state, including any state agency or municipality whose decisions affect these resources or values, from interfering with their protection. The state may file an action to prevent private parties from interfering with those rights, but there is little basis for allowing citizens to directly challenge the actions of other citizens.

Principle-reinforcing applications of the Amendment are discussed in Section III. Significantly, most of these applications have already been recognized by Pennsylvania courts. As *United Artists' Theater Circuit v. City of Philadelphia*¹⁸ and other cases suggest, the Amendment confirms and extends the police power to further both parts of Article I, Section 27, provides guidance in statutory interpretation, and supports the constitutionality of laws whose constitutionality has been challenged on other grounds.

The public trust clause also suggests the need for judicial recognition of several subsidiary rules that reinforce the state's substantive obligations. In private trust law, the trustee is obliged to keep track of the trust corpus, to report to the beneficiary at the beneficiary's request on the status of the trust corpus, and to permit third-party auditing of the trustee's accounts.¹⁹ These rules reinforce the trustee's responsibility to properly maintain the trust corpus. Similarly here, the state should be obliged to inventory the public natural resources for which it is responsible, to issue periodic public reports on their status, indicating threats to these natural resources and what the state intends to do about them, and to subject its accounting to third-party auditing. Such obligations would reinforce the state's substantive obligations under the

17. See *infra* note 202 and accompanying text.

18. 635 A.2d 612 (Pa. 1993) (overruling 595 A.2d 6 (Pa. 1991)).

19. See *infra* notes 318-24 and accompanying text.

Amendment. They would also force the state to deal with its trust responsibilities in a more holistic manner.

II. Substantive Rules

A. *Three Self-Executing Applications*

Three decades after Article I, Section 27 was overwhelmingly approved by Pennsylvania voters, the question persists whether the Amendment is self-executing—that is, whether the Amendment establishes substantive rules that can be enforced in the absence of implementing legislation. The Pennsylvania supreme court decided in *Gettysburg Tower* that the environmental rights clause is a self-executing substantive rule that the government can enforce judicially.²⁰ Yet the supreme court continues to write opinions saying only that a plurality of that court would have decided that the Amendment is not self-executing.²¹ More basically, perhaps, the question regarding self-execution continues to be asked as if the Amendment were an undivided whole—an assumption that ignores the separate public trust and environmental rights clauses of Article I, Section 27. In both the *Gettysburg Tower* and *Payne* cases, however, the supreme court held or stated that three separate applications of Article I, Section 27 were self-executing.²² Two of these applications are against the government, and only one is against private persons.²³

Perhaps the strongest case for a self-executing application can be made for the public trust clause, which creates specific governmental obligations. The next strongest case for a self-executing application can be made for the environmental rights clause, but as a limitation on government. The weakest self-executing claim is for the environmental rights clause as authority for the government to challenge private activity in court, and yet this is the application that Pennsylvania courts accepted in *Gettysburg Tower*.²⁴ Because

20. See *infra* text accompanying notes 25-44.

21. See *United Artists' Theater Circuit*, 635 A.2d at 620; see also *Harley v. Schuylkill County*, 476 F. Supp. 191, 195 (E.D. Pa. 1979); *Western Pa. Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 485 A.2d 1, 11 (Pa. Super Ct. 1984) (erroneously citing *Gettysburg Tower* for proposition that Amendment is not self-executing).

22. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588 (Pa. 1973); *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

23. See *Gettysburg Battlefield*, 311 A.2d 588; *Payne*, 312 A.2d 86.

24. See *Gettysburg Battlefield*, 13 Adams County Legal J. 75, *aff'd* 302 A.2d 886, 311 A.2d 588 (Pa. 1973).

that application is good law, the other two must also be. Moreover, because the other two applications are different, they should be judged on their own merits rather than through the lens of *Gettysburg Tower*. Yet *Gettysburg Tower* was decided first, and thus will be discussed first.

1. *Environmental Rights.*

a. *Against Private Parties.*—The Amendment's first sentence provides: "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."²⁵ In *Gettysburg Tower*, the Pennsylvania Attorney General brought an action against the developer of a proposed observation tower on private land just outside the boundary of Gettysburg Battlefield National Park. The state claimed that the 307-foot tower would interfere with the natural, scenic, historic, and esthetic values of the Gettysburg area, and particularly those held by visitors to the park.²⁶ The *Gettysburg Tower* case was tried and decided based on the claim that the right to protection of those values under Article I, Section 27 imposed a substantive limitation on private development.²⁷ This required a prior decision on the question of whether this right is self-executing. The *Gettysburg Tower* courts uniformly held that it is.²⁸ Although the entire Amendment is quoted throughout the opinions, virtually all of their analysis focuses on the Amendment's first sentence.²⁹

The court of common pleas held the environmental rights clause to be self-executing before it decided that the state had not shown a violation of the rights stated in that sentence.³⁰ The

25. PA. CONST. art. I, § 27.

26. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 302 A.2d 886, 887-88 (Pa. Commw. Ct. 1973).

27. See *Part 1*, *supra* note 1, at 704-08.

28. See *infra* text accompanying notes 30-44.

29. See *id.* The environmental rights and public trust parts of the Amendment are occasionally treated as synonymous, however. The supreme court concurring opinion, for example, focuses on natural and historic resources, and suggests that "natural and historic resources are the common property of the state." *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 595 (Pa. 1973) (citation omitted). Wholly apart from the merit of that proposition for the property in question here, the concurring opinion is using language that refers primarily to the public trust part of the Amendment.

30. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 13 Adams County Legal J. 75, 79-80 (Pa. Com. Pl. 1971).

commonwealth court affirmed,³¹ and the supreme court affirmed the commonwealth court's decision. But the supreme court did so with three opinions—a plurality opinion that was signed by two justices with a third concurring only in the result,³² a concurring opinion signed by two justices,³³ and a dissenting opinion by the remaining two.³⁴

The plurality voted to affirm the commonwealth court's decision because, in its view, the Amendment is not self-executing. Because the Amendment is not self-executing, the plurality reasoned, the state lost not because it failed to prove its case, but because the Amendment provides no basis for a lawsuit.³⁵ The plurality therefore found it unnecessary to reach the merits.³⁶

In a concurring opinion, two other justices essentially supported both the common pleas court and commonwealth court decisions. The justices reasoned that “the Commonwealth, even prior to the recent adoption of Article I, Section 27 possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27.”³⁷ In their view, however, the Attorney General had failed to demonstrate that the state was entitled to equitable relief.³⁸ Although this opinion did not expressly state that the Amendment is self-executing, it is best read to say so. In stating that their reasons for supporting affirmance of the commonwealth court are different than those of the plurality, the two justices suggested that they did not agree with the plurality.³⁹ The concurring opinion did not argue that the state lacked the ability to bring such suits in the absence of legislation. Nor would it have made much sense for the opinion to draw that conclusion, particularly because it argued that the state has had all along the authority to bring this kind of action. Because the only articulated source of authority for the government's action was Article I, Section 27, the concurring opinion

31. See *Gettysburg Battlefield*, 302 A.2d 886.

32. See *Gettysburg Battlefield*, 311 A.2d at 589 (plurality opinion, labeled “opinion of the court,” by O'Brien and Pomeroy, JJ., with Nix, J., concurring in the result).

33. See *id.* at 595 (concurring opinion by Roberts and Eagen, JJ.).

34. See *id.* at 596 (dissenting opinion by Manderino and Jones, JJ.).

35. See *id.* at 590-95.

36. See *id.*

37. *Gettysburg Battlefield*, 311 A.2d at 595.

38. See *id.* at 596.

39. See *id.* at 595.

implicitly supports the proposition that the environmental rights clause provides a self-executing basis for the government's action.

The dissenting opinion, which was signed by two justices, expressly states that the amendment is self-executing.⁴⁰ The dissent then argued that the state had presented "compelling evidence" that the tower would "desecrate the natural, scenic, esthetic and historic values of the Gettysburg environment,"⁴¹ and said it would enjoin the tower's construction based on Article I, Section 27.⁴²

Thus, four of the supreme court's seven justices concluded that the public right stated in the Amendment's first sentence is self-executing.⁴³ Two said so expressly, and two wrote an opinion that is best read that way. A majority of the supreme court thus concluded that the environmental rights clause is self-executing insofar as it authorizes government actions against private parties.

There is another reason for this result. A supreme court opinion is precedential only if it is joined by a majority of the justices who participated in the case. Plurality opinions do not create binding precedent.⁴⁴ The supreme court affirmed the commonwealth court's decision, and failed to produce a majority for the proposition that the Amendment is not self-executing. The commonwealth court holding that the Amendment is self-executing thus stands.

The reasons articulated by the various opinions explain and justify this result. To be self-executing, a provision of the Pennsylvania constitution must 1) not contain language indicating "an intent to require legislation" and 2) be capable of "given effect without the aid of legislation."⁴⁵ The court opinions show that this application of the environmental rights clause met both requirements.

40. *See id.* at 597.

41. *Id.* at 597. The opinion cited the testimony of many witnesses, including the Director of the National Park Service, who called the tower an "absolute monstrosity." *Id.* at 597-98. The dissent also argued that the Park Service had never approved of the tower, but had only entered the agreement to minimize its impact on the park. *See id.* at 598 n.3.

42. *Gettysburg Battlefield*, 311 A.2d at 599.

43. *See id.* at 595-96 (concurring opinion) & 596-99 (dissenting opinion).

44. *See* G. RONALD DARLINGTON ET AL., PENNSYLVANIA APPELLATE PRACTICE § 3102:2 & nn.15 & 18 (2d ed. 1997) (containing citations to Pennsylvania court decisions).

45. *In re Larsen*, 655 A.2d 239, 243 (Pa. 1995) (citing ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 71 (1985)).

The environmental rights clause contains no express reference to legislative implementation.⁴⁶ The absence of such language distinguishes it from another constitutional amendment that was approved in the same referendum⁴⁷ as well as environmental amendments in other states.⁴⁸ Because the legislature wrote the Amendment without such language, it evidently sought to create judicially enforceable public rights.⁴⁹ The Amendment's placement in Article I of the constitution also indicates that it was intended to be self-executing. Article I, which is entitled "Declaration of Rights," contains other historic rights and freedoms whose meaning is also determined independently of legislative action.⁵⁰

Where legislative implementation would render a constitutional amendment meaningless, moreover, it should be held to be self-executing.⁵¹ This is particularly important because of the lengthy legislative approval and public referendum process required of constitutional amendments in Pennsylvania.⁵² Here, the state already had some authority prior to the Amendment to bring actions to protect similar public environmental rights. Under the *parens patriae* doctrine, states can bring suit "on behalf of the citizens and in the interests of the community or as trustee of the state's public resources."⁵³ Although the standard *parens patriae*

46. See *Larsen*, 655 A.2d at 243 (constitutional provision expressly creating Judicial Conduct Board and Court of Judicial Discipline is self-executing); *Lennox v. Clark*, 93 A.2d 834 (Pa. 1953) (constitutional provision stating that Philadelphia county offices are "hereby" abolished, and that this provision "shall become effective immediately upon its adoption," is self-executing).

47. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 13 Adams County Legal J. 75, 79 (Pa. Com. Pl. 1971).

48. See *Gettysburg Battlefield*, 311 A.2d at 597.

49. See *id.* In addition, previous Amendments to Article I of the state constitution, which contain a declaration of rights, were held to be self-executing. See *id.* at 592 (citing *Erdman v. Mitchell*, 207 Pa. 79 (1903)).

50. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 302 A.2d 886, 892 (Pa. Commw. Ct. 1973). The provisions of Article I are "recognized and unalterably established." PA. CONST. art. I (preamble). In addition, "everything in this article is excepted out of the general powers of government and shall forever remain inviolate." PA. CONST. art 1, § 25. These statements also indicate that Section 27 was intended to have independent meaning.

51. See *Lennox*, 93 A.2d at 839 ("[I]t would be wholly incredible to suppose that the only accomplishment intended by the City-County Consolidation Amendment was the merely puerile one of a change of titles, and that for such a superficial purpose alone two successive legislatures voted upon the amendment and the citizens of the Commonwealth adopted it at a statewide election!").

52. See PA. CONST. art. XI.

53. *Gettysburg Battlefield*, 311 A.2d at 595-96 (citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)).

case in environmental settings involves a state's challenge to pollution originating out of state,⁵⁴ there is no doctrinal basis preventing its application to private defendants located in the same state.⁵⁵ In this case, the state brought an action that was akin to a *parens patriae* or public nuisance action. Moreover, the environmental rights clause plainly embraces many environmental situations that could be challenged in such an action. The Amendment cannot reasonably be read to restrict that authority, or to provide less authority than already existed.⁵⁶

This application of Article I, Section 27 is also capable of being given effect without implementing legislation.⁵⁷ The text of the Amendment is no more general, and thus no more requiring of legislative definition, than constitutional provisions concerning freedom of religion and speech.⁵⁸ In fact, clean air, pure water, and natural, scenic, historic, and esthetic values arguably have more precise meaning than concepts such as due process that the courts have not hesitated to define.⁵⁹

The supreme court plurality, which would have decided that the first sentence is not self-executing, was concerned that the Amendment seemed to give the government significant new power and was exercising it against a private landowner.⁶⁰ The generality of the language in the environmental rights clause contributed to that concern.⁶¹ Yet the common pleas court held that when the

54. See *Tennessee Copper*, 206 U.S. at 236; see also *Missouri v. Illinois*, 180 U.S. at 219.

55. See Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 ILL. B.J. 684, 686 (1998) (only significant controversy over defendants is inclusion of federal government, agencies, and officers as defendants). Within a state, an action to protect public rights in an environmental setting would most likely be characterized as a public nuisance action. Indeed, the *parens patriae* cases tend to be public nuisance cases. See *Tennessee Copper*, 206 U.S. at 237; *Missouri v. Illinois*, 180 U.S. at 242.

56. See *Gettysburg Battlefield*, 311 A.2d at 595-96.

57. Compare *Commonwealth ex rel. Crow v. Smith*, 23 A.2d 440 (Pa. 1942) (constitutional provision prohibiting a person holding an office of trust or profit under United States from holding state office does not require implementing legislation) with *Eagen v. Smith*, 78 A.2d 801 (Pa. 1951) (constitutional provisions concerning filling of judicial vacancies by election require legislative establishment of election procedure, and are therefore not self-executing).

58. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 302 A.2d 886, 892 (Pa. Commw. Ct. 1973).

59. See *id.*

60. See *Gettysburg Battlefield*, 311 A.2d at 592 (Pa. 1973) ("The Commonwealth has cited no example of a situation where a constitutional provision which expanded the powers of government to act against individuals was held to be self-executing.").

61. See *id.* Such a grant of power to government would leave private property owners subject to uncertain standards and perhaps inconsistent government enforcement, in violation

government seeks an injunction it must 1) demonstrate irreparable harm to the values stated in the Amendment and 2) prove its case by clear and convincing evidence.⁶² As the outcome in *Gettysburg Tower* indicates, these requirements limit the government's ability to seek judicial vindication of environmental rights in questionable cases.

Moreover, *Gettysburg Tower* does not stand for the proposition that citizens can directly enforce the environmental rights clause against private parties. The state attorney general, after all, brought that case. Although it was plainly intended that the environmental rights clause would be a basis for citizen lawsuits, that intention was based on an analogy between the environmental rights clause and the rights contained in the Pennsylvania Declaration of Rights or the U.S. Bill of Rights.⁶³ Those rights, however, generally are enforceable against the government rather than private parties.⁶⁴

of the Equal Protection and Due Process clauses of the U.S. Constitution. *See id.* at 593. The plurality was also concerned that the inclusion of esthetic and historic values in the environmental rights clause gave the government power it previously lacked. *See id.* at 592.

The plurality opinion did not respond directly to the justifications provided by the court of common pleas and commonwealth court, particularly those relating to legislative intent and the role of the courts in interpreting the values stated in the Amendment's first sentence.

62. *See Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 13 Adams County Legal J. 75, 83 (Pa. Com. Pl. 1971) (opinion of the court); *see also id.* at 135 (supplemental opinion of court).

63. *See* Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 124 (1990).

64. Indeed, the direct application of constitutional rules by citizens to other private parties in the federal constitution is highly unusual. *See* J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 260-61 (1999) (identifying only two Amendments to the U.S. Constitution that provide for such actions—U.S. CONST. amend. XIII (abolishing slavery) and U.S. CONST. amend. XVIII, § 1 (prohibiting the sale of liquor)). The latter, of course, has been repealed. *See* U.S. CONST. amend. XXI, § 1.

Similarly, the Declaration of Rights in the Pennsylvania constitution generally imposes limits on government, not private parties. *See* PA. CONST. art. I; *see also* *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 515 A.2d 1331, 1334-46 (Pa. 1986) (Declaration of Rights is a limitation on state power, and does not govern relationships among individuals). *But see* Nancy M. Burkoff, *Individual Rights and the Pennsylvania Constitution: Is There a State Action Requirement?*, 67 TEMPLE L. REV. 1051 (1994) (arguing that the Pennsylvania Constitution provides a private right of action against other private parties in some circumstances). The environmental rights clause in Article I, Section 27 contains no language expressly limiting its application to state action. Still, its placement in Article I suggests an implied state action limit.

b. Against Government.—The *Gettysburg Tower* case suggests another approach to using Article I, Section 27—a direct restraint on government actions that would interfere with environmental rights. Unlike the public trust clause, which explicitly assigns the state a trusteeship responsibility for public resources, the environmental rights clause is silent about the state’s responsibility to protect environmental rights. The various opinions in *Gettysburg Tower* suggest that the environmental rights clause has at least two consequences for the state. As already noted, the state has legal authority to exercise discretion to enforce the environmental rights under Article I, Section 27.⁶⁵ In addition, the supreme court plurality opinion, which stated that the Amendment is not self-executing, recognized an exception to that conclusion.⁶⁶ The Amendment’s first sentence is self-executing, the plurality suggested, to the extent that “it limits the right of government to interfere” with the public rights protected under Article I, Section 27.⁶⁷ This reading, the plurality stated, would be consistent with the other rights stated in Article I of the state constitution, all of which limit the power of government in some way.⁶⁸ Because the other supreme court opinions concluded that the environmental rights clause is self-executing, the entire court agreed (albeit indirectly and in dicta) that this clause imposes a self-executing limit on governmental action. In addition to conferring the authority to bring actions to vindicate public rights, therefore, the Amendment also prevents the state from interfering with these rights.

