UPHOLDING THE PUBLIC TRUST IN STATE CONSTITUTIONS

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INTRODUCTION

On April 14, 1970, this country's first "Earth Day," the Pennsylvania legislature approved a proposed amendment to the state constitution.[1] It read:

> **Section 27. Natural resources and the public estate**
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic 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.[2]

On May 18, 1971, Pennsylvania's citizens overwhelmingly approved the amendment, thereby codifying it as Article I, Section 27 of their state constitution.[3] At or near the same time Pennsylvania was amending its constitution to reflect a new premium on environmental protection, many other states were doing the same.[4]

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1. Pennsylvania's constitution requires that any amendment be approved by a majority of both houses of the state legislature and then approved by a majority of voters in a referendum. *See* Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123 n.1 (1990).

2. PA. CONST. art. I, § 27. Because the Pennsylvania Constitution requires that two consecutive legislatures approve an amendment before it is submitted to the citizens, this was the first time the legislature approved the amendment. It was approved for the second time in the 1971–72 session. *See* Kury, *supra* note 1, at 123.

3. *See* Kury, *supra* note 1, at 123–24. Just over one million voters favored the amendment; about a quarter-million opposed it. *See id.*

4. *See* Roland M. Frye, Jr., *Environmental Provisions in State Constitutions*, 5 ENVTL. L. REP. 50028–29 (1975); Stewart G. Pollock, *State Constitutions, Land Use, and Public Resources: The Gift Outright*, 1984 ANN. SURV. AM. L. 13, 28–29; Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 126–27 (1990).

For constitutional provisions that refer explicitly to the environment or natural resources, see ALA. CONST. art. VIII; CAL. CONST. art. X, § 2; FLA. CONST. art. II, § 7; HAW. CONST. art. XI; ILL. CONST. art. XI; LA. CONST. art. IX; MASS. CONST. § 179; MICH. CONST. art. IV, § 52; MONT. CONST. art. IX, § 1; N.M. CONST. art. XX, § 21;

Why did this flurry of state constitutional amendment occur? Why didn't state citizens request that their legislators pass comprehensive environmental protection statutes instead? The author of Pennsylvania's amendment suggested his state's constitutional change out of a desire to "give our natural environment the same kind of constitutional protection that [is] given our political rights."[5] A constitutional amendment, as opposed to a statute, protects policy judgments from the ebb and flow of the political tide. A constitutional amendment becomes part of a document that is "the ultimate repository of a people's considered judgment about basic matters of public policy."[6] A constitution represents a commitment by those citizens whom it governs to preserve, over time, the institutions and principles the document contains.[7] Citizens of Pennsylvania and other states presumably determined that environmental protection is a "basic matter[] of public policy;"[8] and therefore added provisions requiring environmental protection to their state constitutions to commit themselves and future generations to this project.

In theory, an environmental provision in a constitution could have a wide range of effects. Depending on how the provision is written, it might reach any number of activities that harm the environment. Such activities range from the usual topics of constitutional concern, such as government action and inaction, to much more controversial subjects of constitutional concern, including private action and even private inaction.[9] A constitutional provi-

N.Y. CONST. art. XIV; N.C. CONST. art. XIV, § 5; OHIO CONST. art. II, § 36; PA. CONST. art. I, § 27; R.I. CONST. art. 1, § 17; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVIII; VA. CONST. art. XI, § 1.

5. Franklin L. Kury, *The Pennsylvania Environmental Protection Amendment*, PA. B. ASS'N Q., Apr. 1987, at 85, 87.

6. A. E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 229 (1972).

7. *See* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1143–46 (1995).

8. Howard, *supra* note 6, at 229.

9. The Pennsylvania amendment, for example, was thought at the time of its proposal to allow state citizens to challenge, at a minimum, direct government action which caused environmental harm. *See* Kury, *supra* note 5, at 89. It was also seen as a potential limit on acts by private parties subject to government regulations, such as a power company that wanted to build new transmission lines, and as an exhortation against government inaction concerning the correction of current environmental damage and violations of existing environmental protection statutes. *See id.* at 90.

sion might also create or expand citizens' standing to challenge actions that harm the environment.[10]

Since the earliest environmental provisions were enacted, however, commentators have almost universally lamented their ineffectiveness.[11] Several potential barriers to the effectiveness of such provisions exist; all prevent the provisions from having substantive effect. In some states, constitutions' environmental protection provisions appear to have gone unused by pro-environment litigants.[12] In other states, courts have heard cases based on constitutions' environmental protection provisions, but have refused to give the provisions effect for one or both of two reasons. First, courts have been very reluctant to hold that environmental protection provisions are self-executing.[13] A provision that is not self-executing has no independent legal significance; such a provision may only be given force by a legislature's enactment of enabling statutes. Second, courts have been unwilling to read constitutions' environmental protection provisions as having any effect on standing requirements, which are traditionally difficult for pro-environment plaintiffs to meet.[14]

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10. Pennsylvania's amendment was also intended to grant to individual citizens standing to challenge impairments of their "environmental rights." *See id.* at 89.

11. *See, e.g.*, Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 847 (1990); Oliver A. Pollard, III, Note, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351 (1986); McLaren, *supra* note 4, at 152; Tammy Wyatt-Shaw, Comment, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something,"* 15 PUB. LAND L. REV. 219, 231–35 (1994); *cf.* José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333 (1993) (agreeing that provisions have been ineffective but praising this trend).

12. *See, e.g.*, UTAH CONST. art. XVIII (no appellate cases interpret this provision); OHIO CONST. art. II, § 36 (only reported cases involve state's use of provision as an affirmative grant of power).

13. *See, e.g.*, Robb v. Shockoe Slip Found., 324 S.E.2d 674, 676 (Va. 1985) (holding that an environmental protection provision in the Virginia constitution is not self-executing); *see generally* Fernandez, *supra* note 11, at 334 (noting that state courts have used the doctrine of self-execution to thwart the intent of adopters of environmental provisions in state constitutions); Pollard, *supra* note 11, at 351 (explaining that courts have held environmental provisions in state constitutions "ineffective absent additional legislation").

14. *See, e.g.*, Scattering Fork Drainage Dist. v. Ogilvie, 311 N.E.2d 203, 210 (Ill. App. Ct. 1974) (holding that plaintiff had no standing despite the Illinois constitution's creation of a "right to a healthful environment" enforceable "against any party, governmental or private," IL. CONST. art. II, § 2); Wyatt-Shaw, *supra* note 11, at 241–43 (discussing likely obstacles to standing for plaintiffs attempting to use the Montana constitution's provision).

In reviewing the effectiveness of environmental protection provisions in state constitutions, commentators have focused especially on those provisions which courts have held are not self-executing. According to Professor Lynda Butler, courts' holdings that these provisions are not self-executing have meant that "the incorporation of environmental provisions into state constitutions has not brought about the anticipated results."[15] Professor José Fernandez makes this case more strongly, arguing that, by refusing to find that constitutions' environmental protection provisions are self-executing, "state courts have rendered opinions which appear to thwart the adopters' intent to make those provisions effective."[16] Previous student authors have reached more dramatic conclusions. One student wrote that environmental provisions in state constitutions are "almost meaningless," and that any promise of environmental protection they provide is "illusory."[17] Another student described the demise of such provisions more melodramatically:

> Faced with the prospect of continuing environmental degradation, people across America concluded that the time has come to take matters out of the hands of elected officials. They chose to elevate environmental protection to constitutional status where, they hoped, these values would be beyond the political milieu, and where they would receive the highest protection. Citizens counted on the judiciary to guarantee these environmental values. But state courts have let America down.[18]

Despite the strength with which this view has been stated, this Note argues that it is deceptive. In some states, constitutional provisions *have* played a significant role in enforcing the rights that they ostensibly guarantee. Although most state constitutions' environmental provisions have proven to be largely ineffective, courts in at least four states—Louisiana, Alaska, Pennsylvania, and Florida—have used environmental provisions in their respective constitutions to review state action. Courts in two other states—

15. Butler, *supra* note 11, at 847.

16. Fernandez, *supra* note 11, at 334. Fernandez concludes, however, that the findings against self-execution are correct. *See id.* at 375–87; *see also infra* notes 49–51 and accompanying text.

17. Pollard, *supra* note 11, at 380–81.

18. McLaren, *supra* note 4, at 151–52.

Michigan and Hawaii—have suggested that they might do the same.

A number of the constitutions' environmental protection provisions, including all of those in this successful minority, share some affinity with the ancient common law doctrine of the public trust. The central principle of the public trust doctrine has been summarized as follows:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.[19]

Each of the successful provisions invokes some combination of the concepts undergirding the public trust doctrine: conservation, public access, and trusteeship. Alaska's provision, for example, focuses on conserving natural resources for public use: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[20] The Louisiana constitution provides another example. Its provision refers to the conservation of a broad range of natural resources for the public:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and aesthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.[21]

A third example comes from Hawaii's constitution, which explicitly creates a public trust over all of the state's natural resources:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development

19. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 490 (1970).

For provisions containing some form of the word "trust," see HAW. CONST. art. XI; PA. CONST. art. I, § 27; VA. CONST. art. XI, § 3. For provisions outlining public trust principles, see ALA. CONST. art. VIII; CAL. CONST. art. X, § 2; FLA. CONST. art. II, § 7; LA. CONST. art. IX; MASS. CONST. § 179; MICH. CONST. art. IV, § 52; MONT. CONST. art. IX, § 1; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV; N.C. CONST. art. XIV, § 5; R.I. CONST. art. 1, § 17; TEX. CONST. art. XVI, § 59.

20. ALA. CONST. art. VIII, § 3.

21. LA. CONST. art. IX, § 1.

> and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.[22]

This Note contends that courts in states that have given effect to constitutions' environmental protection provisions have interpreted them as evocations of the public trust. Although the exact mechanism through which the public trust doctrine affects a constitutional provision varies from state to state, the principle behind the public trust doctrine seems to have enabled these state courts to honor their citizens' commitment to the environmental values which they have incorporated in their constitutions.

Part I of this Note provides a brief description of the public trust doctrine and its recent role in American environmental law. Part II addresses the issue of self-executability of constitutions' environmental provisions; that is, whether they have independent legal significance without enabling legislation. Although several prior commentators have noted that courts have almost uniformly held that these provisions are not self-executing,[23] this Note describes four methods by which courts have surmounted this obstacle. Part III addresses another common problem: courts' refusal to interpret constitutions' environmental provisions to affect citizen standing.[24] It describes two ways in which courts have dealt with the relationship of such provisions to standing. Part IV describes methods in which the courts that have surmounted the obstacles of self-execution and standing have used the public trust doctrine to put constitutions' environmental provisions to work. Finally, the Note concludes that the courts in this minority have been truer to the principles that led to the ratification of constitutions' environmental protection provisions in the first place, and notes the potential for courts in other states to do the same.

I. THE PUBLIC TRUST DOCTRINE

The public trust doctrine "is based on the notion that the public holds inviolable rights in certain lands and resources, and

22. HAW. CONST. art. XI, § 1.

23. *See* Fernandez, *supra* note 11, at 365; Pollard, *supra* note 11, at 351.

24. *See* Howard, *supra* note 6, at 224–28; Wyatt-Shaw, *supra* note 11, at 241–43.

that regardless of title ownership, the state retains certain rights in such lands and resources in trust for the public."[25] This conception of public rights has two ancient bases. First, under Roman law "'the air, running water, the sea, and consequently the sea shore' were the property of no man but rather were common to all."[26] Second, early English common law provided that title to tidelands had two components: the King's right of *jus privatum*, which could be alienated, and the *jus publicum* rights of navigation and fishing, which were held by the King in inalienable trust for the public.[27]

The classic American conception of the public trust doctrine is found in *Illinois Central Railroad Co. v. Illinois*,[28] where the Supreme Court invalidated Illinois' grant of title to land under Lake Michigan as a violation of the state's common law public trust obligations.[29] Other early public trust decisions in the United States were mainly confined, like *Illinois Central*, to disputes concerning public access to navigable waters or to the lands beneath them.[30]

In 1970, however, Professor Joseph Sax gave new vitality to the public trust doctrine by suggesting that it could be expanded and used by environmentally concerned citizens as a litigation tool.[31] In his view, the doctrine required courts to review with skepticism any government action that restricted or burdened public access to potentially any natural resource.[32] Since the publication of Sax's initial work on the public trust, state courts have applied the doctrine to require public access to various resources other than navigable water and the lands beneath, including the

25. 2 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 10.05[1] (1995).