This conclusion makes sense for the same reasons as those stated in *Gettysburg Tower*, and for several additional reasons. The language of Article I, Section 27 indicates no intent to require legislation to limit the government’s ability to interfere with environmental rights. The environmental rights identified in the

65. See *Gettysburg Battlefield*, 13 Adams County Legal J. at 80-81, 86, *aff’d*, 302 A.2d at 892. The courts did not hold, and could not have held, that the Attorney General is obliged to file lawsuits whenever Article I, Section 27 rights are threatened.

66. See *Commonwealth v. Nat’l Gettysburg Battlefield Tower*, 311 A.2d 588, 592 (Pa. 1973). In discussing the Amendment’s first sentence, moreover, the commonwealth court reasoned that Section 27 “is more than a declaration of rights to not be denied by government; it establishes rights to be protected by government.” See *Gettysburg Battlefield*, 302 A.2d at 892.

67. *Gettysburg Battlefield*, 311 A.2d at 592.

68. See *id.*

Amendment's first sentence cannot be protected unless that sentence limits contrary government actions. A basic concern of the Amendment's drafters, moreover, was ensuring that the state supported environmental protection rather than environmental degradation.⁶⁹

The environmental rights clause is also capable of being applied against the government without legislation. It is no more general than other provisions in the Declaration of Rights. These other provisions, moreover, impose limits on the government; the application of Article I, Section 27 as a limit on government authority is thus consistent with those other provisions. Every executive agency has a responsibility under the equal protection provisions of the state and federal constitutions, for example. No one would say that the Agriculture Department could refuse to hire blacks, Hispanics, or women because civil rights were under the jurisdiction of another agency. Similarly, no one should say that the Agriculture Department, or any other state agency, can ignore public rights to the preservation of certain environmental values because some other agency has responsibility for them. Finally, as the state has recognized in other environmental contexts,⁷⁰ the government should not ask private parties to do that which it is unwilling to do.

Self-executing application of the environmental rights provision against government also avoids the concerns of the supreme court plurality in *Gettysburg Tower*. When the government is violating public rights, it is quite simply in a different position than when it seeks an injunction against a private person. The use of the Amendment to limit government actions that interfere with environmental rights involves fewer questions about adequate notice, due process, and constitutional takings for private property owners.⁷¹

69. See FRANKLIN L. KURY, *NATURAL RESOURCES AND THE PUBLIC ESTATE: A BIOGRAPHY OF ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION* 1-4 (1985).

70. See, e.g., PA. STAT. ANN. tit. 53, §§ 4000.1503-1505 (West 1997) (requiring state agencies to implement recycling and waste reduction programs as well as programs to procure goods with recycled content). These obligations were imposed at the same time that the state launched a massive mandatory recycling program for people living in large and medium-sized communities. See *id.* § 4000.1501.

71. As a practical result, the government may be obliged to adopt or modify legislation or regulations that would protect these rights. But the adoption or modification of legislation or regulations to fill existing legislative gaps will not necessarily occur unless the environmental rights clause is understood to impose a self-executing limitation on government.

Unfortunately, this conclusion has received relatively little attention in the litigation brought under the Amendment, even though there is abundant evidence that state laws and policies adversely affect the values identified in the Amendment's first sentence.⁷² Yet this application of Article I, Section 27 could have significant and positive consequences.

These consequences are evident from an examination of *Community College of Delaware County v. Fox*,⁷³ in which the commonwealth court held that the Department of Environmental Resources could be held responsible under Article I, Section 27 for only those environmental effects that were within the scope of its own statutes.⁷⁴ In this case, a citizen and a nonprofit organization challenged the Department's issuance of a sewer extension, claiming that the agency failed to consider the long-range and indirect effects of the permitted action, particularly the possibility that the extension would encourage development of open land that should be considered for use as a recreational or natural area or state park.⁷⁵ Because the appellants sought to protect water quality and ensure that ostensibly private land would remain as open space, their claims fell within the scope of the environmental rights clause.⁷⁶ The Environmental Hearing Board, which hears appeals of Department decisions, made detailed factual findings on the possible adverse environmental effects of such development.⁷⁷ The Board sustained the challenge, concluding that neither the Department nor any local government had considered alternatives to conventional development.⁷⁸

The commonwealth court reversed, holding that the department could not be responsible under Article I, Section 27 for the land's development so long as the department complied with its

72. See, e.g., REPORT OF THE PENNSYLVANIA 21ST CENTURY ENVIRONMENT COMMISSION at 16-17 (1998) (laws and policies encourage sprawl), 19-20 & 25 (laws and policies hurt historic preservation) [hereinafter REPORT OF 21ST CENTURY COMMISSION].

73. 342 A.2d 468 (Pa. Commw. Ct. 1975), *appeal dismissed as moot*, 381 A.2d 48 (Pa. 1977).

74. See *id.* at 482.

75. See *id.*

76. Although not decided, the water quality claim also comes under the state's public trust obligations under Article I, Section 27.

77. See *Fox*, 342 A.2d at 472-73.

78. See *id.* (quoting the findings of the hearing board).

own statutes.⁷⁹ The problem, from the commonwealth court's perspective, was that the determination of which lands are to be kept as open space is "within the statutory authority not of [the Department] but of the various boroughs, townships, counties and cities of the Commonwealth pursuant to a long series of legislative enactments."⁸⁰ While these municipal authorities were also responsible for complying with Article I, Section 27 under their own statutes, their failure to consider the use of these lands for open space could not be raised in a challenge to the department's issuance of a permit.

This case would have been decided differently if the citizens had argued, and the court had decided, that *Gettysburg Tower* imposed a self-executing limit on government authority. The court would have ensured that the Department's decision did not interfere with preservation of the natural, scenic, historic, and esthetic values of the environment or the public's right to clean air and pure water. Because the environmental rights clause imposes a substantive limitation on the Department, the Department necessarily has a procedural obligation to consider in advance the potential effects of its actions on those rights.

Nor does the environmental rights clause simply limit state agencies. As *Fox* recognized, municipalities are covered by Article I, Section 27 because they are subdivisions of the state.⁸¹ Local governments, too, are prohibited from interfering with pure water, clean air, and the preservation of certain environmental values. They, too, must therefore consider in advance the potential effects

79. See *id.* at 479-82. Similarly, in *Swartwood v. Dep't of Environmental Resources*, 424 A.2d 993 (Pa. Commw. Ct. 1981), the court rejected an Article I, Section 27 claim that the Department abused its discretion in failing to consider alternatives to locating proposed apartment buildings in an agricultural and woodland area. The court held that the Department has no statutory authority over open space protection and that municipalities have such authority. See *id.*; see also *Fuller v. Dep't of Env'tl. Resources*, 599 A.2d 248 (Pa. Commw. Ct. 1991) (location of sewage treatment plant cannot be challenged under Article I, Section 27 in appeal of permit issued under statute that does not give department authority over location); *Dep't of Env'tl. Resources v. Precision Tube Co.*, 358 A.2d 137, 140 (Pa. Commw. Ct. 1976) ("Article I, Section 27 . . . does not expand the statutory power of DER in passing on permit applications to require it to consider additional criteria"); *Borough of Moosic v. Pennsylvania Pub. Util. Comm'n*, 429 A.2d 1237 (Pa. Commw. Ct. 1981) (following *Fox*).

80. *Fox*, 342 A.2d at 481. The court cited to the Municipalities Planning Code, PA. STAT. ANN. tit. 53, §§ 10101-11201 (West 1997) and the Eminent Domain Code, PA. STAT. ANN. tit. 26, §§ 1-101 to 1-903 (West 1997). See *id.*

81. See *id.* at 481-82.

of their actions. Where authority concerning the values protected by the first sentence is divided between state and local agencies, therefore, that division cannot be used to frustrate the protection of environmental rights.

This approach would create parity between private and governmental parties whose decisions are challenged under the Amendment's first sentence. It would also correct problems created by *Fox* without requiring reversal of that case. The *Fox* case allows the fragmentation of governmental decision-making and the existence of statutory gaps to provide legal defenses to governmental actions that are destructive of the principles stated in the environmental rights clause.⁸² This is especially true for state and local decisions that affect land use because suburban sprawl has a serious and continuing adverse effect on the natural, scenic, historic, and esthetic values of the environment. Applying *Gettysburg Tower* to government decisions would help ensure that the values identified by the Amendment are protected in the first place, even if that would ultimately require amendment of the underlying statutes.

Although the government plainly has an important role to play in enforcing environmental rights, the Amendment's drafters contemplated that citizens would also file lawsuits against the government based on claimed violations of environmental rights.⁸³ Because the government has lawful cause to seek an injunction under Article I, Section 27 whenever a person threatens or causes harm to the values and resources protected by the environmental rights clause, citizens surely have the same self-executing right against the government. To have standing, citizen plaintiffs would have to allege a substantial, direct, and immediate infringement by the government of their environmental rights, and a direct causal connection between the act complained of and the harm alleged.⁸⁴

82. The *Fox* court was legitimately concerned with the finality of local government decisions. If a citizen does not exercise his or her statutory right to appeal a local agency decision, he or she should not be able to challenge the local decision by appealing a related state decision. See *Fox*, 342 A.2d at 478-49. On the other hand, there needs to be a judicial forum where the cumulative and synergistic effects of multiple agency decisions involving the same project or resource can be evaluated.

83. Kury, *supra* note 63, at 124.

84. See *Sierra Club v. Hartman*, 605 A.2d 309 (Pa. 1992); *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975).

2. *Public Trust*—The public trust clause of the Amendment provides the following: “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.”⁸⁵ The duty of administrative agencies and municipalities to protect public natural resources under their control or influence is self-executing. As a result, these trustees are obliged to conserve and maintain those resources regardless of their explicit statutory authority.

In *Payne v. Kassab*, citizens unsuccessfully challenged a street-widening project encroaching on a public commons.⁸⁶ They alleged, among other things, that the project was inconsistent with the state’s public trust obligations under Article I, Section 27. The commonwealth court’s decision in *Payne* included a conclusion of law that “Article I, Section 27 of the Pennsylvania Constitution is a self-executing provision in accordance with doctrines of public trust”⁸⁷ In affirming the commonwealth court, the supreme court said it saw no need to decide whether the first sentence of the Amendment is self-executing. That question may be important when the state “is seeking to curtail or prevent the otherwise entirely legal use of private property” on the ground that it impinges on natural, scenic, historic, and esthetic values, the court reasoned, referring to *Gettysburg Tower*:

Here, however, the shoe is on the other foot, as it were. There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad

85. PA. CONST. art. I, § 27.

86. See *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973) *aff’d*, 361 A.2d 263 (Pa. 1976).

87. *Id.* at 97. The court added that it “represents a proper exercise of state powers within the scope of the Ninth Amendment to the United States Constitution.” *Id.* Five of the court’s seven judges signed that opinion. Bowman, P.J., concurred in the result but stated that Article I, Section 27 is not self-executing and Wilkinson, J., concurred in the result but stated that it was not necessary for the court to decide whether Article I, Section 27 is self-executing. See *id.* at 97-98.

purposes and establish these relationships; the Amendment does so by its own ipse dixit.⁸⁸

The court then concluded that the state had not violated its public trust responsibilities under the Amendment because of various environmental safeguards built into the project by statute.⁸⁹

The *Payne* decisions leave no question that the trustees have some self-executing responsibilities, but it is not clear what those responsibilities are. The Commonwealth court's opinion suggests that these responsibilities are defined by a three-part test.⁹⁰ The supreme court's opinion suggests that these responsibilities are defined by the Amendment itself.⁹¹ In addition to being more authoritative, the supreme court's view represents a proper interpretation of Article I, Section 27.

The public trust clause is self-executing for the same reasons as the environmental rights clause, and for additional reasons. These additional reasons include the state's explicit obligation to protect public trust resources, and the public trust clause's continuity with the historic application of common law public trust doctrines in Pennsylvania.

Unlike other state constitutional provisions, and unlike environmental amendments in other states, the public trust clause says nothing about the need for legislative implementation. If the legislature, which fashioned Article I, Section 27 in the first place, had intended the Amendment to require legislative implementation, it would have written the Amendment that way.⁹² The placement of the Amendment in Article I of the state constitution, along with other historic rights and freedoms, suggests that the public right to benefit from this trust is also self-executing.⁹³

Unlike the environmental rights clause, moreover, the public trust clause imposes an affirmative responsibility on the state. The word "shall" in a constitutional amendment indicates that the

88. *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976); see also ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 177 (1985) (stating that the public trust part of Article I, Section 27 is self-executing).

89. See *Payne*, 361 A.2d at 272. The court did not apply or affirm the commonwealth court's three-part test. Instead, it simply noted that commonwealth court had fashioned such a test. See *id.* at n.23.

90. See *Payne* 312 A.2d at 94; see also *infra* note 202 and accompanying text.

91. See *Payne*, 361 A.2d 263.

92. See *supra* note 49 and accompanying text.

93. See *supra* note 50 and accompanying text.

provision is self-executing.⁹⁴ The public trust clause provides, in part, that “the Commonwealth shall conserve and maintain” public natural resources.⁹⁵ The state has a mandatory duty to protect public trust resources, regardless of the legislation in existence.

To a large degree, moreover, the public trust clause simply confirms the state’s pre-existing authority to protect public natural resources.⁹⁶ The public trust clause would be superfluous if it provided less authority than had previously existed or if it implicitly repealed that authority. This pre-existing authority to protect public natural resources has two legal sources. One source, as the supreme court’s concurring opinion in *Gettysburg Tower* explained, is the historic *parens patriae* doctrine allowing the state to bring an action to protect the public’s interest in public natural resources.⁹⁷

Another source is the common law public trust doctrines for publicly dedicated land and navigable waterways.⁹⁸ It is not likely that the Amendment implicitly repealed prior public trust law in Pennsylvania. In *Payne*, in fact, both the commonwealth and supreme courts expressly considered the public trust law concerning dedications of public land separately from the public trust law under Article I, Section 27.⁹⁹

The public trust clause is also capable of being implemented without legislation. The trust obligation is surely precise enough to be self-executing; it is no more imprecise than other constitutional provisions.¹⁰⁰ The historic use of the *parens patriae* and common law public trust doctrines strongly supports this conclusion.

The public trust clause is also self-executing because it applies to public property, not private property. Unlike the Amendment’s first sentence in *Gettysburg Tower*, the public trust clause does not directly limit landowners’ use of their own land. As the supreme

94. See *Smith v. City of Philadelphia*, 516 A.2d 306, 315-16 (Pa. 1986).

95. See PA. CONST. art I, § 27.

96. See *infra* notes 97-99 and accompanying text; see also Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 376-82 (1993) (legitimacy of judicial decisions concerning constitutional rights is greater when principles or rules on which those rights are based are rooted in history or custom).

97. See *Commonwealth v. Nat’l Gettysburg Battlefield Tower*, 311 A.2d 588, 595-96 (1973).

98. See *infra* Section II.B.

99. See *infra* text accompanying notes 166-171.

100. See *supra* notes 57-58 and accompanying text.

court itself said in *Payne*, this makes it much easier to conclude that the public trust clause is self-executing.¹⁰¹

Under Article I, Section 27, in sum, state trustees have a constitutional duty to conserve and maintain public natural resources for public benefit. They lack the constitutional authority to do otherwise. It is thus irrelevant whether they have the statutory authority to protect or consider the protection of those resources.

The need to articulate this point clearly is evident from *Community College of Delaware County v. Fox*.¹⁰² Because the *Fox* court did not distinguish the two parts of the Amendment, and because public trust resources were also at issue,¹⁰³ its holding ostensibly applies to the public trust as well as environmental rights clauses. *Fox* makes it "virtually impossible for a commonwealth agency to exercise its power as trustee of the state's public natural resources."¹⁰⁴ As already argued, however, the court was not asked to address the question of whether the Amendment limits government authority to injure environmental rights; the government does not have that authority. Similarly here, the state does not have the authority to injure public natural resources. In fact, this result is even more compelling for the public trust clause because that clause expressly obliges "the Commonwealth," and thus all agents of the Commonwealth, to conserve and maintain public natural resources.¹⁰⁵ Whatever their authorizing statutes may say or fail to say, state agencies and municipalities are obliged to conserve and maintain public natural resources.¹⁰⁶ They are also obliged to consider in advance the effects of their decisions on public natural resources.

B. The Constitutional Public Trust

Because the public trust clause expressly creates a public trust for public natural resources, it should be understood and analyzed

101. See *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976). Of course, application of the public trust doctrine may indirectly affect private property.

102. 342 A.2d 468 (Pa. Commw. Ct. 1975).

103. These resources include stream water.

104. Margaret J. Fried & Monique J. Van Damme, *Environmental Protection in a Constitutional Setting*, 68 TEMPLE L. REV. 1369, 1392 (1995).

105. See PA. CONST. art I, § 27. Of course, this obligation is more apparent if the Amendment is analyzed according to its two parts.