26. *Id.* (quoting JUSTINIAN, INST. 2.1.1 (T. Sanders Trans. 1st Am ed. 1876)).

27. *See id.*

28. 146 U.S. 387 (1892).

29. *See id.* at 452–55, 460.

30. *See, e.g.*, City of Milwaukee v. State, 214 N.W. 820 (Wis. 1927) (concerning the transfer of submerged lands to a steel company so that the company could construct a dock and wharf); People v. California Fish Co., 138 P. 79, 88 (1913) (concerning the state's taking of navigable tidelands).

31. *See* Sax, *supra* note 19, at 556–57.

32. *See id.* at 563–65.

dry sand areas of a beach,[33] portage routes near rivers,[34] and wildlife.[35]

Commentators have also jumped on the public trust bandwagon, suggesting that the doctrine might be extended to resources such as wildlife[36] and public lands.[37] Other commentators, however, have been dismayed by the resurgence of the public trust doctrine, criticizing it on grounds that it lacks a coherent doctrinal basis,[38] fails to reflect current environmental concerns,[39] requires a judiciary with a pro-environment bias,[40] and is undemocratic.[41]

Many of the state constitutions' environmental protection provisions were written with the public trust doctrine in mind.[42] By constitutionalizing and expanding the public trust doctrine, states should be able to avoid the criticism that it lacks a doctrinal basis,[43] as the text of the constitutional provision itself will become the basis of the doctrine. The suggestion that its successful enforcement requires a pro-environment judiciary[44] has no more

33. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365–66 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

34. *See* Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1091 (Mont. 1984).

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

36. *See* Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 107–08, 118 (1986).

37. *See* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 316 (1980).

38. *See* Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 398–99 (1991) ("None of the judicial examinations and very little of the recent scholarship on the public trust doctrine have explained why these principles [ordering societal interests in property] arose and what function they have served in the development of legal and social institutions.").

39. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 710–12 (1986) (arguing that the doctrine's traditional promotion of commerce and public access are "at odds with modern environmental conservation and protection laws").

40. *See id.* at 712–13 (suggesting that past cases which used the public trust doctrine to support certain favored developmental activities and the doctrine's vagueness would allow judges to use the public trust doctrine to support decisions that actually harm the environment).

41. *See* James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565, 583 (1986) (concluding that the doctrine is a "tool[] for political losers or for those seeking to avoid the costs of becoming political winners").

42. *See supra* note 19 and accompanying text.

43. *See* Rieser, *supra* note 38, at 398–99.

44. *See* Lazarus, *supra* note 39, at 712–13.

force than a contention that the First Amendment depends on a pro-speech judiciary to give it effect. Finally, the process used to constitutionalize public trust values answers criticisms that the doctrine is undemocratic.[45] On the contrary, incorporating public trust values in a state constitution reflects the state's democratic choice to make a long-term commitment to those values.[46]

In at least a few states, the public trust doctrine has metamorphosed from a common law guarantee of access to a limited resource into a broader, *constitutional* requirement of resource preservation and use. The next section of this Note examines the ways that courts in a few states have avoided the first obstacle to the enforcement of this constitutional requirement, the issue of self-execution.

II. SELF-EXECUTION

In theory, an environmental protection provision in a state constitution has no independent substantive effect unless it is considered self-executing. Whether it was intended to allow judicial review of government action alone or of private action as well, only a self-executing provision can have legal effect independent of any existing environmental statutes.[47] Although previous commentators have been quick to point out the tendency of courts to rule that constitutions' environmental protection provisions are not self-executing,[48] certain courts have in fact avoided the consequences of non-self-execution through several methods that are not mutually exclusive. Some courts have simply held that the environmental protection provision is self-executing; courts in Pennsylvania, Louisiana, and Michigan have taken this approach. Other courts have bypassed the issue by holding that the relevant provision imposes upon the state a mandatory duty of natural resource protection which has already been satisfied by a legislative enactment. Courts in Louisiana and, to a lesser extent, Michigan have taken this approach. Courts have also avoided the issue of self-execution by holding that their state constitutions' provision merely codifies pre-existing public trust common law. Courts in Alaska and Louisiana have used this technique, and the Hawaii courts have hinted at it.

45. *See* Huffman, *supra* note 41, at 583.
46. *See* Rubenfeld, *supra* note 7, at 1143–46.
47. *See* Fernandez, *supra* note 11, at 333.
48. *See supra* note 11 and accompanying text.

Finally, Florida courts have avoided addressing the issue of self-execution, but nevertheless have used the Florida constitution's environmental protection provision to guide decisions anyway.

One recent author, Professor José Fernandez, contends that constitutions' environmental protection provisions should not be treated as self-executing.[49] One problem he identifies is the provisions' vagueness.[50] He also contends that courts are incapable of enforcing directives to the legislature that might result from cases based on constitutions' environmental protection provisions without violating the separation of powers, or that such provisions concern issues that constitute nonjusticiable "political questions" which threaten courts' legitimacy.[51]

Fernandez's position, however, bumps up against the standard modern presumption that constitutional provisions are self-executing.[52] This presumption, rather than the older one against self-execution, gives more respect to citizens' decisions to constitutionalize a value or a principle. Most commentators have correctly argued that this presumption should apply to constitutions' environmental protection provisions for the same reason.[53]

Several state courts have implicitly rejected Fernandez's arguments and bucked the judicial trend against self-execution for constitutions' environmental protection provisions, at least as far as judicial review of government action is concerned. These courts have used the public trust doctrine in varying degrees to bolster their understanding of their constitutions' environmental provisions. Linking provisions with the ancient public trust doctrine has allowed courts in a few of these states to refer to a tradition at least as old as those that Fernandez says give meaningful content to other vague constitutional terms such as "due process" and "freedom of speech."[54] By generally restricting the scope of their review to government acts other than those of the legislature, and

49. *See* Fernandez, *supra* note 11, at 376–84.

50. *See id*. at 376–82.

51. *See id*. at 382–84.

52. *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 199 (1983).

53. *See* Pollard, *supra* note 11, at 380–81; *see also* Butler, *supra* note 11, at 854–60 (discussing same issue but using "political question" terminology). *But cf.* McLaren, *supra* note 4, at 132–37 (arguing against a general presumption of self-execution in the absence of clear language indicating a "public policy" or a "right" to a healthy environment with no reference to the state legislature).