106. Similarly, they lack the authority to interfere with the public rights stated in the first part of the Amendment.

in traditional public trust terms. Public trust law is based to a great extent on analogies to, and application of, private or charitable trust law.¹⁰⁷ Private trust or charitable trust law applies when property (the corpus or res of the trust) is held or managed by a trustee for the benefit of its equitable owners, or beneficiaries.¹⁰⁸ The trustee's obligations for a particular trust ordinarily are set forth by the settlor, or person who created the trust.¹⁰⁹ The trustee must adhere to those obligations, although there may be circumstances under which management of the trust corpus can be changed.¹¹⁰

Understanding the public trust clause thus requires identification of the settlor, the trust corpus, the beneficiaries, the trustee, and the trustee's obligations.¹¹¹ These are also the categories that have informed the application of the common law public trust in Pennsylvania for publicly dedicated land and navigable waters.¹¹² Because the Amendment builds on these common law public trust doctrines, it makes sense to interpret the constitutional public trust using the same categories.

107. See, e.g., *Lassen v. Arizona*, 385 U.S. 458 (1967) (federal land granted to states for school purposes subject to same principles as those governing private trusts); *Hill v. Thompson*, 564 So.2d 1 (Miss. 1989) (common law rules of private trust applied to public school lands trust); *State v. Hale*, 573 N.E.2d 46, 50 (Ohio 1991) (public official entrusted with public money is trustee of public trust fund with same level of responsibility as trustee of private trust fund).

108. See GEORGE T. BOGERT, *TRUSTS* §§ 25, 37 (6th ed. 1987).

109. See *id.* § 102(a) (but recognizing that the trustee's duty may also be controlled by court order, conduct of the beneficiary, or statute). The trustee's specific duties under public and private trusts are not necessarily the same, however. For private and charitable trusts, a basic duty of the trustee is to make trust property economically productive. See *id.* § 101. But see *Brooks v. Wright*, 971 P.2d 1025 (Alaska 1999) (although many basic principles of private trust law apply to public land trusts, some private trust law principles, such as duty to maximize economic yield from trust property, are inconsistent with constitutional terms of public trust for natural resources).

110. See BOGERT, *supra* note 108, § 146 (permitting court alteration of private trust provisions when necessary or highly convenient to accomplish settlor's purposes, and circumstances arise that were not known to or anticipated by settlor), & § 147 (permitting court to order trust funds to be directed to different charitable purpose than directed by settlor, when settlor had general intent to benefit charity but "accomplishment of settlor's purpose is or becomes impossible, impractical or inexpedient").

111. See ZYGMUNT J. B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 994 (2d ed. 1998).

112. See, e.g., *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 721 (Pa. Super. Ct. 1999) (navigable stream is "owned by the Commonwealth for the public trust"); *In re 1.2 Acres of Bangor Memorial Park*, 567 A.2d 750, 752 (Pa. Commw. Ct. 1989) (land dedicated for public parks is governed by public trust doctrine).

1. *Settlors*.—The settlors for publicly dedicated land are ordinarily individuals or governments who dedicate particular parcels for public use, or whose offer of dedication is accepted by a governmental entity.¹¹³ These persons are actually settlors in the private trust sense, because they established or initiated the trusts in question.¹¹⁴

The settlors for the Article I, Section 27 public trust were Pennsylvania's people and the General Assembly.¹¹⁵ This is consistent with the standard constitutional process for the adoption of such provisions.

2. *Trust Corpus*.—The trust corpus, or subject of the trust for public land that has been dedicated for public use, depends on the terms of the specific dedication. Ordinarily, the trust corpus in an environmental setting is a public commons, public park, or similar parcel.¹¹⁶ The trust corpus for the navigable waters doctrine includes the water and bed of navigable waters up to the high water mark.¹¹⁷ Navigable waters are those that are both naviga-

113. See, e.g., *Hoffman v. City of Pittsburgh*, 75 A.2d 649, 650 (Pa. 1950) (dedication by original owner); *Borough of Ridgway v. Grant*, 425 A.2d 1168, 1169 (Pa. Commw. Ct. 1981) (grant by three persons accepted by municipality).

114. For navigable waters, the analogy to settlors is more difficult. The public trust doctrine for such waters is based largely on a Pennsylvania common law adaptation of English trust law. See, e.g., *Carson v. Blazer*, 2 Binn. 475, 489-95 (Pa. 1810) (holding that the state owns the land underlying Susquehanna River, and that private owner of land along the bank of the river thus lacks exclusive right to fish immediately in front of his land). The court thus rejected the contrary English rule that fresh water rivers where the tides do not ebb and blow belong to the bank owners. See *Fulmer v. Williams*, 15 A. 726, 727 (Pa. 1888) (explaining that English rule was not adopted because it was unsuited to the country's "large rivers with navigable tributaries, forming vast systems of internal communication, extending hundreds and in some instances thousands of miles above the reach of tide-water"). The courts, in a sense, are the settlors for public trust law concerning navigable waters.

115. The constitutional status of this public trust doctrine means that courts do not need to play a leading role in extending the common law public trust to other resources or in providing protections that common law doctrines do not now provide. It also answers, at least for Pennsylvania, persistent questions about the legitimacy of public trust law. See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 710-13 (1986) (raising questions about judicial activism and the limited historical basis of public trust law).

116. See, e.g., *Hoffman*, 75 A.2d 649 ("public square"); *Commonwealth ex rel. Attorney General v. Burgess*, 50 A. 825 (Pa. 1902) ("public ground"); *Borough of Ridgway*, 425 A.2d 1168 ("public municipal park"). It is also possible to dedicate land for streets or highways, but such dedications do not ordinarily have an environmental purpose.

117. See e.g., *City of Philadelphia v. Philadelphia Suburban Water Co.*, 163 A. 297, 300 (Pa. 1932); *Fulmer*, 15 A. at 727.

ble in fact and “susceptible of being used, in their ordinary condition, as highways for commerce.”¹¹⁸

The trust corpus for Article I, Section 27 is “Pennsylvania’s public natural resources.”¹¹⁹ The Amendment’s legislative history indicates that the public trust clause applies to natural resources that are publicly owned or are subject to a pre-existing common law public trust; it does not apply to “purely private property rights.”¹²⁰

Even with the exception of private property, the scope of the public trust is quite broad. It includes virtually all natural resources that are subject to a common law trust, and a great deal more. These public natural resources include ambient air as well as surface and ground water that has not been privately appropriated.¹²¹ Public natural resources also include wild animals and fish that have not been captured or killed,¹²² and especially threatened

118. *Cleveland & Pittsburgh R.R. Co. v. Pittsburgh Coal Co.*, 176 A. 7, 9 (Pa. 1935). Because many lakes are navigable in fact but not susceptible of being used for commerce, they are not considered navigable. *See Lakeside Park Co. v. Forsmark*, 153 A.2d 486, 488-90 (Pa. 1959); *see also Commonwealth v. Foster*, 36 Pa. Super. 433 (1908) (stream that is not navigable cannot be made so by legislative declaration).

119. PA. CONST. art. I, § 27.

120. Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. BAR ASS’N Q. 421, 426-27 (1970). Nor does it appear to create private property rights. In *Pennsylvania Game Comm’n v. Marich*, 666 A.2d 253, 256 (Pa. 1995), the supreme court held that Article I, Section 27 does not provide a liberty or property interest to an individual to conduct recreational hunting because the amendment requires the state to “conserve and maintain the natural resources and public estate for the benefit of all the people.”

121. Broughton, *supra* note 120, at 425. The state has more than 80,000 miles of rivers and streams. *See REPORT OF 21ST CENTURY COMMISSION*, *supra* note 72, at 29. Because a landowner does not have an absolute right to the groundwater under his or her property, groundwater is probably a public natural resource under the second part of the Amendment. Under common law, groundwater withdrawals are permitted to the extent they do not unreasonably interfere with the supply of water drawn from wells on nearby property. *See Hatfield Township v. Lansdale Mun. Auth.*, 168 A.2d 333 (Pa. 1961) (citing *Rothrauff v. Sinking Spring Water Co.*, 14 A.2d 87 (Pa. 1940)). It is thus possible to use groundwater that underlies the property of another, particularly if there are no wells on the other property or if little water is drawn from wells on that property.

122. *See* 34 PA. CONS. STAT. ANN. § 103(a) (West 1997) (vesting “ownership, jurisdiction over and control of game or wildlife” in Pennsylvania Game Commission); *see also id.* § 2304(a) (stating that the “carcass of game or wildlife lawfully killed or taken shall be the property of the person who inflicts a mortal wound which enables that person to take possession of the carcass”). *See Pennsylvania Game Comm’n v. Marich*, 666 A.2d 253 (1995) (assuming that sea ducks whose hunting is regulated by Game Commission are covered by Article I, Section 27); *see also* 30 PA. CONS. STAT. ANN. § 2506(a) & (b) (stating that the “proprietary ownership, jurisdiction, and control of fish, living free in nature, are vested in this Commonwealth,” and identifying Pennsylvania Fish and Boat Commission as state

or endangered species.¹²³ In addition, these public natural resources include the area between ordinary high and low water marks of a navigable river or water body.¹²⁴ The state owns the land under such waters, too.¹²⁵ Public natural resources also encompass government owned natural resources, including almost 4.5 million acres in state parks, forests, game lands, and other public lands used for environmental purposes.¹²⁶ They also include land that has been publicly dedicated for a public park or similar common use.¹²⁷ In addition, public natural resources include the trees, plants, and minerals on public property.¹²⁸

agency "authorized to regulate, control, manage and perpetuate fish"). The definition of fish "includes all game fish, fish bait, bait fish, amphibians, reptiles and aquatic organisms." *Id.* at § 102. Persons with a valid license are permitted to keep fish that meet certain regulations. See 58 PA. CODE §§ 61, 63 (1998). Before Article I, Section 27 was adopted, the superior court held that, while "the state has power to preserve and control" fish for "the enjoyment of all citizens," the state did not own the fish. *Commonwealth v. Agway, Inc.*, 232 A.2d 69, 71 (Pa. Super. Ct. 1967). *But see Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977):

A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.

See also *Potts v. Davis*, 610 A.2d 74, 75 n.2 (Pa. Commw. Ct. 1990) (citing *Douglas* and suggesting that ownership claim in section 103(a) of the Game Code is merely a nineteenth century legal fiction expressing the importance of state's interest in protecting wildlife, but not referring to Article I, Section 27).

123. See PENNSYLVANIA BIOLOGICAL SURVEY, INVENTORY AND MONITORING OF BIOTIC RESOURCES IN PENNSYLVANIA 85-200 (1998) (describing threatened and endangered mammals, birds, amphibians, reptiles, fishes, and invertebrates).

124. See e.g., *Freeland v. Pennsylvania Railroad Co.*, 47 A. 745 (Pa. 1901) (stating that this area is subject to the public rights of navigation, fishing, and improvement of the stream). Navigable waters include those subject to tides as well as rivers capable of being navigated, or "navigable in the common sense of the term." *Conneaut Lake Ice Co. v. Quigley*, 74 A. 648, 650 (Pa. 1909); see also *Ball v. Slack*, 2 Whart. 508, 538 (Pa. 1837).

125. See *Paasch v. Wright*, 177 A. 795, 796 (Pa. 1935) (lands underlying navigable waters are owned in trust by the Commonwealth).

126. See REPORT OF 21ST CENTURY COMMISSION, *supra* note 72, at 29. Such lands are unquestionably public natural resources. Not all state-owned land would qualify as a public natural resource, however.

127. See, e.g., *Payne v. Kassab* 312 A.2d 86 (Pa. Commw. Ct. 1973). Because much dedicated land is used for environmental or recreational purposes, it would qualify as a public natural resource. Land that is dedicated for other purposes and used in other ways (e.g., highways) would not qualify as a public natural resource.

128. *Broughton*, *supra* note 120, at 426; see also INVENTORY AND MONITORING OF BIOTIC RESOURCES IN PENNSYLVANIA, *supra* note 123, at 23-82 (describing threatened or endangered vascular plants, fungi, briophytes, and lichens). To the extent such species exist on public lands, of course, they are part of the public's natural resources.

While the drafters did not wish to immediately change the existing boundary between public and private property, they also did not wish to permanently freeze that boundary. When the Amendment was debated in the legislature, it originally contained a list of protected resources—"air, waters, fish, wildlife, and the public lands and property of the Commonwealth."¹²⁹ There was concern that listing the specific resources subject to the public trust might freeze the public trust corpus.¹³⁰ As a result, the list was removed.¹³¹ While there was no evident objection to the listed subjects, at least insofar as they are public resources, the drafters wanted to authorize the continuing development of public trust law, including its application to public resources not previously recognized as such. The Amendment's supporters observed that neither public trust resources nor private property are legally fixed.¹³² Previously recognized forms of private property have disappeared, and future public property rights, perhaps relating to ecological diversity, might someday be recognized.¹³³ The final language neither requires nor prohibits further changes in the boundary between public natural resources and private property rights.¹³⁴

Of equal importance to the scope of "public natural resources" is the statement in Article I, Section 27 that these resources are the "common property of all the people." Use of the term "property" is extremely important, because it means that the state (like a private trustee) has legal title to the trust corpus. Since the state does not have to prove ownership, it is in a stronger position to protect public trust resources than many other states.¹³⁵ Indeed,

129. See H.B. 958, 153d Leg., 2nd Sess. (Pa. 1969) (Printer's No. 1105); see also Broughton, *supra* note 120, at 424.

130. "The introducing word, 'including,' would not ordinarily be so interpreted, but a list always presents some danger that a court may sometime use the list to limit, rather than expand, a basic concept." Broughton, *supra* note 120, at 425.

131. Compare H.B. 958, 153d Leg., 2nd Sess. (Pa. 1969) (Printer's No. 2860) with H.B. 958 (Printer's No. 1105).

132. Broughton, *supra* note 120, at 425-26.

133. "At one time, for example, an advowson, a right to appoint a clerk at a church, was a real property right, inheritable by heirs, and the subject of real property actions. Today, an advowson is strictly an historical curiosity." Broughton, *supra* note 120, at 425 (citation omitted).

134. See *id.* at 426. Restrictions on the use of public natural resources do, of course, indirectly affect uses of private property.

135. See Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188 (1980) ("The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title.").

the constitutional declaration of public ownership is reflected in fish and game statutes enacted since its passage that specifically claim public ownership of such resources.¹³⁶

3. *Beneficiaries.*—Both common law public trust doctrines have the general public as their beneficiaries. Publicly dedicated land is to be held “for the benefit of the public,” including people living near or using the lands in question.¹³⁷ The right to use navigable waters generally is “open to all.”¹³⁸

Similarly, Article I, Section 27 states that the Commonwealth is to conserve and maintain the state’s public natural resources “for the benefit of all the people.” The people are beneficiaries of the trust,¹³⁹ and thus have certain rights to have the trust managed appropriately. The common law public trust cases indicate that beneficiaries can assert their rights under the trust by bringing an action against the trustee for failure to comply with the trustee’s obligations.¹⁴⁰ It follows that public beneficiaries of the constitutional trust can also bring an action against the trustee for failure to comply with its obligations.

136. See *supra* note 122.

137. See PA. STAT. ANN. tit. 73, § 3382 (West 1997); *Bruker v. Burgess and Town Council of Borough of Carlisle*, 102 A.2d 418, 419-20 (Pa. 1954) (plaintiffs are citizens and taxpayers who are also vendors or customers in public market); *Hoffman v. City of Pittsburgh*, 75 A.2d 649, 651 (Pa. 1950) (plaintiffs held to have standing because they own lots fronting on public square).

These cases tend not to distinguish between the beneficiary class as a whole and those who have standing to sue. Plainly, these plaintiffs are members of the beneficiary class. But the beneficiaries of a public square or public market also include others who, for example, own property that does not front on the square or market. These other beneficiaries may also be plaintiffs. See *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, 96 A. 123, 125 (Pa. 1915) (holding that taxpayers were properly allowed to intervene as plaintiffs to challenge change in use of publicly dedicated land because they were part of public to whom property was dedicated and because tax money had been used to improve the property).

138. *Carson v. Blazer*, 2 Binn. 475, 495 (Pa. 1810) (right to fish navigable waters); see also *City of Philadelphia v. Philadelphia Suburban Water Co.*, 163 A. 297, 300 (Pa. 1932) (Schuylkill River is navigable, and title to its bed and waters is thus “held by the state for the benefit of the public”); *Citizens’ Electric Co. v. Susquehanna Boom Co.*, 113 A. 559, 561 (Pa. 1921) (Susquehanna River is a “public highway for the use of the citizens of the commonwealth”).

139. See *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976) (referring to appellants as beneficiaries of public trust created by Article I, Section 27).

140. See, e.g., *Board of Trustees v. Trustees of University of Pennsylvania*, 96 A. 123, 125 (Pa. 1900). Violation of the trust terms is also a public nuisance, and can be challenged as such. See, e.g., *City of Pittsburgh v. Epping-Carpenter Co.*, 45 A. 129, 133 (Pa. 1900) (occupation of publicly dedicated property inconsistent with public right is public nuisance).

Plaintiffs or appellants challenging a government action under the constitutional public trust will thus need to show that the resource being affected is part of the “public natural resources” of the state. Because cases decided under the *Payne* test have not distinguished between the different types of resources and values protected by each part of the Amendment, this requirement would be new.

Plaintiffs or appellants will also likely need to show that they are sufficiently affected by a particular action or proposed action to meet the state’s standing rules.¹⁴¹ Because all of Pennsylvania’s citizens are the beneficiaries, there may be a problem showing that individuals or organizations are adversely affected in a way that is different from all other members of the public.¹⁴² As a result, named beneficiaries should ordinarily be persons who are particularly affected by the action (or inaction) they are challenging. Pennsylvania law, however, permits taxpayers to bring an action against the state if it appears that their grievance might otherwise not be judicially redressible.¹⁴³ Similarly here, where an action or inaction affecting the public trust is felt statewide, beneficiaries of the public trust should be able to bring an action.

4. *Trustees.*—As is ordinarily the case with public trust law, the trustees for publicly dedicated land and navigable waters are governmental entities. For publicly dedicated land, the trustee is ordinarily a municipality or the state.¹⁴⁴ For navigable waters, the trustee is the state.¹⁴⁵

141. See *supra* note 84 and accompanying text.

142. Ordinarily, plaintiffs need to show that their interest is substantial, direct, and immediate. See *id.*

143. See *Consumer Party v. Commonwealth*, 507 A.2d 323, 329 (Pa. 1986); *Application of Biester*, 409 A.2d 848, 852 (Pa. 1979).

144. See PA. STAT. ANN. tit. 53, § 3382 (West 1997) (all lands or buildings donated to political subdivision for use as public facility, or dedicated or offered for dedication for public use, “shall be deemed to be held by such political subdivision, as trustee, for the benefit of the public with full legal title in the said trustee.”). Land or buildings may also be donated to the state, in which case the state would be the trustee. See, e.g., PA. STAT. ANN. tit. 71, § 1340.303(a)(2) (West Supp. 1999-2000) (authorizing Department of Conservation and Natural Resources to receive land for state parks by gift, subject to encumbrances not inconsistent with use for parks). These encumbrances may include ownership of the land in trust.

145. See *City of Philadelphia v. Philadelphia Suburban Water Co.*, 163 A. 297, 300 (Pa. 1932); *Shrunk v. Schuylkill Navigation Co.*, 28 Serg. & Rawle 71, 80-81 (1826) (“entire right to the soil and water” of navigable waters are “vested in the state, for the benefit of the public”).

Under Article I, Section 27, "the Commonwealth" is expressly made "trustee."¹⁴⁶ This language does not indicate whether the governor, the attorney general, the legislature, the courts, or a combination of these, is the trustee.¹⁴⁷ In reality, the trusteeship responsibility is divided among all of them. The cases decided under the Amendment make it clear that the executive branch has some responsibilities to carry out Article I, Section 27, that legislation can effectively implement the Amendment, and that the Attorney General has the authority to file an action to vindicate the rights protected by the Amendment. The courts are also trustees, although they have a different role to play. In a 1986 case involving constitutional challenges to convictions for the illegal transportation of solid waste, the supreme court recognized that the courts have a trusteeship responsibility under the Amendment.¹⁴⁸ In rejecting those challenges, the court reasoned that the "courts of this Commonwealth, as part of a co-equal branch of government, serve as 'trustees' of 'Pennsylvania's public natural resources,' no less than do the executive and legislative branches of government."¹⁴⁹ As a result, the court explained, "we share the duty and obligation to protect and foster the environmental well-being of the Commonwealth of Pennsylvania."¹⁵⁰

All agencies in the executive branch whose actions can affect public natural resources have a trusteeship responsibility under Article I, Section 27. The governor, of course, is ultimately responsible for seeing that the state's laws are faithfully executed.¹⁵¹ Article I, Section 27, as part of the state constitution, plainly falls within that responsibility. A variety of agencies have statutory responsibilities concerning environmental matters, but none has the lead or primary responsibility for implementing Article I, Section 27.¹⁵² While some agencies, such as the Depart-

146. PA. CONST. art. I, § 27.

147. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 593 (Pa. 1973).

148. See *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358 (Pa. 1986).

149. *Id.* at 1370.

150. *Id.* The court's conclusion was supported by language in the challenged statute that specifically stated the statute was intended to implement Article I, Section 27. See *id.*

151. See PA. CONST. art. IV, § 2.

152. Until 1995, the Department of Environmental Resources was the pre-eminent state environmental agency, with responsibilities for pollution control as well as the management of state forests and parks. Even though the Department was the obvious lead among executive agencies, however, the commonwealth court held that the Department did not have

ment of Environmental Protection and the Department of Conservation and Natural Resources, plainly are covered by this public trust responsibility, any other executive agency that can affect public natural resources is also included.¹⁵³ Because municipalities are subdivisions of the state, they are trustees to the extent that their decisions affect public natural resources.¹⁵⁴

Ordinarily, some state or local governmental entity will be the defendant or appellee in a constitutional public trust case. Still, the possibility exists that a private party could be challenged for adversely affecting public trust property. In common law cases involving navigable waters, plaintiffs have claimed that such a party is causing a public nuisance.¹⁵⁵ Whenever a private party is the target of a lawsuit or appeal in which a violation of the constitutional public trust is charged, it would probably be necessary for the relevant governmental entity to be joined as an indispensable party.

5. *Responsibilities of Trustees.*

a. Common Law Framework.—Trustee responsibilities are understood in two ways in public trust law, including the common law Pennsylvania doctrines that preceded Article I, section 27. The trustee has an overall responsibility to manage the trust corpus in a certain way. The basic trust management responsibilities define the obligations of the trustee on a day-to-day basis, provide a standard against which the trustee's actions can be evaluated, and thus represent the primary duties of the trustee. Changes in the use of trust resources are permissible if they are within the terms of the trust. Yet there may be circumstances under which it is necessary or appropriate to change the uses of trust resources in a manner that is outside the general terms of the trust. To protect the integrity of the trust, however, changes inconsistent with the

primary responsibility for implementing the Amendment. See *Bruhin v. Commonwealth*, 320 A.2d 907 (Pa. Commw. Ct. 1974).

153. While this analysis is similar to that for the environmental rights part of the Amendment, agency responsibilities under each part of Article I, Section 27 will depend on the different scope of each.

154. See *Community College of Delaware County v. Fox*, 342 A.2d 468, 481-82 (Pa. Commw. Ct. 1975).

155. See *City of Pittsburgh v. Epping-Carpenter Co.*, 45 A. 129, 133 (Pa. 1900).

overall trust terms should be permitted rarely, if at all.¹⁵⁶ When a use of trust property is challenged, then, a court must first determine the government's substantive responsibilities under the terms of the trust. The court must then decide whether the proposed use is consistent with those terms. If not, the court must decide whether this is one of those exceptional cases in which it is appropriate to allow a use that is not consistent with the trust terms.

For publicly dedicated land, the overall responsibilities of the trustee vary with the terms of the dedication.¹⁵⁷ The land, however, must be managed in a manner that is consistent with, and does not interfere with, the terms of the dedication.¹⁵⁸ By ensuring adherence to the terms of the dedication, courts protect the interests of both present and future users of the land,¹⁵⁹ even though future uses under the dedication may not be the same as present uses.¹⁶⁰

156. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (explaining judicial reluctance to permit changes in use of public trust resources that are inconsistent with trust terms as essential to effectiveness of public trust doctrine). The principal case cited by Professor Sax, *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), illustrates the importance of judicial decisions requiring adherence to the overall trust terms. In that case, Illinois held title to the lands under the navigable waters of Lake Michigan "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). In 1869, the Illinois legislature granted the railroad nearly all of the submerged lands in Chicago harbor, about 1,000 acres in total. See *id.* at 448-51, 454. The Supreme Court held the legislative action to be invalid because it "is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public." *Id.* at 453.

157. See PA. STAT. ANN. tit. 53, § 3382 (West 1997) (describing such lands as "held . . . for the benefit of the public with full legal title" in the municipality as trustee).

158. Compare *Mahon v. Luzerne County*, 46 A. 894 (Pa. 1900) (erection of public building on land dedicated broadly as public square is consistent with dedication) with *Borough of Ridgway v. Grant*, 425 A.2d 1168 (Pa. Commw. Ct. 1981) (placement of fire engine house on land dedicated as public park is inconsistent with use of land as public park).

159. See *Hoffman v. City of Pittsburgh*, 75 A.2d 649, 654 (Pa. 1950) ("[F]uture City fathers may feel that human values—air, light, rest, recreation and health which can be derived from any public square—are more important and valuable to the citizens of Pittsburgh than the increased revenue which will likely be produced by a sale of this public property.").

160. See *Bruker v. Burgess of Borough of Carlisle*, 102 A.2d 418, 422 (Pa. 1954) ("Whenever property is dedicated in merely general terms to public use such use necessarily varies with the changing circumstances, customs and requirements of city life . . .").

If the proposed change in use is not consistent with the terms of the dedication, the next question is whether the type of change, or the circumstances of the change, render the proposed change appropriate nonetheless. The rules governing this question are extremely protective of the original dedication. A different use is permitted when the original trust purpose "is no longer practicable or possible" and "has ceased to serve the public interest."¹⁶¹ As long as the property is being used for the original trust purpose, this is a difficult test to meet.¹⁶² Thus, dedicated land cannot in general be sold for private use, even if the proceeds will be used for public purposes.¹⁶³ Land that is dedicated for one public purpose cannot even be used for a different public purpose.¹⁶⁴ Nor can the public right in land subject to such a public trust be extinguished by adverse possession.¹⁶⁵

Significantly, the court in *Payne* also addressed the question of whether the common law rules concerning publicly dedicated land were violated by the use of part of the public commons for a street-widening project.¹⁶⁶ Early in the nineteenth century, the legislature dedicated the land on which the park was located as a public commons.¹⁶⁷ The land had been used as a public park since that

161. PA. STAT. ANN. 53, § 3384 (West 1997). When that occurs, the trustee may substitute other property to carry out the trust purposes, sell the property and apply the proceeds to carry out the trust purposes, or, if the original trust purposes are no longer in the public interest, apply the proceeds to a different public purpose. *See id.*

162. *See, e.g., Trustees of the Philadelphia Museums v. Trustees of the University of Pennsylvania*, 96 A. 123, 126 (Pa. 1915) (limiting city's ability to alienate dedicated property "[s]o long at least as the property and buildings occupied by the museums continue to be used for that purpose in good faith").

163. *See, e.g., Hoffman*, 75 A.2d at 654; *In re Conveyance of 1.2 Acres of Bangor Memorial Park*, 4 Pa. D. & C. 4th 343 (Pa. Com. Pl. 1988) *aff'd*, 567 A.2d 750 (Pa. Commw. Ct. 1989). In *Payne v. Kassab*, the supreme court stated that the "diversion of dedicated land from one public use to another may be approved in a proper case," but cited cases in which the new public use was consistent with the dedicatory language. *See Payne v. Kassab*, 361 A.2d 263, 269 (Pa. 1976) (citing, *e.g., Shields v. Philadelphia*, 176 A.2d 697 (Pa. 1962) (allowing portion of park to be used as Little League baseball field when dedication stated that "no buildings shall be erected thereon other than those required for the comfort of the people, and also that the garden and greens shall be preserved as far as possible"); *Bernstein v. Pittsburgh*, 77 A.2d 452 (Pa. 1951) (allowing portion of park to be used for open air auditorium when dedication called for "place of free, attractive and healthful resort, and open air recreation . . . and for no other purpose whatever")).

164. *See Borough of Ridgway v. Grant*, 425 A.2d 1168 (Pa. Commw. Ct. 1981).

165. *Cf. Lacy v. Montgomery*, 124 A.2d 492, 497-98 (Pa. 1956) (public highway).

166. *See Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973).

167. *See id.* at 88, 90.

time, as well as for a variety of festivals, civic programs, and educational and recreational purposes.¹⁶⁸

The commonwealth court held that this land was not being taken for private use, that the street widening project would not alter the charter and nature of the commons, and that it was "merely a diversion of a minimal quantum of public land from one public purpose to another public purpose."¹⁶⁹ The supreme court affirmed, using essentially the same reasoning, but adding that the dedicatory language only referred to a public commons without specifying acceptable uses in greater detail.¹⁷⁰ A dissenting opinion argued that use of the land as a road was not consistent with its original dedication as a public commons.¹⁷¹

The common law public trust rules concerning public rights in navigable waterways also state the trustee's overall responsibility and define the circumstances under which uses of navigable waterways can be changed. The state holds the bed and waters of navigable waters for public benefit, including navigation, fishing, domestic consumption, and other uses.¹⁷² Unlike public dedications, where the terms of the dedication differ from parcel to parcel based on the wishes of those dedicating the land, the terms of this trust are based on common law, and do not generally differ from one navigable water body to another. Riparian owners have no exclusive right to these uses and may not interfere with them.¹⁷³

Also unlike public dedications, there do not appear to be situations under which the basic terms of the government's trust responsibility can be changed. It is difficult to conceive of a situation under which public use of the water or bed of navigable waters would be "no longer practicable or possible," and have "ceased to serve the public interest."

168. *See id.* at 91-92.

169. *Id.* at 96.

170. *See Payne v. Kassab*, 361 A.2d 263, 268-69 (Pa. 1976).

171. *See id.* at 273-74 (Roberts, J., dissenting). The dissenting opinion also disputed the conclusion that use of the half-acre as a public road is *de minimis*. *See id.* at 274.

172. *See Shrunken v. Schuylkill Navigation Co.*, 14 Serg. & R. 71, 80-81 (Pa. 1826) (rivers); *Conneaut Lake Ice Co. v. Quigley*, 74 A. 648, 650 (Pa. 1909) (lakes). The bed under nonnavigable waters is owned by the riparian owners, but such waters are still subject to a public easement for navigation when navigation is possible. *See Barclay R.R. & Coal Co. v. Ingham*, 36 Pa. 194, 200-02 (1860).

173. At the same time, these public rights do not mean that the public may trespass on private lands to enjoy them. *See, e.g., Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646, 650 (Pa. 1938).

Private uses of public trust resources are permissible, but are subject to the overriding rule that these uses may not interfere with public rights. Thus, people may take fish from navigable waters,¹⁷⁴ subject to state regulations to ensure the continuing availability of fish over time.¹⁷⁵ Municipalities and others may withdraw water for their own use, again subject to a state regulatory system designed to prevent the removal of so much water as to interfere with public rights.¹⁷⁶ Riparian owners may also use the land along navigable waters between the high and low water marks so long as these uses do not substantially interfere with navigation or other public rights.¹⁷⁷ The state can grant land that lies below navigable waters to private interests if it first finds that the grant is consistent with the public interest, but the grant is revocable if the use of granted land is inconsistent with the public interest.¹⁷⁸ The right to pollute navigable or nonnavigable waters cannot be acquired by prescription.¹⁷⁹

b. Constitutional Framework.—As these two public trust doctrines indicate, the starting point for a trust analysis is the terms of the trust itself. While changes in the use consistent with the trust terms are generally permissible, changes that are inconsistent with the trust terms generally are not permissible. This analytical

174. See *Carson v. Blazer*, 2 Binn. 475, 494-95 (Pa. 1810).

175. See 30 PA. CONS. STAT. ANN. § 2102 (West 1997) (authorizing adoption of regulations concerning “protection, preservation and management of fish and fish habitat”).

176. See *City of Philadelphia v. Philadelphia Suburban Water Co.*, 163 A. 297 (Pa. 1932); see also PA. STAT. ANN. tit. 32, §§ 631-41 (West 1997) (statute governing acquisition of water rights in surface waters by public water supply agencies); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (stating that “few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.”).

Withdrawals by riparian owners are generally limited to those necessary for the use of riparian land for ordinary purposes. See *Scranton Gas & Water Co. v. Delaware, L. & W. R.R. Co.*, 88 A. 24 (Pa. 1913).

177. See *Commonwealth v. Young Men’s Christian Ass’n*, 32 A. 121 (Pa. 1895); *Fulmer v. Williams*, 15 A. 726 (Pa. 1888).

178. See Title 32, § 675 (declaring void any “right, grant or privilege heretofore or hereafter granted or given, by the Commonwealth of Pennsylvania, in the bed of any navigable waters within or on the boundaries of this Commonwealth . . . whenever the same becomes or is deemed derogatory or inimical to the public interest, or fails to serve the best interests of the Commonwealth”).

179. See *Pennsylvania R.R. v. Sagamore Coal Co.*, 126 A. 386, 391 (Pa. 1924); *Clearview Land Dev. Co. v. Commonwealth*, 327 A.2d 202, 205 (Pa. Commw. Ct. 1974).

structure for public trust decision-making is both appropriate and necessary for the Amendment's public trust clause.

The public trust clause expressly imposes three separate but related responsibilities on state trustees. To begin with, the Commonwealth is to "conserve and maintain" public natural resources.¹⁸⁰ The 1993 Conservation and Natural Resources Act expressly recognizes this responsibility for the overall management of public natural resources.¹⁸¹ Changes in the use of public natural resources are permissible so long as these resources are conserved and maintained. Nothing in the Amendment's text freezes existing uses, and the inevitability of changes in use was recognized during the legislative process that prepared the Amendment for public referendum.¹⁸² On the other hand, degradation of public natural resources or diminution in their quality would likely be inconsistent with the obligation to conserve and maintain them.

Second, the Commonwealth must manage these resources "for the benefit of all the people."¹⁸³ Access to and distribution of these resources are thus equal in importance to environmental quality. Inequitable public access to public natural resources, inequitable distribution of those resources, and state decisions that give priority to private profit-making uses over public uses, are generally limited by the public trust clause. Public natural resources, after all, are to benefit "all of the people."¹⁸⁴ Quite plainly, access restrictions to protect such resources (e.g., limits on the number and size of fish that may be taken) are appropriate because they are applied to all. When the state allows a particular company to use a length of stream on an indefinite basis, however, and in so doing prevents others from fishing, boating, swimming or otherwise using the stream, the state has almost certainly violated the public trust clause.

Finally, the public trust clause requires the state to maintain public ownership of public natural resources.¹⁸⁵ It does so by

180. See PA. CONST. art. I, § 27.

181. See PA. STAT. ANN. tit. 71, § 1340.101(a)(1) (West Supp. 1998-99).

182. See *Part I, supra* note 1, at 704.

183. PA. CONST. art. I, § 27.

184. *Id.* Thus, for example, at least one state park is located within 25 miles of each Pennsylvania citizen. See REPORT OF 21ST CENTURY COMMISSION, *supra* note 72, at 36.