54. *See* Fernandez, *supra* note 11, at 377–80.

by excluding legislative or private citizens' acts from the purview of their decisions, courts in this minority have also refrained from issuing decisions that too closely resemble legislation.

A. *Self-Executing Provisions*

The first technique used by courts to avoid the consequences of non-self-execution is simply to hold that a provision is self-executing. Courts in Pennsylvania, Michigan, and Louisiana have all done this, but only the former two have explained the reasoning behind their decisions. This construction is probably most in line with the intent of the provisions' adopters, since very few constitutions' environmental protection provisions indicate that they will not be self-executing. This interpretation also comports with the "plain meaning rule" typically used in state constitutional construction.[55]

The issue of self-execution has been most fully explored in Pennsylvania. Pennsylvania Constitution Article I, Section 27 was intended by its author to be self-executing.[56] Pennsylvania's courts eventually settled on this position insofar as the provision applies to state action.[57] The provision's potential to encompass review of private acts is still undetermined.[58]

The battle lines for this latter issue were drawn in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,[59] where the Commonwealth sued to enjoin a private company from constructing a 307-foot high observation tower 400 feet away from Gettysburg National Military Park.[60] The state appellate court held that Section 27 was self-executing even when applied to action taken by a private party.[61] It noted that this provision was unique to the state constitution in imposing on the government an affirmative duty to protect the environment, and concluded that this construction made sense in light of the fact that "the despoliation of the environment is an act to be expected, in our private

55. *See* Williams, *supra* note 52, at 196–97.

56. *See* Kury, *supra* note 1, at 124–25.

57. *See infra* notes 76–79 and accompanying text.

58. *See id*.

59. 302 A.2d 886 (Pa. Commw. Ct.), *aff'd*, 311 A.2d 588 (Pa. 1973) [hereinafter *Gettysburg Tower I*].

60. *See id.* at 887.

61. *See id.* at 892.

ownership society, from private persons."[62] The court also rejected the argument that the terms of the provision were too vague to support self-execution, noting that amorphous concepts such as due process and equal protection had been "attacked with gusto" by the courts.[63] Despite this reasoning, the appellate court upheld the lower court's conclusion that the construction of the tower did not violate the public trust in the environment, because the Commonwealth was unable to demonstrate "manifest error" in this conclusion.[64]

The Pennsylvania Supreme Court then affirmed the appellate court's ruling that the construction of the tower could proceed.[65] Yet the opinion of the court (signed by only two justices) held that Section 27 was not self-executing because it expanded rather than limited the powers of government,[66] and because a contrary holding could lead to due process and equal protection violations if individuals were singled out and prosecuted by the state for despoiling the environment.[67] Two other justices concurred in an opinion that did not reach the issue of self-execution,[68] while another concurred in result only.[69] The remaining two justices argued vigorously in dissent that Section 27 was self-executing and that construction of the proposed tower would violate it.[70] They argued that the provision represented an overwhelming public mandate to "install[] the common law public trust doctrine as a constitutional right to environmental protection susceptible to enforcement by an action in equity."[71] They agreed with the Commonwealth Court that the provision's vagueness and the resultant need for judicial interpretation did not prevent it from being self-executing.[72]

62. *Id.*

63. *Id.*

64. *Id.* at 893–95.

65. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 595 (Pa. 1973) [hereinafter *Gettysburg Tower II*].

66. *See id.* at 592. This is a traditional distinction in self-execution law. *See* Fernandez, *supra* note 11, at 341–42.

67. *See Gettysburg Tower II*, 311 A.2d at 593–94.

68. *See id.* at 595–96 (Roberts, J., concurring).

69. *See id.* at 595 (Nix, J., concurring in the result).

70. *See id.* at 596–99 (Jones, J., dissenting).

71. *Id.* at 596 (emphasis omitted).

72. *See id.* at 597.

Later that same year, the Commonwealth Court heard its most significant Section 27 case, *Payne v. Kassab*.[73] Payne and other citizens used Section 27 to challenge the Pennsylvania Department of Transportation's proposed widening of a street in Wilkes-Barre that would have encroached upon a park-like downtown commons area.[74] The court used the Pennsylvania Supreme Court's even split on the issue of self-execution in *Gettysburg Tower* as an affirmance of its position that Section 27 was a self-executing enactment of the public trust.[75] The fact that this case involved a challenge to governmental rather than to private action reduced the magnitude of Section 27's potential intrusion into private citizens' lives and therefore made this ruling less controversial. As in the earlier case, however, the court held that allowing the action to proceed did not violate Section 27.

Payne was affirmed by the Pennsylvania Supreme Court three years later,[76] but that court did not "explore the difficult terrain of whether the amendment is or is not 'self-executing.'"[77] The Supreme Court said that this question might be important if the Commonwealth were to use its trustee powers to seek to prevent the otherwise legal use of private property, but that this issue did not arise when, as in *Payne*, citizens sought to challenge state action.[78] In the latter case, the court said that no implementing legislation was necessary to establish the Commonwealth's duty to conserve and maintain public natural resources for the benefit of all the people, because the provision does so "by its own *ipse dixit*."[79] None of the reported cases since *Gettysburg Tower* contain a challenge by the Commonwealth to a private property owner, so the issue of self-execution in Pennsylvania appears to be settled at least until the state challenges another private landowner.

In summary, Article I, Section 27 of the Pennsylvania Constitution is considered self-executing for the purposes of allowing judicial review of government action. For the purposes of allowing judicial review of private action, Section 27's status is unclear. The

73. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).
74. *See id.* at 88.
75. *See id.* at 94, 97.
76. 361 A.2d 263, 273 (Pa. 1976).
77. *Id.* at 272.
78. *See id.*
79. *Id.*

Commonwealth Court has held that the provision is also self-executing in this regard.[80] The most recent Pennsylvania Supreme Court case on point explicitly refused to address this question.[81]

In *In re Highway US–24*, the Supreme Court of Michigan held that the Michigan Constitution's environmental protection provision, Article 4, Section 52, was self-executing.[82] In that case, the plaintiffs, owners of land the state sought to condemn for road improvement, claimed that the law under which the state sought condemnation was unconstitutional because it did not specifically provide for compliance with the constitution's environmental protection provision.[83] The court analyzed the question of self-execution with its standard three-part test for this issue.[84] First, it examined the common understanding of the language and determined that the provision's requirement that "[t]he legislature *shall* provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction"[85] was normally understood as mandatory.[86] Second, the court examined the purpose of and the circumstances surrounding the adoption of the provision. It found that the purpose of the provision was to impose on the state a mandatory duty of environmental protection.[87] It then also found that while the circumstances surrounding the provision's adoption were ambiguous, this ambiguity was not sufficient to overcome the clear common understanding and purpose of the provision.[88] Finally, the court dismissed the third part of the test, its preference for constitutional constructions over unconstitutional ones, as irrelevant.[89] The court thus concluded that this provision was self-executing.[90]

80. *See Commonwealth v. National Battlefield Tower*, 302 A.2d 886, 892 (Pa. Commw. Ct.), *aff'd*, 311 A.2d 588 (Pa. 1973). The provision reads: "The conservation and development of the natural resources of the state are hearby declared to be of paramount public concern in the interest of the health, safety, and general welfare of the people. The legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment and destruction." MICH. CONST. art. 4, § 52.

81. *See Payne*, 361 A.2d at 272.

82. 220 N.W.2d 416, 426 (Mich. 1974).

83. *See id.* at 419.

84. *See id.* at 425 (citing Traverse City Sch. Dist. v. Attorney Gen., 185 N.W.2d 9 (Mich. 1971)).

85. MICH. CONST. art. 4, § 52 (emphasis added).

86. *See* In re *Highway US–24*, 220 N.W.2d at 425.

87. *See id.* at 425–26.

88. *See id.* at 426.

89. *See id.*

90. *See id.* The court did not address the range of actions this holding could have

Courts in Pennsylvania and Michigan have been the only courts thus far to explain why their constitutions' environmental protection provisions are self-executing. Yet this position seems consistent with the desires of the citizens of their states, who presumably wanted the provisions to have some effect when they approved them.[91]

B. *Provisions Creating a Mandatory But Previously Satisfied Duty*

Courts have sometimes mitigated the controversial nature of a holding that a provision is self-executing by simultaneously holding that their state legislatures have previously satisfied the duties imposed on them by their constitutions' environmental provisions through previously enacted environmental legislation. This technique papers over the issue of self-execution, but it allows the courts to fulfill the expressed wishes of the state citizens without violating the separation of powers by issuing specific directives to the legislature. Courts in Michigan and Louisiana have used this technique.

The Michigan Supreme Court helped insulate its *In re Highway US–24* by holding that a previously enacted, generally applicable statute satisfied the mandatory duty of environmental protection imposed on Michigan by Article 4, Section 52.[92] Section 52, it said, required nothing more. By refusing to require any further action by the legislature, the court avoided even the appearance of violating the separation of powers.

The Louisiana Supreme Court used the same technique in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*.[93] There, the court was asked to review the approval of permits issued to a corporation for the operation of a major hazardous waste facility.[94] It held that Article IX, Section 1 of the state constitution required the state legislature to enact laws establishing the public trust for the "protection, conservation and replenish-

made subject to review because of its simultaneous pronouncement that the legislature had already satisfied its duty through enacting a comprehensive environmental protection statute. *See infra* note 92 and accompanying text.

91. *See supra* notes 5–8 and accompanying text.

92. *See* In re *Highway U.S.–24*, 220 N.W.2d at 426–27.

93. 452 So. 2d 1152 (La. 1984).

94. *See id.* at 1154.

ment"[95] of all natural resources of the state. The holding was tantamount to one that Section 1 is self-executing, but the court did not directly broach the issue of self-execution. Instead, it avoided any possibility of directing legislative action by holding that the Louisiana legislature had already fulfilled its mandate by enacting a comprehensive environmental protection statute.[96]

These two decisions illustrate a second strategy for courts faced with questions of self-execution. By simultaneously determining that a constitutional environmental provision is self-executing and that prior general legislation satisfies the legislative duty imposed by a provision, courts in Louisiana and Michigan have given substantive effect to their constitutions' environmental protection provisions with less danger of violating separation of powers principles.

C. *Provisions Codifying Pre-Existing Common Law*

A third method by which courts can avoid the difficulties inherent in a finding that a constitution's environmental provision is self-executing is to hold that the provision does not create new duties or responsibilities. Instead, a court can hold that the provision merely codifies and expands the reach of the public trust doctrine under common law. This approach uses the pre-existing standards of the doctrine to provide a ready answer to the traditional self-execution challenges of vagueness and separation of powers. The Alaska Supreme Court has relied exclusively on this method. Courts in Louisiana and Pennsylvania[97] have also used this technique. Finally, the Hawaii Supreme Court has suggested that it might avoid self-execution problems in this fashion as well.

The self-executability of Alaska's provision has never been questioned by the courts in that state, but the Alaska Supreme Court has made a de facto decision on self-execution. In *Owsichek v. State Guide Licensing & Control Board*,[98] a professional hunt-

95. *Id*. This duty is discussed at *infra* notes 170–91 and accompanying text.

96. *See Save Ourselves*, 452 So. 2d at 1154 (referring to the Louisiana Environmental Affairs Act, which is now known as the Louisiana Environmental Quality Act and is codified at LA. REV. STAT. ANN. § 30:2001–30:2394 (West 1989)). This approach was affirmed in *In re American Waste & Pollution Control Co.*, 642 So. 2d 1258, 1262 (La. 1994).

97. For a discussion of Pennsylvania's use of this technique, *see supra* notes 70–72 and accompanying text.

98. 763 P.2d 488 (Alaska 1988).

ing guide claimed that a statutory scheme establishing "exclusive guide areas"[99] violated Alaska Constitution Article VIII, Section 3.[100] The court explained that the section incorporated historical, common law principles imposing a public trust duty upon the state.[101] The court attempted to reduce the impact of its potentially controversial decision invalidating the exclusive guide areas created by the legislature by relying upon these "[a]ncient traditions in property rights."[102]

Similarly, the Louisiana Supreme Court used references to common law traditions to bolster its implicit decision in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*[103] that Louisiana's constitutional provision was self-executing. In that opinion, the court referred to the public trust doctrine as "well settled law of this country"[104] and to a provision from a prior state constitution stating that "'[t]he natural resources of the state shall be protected, conserved and replenished.'"[105]