185. See PA. CONST. art. I, § 27.

making these resources the common property “of all the people.”¹⁸⁶ In general, the government cannot convey public natural resources to private parties or allow their permanent or semi-permanent conversion to private use.¹⁸⁷ Pennsylvania’s pre-existing public trust law generally forbids such conversion.¹⁸⁸ Publicly dedicated land cannot be sold to private parties; the bed of navigable waters is subject to public ownership.¹⁸⁹ Because the public trust clause builds on the state’s experience with these rules, it follows that public natural resources should be protected in the same manner. Of course, private consumptive uses of public natural resources for fishing, hunting, water withdrawals, and other purposes are not prohibited by the constitutional trust unless they interfere with the conservation and maintenance of those resources. The permanent or semi-permanent conversion of public natural resources to private use, however, deprives the public of access to these resources, and is thus prohibited.¹⁹⁰

The conversion of public natural resources from one public owner to another probably does not, by itself, violate the public trust clause. Such a conversion might violate the Amendment, however, if it was inconsistent with conservation and maintenance of resources or with their public availability.

Each of these three obligations applies, by the terms of the public trust clause, to both present and future generations. The state’s obligation to conserve and maintain public natural resources for future generations means that the state must ensure that these resources are of at least the same quality and diversity for future generations as they are for the present generation. In this way, the state is to maximize the options available to future generations.¹⁹¹

186. *Id.*

187. *Cf. Pennsylvania Game Comm’n v. Marich*, 666 A.2d 253, 256 (Pa. 1995) (Amendment cannot be used to justify private property claims in the values or resources it identifies).

188. *See supra* text accompanying notes 163, 173, and 178.

189. *See id.*

190. Leases of state-owned forest land for logging were anticipated during the legislative process that produced the Amendment. *See Part I, supra* note 1, at 704. However, a lease could be of such a long duration, and involve such preclusion of other uses, as to violate the public trust clause.

In general, nothing in the public trust clause would prevent the state from transferring natural resource lands to private parties if the state received equivalent or higher quality lands in return.

191. *See* EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* 38-43 (1989).

The state's duty to ensure public access to, and fair distribution of, public natural resources also applies to future generations. Thus, among other things, the government may not permit or allow uses of public natural resources that will cause long-term or irreversible adverse impacts on those resources, even if the present impact of those uses is minimal.¹⁹² Finally, the obligation to maintain public ownership of public natural resources necessarily protects future generations from a variety of leasing and other arrangements that could attenuate public ownership of those resources over time.

In fact, the obligation to conserve and maintain public natural resources for the benefit of future generations probably means that the state is required to restore degraded resources and plan for the enhancement of other public natural resources. This obligation is specifically important where these resources have been degraded by past human activity. More generally, it is necessary because natural conditions fluctuate with human activity, weather and climate, and other variables.¹⁹³ Because the condition of public natural resources is constantly changing, it is impossible to simply maintain them at some fixed condition. Rather, the state needs to aim at enhancing their quality and integrity to ensure that they are conserved and maintained, particularly for future generations.

Before the government makes a decision that may affect public natural resources, it needs to consider these obligations.¹⁹⁴ To do so, of course, it also needs to have sufficient information.¹⁹⁵ It thus behooves the state to develop that information on its own, or to request it from the applicant or project proponent, and oblige

192. *See id.*

193. *See* John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 71-72 (1998).

194. *See* William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 438-48 (1997) (public trust amendments to state constitutions should be read to require governmental consideration of public trust resources in decision making). Because both the public trust doctrines in Pennsylvania and the public trust clause have historically imposed substantive responsibilities on governmental trustees, and because courts can supervise the exercise of these responsibilities without second guessing technical or policy issues, the procedural obligation (to consider and develop information concerning compliance with substantive trustee responsibilities) is in addition to (not in lieu of) the trustees' substantive duties. Indeed, the government's obligation to develop information and consider how it will comply with its substantive responsibilities should facilitate any judicial review that may occur.

195. *See* John C. Dernbach, *The Unfocused Regulation of Toxic and Hazardous Pollutants*, 21 HARV. ENVTL. L. REV. 1, 64-65 (1997) (information concerning pollution).

such persons to demonstrate that the proposal is consistent with the state's obligation to conserve and maintain these resources.

The public trust clause could thus be used to challenge a governmental decision involving public natural resources. Because the clause imposes specific mandatory duties on governmental trustees, though, it could also be used in a mandamus action where the ostensibly responsible governmental entity has not acted.

The generality of the state's public trust obligations under Article I, Section 27 means that the state has a great deal of flexibility in carrying out its responsibilities. This approach would not necessarily change in significant ways the manner in which many basic government functions are already being carried out. The state's regulatory authority under The Clean Streams Law and the Air Pollution Control Act,¹⁹⁶ for example, covers many, but not all, of the issues identified by the constitutional text. Where protection of public natural resources has been considered by a government agency with statutory authority for protection of public natural resources, and where the resolution of factual questions requires technical expertise, courts should defer to agency expertise on those factual questions. A basic purpose of the Amendment, after all, is not to second guess technical decisions, but rather to fill gaps created by the absence of statutory or regulatory authority.¹⁹⁷ It is thus likely that the direct application of the Amendment to such permits would not dramatically change the permitting process. However, if a particular matter was not specifically considered, or if the agency's decision plainly does not comply with the public trust clause, then deference would be inappropriate. In such ways, the Amendment would fill legislative and administrative gaps that need to be filled if public natural resources are to be accorded necessary protection under the constitution.¹⁹⁸

The Amendment contains no language allowing the use of public natural resources for any purposes other than those stated

196. PA. STAT. ANN. tit. 35, §§ 691.1-1001 (West 1993) (clean streams); PA. STAT. ANN. tit. 35, §§ 4001-4106 (West 1993 & Supp. 1999) (air pollution).

197. Equitable access to public natural resources and the conversion of public natural resources to private ownership, moreover, do not even involve scientific or technical issues.

198. It can even be argued that the use of public natural resources for the private discharge of pollutants constitutionally requires the payment of a fee. Private users of public natural resources pay fees to camp in state parks, fish, hunt, trap, dredge in navigable waters, boat in navigable waters, and cut state forests for timber. If anything, pollution of public natural resources is more intrusive than many of these uses. By charging a fee for all such permits, moreover, the state would encourage reductions in pollution.

in the public trust clause. The New York and Massachusetts constitutions, by contrast, expressly permit the use of public natural resources for other purposes under specific circumstances.¹⁹⁹ The absence of such language in a constitutional provision does not necessarily preclude the judicial creation of limited exceptions, but it does indicate the primacy of the trustees' overall obligations.²⁰⁰ This conclusion is consistent with public trust law, which recognizes the paramount importance of the trustees' obligations under the trust.

c. *Eliminating the Payne Test but Not Overruling the Payne Decision.*—In *Payne v. Kassab*, the commonwealth court created a three-part test to determine compliance with Article I, Section 27, and especially its public trust clause.²⁰¹ This test, but not the court's overall holding, should be set aside.

Under the *Payne* test, a governmental decision is subject to three questions:

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- (3) Does the environmental harm which will result

199. See MASS. CONST. art. XCVII (permitting land to be used in a manner inconsistent with overall trust obligations if approved by a two-thirds vote in each house of the legislature); N.Y. CONST. art. XIV, § 3 (permitting certain lands to be used in a manner inconsistent with overall constitutional obligations).

200. Formulating such an exception is inappropriate here for several reasons. Most basically, the methodical development of constitutional law requires exceptions to grow out of the facts of particular cases. To suggest the existence of specific exceptions in advance is premature. This is particularly true because the public trust clause imposes relatively general requirements that, if allowed to operate as they were intended, would not unduly restrict state agencies and municipalities. Second, and of almost equal importance, the desire for exceptions to environmental protection rules grows to a great extent from an assumption that is simply impossible to fully protect environmental resources. Pennsylvania's experience with environmental protection over the past three decades, however, demonstrates that it is possible to reconcile environmental protection with economic development. See *Part I, supra* note 1, at 720-21. It is unnecessary and inappropriate, not to mention prejudicial to future generations, to manage those resources on a "damage control" basis. Third, exceptions (including balancing rules) would inevitably compromise the state's constitutional obligation to manage the public trust in specific ways, and would be understood by governmental trustees as prior legal approval to dispose of public natural resources in ways not authorized by the constitutional text. If there are eventually to be exceptions, they should be so few in number and so limited in scope that the trustees could not possibly mistake the exceptions for the general rule.

201. See *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?²⁰²

The *Payne* test should not be understood as a rule governing the overall responsibilities of the trustee under Article I, Section 27. Rather the constitutional text should serve that role. The constitutional text, not the *Payne* test, was written and then amended by the state legislature, and overwhelmingly approved by Pennsylvania's voters.

The *Payne* test is narrower in scope than the public trust clause. The public trust clause requires the governmental trustees to conserve and maintain public resources, to make those resources available on an equitable basis for public benefit, and to maintain public ownership of those resources.²⁰³ The *Payne* test, by contrast, addresses only environmental incursions or environmental harms.²⁰⁴ Thus, it is perfectly acceptable under the *Payne* test for the state to restrict access to public natural resources on an inequitable basis or to convey such resources to private persons, so long as any environmental harm does not clearly outweigh the benefits. The *Payne* test, in sum, ignores two of three types of legal protection expressly provided by the public trust clause. Because the common law public trust doctrines for navigable waters and publicly dedicated land prevented the government from allowing inequitable access or alienating public property, the *Payne* test makes the constitutional public trust less protective than pre-

202. *Id.*

203. See PA. CONST. art I, § 27.

204. See *Payne*, 312 A.2d at 94.

existing law.²⁰⁵ The test thus damages the credibility and effectiveness of the state's constitutional amendment process.

The *Payne* test is also inconsistent with the trustees' third obligation—to "conserve and maintain" public natural resources. In fact, the *Payne* test undermines the government's overall responsibilities. It does so by substituting procedural requirements for the substantive protection stated in the Amendment, and by failing to connect these procedures to the Amendment's text and purposes.²⁰⁶

The first prong of the test requires the state to comply with all applicable statutes and regulations relevant to its trust responsibilities. Yet state government is subject to applicable laws in any event; the Amendment does not change its responsibilities in that regard.²⁰⁷ In the *Payne* case, in fact, application of the entire test added nothing to the Department of Transportation's existing responsibilities. Moreover, because statutes and regulations differ depending on the problem being addressed, and can change over

205. In *Payne*, the court allowed public land to be shifted from one public use to another. The more common Article I, Section 27 case, however, involves the private use of public resources. By permitting the protection of public rights to be outweighed by private benefits, the balancing test implicitly compromises public trust resources at the expense of private wealth. The vices of balancing under the *Payne* test are made evident by examining what would happen if publicly dedicated lands were subject to this test instead of the long-established public trust rules. For example, a city is considering the sale of land dedicated as a public park to a private sports franchise, which plans to remove the park and construct a stadium. Under the traditional laws for public dedications, such a proposal would easily fail because it involves the conversion of public land to private use. Under the *Payne* test, however, that sale might be permitted. Because the sale is much more likely to be permissible if the project's proponents could demonstrate significant economic benefits, the test is in some ways less about protection of the trust corpus than it is about the economic merits of the project. It thus appears, for example, that the *Payne* test would allow commercial or condominium development in state or municipal park, game, or forest lands, and perhaps even a hazardous waste landfill or incinerator, if harm to the land were minimized, the benefits were great enough, and there were no statutory barriers. These examples are found in Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution*, in 1 PENNSYLVANIA ENVIRONMENTAL LAW AND PRACTICE § 2-3 (Joel R. Burcat and Terry L. Bossert eds. 1998).

The *Payne* test thus puts public trust resources at continuous risk of being lost to projects that promise greater economic benefits. Because it does so, it undermines both the language and purposes of the Amendment. See Eric Pearson & Gerald J. Hutton, *Land Use in Pennsylvania: Any Change Since the Environmental Rights Amendment?*, 14 DUQ. L. REV. 165, 195 (1976).

206. See Fernandez, *supra* note 96, at 371 (the *Payne* test "eviscerated" Article I, Section 27 and "provided no new protection to the environment, a result hardly reconcilable with the intent of the framers of Section 27").

207. See Pearson & Hutton, *supra* note 205, at 195.

time, this prong of the test has no inherent substantive content. The prong is thus deeply antagonistic to a basic purpose of Article I, Section 27—which was to provide a separate and enduring basis for environmental protection.

The second prong of the test, which requires the state to make a reasonable effort to reduce environmental incursion to a minimum,²⁰⁸ is hardly better as a statement of overall trust management responsibilities. The Amendment itself states that the “Commonwealth shall conserve and maintain” the state’s public natural resources “for the benefit of all the people,” including “generations yet to come.”²⁰⁹ The second prong only requires the state to make a reasonable effort to reduce environmental incursion to a minimum; it does not even require that environmental incursions be minimized. Even if it did, reducing continuing incursions on the trust corpus will not, by itself, “conserve and maintain” the trust corpus over time. Although reducing incursions is a necessary part of the state’s responsibilities, it is not sufficient.²¹⁰

The third prong authorizes the state to permit harm to the trust corpus when the benefits of doing so outweigh the costs. Again, the absence of any reference to the state’s explicit duty to “conserve and maintain” resources is troubling. The trust manager is instead authorized to allow that deterioration if the benefits are great enough. What makes this prong especially subversive of the Amendment is that it provides no categorical protection of the trust; if the economic benefits of a particular project are great enough, the state can compromise the resources, on a daily basis, and still claim that it has carried out its responsibilities under the trust.²¹¹

208. See *Payne*, 312 A.2d at 94.

209. PA. CONST. art. I, § 27.

210. See also *Pearson & Hutton*, *supra* note 205, at 195-96 (somewhat similar criticisms of second prong).

211. Despite the established administrative law principle obliging courts to defer to administrative expertise and to remand cases where the agency has failed to address a required matter, moreover, courts have conducted their own balancing when the Department has failed to do so, summarily concluding that the project’s benefits outweigh its costs. See *e.g.*, *Concerned Citizens for Orderly Progress v. Commonwealth*, Dep’t of Env’tl. Resources, 387 A.2d 989, 994 (Pa. Commw. Ct. 1978) (“Our own examination of the exhaustive record reveals that the environmental impact of the sewage plant . . . will be negligible, while the social and economic benefits appear to be significant.”). A court’s willingness to balance in the first instance compromises the agency’s obligation altogether.

The third prong²¹² also contradicts the principle of constitutional construction requiring that the various provisions of the constitution be interpreted as “an integrated whole.”²¹³ Article I, Section 27 recognizes that the state’s wealth is not simply economic or social; the “common wealth” also includes public natural resources. Thus, any legal test to implement Article I, Section 27 should protect and enhance social and economic development as well as public natural resources at the same time. Such a test would honor the obligation to interpret the various provisions of the constitution as a whole, reading them together instead of subordinating some to others. Rather than providing a means of reconciling constitutionally-based goals, though, the *Payne* test simply allows one set of goals to trump another. By allowing economic and social development to outweigh protection of public natural resources, the third prong of the *Payne* test violates a basic principle of constitutional interpretation and undercuts the Amendment’s basic purpose.

The absence of any required long-term analysis of costs and benefits is also problematic. Because the state’s public natural resources are to be held in trust for the benefit of “generations yet to come,” it is necessary to consider the costs of incursions on those resources to future generations. Part of the Amendment’s purpose, in fact, was to prevent long-term costs to public natural resources from their short-term exploitation for private benefit.²¹⁴ The third prong, however, contains no reference at all to the time over which costs and benefits should be calculated.

Apart from these faults with its individual prongs, the *Payne* test as a whole has two additional flaws. As a management rule, the *Payne* test seems focused on case-by-case or project-by-project decision-making. This approach is utterly inconsistent with the widely-recognized idea that management should be guided by basic overarching concepts.²¹⁵ The obligation to conserve and maintain public natural resources—which does not now inform use of the test—provides such a polestar. The state cannot responsibly or lawfully exercise its responsibilities under the Amendment without such guidance.

212. See *Payne*, 312 A.2d at 94.

213. See *Cavanaugh v. Davis*, 440 A.2d 1380, 1381 (Pa. 1982).

214. See KURY, *supra* note 69, at 1-3.

215. Cf. PA. STAT. ANN. tit. 71, § 1340.101(a)(1) (West 1997) (stating the overall duty to protect public natural resources under Article I, Section 27).

Finally, the *Payne* test protects public natural resources against environmental degradation less effectively than the common law doctrines that preceded it. These doctrines require the trustee to manage trust resources according to a discernible standard, and make it difficult for the trustee to depart from that standard. Because the *Payne* test does neither of these things, it is not even a true public trust test. It is, rather, a “damage control” test that allows for the continuing degradation of public natural resources. As a result, the test provides less protection for navigable waters and publicly dedicated lands than the common law public trust doctrines that preceded Article I, Section 27. The test thus compromises the integrity of the legal process that brought the Amendment into existence.

The *Payne* test, but not the *Payne* decision, should thus be set aside. This approach to protecting public natural resources is consistent with the supreme court’s understanding in *Payne*. The supreme court was willing to tolerate the proposed changes in uses of the public commons because the applicable transportation statute had led to a decision that greatly reduced the project’s impact.²¹⁶ Compliance with all applicable laws, and a reasonable effort to reduce environmental incursions—the first two prongs of the *Payne* test²¹⁷—led the court to conclude that the state had not violated its public trust obligation.²¹⁸ This constitutional obligation was the central Article I, Section 27 issue litigated in the case, not the three-prong test. Indeed, the supreme court made only a brief reference to the test in a footnote.²¹⁹

By eliminating the *Payne* test, courts could force parties to think more clearly about the resources being affected. Courts could also give themselves more discretion in fashioning an appropriate remedy. A reviewing court’s primary obligation, in

216. See *Payne v. Kassab*, 361 A.2d 263, 273 (Pa. 1976).

217. See *Payne v. Kassab*, 312 A.2d 86, 95 (Pa. Commw. Ct. 1973).

218. The only questionable part of the *Payne* decision was its allowance of 0.59 acres of public park to be used for a public street. Because the obligation to conserve and maintain public natural resources such as the park applies to both present and future generations, the *Payne* decision could be understood to permit the nibbling away of public natural resources in a series of such decisions over an extended period. It would have been better if the courts had required the development of an equal-sized parcel of new park land on River Common or a larger-sized parcel of new park land nearby. Such a decision would have permitted the street-widening project to proceed without compromising in any way the obligation to conserve and maintain public natural resources.

219. See *Payne*, 361 A.2d at 273 n.23.

judging an allegation that the constitution has been violated, is to decide that claim. By focusing on that claim, a court can more clearly understand the extent, if any, to which public rights have been or will be injured, and can force parties to do the same. The standard for an injunction, by contrast, includes a balancing test.²²⁰ Similarly, the third prong of the *Payne* test requires balancing.²²¹ When the right and the remedy are blended, as the *Payne* test suggests, it is harder to clearly understand either.

The balancing part of the *Payne* test also suggests an all-or-nothing judicial decision concerning a challenged law or project that greatly oversimplifies reality. By separating the remedy from the violation, a court would force the parties to think more clearly and precisely about the remedy, and thus develop more finely-tuned solutions. Remedies to protect public resources might include specific modifications in a project, the replacement of affected resources, or proceeding at a different time. In such ways, eliminating the *Payne* test could give courts more flexibility rather than less.

C. *Environmental Rights*

1. *Protected Persons*.—Because the environmental rights clause applies to “[t]he people,” all Pennsylvania residents appear to be protected.²²² The environmental rights sentence in Article I, Section 27 focuses on the specific environment where people live, work, and play. The natural, esthetic, scenic, and historic values in *Gettysburg Tower*, for example, were those of the Gettysburg battlefield.²²³

In addition, “the people” hold these rights on equal terms as individuals.²²⁴ This principle is considered true of all legal rights; any individual or group that is deprived of legal rights is entitled to judicial relief. The distribution of environmental benefits and

220. To obtain a preliminary injunction, a plaintiff must show “first, that it is necessary to prevent immediate and irreparable harm which would not be compensated by damages; second, that greater injury would result by refusing than by granting it; and third, that it properly restores the parties to their status as it existed immediately prior to the alleged unlawful conduct.” *Valley Forge Historical Soc’y v. Washington Memorial Chapel*, 426 A.2d 1123, 1128 (Pa. 1981).

221. See *Payne*, 312 A.2d at 95.

222. See PA. CONST. art. I, § 27.

223. See *Commonwealth v. Nat’l Gettysburg Battlefield Tower*, 13 Adams County Legal J. 75 (Pa. Com. Pl. 1971).

224. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 198-99 (1978).

burdens is thus squarely within the reach of the Amendment. The values identified in the first sentence are not meaningfully or legally protected if some people enjoy them and others do not.

Of course, it may not be enough for plaintiffs or appellants to simply assert that they fall within the protected class. They will also need to show that they are sufficiently affected by the action they are challenging to meet the state's standing requirements.²²⁵

2. *Protected Values and Conditions.*—What is protected by the environmental rights clause? This question has not been necessary under the three-prong *Payne* test; if the case involves the environment, that is enough under *Payne*. Because the two parts of the Amendment refer to different environmental features and values, however, it is necessary under each part to identify what is protected.

The general meaning of the people's right to "clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment" can be discerned from the Amendment's text. As the clause is drafted, it gives the people the right to two environmental conditions (clean air and pure water) and to the preservation of four environmental values (natural, scenic, historic, and esthetic).²²⁶

The specific content of these four values is not stated in the Amendment, but their general meaning can be discerned from the ordinary meaning of these words, and the way they have been applied. Natural values are based on direct uses such as food, clothing, drinking water, and energy.²²⁷ Natural values also include many services that are of benefit to humans. Watersheds, for example, can help store groundwater, limit flooding, provide habitat, and offer recreational opportunities. Many of these services are irreplaceable.²²⁸ The common law already recognizes

225. See *supra* note 84 and accompanying text.

226. See PA. CONST. art. I, § 27.

227. See R.T. WATSON, ET AL., GLOBAL BIODIVERSITY ASSESSMENT: SUMMARY FOR POLICY-MAKERS 12-13 (1995).

228. See generally Robert Costanza et al, *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE 253 (1997) (estimating the annual economic value of global ecological "services" at an annual average of \$33 trillion, almost twice the current annual global gross domestic product); see also Gretchen C. Daily, *Valuing and Safeguarding Earth's Life-Support Systems*, in NATURE'S SERVICES 369 (Gretchen C. Daily ed. 1997) (estimating economic value of biodiversity, natural pest enemies, forests, grasslands, and other natural features to be "many trillions of dollars annually"). This type of analysis generally has not yet been done for specific resources in specific places such as Pennsylvania, however. Cf.

such values to some degree by, for some example, giving property owners a right to lateral support and a right to natural drainage rather than flooding from new development.²²⁹ Natural values also include the potential medicinal and economic benefits of biodiversity as well as the psychological benefits to hunters, fishers, hikers and others of being present in an outdoor setting.²³⁰ Finally, natural values of the environment necessarily include the values of natural systems that are not affected by humans, including ecosystem integrity and biological diversity.

Historic preservation was earlier motivated largely by the desire to inspire a sense of patriotism or to protect the artistic merit or architectural integrity of buildings.²³¹ Those themes are now integrated into a community-building rationale that emphasizes the “ ‘sense of place’ that older structures lend to a community, giving individuals interest, orientation, and a sense of familiarity in their surroundings.”²³² This change in the understanding of historic values suggests that the environmental rights clause allows some evolution in values over time. Elasticity is particularly important because the historic and other values identified in the first sentence have changed over the past century, and are likely to continue to evolve.

Scenic values include an environment that is pleasing to the eye.²³³ Esthetic values in the environment are based on vision

James Salzman, *Valuing Ecosystem Services*, 24 *ECOLOGY* L.Q. 887, 891-98 (1997).

229. See, e.g., *Commonwealth v. Solley*, 121 A.2d 169 (Pa. 1956) (lateral support); *Westbury Realty Corp. v. Lancaster Shopping Center, Inc.*, 152 A.2d 669 (Pa. 1959) (flooding); see also R. Timothy Weston, *Gone With the Water—Drainage Rights and Storm Water Management in Pennsylvania*, 22 *VILL. L. REV.* 901, 906-37 (1977) (explaining Pennsylvania drainage rules). The rights protected by the environmental rights clause, however, do not depend on property ownership.

230. See 25 PA. CODE § 9.302 (West 1998) (identifying these and other values of natural areas). The preservation of natural values can also provide people with a sense of their connection to the natural world.

231. See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *STAN. L. REV.* 473, 479-488 (1981). See, for example, *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668 (1896), which held that the federal government had a valid public purpose when it condemned property for a national battlefield memorial at Gettysburg. The purpose was primarily patriotic—public recognition of the effort to preserve the union and the sacrifices made by those who fought there. See *id.* at 680-83.

232. See Rose, *supra* note 231, at 480, 488-94. Because this rationale emphasizes the relationship between individuals and their surroundings, it is consistent with and generally supportive of environmental protection. See *id.* at 483 n.48.

233. Scenic values involve “pleasing views of natural features.” *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1613 (3rd ed. 1992).

and other human senses—the ability to smell, hear, touch, and taste.²³⁴ In addition to the visual appeal of the environment, and the pleasure it can bring to the senses, the concept of esthetic values also embraces the absence of continuous loud noises, offensive smells, and other intrusions on the senses.²³⁵ These esthetic and scenic rights, which are less tangible than the first two, relate more directly to the human spirit. Whether these values are understood in psychological or religious terms, the constitution recognizes them even if their benefits lie outside the economic realm.

Few judicial decisions contain specific holdings on the content of these values, although courts frequently assume that these values are protected by the Amendment.²³⁶ The visibility of a proposed private landfill to nearby residents and others implicates the scenic and esthetic values protected by Article I, Section 27, for example.²³⁷ Similarly, mushroom farms and fruit orchards adjacent to the proposed landfill have natural values that are also protected by the Amendment.²³⁸ The proximity of water pumping stations to historic structures and lands implicates the historic as well as scenic and esthetic values identified by the Amendment.²³⁹

Litigants and judges may also find it useful to look at legislative and administrative statements of those values. These statements do not have constitutional status, of course, but they provide evidence of how those values are now understood. Thus, for example, The Clean Streams Law states that clean water has

234. Esthetic values express beauty, and suggest greater attention to how humans perceive that beauty. *See id.* at 28. The word is derived from Greek words that mean sense perception and perceptible things. *See id.*

235. *See* Robert Broughton, *Esthetics and Environmental Law: Decisions and Values*, 7 LAND & WATER L. REV. 451, 463 (1972) (contrasting intrusions on “visual esthetics” by ugly landscape features with intrusions on other esthetic values by “offensive smells and loud and continuous noises . . .”).

236. Similarly, legislation is often intended to implement Article I, Section 27, but statutes rarely contain a more specific explication of these values.

237. *See* Pennsylvania Env'tl. Mgt. Services, Inc. v. Dep't of Env'tl. Resources, 503 A.2d 477, 480 n.9 (Pa. Commw. Ct. 1986). Esthetic rights, however, extend only so far. *See* Concerned Residents of the Yough, Inc. v. Dep't of Env'tl. Resources, 639 A.2d 1265, 1275 (Pa. Commw. Ct. 1994) (“[N]othing in Article I, Section 27 . . . explicitly provides the citizens of Pennsylvania with a right to quiet, serene surroundings.”).

238. *See* Pennsylvania Env'tl. Mgt. Services, 503 A.2d 477.

239. *See* Del-AWARE, Unlimited, Inc. v. Dep't of Env'tl. Resources, 508 A.2d 348 (Pa. Commw. Ct. 1986).

economic, recreational, and other benefits.²⁴⁰ When a litigant asserts that such values should be protected under the environmental rights clause, the litigant is referring to values that the General Assembly has already recognized. Other sources of recognized values include administrative regulations²⁴¹ and the state's environmental master plan.²⁴² This approach could facilitate the identification of protected values, is more likely to ensure that the Amendment's interpretation is consistent with currently held values, and would make the environmental rights clause more precise. It would not, however, prevent courts and litigants from protecting other values when appropriate.

The rights to "clean air" and "pure water" are clearer and seemingly more absolute than the rights to preservation of certain environmental values. As the text is written, these rights are to be protected for their own sake, not because they are supported by particular values of the environment. At the same time, the protection of these rights need not be an exercise in absolutism. To begin with, protection of clean air and pure water likely also preserves natural, scenic, esthetic, and perhaps even historic values of the air and water, including ecological integrity. In addition, the rights to "clean air" and "pure water" surely include the right to be protected against pollutants that would kill, injure, cause disease, or otherwise damage human health.²⁴³ Among other things, then, the Amendment declares that the people have a right to a healthy environment.²⁴⁴

240. See PA. STAT. ANN. tit. 35, § 691.4(1) (West 1993) stating that "[c]lean, unpolluted streams are absolutely essential" to "attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry").

241. The state's municipal waste regulations, for example, require landfill operators to prevent and control dust, odors, noise, and other esthetic problems. See 25 PA. CODE § 273.218 (West 1993).

242. See 25 PA. CODE § 9.1-9.317 (West 1997) (identifying many environmental values).

243. See, e.g., W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms*, 3 GEO. INT'L ENVTL. L. REV. 85, 112 (1990) (arguing that the right to a clean environment is fundamental to the right to life because "a contaminated environment will kill human life").

244. Cf. ILL. CONST. art. XI, § 1 (declaring that each "person has a right to a healthful environment"). In fact, the terms "clean" and "pure" suggest that this right is not to be understood as requiring scientific certainty about what is healthy or unhealthy; fewer contaminants are better than more. These terms partially support the propriety of a recently enunciated state goal of zero releases of pollutants that are known to have adverse health effects. See REPORT OF 21ST CENTURY COMMISSION, *supra* note 72, at 46 (restating previously enunciated goal). The part of the policy requiring scientific certainty about health effects, however, is inconsistent with the "clean" and "pure" language; pollutants are

Finally, whatever else “pure” and “clean” may mean, the terms almost certainly create a presumption against the state allowing the air to become less clean and the water less pure than they are at present. In these cases, the issue is not about abstract standards of cleanliness or purity; it is about actions that make existing air or water quality worse. The rights to clean air and pure water, in sum, generally should prevent actions that would degrade air or water.²⁴⁵ Such judicial actions are also consistent with a basic purpose of the Amendment—prevention of environmental backsliding.

3. *Responsible Parties.*—Under the environmental rights clause, a governmental entity is the most likely defendant or appellee. As already explained, the entity’s asserted lack of statutory authority to protect environmental rights does not provide an exception to this rule. The environmental rights clause fills precisely such gaps in the government’s statutory authority to protect environmental rights.

Of course, a private party could also be the defendant in a governmental action to prevent or control injury to the public’s environmental rights. Such a suit would be like that filed in *Gettysburg Tower*.²⁴⁶

pollutants.

245. Cf. *Montana Env’tl. Information Center v. Dep’t of Env’tl. Quality*, No 97-455, 1999 Mont. LEXIS 266 (Mont. Oct. 20, 1999) (holding that state constitutional right to a clean and healthy environment is implicated by addition of arsenic to surface waters from ground water pumping tests when the Department has concluded addition of arsenic will have a significant water quality impact). The legislature had specifically exempted discharges from such tests from review under the state’s water quality nondegradation rules. See *id.* at *26-27. The court decided that this legislative exemption should be subject to strict scrutiny under certain provisions of the Montana Constitution, see MONT. CONST. art II, § 3 (stating that all persons have “the right to a clean and healthful environment”); MONT. CONST. art IX, § 1 (requiring the “State and each person [to] maintain and improve a clean and healthful environment in Montana for present and future generations”). See *Montana Env’tl. Information Center*, 1999 Mont. LEXIS 266, at *24 & *45. It remanded the case to the district court for a determination of whether there is a compelling state interest for enactment of the exemption, whether the exemption “is closely tailored to effectuate that interest,” and whether the exemption represents “the least onerous path that can be taken to achieve the state’s objective.” *Id.* at *32-34 & *47 (citing *Wadsworth v. State*, 911 P.2d 1165, 1174 (Mont. 1996)).

246. See *Commonwealth v. Nat’l Gettysburg Battlefield Tower*, 13 Adams County Legal J. 45; *Commonwealth v. Nat’l Gettysburg Battlefield Tower*, 13 Adams County Legal J. 75 (Pa. Com. Pl. 1971).

4. *Violation of Rights.*—A litigant needs to demonstrate that these rights have been, or are about to be, violated. This demonstration would ordinarily involve presentation of evidence showing 1) actual or likely injury or damage to specific environmental features, and 2) corresponding injury to values or conditions protected by the Amendment. Without some actual or threatened environmental degradation, it is not possible to claim corresponding injury to the scenic, historic, esthetic, or natural values in the environment, or to clean air or pure water. As *Gettysburg Tower* suggests, the standard is difficult to meet.²⁴⁷ When the government has protected these values or conditions, it would be impossible to meet.

Because the environmental rights clause does not require the preservation of specific features, however, a defendant should be able to present evidence that the challenged action includes compensating, mitigating, or offsetting aspects that will restore or enhance the values that are damaged. These compensating or offsetting features should, under the terms of that sentence, involve preservation and even enhancement of air quality, water quality, or the natural, scenic, historic, and esthetic values of the environment. The inherently local aspect of quality of life suggests that these aspects of the proposal must also occur in the same place as the proposal in question.

When a violation of the right to clean air or pure water is alleged, it should not ordinarily be sufficient to show that the proposed action would add some amount of contamination to the air or water. The Air Pollution Control Act and The Clean Streams Law,²⁴⁸ as well as the regulations adopted under those statutes, already limit the amount of permissible air and water contamination or pollution. Under these laws, the Department of Environmental Protection makes decisions about the permissible concentration of particular pollutants in parts per million or milligrams per liter. The courts should ensure that particular values of clean air and pure water, such as human health, ecological

247. See *id.* The court in *Gettysburg Tower* required the government to prove its case by clear and convincing evidence, but only because the state was seeking an injunction. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 13 Adams County Legal J. 134, 136-37 (Pa. Com. Pl. 1971).

248. PA. STAT. ANN. tit. 35, §§ 691.1-1001 (West 1993) (The Clean Streams Law); PA. STAT. ANN. tit. 35 §§ 4001-4106 (1993 & West Supp. 1999-2000) (Air Pollution Control Act).

integrity, and nondegradation are being protected by such decisions.²⁴⁹

Thus, litigants would need to show that a particular concentration or discharge of pollutant injures both the environment and the particular values or qualities protected by the Amendment. When the Department has considered the same values or qualities as those considered in a challenge to the Department's action, it would be appropriate for a court to defer to the Department's expertise on questions of fact (but not on questions of constitutional law). When the Department has not considered those values or qualities, or when the Department has not considered them thoroughly or carefully, deference on questions of fact is not appropriate.