Finally, the Hawaii Supreme Court, although it has never directly ruled on the self-executability of the Hawaii constitution's environmental provisions, has suggested that it might treat them as codifications of the common law public trust. In *Robinson v. Ariyoshi*,[106] the court responded to certified questions from the United States Court of Appeals for the Ninth Circuit concerning water rights under Hawaiian law.[107] Its opinion hinted at the common law codification approach by noting that the "reassertion of dormant public interests in the diversion and application of Hawaii's waters" was required by Hawaii Constitution Article XI, Sections 1 and 7.[108] While not determinative of the case, this language certainly evokes the public trust doctrine.[109]

99. *Id.* at 489.
100. *See id.* at 491.
101. *See id.* at 495 (citing prior decisions).
102. *Id.* at 493.
103. 452 So. 2d 1152 (La. 1984).
104. *Id.* at 1154.
105. *Id.* at 1154 n.1 (quoting Article VI, § 1 of the 1921 Louisiana Constitution).
106. 658 P.2d 287 (Haw. 1982).
107. *See id.* at 292.
108. *Id.* at 311.
109. Further support for the position that Hawaii's provisions are self-executing comes from another section of the Hawaii Constitution, which declares that its provisions "shall be self-executing to the fullest extent that their respective natures permit." HAW. CONST. art. XVI, § 16.

Decisions from Alaska, Louisiana, and Hawaii thus illustrate a third method for reducing resistance to a holding that a constitution's environmental protection provision is self-executing. Holding that such a provision merely codifies and expands the scope of a duty previously imposed on the state legitimizes a finding that a provision is self-executing.

D. *A Provision that Informs Decisions Without a Ruling on Its Self-Executability*

A final technique by which courts can avoid the theoretical problems of self-execution is to avoid raising the issue of self-execution at all, but then to refer to a constitution's environmental protection provision for guidance in making decisions. Florida courts appear to have used this tactic.

In the first reported case interpreting the Florida Constitution's environmental provision, *Seadade Industries, Inc. v. Florida Power & Light Co.*,[110] the state Supreme Court held that Article II, Section 7's expression of the public interest in natural resources made the protection of those resources an appropriate matter for judicial consideration in a condemnation case.[111] Subsequent cases have continued to look to Section 7 for guidance. A few years later, the court held that this provision allowed the legislature to exempt the Florida Department of Natural Resources from actions otherwise required by the constitutional provision establishing the state Game and Fresh Water Fish Commission.[112]

No Florida court has raised the possibility that the provisions of Section 7 might not be self-executing. This strategy has therefore allowed the exact contours of Section 7's application to government and private action to remain undefined, but the provision clearly has had some force in judicial decisions.

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110. 245 So. 2d 209 (Fla. 1971). When the cases discussed in this Note were decided, this provision read "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." FLA. CONST. art 2, § 7(a).

A recent amendment to Section 7 has added a provision making those who cause water pollution in the Everglades primarily responsible for the costs of clean-up. *See* FLA. CONST. art. 2, § 7(b).

111. *See Seadade Indus.*, 245 So. 2d at 214.

112. *See* Askew v. Game & Fresh Water Fish Comm'n, 336 So. 2d 556, 560 (Fla. 1976). For other cases using Section 7 as authority, see *infra* notes 214–44 and accompanying text.

The discussion above demonstrates that courts in some states have devised several strategies for avoiding traditional difficulties concerning the self-executability of constitutions' environmental provisions. Courts in other states might accept commentators' challenge to apply the standard presumption of self-executability to these provisions.[113] If not, the other strategies described above could allow state courts to apply the principles embedded in environmental provisions without raising concerns about the bounds of judicial power. Of these strategies, reference to the well-established common law tradition of public trust law is probably the most promising for state courts whose constitutional provisions use language evocative of the public trust.

III. STANDING

A determination that a constitution's environmental protection provision is self-executing does not automatically allow state citizens to use the provision in court. After determining that a provision is self-executing, courts often must decide whether these provisions grant or affect citizen standing. Standing rules have traditionally been an obstacle to environmentally concerned plaintiffs seeking access to the courts.[114] In the 1970s, the Supreme Court liberalized federal standing requirements for pro-environment plaintiffs, granting standing to plaintiffs with claims based on demonstrable current or future aesthetic and environmental injuries.[115] More recently, however, the Court has reverted to a more traditional and restrictive standing analysis, requiring an imminent injury-in-fact, a causal connection between the injury and the conduct complained of, and an available remedy that will redress the injury.[116] This standard is often difficult for plaintiffs in environmental litigation to meet.[117]

Standing rules in state courts often create similar problems. A common purpose of the state constitutions' environmental provi-

113. *See supra* notes 52–53 and accompanying text.

114. *See* Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 459–60 (1972).

115. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688–90 (1973); Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

116. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

117. *See* Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-In-Fact After* Lujan v. Defenders of Wildlife, 12 U.C.L.A.J. ENVT'L L. & POLICY 345, 346 (1994).

sions, however, was to grant citizens standing in environmental suits.[118] Courts in some states have appeared oblivious to this purpose.[119] In states where constitutions' environmental protection provisions have had substantive effect, courts have paid heed to this purpose. In Pennsylvania, Louisiana, and Florida, courts have used their constitutions' environmental protection provisions as authority for a more liberal interpretation of standing requirements. Courts in Michigan, Alaska, and Hawaii have suggested that they might use their constitutions' environmental protection provisions in the same way. In all of these states, citizens have been allowed to challenge particular private and governmental actions as violations of their respective constitutions.[120]

A. *Broad Construction of Traditional Requirements*

A broad interpretation of standing requirements is the most favorable for would-be citizen plaintiffs in environmental actions. Courts in Pennsylvania have used their constitution's environmental protection provisions as authority to read common law standing requirements liberally, while courts in Louisiana and Florida have used their constitutions' provisions to support broad readings of statutes governing standing. The effect in all three states has been to increase access to the courts for citizens with environmental complaints.

The state with the most developed law in this area is again Pennsylvania.[121] The Pennsylvania Supreme Court has refused to dispense with Pennsylvania's traditional common law requirements for standing in Section 27 cases,[122] but it has construed those re-

118. *See, e.g.*, Kury, *supra* note 1, at 124; McLaren, *supra* note 4, at 141–42.