5. *Relationship to Public Trust.*—The environmental rights and public trust clauses both apply when they overlap. The environmental rights clause applies to most, if not all, public natural resources covered by the constitutional public trust. Thus, virtually every constitutional public trust case will also be an environmental rights case.²⁵⁰

This overlap has important consequences for public natural resources, because the environmental rights clause strengthens and clarifies the state's responsibilities for all public natural resources. Thus, under the public trust clause, the state must conserve and maintain public natural resources, make them available on an equitable basis to the public, and keep them in public ownership. Because public natural resources include surface and groundwater as well as the air, the environmental rights clause also applies to such resources. This clause, moreover, requires the state to protect the public's right to "clean air" and "pure water."²⁵¹ In so doing, it sharpens and clarifies the meaning of "conserve and maintain."²⁵²

Public natural resources also have natural, scenic, historic, and esthetic values that are protected under the environmental rights

249. This reading of the Amendment also precludes the opening of judicial floodgates based on a reading of clean air and pure water as requiring laboratory cleanliness or purity.

250. Environmental rights cases, by contrast, are not necessarily public trust cases. In *Gettysburg Tower*, for example, the issue was the potential effect on environmental rights of an observation tower built on private land. The tower had no direct or indirect impacts on public trust resources.

251. See PA. CONST. art I, § 27.

252. See *id.*

clause. The trust obligation to conserve and maintain public natural resources is somewhat different from the trust obligation to preserve certain values in those public resources. One concerns resources, and the other concerns values in those resources; the first requires conservation, and the second requires preservation. Conservation of renewable resources such as forests, for example, ordinarily requires that the amount of harvesting not exceed the rate of replenishment. In that way, the materials provided are continually available. But conservation by itself might conceivably be inconsistent with preservation of natural, scenic, historic, and esthetic values, or with clean air and pure water. The state could lease public forest lands for clearcutting in a manner that allows regrowth of the trees, but which greatly interferes with the integrity of unique ecosystems. Such a decision would likely violate the Amendment.

III. Principle-Reinforcing Rules

The public trust and environmental rights clauses of Article I, Section 27 can also be used to support government actions taken under other laws on behalf of the values or principles that it states, and can even be used to challenge governmental actions that undermine those values or principles. Indeed, Pennsylvania courts have already recognized three principle-reinforcing applications of the Amendment. Article I, Section 27 has confirmed and even extended the application of the police power, has been used to interpret or support the interpretation of statutes, and has provided constitutional authority for laws whose constitutionality was being challenged.²⁵³ Nor do these uses constitute all of the Amendment's possible principle-reinforcing rules. For example, the public trust clause should be used to require the state to conduct a periodic accounting on the status of public natural resources.

1. Confirmation and Extension of Police Power.—The Amendment's first sentence confirms and extends the police power of the state as well as local governments to protect the values and conditions that it identifies. By stating that the public has a right to clean air, pure water, and the preservation of the natural, scenic,

253. In most of these cases, the Amendment has been invoked as an undivided whole. It is likely that the separate use of the environmental rights or public trust clauses would provide more specific and useful principle-reinforcing applications of Article I, Section 27.

historic, and esthetic values of the environment, Article I, Section 27 confirms and even extends previous cases holding these values to be squarely within the scope of public health, safety, welfare, or morals. Similarly, the public trust clause confirms and extends earlier cases holding that the state had the power to protect public natural resources. State or local laws intended to protect those values and resources may perhaps be successfully challenged on other grounds,²⁵⁴ but they cannot be challenged as outside the scope of the government's police power.²⁵⁵

Because the police power provides state and local governments with authority to protect the community, it is one of their "most essential powers."²⁵⁶ Thus, the first question raised in challenges to governmental regulation is whether the action is within the scope of the government's police power. The statute, ordinance, or other governmental action must promote public health, safety, morals, and welfare; otherwise, it is invalid.²⁵⁷ The test is framed somewhat differently for state actions than for municipal zoning ordinances. State actions are legally justified if "the interests of the public generally, as distinguished from those of a particular class, require such interference," if "the means are reasonably necessary for the accomplishing of the purpose," and if the means are "not unduly oppressive upon individuals."²⁵⁸ A zoning ordinance is a valid exercise of the police power if it promotes public health, safety, or welfare, and if its provisions are substantially related to its purported purpose.²⁵⁹ Pennsylvania courts apply that test by balancing the public interest furthered by the ordinance against its confiscatory or exclusionary impact on individual rights.²⁶⁰ The first question in both situations, however, is whether the challenged government action is within the scope of the police power.

254. See e.g., *infra* note 258 and accompanying text.

255. See Lazarus, *supra* note 115, at 655-56 (discussing cases from other states in which public trust doctrine has been used to support exercise of governmental authority). This affirmation and extension of the police power also suggests that local governments have standing to challenge state decisions that substantially affect the rights identified in the first sentence. See *Franklin Township v. Dep't of Env'tl. Resources*, 452 A.2d 718 (Pa. 1982) (plurality opinion).

256. See *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

257. See *infra* text accompanying notes 258-60.

258. *Commonwealth v. Barnes & Tucker Co.*, 371 A.2d 461, 465 (Pa. 1977) (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

259. See *Boundary Drive Assoc. v. Shrewsbury Township Board of Supervisors*, 491 A.2d 86, 90 (Pa. 1985).

260. See *id.*

The state as well as municipalities thus have the police power authority to adopt legislation to protect the environmental rights stated in the first sentence, and to implement the public trust clause.²⁶¹ Even the supreme court plurality in *Gettysburg Tower*, which concluded that Amendment is not self-executing, stated that the Amendment both affirms and adds to the legislature's power to further define the values protected in Article I, Section 27.²⁶² The court found that the state previously had the power to establish standards for clean air and water to protect human health.²⁶³ But the Amendment also authorizes the state to exercise its police power solely for esthetic or historical considerations.²⁶⁴ According to the plurality, the Commonwealth previously lacked that authority.²⁶⁵ In stating that legislation is required to define and protect the values identified in the Amendment,²⁶⁶ the plurality indicated that the legislature unquestionably has the authority to enact such laws.

On the police power issue, the plurality is generally correct.²⁶⁷ Prior to adoption of the Amendment, municipalities and the state unquestionably possessed authority to adopt legislation concerning air and water quality.²⁶⁸ In subsequent cases, courts have identified Article I, Section 27 as an additional basis for the

261. The self-executing status of Article I, Section 27 is irrelevant to this question. If a constitutional provision is not self-executing, it can only be given effect through legislation. Such a provision must thus necessarily provide the authority for implementing legislation. Even if a provision is self-executing, its self-executing status does not preclude the adoption of implementing legislation.

262. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 592 (Pa. 1973).

263. See *id.* at 592.

264. See PA. CONST. art. I, § 27.

265. See *Gettysburg Battlefield*, 311 A.2d at 592. The opinion did not discuss police power authority to protect natural or scenic values.

266. See *id.* at 595.

267. The principle exception to the plurality's conclusion involves esthetic values, where the state's police power was fairly well recognized even before the Amendment was adopted. See *infra* note 314 and accompanying text.

268. See, e.g., *Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908) (water); *Commonwealth v. Emmers*, 70 A. 762 (Pa. 1908) (water).

exercise of that authority,²⁶⁹ and have even used the Amendment to slightly extend the state's authority to protect water quality.

In *Commonwealth v. Barnes & Tucker Coal Co.*,²⁷⁰ the state sought an injunction requiring a coal mining company to treat large volumes of acid mine drainage that were flowing into streams from an underground mine the company had recently closed.²⁷¹ The

269. In 1980, the supreme court upheld the constitutionality of Section 316 of The Clean Streams Law, which authorizes the Department to order a landowner or occupier to correct pollution or danger of pollution on the property. *See National Wood Preservers, Inc. v. Dep't of Env'tl. Resources*, 414 A.2d 37 (Pa. 1980). In that case, a couple leased land to a wood preservative business, which then discharged waste liquids containing toxic substances into a well on the property. *See id.* When those substances were found in a nearby stream, the Department issued orders to the landowners and the business to abate this condition, using Section 316 as its sole authority. *See id.* at 39. The agency did not assert a violation of the environmental rights clause even though the discharge interfered with the public's constitutional right to "pure water," nor did the agency assert a violation of the public's right to the conservation of public natural resources, even though the discharge degraded groundwater and a stream. *See id.* In challenging the statute, the landowners and the business did not question the department's claim that Section 316 is in the public interest. *See id.* at 43-44. Rather, they claimed that section 316 is an improper exercise of the police power. *See National Wood Preservers*, 414 A.2d at 42. The court rejected that claim. *See id.* at 44. Article I, Section 27 "imposes a duty upon the Commonwealth to protect our environment," the court reasoned. *See id.* at 44. "Indeed, maintenance of the environment is a fundamental objective of state power." *Id.* The court added that the state has long had an inherent interest in protecting the environment, and has furthered that interest with water quality legislation. *See id.*

The court also rejected arguments that the means the Department chose were not reasonably necessary for the accomplishment of its purposes, and that the means were unduly oppressive to individuals, although it did not use Article I, Section 27 in disposing of these claims. The landowners and the wood preservative business focused their constitutional argument on the claim that the means chosen by the Department were unduly oppressive to individuals. *See National Wood Preservers*, 414 A.2d at 45-47. The gist of their argument was that Section 316 imposes liability solely on the basis of land ownership or occupancy. *See id.* The court rejected that argument because the orders were also based on legislation designed to eliminate water pollution as well as findings that polluting substances exist on the land and can feasibly be removed. *See id.* In addition, the court reasoned that the exercise of police power depends on the public's interest in having the condition abated, not on the responsibility of the landowner or occupier for creating the condition. *See id.*

In a recent decision, the supreme court extended its prior holding to lessees who are neither responsible for groundwater contamination nor even aware of it, as long as pollution exists under the land and abatement is feasible. *See Adams Sanitation Co. v. Dep't of Env'tl. Resources*, 715 A.2d 390 (Pa. 1998). In so doing, it repeated its prior conclusion that Section 316 satisfied the public interest and "reasonably necessary" means tests "in light of Article I, Section 27 of the Pennsylvania Constitution and the stated purpose of the Clean Streams Law." *Id.* at 395; *see also* *Dep't of Env'tl. Resources v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1209 (Pa. 1979) (air quality); *Dep't of Env'tl. Resources v. Bethlehem Steel Corp.*, 367 A.2d 222, 226 n.10 (Pa. 1976) (air quality); *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308, 317 (Pa. 1973) (water quality).

270. 303 A.2d 544 (Pa. Commw. Ct. 1973), *rev'd*, 319 A.2d 871 (Pa. 1974).

271. *See id.* at 545.

discharge interfered with the public's right to "pure water" and to the conservation of public natural resources, although the state does not appear to have made a claim based solely on the Amendment.²⁷² Rather, the state's complaint was based in part on public nuisance. As the supreme court recognized, the Amendment makes a public nuisance claim easier to prove.²⁷³ Under prior public nuisance law, the pollution of a stream created an enjoined nuisance "if the public uses the water."²⁷⁴ The streams in *Barnes & Tucker*, however, were already polluted from sewage as well as acid mine drainage from other mines, and there was almost no evidence that the public used them.²⁷⁵ The supreme court held that pollution of a stream automatically caused a public nuisance, even if the stream was not previously being used.²⁷⁶ Quoting Article I, Section 27, the court said that "the public has a sufficient interest in clean streams alone regardless of any specific use thereof."²⁷⁷ The constitutional declarations that the public has a right to pure water and the conservation of public natural resources, in short, make the violation of these rights actionable as a public nuisance.

The Amendment also appears to have resolved doubts about police power authority to protect historic values. Before the Amendment, the commonwealth court assumed but did not decide that municipalities had the authority to protect historic values.²⁷⁸ Afterwards, the supreme court confirmed the exercise of that authority.²⁷⁹ In fact, Philadelphia amended and strengthened its historic preservation ordinance subsequent to the adoption of, and in apparent reliance on, Article I, Section 27.²⁸⁰

272. See *id.* at 559

273. See *Commonwealth v. Barnes & Tucker Coal Co.* 319 A.2d 871, 880 (Pa. 1974).

274. See *id.* at 882 (citing *Pennsylvania R.R. v. Sagamore Coal Co.*, 126 A.2d 386, 387 (Pa. 1924) (stream was considered pure, and was used as a supply of water for domestic consumption by a large number of people)).

275. See *Barnes & Tucker Coal Co.*, 303 A.2d at 571.

276. See *Barnes & Tucker Coal Co.*, 319 A.2d at 882.

277. *Id.*

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

279. See *United Artists' Theater Circuit v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993).

280. See *United Artists Theater Circuit v. City of Philadelphia*, 595 A.2d 6, 8-9 (Pa. 1991); see also *Unionville-Chadds Ford School District v. Chester County Board of Assessment Appeals*, 692 A.2d 1136 (Pa. Commw. Ct. 1997). The court upheld a real estate tax

The Amendment's effect on the exercise of the police power, however, is a double-edged sword. Just as it provides the state with the authority to act to protect the values and resources it identifies, Article I, Section 27 also deprives the state, under some circumstances, of authority to degrade or diminish those values. For example, many municipal ordinances prohibit landowners from growing "excessive vegetation," which might be defined as vegetation exceeding six to twelve inches in height except for "useful or ornamental purposes."²⁸¹ Such weed ordinances have traditionally been justified as valid exercises of police power because of their association with junky lots and their potential to adversely affect public health by producing allergenic pollen and odors.²⁸² But such ordinances also target landowners who create "natural gardens" they believe to be "environmentally superior to typical manicured lawns."²⁸³ Indeed, a growing body of literature suggests both the utility and attractiveness of landscaping with native vegetation and reducing the amount of one's property that is covered with grass.²⁸⁴

Property owners who use their property in this manner surely are contributing to the preservation and restoration of the natural, scenic, esthetic, and perhaps even historic values of the environment. These property owners should thus be able to successfully assert under the first sentence of Article I, Section 27 that municipalities lack the police power authority to interfere with the preservation of these values on their land. This approach would not protect property owners from enforcement of weed ordinances where their property contains junk, harbors rodents or dangerous insects, or produces allergens or noxious odors.²⁸⁵ Article I,

exemption for Longwood Gardens, a 1,050 acre public garden, in part because its owner "bears a substantial burden that would otherwise fall to the government in the areas of historic preservation, conservation of wild resources, and provision of open space for public recreation." *Id.* at 1141. Citing Article I, Section 27 and several statutes, the court reasoned that the state had an obligation to provide for such public areas. *See id.* If the land had been donated to the local government "instead of placing it in trust and providing an endowment, the government would arguably bear the considerable burden of the facility's management and maintenance." *Id.* at 1142.

281. *See Commonwealth v. Siemel*, 686 A.2d 899, 900 (Pa. Commw. Ct. 1996) (quoting the Borough of Lansdale's weed and grass ordinance, Ordinance 876 § 1(D)).

282. *See Sobocinski v. City of Williamsport*, 319 A.2d 697, 700 (Pa. Commw. Ct. 1974).

283. *Seimel*, 686 A.2d at 902 (Friedman, J., dissenting).

284. *See, e.g., KEN DRUSE, THE NATURAL HABITAT GARDEN* (1994); WILLIAM H.W. WILSON, *LANDSCAPING WITH WILDFLOWERS AND NATIVE PLANTS* (1984).

285. *See Siemel*, 686 A.2d at 902 (Friedman, J., dissenting).

Section 27 would, however, require a fact-finder to weigh the competing claims of the landowner and municipality rather than simply assuming that enforcement of the weed ordinance is a valid exercise of the police power.

2. *Guidance in Statutory Interpretation.*—Article I, Section 27 imposes responsibilities or obligations on the legislature. Because Article I, Section 27 gives certain rights to the “people,” it follows that each branch of government has a responsibility to ensure that those rights are protected. When the legislature acts in ways that result in greater protection of those rights, therefore, it is reasonable to conclude that it is fulfilling its constitutional responsibility, whether or not the legislation identifies implementation of Article I, Section 27 as one of its purposes.²⁸⁶ Thus, when there is any doubt about the meaning of a legislative provision, the doubt should be resolved on behalf of the interpretation that protects the environmental rights or public natural resources identified in Article I, Section 27.²⁸⁷

A 1998 supreme court decision involving Section 316 of The Clean Streams Law is illustrative of this use of the Amendment.²⁸⁸ Section 316 authorizes the Department of Environmental Protection to order a land owner or occupier to correct pollution on the property.²⁸⁹ The department issued a groundwa-

286. See *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1370-71 (Pa. 1986) (describing legislative responsibility for implementation of Article I, Section 27); *Part I, supra* note 1, at 729-31.

287. Statutes are often interpreted to conform to state constitutional provisions. See, e.g., *Hartford Accident & Indem. Co. v. Insurance Commissioner*, 482 A.2d 542 (Pa. 1984). In the *Hartford Accident* case, the supreme court decided that gender-based auto insurance rates were “unfairly discriminatory” under a state insurance statute. See *id.* The decision was based in large part on the Equal Rights Amendment to the state constitution, see *id.* at 547, which provides: “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” PA. CONST. art. I, § 28. Because of this amendment, the court held, “the statute must be interpreted to include sex discrimination as one type of unfair discrimination.” *Hartford Accident & Indem. Co.*, 482 A.2d at 549. The constitution did not simply allow the Insurance Commissioner to interpret the statute in that manner, the court reasoned, rather the constitution required that interpretation. See *id.*

288. See *Adams Sanitation Co. v. Dep’t of Env’tl. Protection*, 715 A.2d 390 (Pa. 1998).

289. Section 316 of The Clean Streams Law provides in part:

Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to

ter pollution abatement order to a company that had leased land for use as a municipal waste landfill even though the lessee did not cause or even know about the groundwater pollution.²⁹⁰ Because Section 316 is so potentially harsh, allowing the state to “compel the expenditure of financial sums by an owner or occupant of land based on no other factor but the ownership or occupancy of the land,”²⁹¹ such cases encourage interpretations of Section 316 that would narrow its scope. Indeed, in an earlier case, the commonwealth court had specifically held that Section 316 was generally inapplicable to landowners and lessees who did not discharge industrial waste into the groundwater.²⁹²

In challenging the order, the lessee argued that Section 316 should be interpreted so that a party is liable only for water pollution it caused or knew about before leasing or operating on the property.²⁹³ Relying in part on Article I, Section 27, the supreme court rejected this argument and implicitly overruled the earlier commonwealth court decision.²⁹⁴ The supreme court first noted that the plain language of Section 316 contains no limitation based on fault or knowledge.²⁹⁵ The court then stated that such

take such action. For the purpose of this section, “landowner” includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

PA. STAT. ANN. tit. 35, § 691.316 (West 1993).

290. Because groundwater is a public natural resource, its protection implicates the public trust part of the Amendment. Since its degradation is inconsistent with the conservation and maintenance of public natural resources, as well as the public’s right to “pure water” and to protection of the natural and esthetic values of the environment, this case involves both parts of Article I, Section 27.

291. *National Wood Preservers, Inc. v. Dep’t of Env’tl. Resources*, 414 A.2d 37, 47 (Pa. 1980) (Flaherty, J., concurring).

292. *See Philadelphia Chewing Gum Co. v. Dep’t of Env’tl. Resources*, 387 A.2d 142 (Pa. Commw. Ct. 1978), *aff’d in part sub nom.*, 414 A.2d 37, *appeal dismissed*, 449 U.S. 803 (1980). The commonwealth court made an exception for landowners and lessees who took action indicating adoption of the contamination after gaining knowledge of it. *See id.* at 150.

The state had issued orders to several landowners in this case—the owner of land on which the groundwater discharges had occurred, the company that leased the land and discharged pollution, and two others (another lessee and an adjoining landowner) who had not caused groundwater pollution. Because the two others had not caused groundwater pollution, the commonwealth court held that they were not liable under Section 316. The state did not file a timely appeal of that part of commonwealth court’s decision. *See National Wood Preservers, Inc.*, 414 A.2d at 40 n.8.

293. *See Adams Sanitation Co., Inc. v. Dep’t of Env’tl. Protection*, 715 A.2d 390 (Pa. 1998).

294. *See id.*

295. *See id.* at 393-94.

limitations would be inconsistent with the purposes of The Clean Streams Law, which include the elimination of all water pollution.²⁹⁶ The lessee's interpretation, the court reasoned, would delay clean-ups and often permit the condition of sites to worsen because the Department of Environmental Protection would have to conduct an extensive investigation into the cause of pollution before issuing an order.²⁹⁷ The court also said that the lessee's interpretation is inconsistent with the "legislative mandate contained in Article I, Section 27."²⁹⁸

This and other cases involving Section 316 of The Clean Streams Law use the Amendment as support for arguments based on the statutory text and purposes.²⁹⁹ The "legislative mandate" to implement Article I, Section 27 appears to play a significant and perhaps decisive role in supporting the stated meaning of Section 316. Because the legislature has an obligation to implement the Amendment, Article I, Section 27 could also be used to decide cases based on vaguer statutory language. Therefore, statutes that affect the values and resources identified in the Amendment should be interpreted in ways that foster its implementation. Statutes that affect public natural resources should be interpreted to require the conservation and maintenance of those resources for present and future generations. Similarly, statutes that affect environmental rights should be interpreted to protect the public's right to clean air, pure water, and the preservation of natural, scenic, historic, and esthetic values of the environment.

3. *Constitutional Authority for Laws Whose Constitutionality is Challenged on Other Grounds.*—Pennsylvania courts have decided constitutional challenges to government regulation by relying in part on the Amendment as authority for state or local action. One line of cases involves protection of privately-owned historic properties. Here, Article I, Section 27 has provided a

296. See *id.* at 394 (citing PA. STAT., tit. 35, §§ 691.4 (West 1993)).

297. See *id.* at 394.

298. *Adams Sanitation Co., Inc.*, 715 A.2d at 394.

299. See *National Wood Preservers, Inc. v. Dep't of Env'tl. Resources*, 414 A.2d 37, 41 (Pa. 1980) (claim that Section 316 applies only to pollution caused by mining is inconsistent with statutory language and would "frustrate the Legislature's fulfillment of its obligation" under Article I, Section 27); *Dresser Indus. v. Dep't of Env'tl. Resources*, 604 A.2d 1177, 1180 (Pa. Commw. Ct. 1992) (claim that Section 316 does not apply to the Commonwealth as landowner because it would "frustrate the Legislature's fulfillment of its obligation under Article I, section 27").

buffer against the expansion of private property rights in ways that would interfere with protection of the values contained in the first part of the Amendment. In *United Artists' Theater Circuit v. City of Philadelphia*,³⁰⁰ the city of Philadelphia designated a motion picture theater as historic, which subjected it to certain restrictions. The theater's owner then challenged that action.³⁰¹ There is no doubt that historic preservation ordinances are generally valid under the U.S. Constitution.³⁰² The theater's owner therefore argued that the ordinance violated the Pennsylvania constitution because it effectuated a taking of private property without compensation.³⁰³ The essential claim was that the Pennsylvania constitution provided more protection for private property owners than the U.S. Constitution. When it initially decided the case, in fact, the state supreme court agreed with that claim, holding the ordinance to effect an unconstitutional taking.³⁰⁴ After reargument, however, the court reversed itself and held that the ordinance did not effect a taking.³⁰⁵

In reversing itself, the court relied partly on Article I, Section 27, whose first sentence explicitly provides a public right to preservation of the historic and esthetic values of the environment. The Amendment protected the ordinance against the theater owner's takings claim. The takings provision of the Pennsylvania constitution is virtually identical to that in the federal constitution.³⁰⁶ When the state and federal constitutions contain the same rights, the Pennsylvania constitution sometimes provides more

300. 635 A.2d 612 (Pa. 1993).

301. *See id.*

302. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

303. *See United Artists' Theater Circuit*, 635 A.2d 612; *see also* PA. CONST. art. I, § 10.

304. *See United Artists Theater Circuit, Inc. v. City of Philadelphia* 595 A.2d 6 (Pa. 1991).

305. *See United Artists' Theater Circuit, Inc.*, 635 A.2d 612 (but holding that the city had acted outside the scope of its own ordinance by designating the theater as historic). The city designated both the exterior and interior of the building as historic. The ordinance did not provide the city with explicit authority to designate building interiors, however. The commonwealth court had held that the ordinance was intended to include both, regardless of the ordinance's language, and that the city's action was within the scope of the ordinance. *See Sameric Corp. v. City of Philadelphia*, 558 A.2d 155, 157 (Pa. Commw. Ct. 1989). Because the ordinance did not provide "clear and unmistakable" authority to designate a building's interior, the supreme court vacated the city's designation. *See United Artists' Theater Circuit, Inc.*, 635 A.2d at 622.

306. *Compare* U.S. CONST. amend. V *with* PA. CONST. art. I, § 10.

protection of individual rights than the U.S. Constitution.³⁰⁷ To make a claim that the Pennsylvania constitution provides greater rights, litigants are required to address several factors, one of which is "unique issues of state and local concern."³⁰⁸ With respect to that factor, the court held that Article I, Section 27 weighed against a decision that the ordinance effected a taking.³⁰⁹ The Amendment, the court held, "reflects a state policy encouraging the preservation of historic and esthetic resources."³¹⁰ The court added that Article I, Section 27 reflects "a general public interest in preserving historic landmarks," that no other practical means exists for preserving such landmarks, and that the ordinance neither deprives the owner of a profitable use nor constitutes a physical intrusion on the property.³¹¹ Thus, Article I, Section 27 both supported the extension of the police power to historic preservation, and helped defend this extension against a property-based constitutional challenge.³¹²

The same reasoning that protected the historic preservation ordinance under the environmental rights clause could also support decisions protecting public natural resources under the public trust part. Because the state owns public trust resources, it should be virtually impossible for landowners to claim property rights to their use, degradation, or alienation.³¹³

307. See, e.g., *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) (Pennsylvania constitution does not incorporate good faith exception to exclusionary rule for violation of constitutional requirement that search warrants be obtained prior to any search or seizure).

308. *Id.* at 895. The other factors are the text of the state constitutional provision, its history, and related case law in other states. See *id.*

309. See *United Artists' Theater Circuit, Inc.*, 635 A.2d at 620.

310. *Id.* On the other three factors, the court noted that the text of the state and federal provisions is similar, that the state generally follows federal case law on the takings, and that no state had held a historic designation to be a taking. See *id.*

311. See *id.* at 618-19.

312. The Amendment has also been used to support the constitutionality of governmental prosecutions of environmental crimes. See *Dep't of Env'tl. Resources v. Blozenski Disposal Service*, 566 A.2d 845 (Pa. 1989) (challenge to constitutionality of a warrantless administrative search); *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358 (Pa. 1986) (claim that two different penalties for the same offense violated the state and federal constitutions).

313. See Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995) (arguing that the public trust doctrine prevents private property owners from claiming reasonable expectations in the use, acquisition, and transfer of lands subject to the public trust). It is still possible to make a successful claim for a compensable taking under the Pennsylvania or U.S. Constitutions, but not on that basis.

As the supreme court's analysis in *United Artists' Theater Circuit* indicates, the Amendment's protection against constitutional challenges is not absolute. Esthetic values provide another example, even though they also are obviously protected by Article I, Section 27. Courts have generally, but not universally, recognized the validity of esthetic considerations as a basis for exercise of the police power.³¹⁴ The use of esthetic values to justify government decisions raises judicial suspicion, however, especially when these values are unsupported by health, safety, environmental protection, or other justifications. Thus, licensing requirements based only on esthetic considerations are invalid because they are vague and standardless.³¹⁵ Similarly, zoning ordinances that establish multiple-acre minimum lot sizes to protect the "character of the area" or its appearance, but which also have an exclusionary purpose or effect, are also invalid.³¹⁶ Although the Amendment was not invoked in these cases, there is no reason to believe it should have changed their outcomes. The constitutionally-based countervailing interests in these cases are simply greater than that expressed in Article I, Section 27.

4. *Accounting for Status of Public Natural Resources.*—The public trust clause also suggests some principle-reinforcing rules that are unique to trust law, and that have not previously been recognized under Article I, Section 27. Such rules would enhance the likelihood that the public's common property will be protected in accordance with the constitution.

314. See, e.g., *Best v. Zoning Board of Adjustment*, 141 A.2d 606, 612 (Pa. 1958) ("preservation of the attractive characteristics of a community [is] a proper element of the general welfare"); *Bilbar Construction Co. v. Easttown Township Bd. of Adjustment*, 141 A.2d 851, 857 (Pa. 1957) ("esthetic considerations have progressively become more and more persuasive as sustaining reasons for the exercise of the police power"). But see *Redevelopment Authority of Oil City v. Woodring*, 445 A.2d 724 (Pa. 1982) (municipal authority's decision to require all electrical lines to be relocated underground solely for esthetic reasons held to be exercise of eminent domain power, not police power).

315. See *Orwell Township Supervisors v. Jewett*, 571 A.2d 1100 (Pa. Commw. Ct. 1990) (invalidating ordinance that authorized denial of a junkyard license for esthetic reasons or because of the operation's effect on other properties). But see *Cox v. New Sewickley Township*, 284 A.2d 829 (Pa. Commw. Ct. 1971) (upholding junkyard ordinance that was based on protection of public health, safety, and the environment as well as esthetic considerations).

316. See e.g., *Concord Township Appeal*, 268 A.2d 765 (Pa. 1970); *Girsh Appeal*, 263 A.2d 395 (Pa. 1970); *National Land & Investment Co. v. Easttown Township Bd. of Supervisors*, 215 A.2d 597 (Pa. 1965); *Berman v. Bd. of Comm'rs*, 608 A.2d 585, 590 (Pa. Commw. Ct. 1992).

As many states have recognized, private trust law provides choices in the application of public trust law that may not otherwise be apparent. Thus, when specific private trust law principles are consistent with the language and purposes of public trust laws, these principles have been imported into public trust law.³¹⁷ While other private trust principles may assist in the implementation of the public trust clause, three seem particularly relevant.

The first is the trustee's basic obligation to keep detailed and accurate accounts on the type and amount of trust property, and on the trustee's administration of that property.³¹⁸ The obligation to inventory the trust corpus is basic to trust law, and includes a continuing obligation to record changes in the property.³¹⁹ Thus, even though not expressly required by its text, the public trust clause necessarily requires the state to conduct a periodic and continuing inventory of the public natural resources that the state owns. Otherwise, there is no practical way of knowing whether the state is complying with its constitutional obligations for public trust resources. By conducting such an inventory and accounting, the state would identify the resources it believes are protected by the constitution. The state would also have to describe the condition of these resources, as well as existing threats to them. Otherwise, it could not be said that the state had an accurate understanding of the status of public trust resources.

No such inventory and accounting has yet been done. It might be possible to cobble together some kind of inventory of public natural resources from various state agencies. Among state agencies, however, there are likely to be information gaps concerning natural resources as well as differences between published and current information.³²⁰ It is difficult, moreover, to understand the big picture until that picture is assembled.

A second obligation of trustees under private and charitable trust law is to report to the beneficiaries at their request complete

317. See *supra* note 107 and accompanying text.

318. See BOGERT, *supra* note 108, § 140; see also RESTATEMENT (SECOND) OF TRUSTS § 172 & cmt. a (1959). See, e.g., *In re Estate of Nesbitt*, 533 A.2d 1015, 1021 (Pa. Super. Ct. 1987).

319. See RESTATEMENT, *supra* note 318, § 172 cmt. c.

320. As of April 1, 1998, for example, the state had assessed water quality and aquatic life in only 12,831 of the state's 83,261 miles of streams. See REPORT OF 21ST CENTURY COMMISSION, *supra* note 72, at 43. About one third of these waters, 4,314 miles, are impaired. See *id.*

and accurate information concerning trust property.³²¹ Essentially, this obligation ensures that the basic information developed about the status of the trust corpus is available to beneficiaries on a regular basis. Again, this obligation is an outgrowth of the trustee's primary duties, and provides an incentive for the trustee to comply with these duties. The obligation to report to beneficiaries is considered so central to the trustee's basic obligations under the trust that Pennsylvania courts have implied this duty even when not expressly required by the trust instrument.³²² Moreover, a public accounting would provide an overall understanding of the status of public natural resources that is unavailable from an analysis of specific problems or cases. The state should thus periodically publish a report identifying public trust resources, their condition, and current and foreseeable threats. Such reporting would also provide information to the public concerning problems and threats that could stimulate and encourage debate about legislative or executive efforts to address them. While there is now some public reporting on progress in cleaning air or water, and on related issues, there is no comprehensive public report on public natural resources.³²³

The final obligation of trustees under private trust law is to permit third parties to examine the accounts and all relevant documents to ensure the accuracy and completeness of these accounts.³²⁴ This auditing mechanism helps prevent and correct

321. See BOGERT, *supra* note 108, § 141; see also RESTATEMENT, *supra* note 318, § 173. Pennsylvania law recognized this responsibility even before adoption of the first restatement. See *In re Estate of Rosenblum*, 328 A.2d 158, 165 n.6 (Pa. 1974); see also *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3rd Cir. 1993) ("This duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.").

322. See, e.g., *Fidelity Bank v. Commonwealth Marine and General Assurance Co.*, 592 F. Supp. 513, 528-29 (E.D. Pa. 1984) (exculpatory paragraph in trust agreement does not abrogate responsibility to report to beneficiaries under Section 173 of Restatement).

323. Proposals to use numerical indicators to measure environmental conditions are similar to what is being argued here. See REPORT OF 21ST CENTURY COMMISSION, *supra* note 72, at 71-74. If environmental indicators covered all public natural resources in the manner described in this Article, in fact, they would accomplish the same result. Such indicators are not simply good policy, however; they are required by Article I, Section 27.

324. See RESTATEMENT, *supra* note 318, § 173 cmt. a (private trustee obliged to permit accountant to examine relevant documents); see also BOGERT, *supra* note 108, § 142 (trustee under duty to render formal accounting in court of equity when required by court or required by statute).

both errors and fraud, and thus enhances the likelihood of adherence to the trustee's basic duties.

This obligation should also be imported into public trust law under Article I, Section 27. The temptation by governors and department heads to use environmental information for political purposes, to change the information being reported from administration to administration, to omit or understate problems, and to overstate progress is simply too great—under any administration—to permit any other conclusion. In fact, the state might best carry out its responsibilities under the Amendment by delegating the entire task of accounting and public reporting to some kind of independent or quasi-independent entity, perhaps a university or consortium of universities. The long-term integrity of the state's commitment to public natural resources requires some kind of independent assessment or auditing.

These obligations are obviously judicially enforceable by beneficiaries in private trust law.³²⁵ They should also be judicially enforceable by beneficiaries under the public trust clause.

IV. Conclusion

My purpose is to begin again a serious discussion about what Article I, Section 27 means and should be recognized to mean. It deserves this discussion not only because it protects the environment, not only because most of that discussion was abruptly cut off by creation of the *Payne* test, but also—and most fundamentally—because it is constitutional law. Article I, Section 27 is richer in meaning and ultimately more necessary than we may have imagined. But we can only know that, and benefit from it, if we treat the Amendment with the seriousness that constitutional law deserves. Unlike the T.S. Eliot verse quoted at the beginning of Part I, though, understanding Article I, Section 27 in this way does not represent “the end of all our exploring.”³²⁶ Rather, it provides a sounder basis for addressing the challenges that lie ahead.

325. See, e.g., *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 469 (Pa. 1979).

326. *Little Gidding*, in *FOUR QUARTETS* 59 (1943).