119. For an example of this trend, see *Scattering Fork Drainage Dist. v. Ogilvie*, 311 N.E.2d 203 (Ill. App. Ct. 1974), where the court denied standing to a plaintiff who claimed that a reservoir construction project would deny him of his general property right to and interest in a healthful environment. *Id.* at 210. The court reached this conclusion despite the fact that the Illinois Constitution grants each person a "right to a healthful environment" enforceable "against any party, governmental or private." IL. CONST. art. XI, § 2.

120. None of the reported cases have gone so far as to allow standing for citizens challenging the validity of a statute itself or the legislature's failure to act in accordance with its mandatory duty. Citizens may not be bringing such challenges, or lower courts may be summarily dismissing them.

121. Pennsylvania's liberal construction of standing requirements and its position on self-execution make it appear quite progressive, but its courts' substantive interpretation of its provision have robbed these positions of their potential to benefit the public. *See infra* notes 192–207 and accompanying text.

122. *See* Franklin Township v. Commonwealth, Dept. of Envtl. Resources, 452 A.2d

quirements quite liberally. The court first dealt with this issue in *Franklin Township v. Commonwealth, Department of Environmental Resources.*[123] There, it held that a party bringing a Section 27 challenge must "(a) have a substantial interest in the subject-matter of the litigation; (b) the interest must be direct; and (c) the interest must be immediate and not a remote consequence."[124] The court went on to find that a township and a county in which a toxic waste disposal and processing facility had received a permit to locate had standing under Section 27 to challenge the issuance of the permit.[125] It suggested that the protection of the environment would usually serve as the "substantial" interest required for standing because "[a]esthetic and environmental well-being are important aspects of the quality of life in our society."[126] The same considerations also supported the required finding that plaintiffs' interests be "direct."[127] Finally, the court held that the local governments' interests were not "remote," noting that "[w]e need not wait until an ecological emergency arises in order to find that the interest of the municipality and county faced with such a disaster is immediate."[128] Section 27, it said, establishes a local government's duty to protect its citizens' quality of life.[129]

Later Pennsylvania cases have followed this liberal approach. Although an opinion by the state appellate court held that a government agency did not have standing to challenge the action of another agency under this provision, it noted that standing requirements under Section 27 are "normally to be broadly construed, especially where a potentially affected locality or private citizen, or specifically empowered watchdog agency, seeks review of an environmentally sensitive [Department of Environmental Resources] decision."[130]

Louisiana courts have used a similar approach in interpreting standing in cases brought under their state constitution's environ-

718, 719 (Pa. 1982).

123. *Id.*

124. *Id.*

125. *See id.* at 722–23.

126. *Id.* at 720.

127. *Id.* at 721.

128. *Id.* at 722.

129. *See id.*

130. Commonwealth, Pa. Game Comm'n v. Commonwealth, Dept. of Envtl. Resources, 509 A.2d 877, 883–84 (Pa. Commw. Ct. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989).

mental provision. There, standing for environmentally concerned plaintiffs is usually not governed directly by the constitution's provision, but by a statute which allows any person "aggrieved" by a final decision or order from the secretary of the Department of Environmental Quality (DEQ) to appeal to a court.[131] Ever since the *Save Ourselves* court held that Article IX, Section 1 of Louisiana's constitution imposes a public trust duty upon the state,[132] Louisiana courts have liberally interpreted this statute's requirement that plaintiffs be "aggrieved." The courts have never directly explained the use of this broad interpretation, but a subsequent Louisiana Supreme Court opinion provides several clues.

In *In re American Waste & Pollution Control Co.*,[133] the court interpreted the statutory language "final decision or order" so as to allow citizen groups to successfully petition for review and remand of an order granting a permit for the construction of a solid waste facility.[134] The decision noted that *Save Ourselves* required that the public's environmental rights receive "active and affirmative protection" from DEQ.[135] It went on to discuss Section 30:2024(C), the statute governing citizen standing, as a part of the "sweeping legislation"[136] through which the legislature had satisfied its "constitutional environmental mandate."[137] The court then found that the statute's authorization of public participation in the review process achieves two goals consistent with the constitutional provision's purpose: receiving public input regarding substantive environmental matters and avoiding abuses in the administrative process.[138] Although the court did not explicitly say so, it seems to have concluded that a broad interpretation of "aggrieved" was required by Section 1 of the constitution, and that the *Save Ourselves* court had contemplated a broad interpretation

131. *See* LA. REV. STAT. ANN. § 30:2024 (C) (West Supp. 1996). The Louisiana legislature amended this statute in 1995, but the amendment has since been ruled unconstitutional. *See In re* E.I. du Pont de Nemours & Co., 674 So.2d 1007, 1009 (La. Ct. App. 1996) (en banc) (citing *In re* Rubicon, Inc., 670 So.2d 475 (La. Ct. App. 1996) (en banc)). The quoted language therefore remains in effect. *See id.*

132. *See* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984).

133. 642 So. 2d 1258 (La. 1994).

134. *See id.* at 1263–66.

135. *See id.* at 1262 (citing *Save Ourselves*, 452 So.2d at 1157).

136. *Id.*

137. *Id.*

138. *See id.* at 1263.

when it held that the legislature had satisfied its duty through statutory enactment.

In other cases, lower Louisiana courts have been faithful to this broad interpretation. In one recent case, a number of organizations representing citizens throughout the state challenged an exemption allowing a company to continue disposing of hazardous waste into injection wells.[139] The court held that all of these groups were "aggrieved" by the threat the injection wells posed to aquifers used by some members of the group for drinking water and thus had standing.[140] In another case, a court held that citizen groups were "aggrieved" by what they claimed was an insufficient DEQ penalty assessment against a violator of air quality regulations.[141] The court found that the group members' purpose of enjoying the nation's outdoors had been diminished by chemical releases, that the releases "affected and endangered" a parish and its citizens, and that members of the groups "suffered injury in that their physical well-being and the aesthetics of their domiciles were diminished."[142] In a third case, civic and environmental groups were considered "aggrieved" by the reopening of a landfill in New Orleans because their members "live[d], work[ed], and recreate[d]" near the landfill and because the members would suffer additional exposure to pollution, noise, odor, and traffic.[143]

Article II, Section 7 of the Florida Constitution has affected standing in much the same way. A few years after Section 7 was added to the Florida Constitution, the legislature enacted the Environmental Protection Act ("Florida EPA").[144] A portion of this act, Section 403.412(2)(a), allows state citizens to sue to compel governmental agencies to perform their environmental protection duties and to enjoin the violation of environmental laws and regulations. In *Florida Wildlife Federation v. State Department of Envi-*

139. *See In re* E.I. du Pont de Nemours & Co., 674 So.2d 1007, 1009 (La. Ct. App. 1996).

140. *See id.* at 1009–10.

141. *See In re* BASF Corp., Chem. Div., 533 So. 2d 971, 974 (La. Ct. App. 1988).

142. *Id.* at 973–74.

143. *In re* Recovery I, Inc., 635 So. 2d 690, 694 (La. Ct. App. 1994). *See also* Calcasieu League for Envt'l Action Now v. Thompson, 661 So.2d 143, 148 (La. Ct. App. 1995) (holding that an environmental group was "aggrieved" by a permit modification that expanded only the "potential sources" of hazardous waste that could be disposed of at a processing facility).

144. FLA. STAT. § 403.412 (West 1993).

ronmental Regulation,[145] the Florida Supreme Court held that Section 403.412(2)(a) created a new cause of action and "ensures that the minimum requirements of standing—injury and interest in redress—[are] met."[146] Beginning with a finding that the statute represented a legislative attempt to implement the policy of conservation expressed in Section 7,[147] the court went on to hold that Section 403.412(2)(a) abrogated nuisance law's "special injury rule," which required that an individual could not maintain a suit to enjoin a nuisance without an injury different in kind and degree from that suffered by the general public, for the purposes of suits brought under the Florida EPA.[148] In other words, Section 7 undergirds the ability of citizens concerned about the environment to sue on that basis alone, without having to prove particularized injury to themselves.

Section 403.412(2)(a) has since been interpreted to accord, at a minimum, a statutory right to all Florida citizens to enjoin either "patent violation" of environmental protection laws or "such palpable abuse of authority which may be said to be commensurate with illegality."[149] Allegations presenting a factual issue concerning whether a governmental action was "arbitrary and capricious" allow a suit to proceed on the latter theory.[150] Section 403.412 (2)(a) has also provided standing to citizens seeking to require a state water management district to establish and maintain minimum water flows as required by statute.[151]

The cases from Pennsylvania, Louisiana, and Florida illustrate one potential result of the interaction between constitutions' environmental protection provisions and standing rules. Courts in both states have used the provisions to support liberal readings of standing requirements and thus have allowed citizens to enforce the rights created by their constitutions' environmental provisions.

145. 390 So.2d 64 (Fla. 1980).

146. *Id.* at 66.

147. *See id.*

148. *See id.* at 67.

149. *See* Friends of the Everglades, Inc. v. Board of Cty. Comm'ners of Monroe Cty., 456 So.2d 904, 914 (Fla. Ct. App. 1984), *rev. den. sub nom* Upper Keys Citizens Ass'n v. Board of Cty. Comm'ners of Monroe Cty., 462 So.2d 1108 (Fla. 1985).

150. *Id.* at 915.

151. *See* Concerned Citizens of Putnam Cty. for Responsive Gov't, Inc. v. St. Johns River Water Mgmt. Dist., 622 So.2d 520, 521–22 (Fla. Ct. App. 1993).

B. *Suggestions of Liberal Standing Requirements*

Courts in several other states that have constitutions with environmental protection provisions have given effect to these provisions without explicitly ruling on standing. If, however, litigants using these provisions faced challenges based on their lack of standing, various sources, including judicial opinions and legislative history, suggest that courts might adopt broad readings of their requirements as Pennsylvania and Louisiana have done. Suggestions of broad readings linked to constitutions' environmental protection provisions are present in Michigan, Alaska, and Hawaii.

The Michigan Supreme Court recently gave a broad reading to a court rule granting standing in *House Speaker v. Governor*,[152] where one aspect of the plaintiffs' challenge was based on that state constitution's environmental protection provision, Article 4, Section 52.[153] The court rule allows a "domestic nonprofit corporation organized for civic, protective, or improvement purposes to bring an action to prevent the illegal expenditure of state funds."[154] Two environmental groups challenged the governor's transfer of power and function from the legislatively-created Department of Natural Resources (DNR) to a new, gubernatorially-created DNR on the grounds that Section 52 vested authority to protect the state resources solely in the legislature.[155] Assuming that the governor had acted without authority, the court granted standing on the tenuous basis that "plaintiffs can be said to have brought this lawsuit to prevent the expenditure of state funds by a group having no lawful authority to make such expenditures."[156] The court did not refer to Section 52 in this portion of its opinion, so the provision's exact effect on standing remains unclear.

In Michigan, statutory law codifying the public trust in natural resources contains provisions which explicitly grant standing to citizens who bring suit for acts that might threaten the environment.[157] These provisions currently render moot the question of Article 4, Section 52's effect on standing. If these statutes were repealed, however, Article 4, Section 52 would probably be inter-

152. 506 N.W.2d 190 (Mich. 1993).
153. *See id.* at 199, 202.
154. *Id.* at 199.
155. *See id.* at 195.
156. *Id.* at 199.
157. *See* MICH. COMP. LAWS ANN. §§ 324.1701, 324.30110 (West Supp. 1996).

preted to broaden traditional standing requirements. *House Speaker* demonstrates the Michigan Supreme Court's willingness to read standing requirements liberally. The self-executing nature of Section 52 and the similarity of its language to provisions in the Pennsylvania and Louisiana constitutions that have liberal standing requirements suggest that Michigan courts could also use decisions from those states as persuasive authority for a holding that Section 52 liberalizes standing requirements.

The Alaska Supreme Court's decision in *Owsichek v. State Guide Licensing & Control Board*[158] provides a similarly inconclusive but suggestive holding concerning citizen standing under the environmental provision in that state's constitution. The plaintiff in *Owsichek* was a hunting guide who challenged statutorily-established "[r]estricted guide areas," claiming that the establishment of those areas violated Article VIII, Section 3 of the Alaska Constitution.[159] The court noted in dicta that Owsichek had standing under this section, relying on the fact that his use of wildlife as a professional guide was "sufficiently direct" to place him within Section 3's protection.[160] The similarity of this language to the United States Supreme Court's references to "concrete and particularized" and "actual or imminent" injuries suggests that Section 3 might help plaintiffs satisfy the "injury" component of standing.[161] Standing has never been denied in a reported case construing Section 3, but *Owsichek* is the only case in which Section 3 provided the sole basis under which a plaintiff sued.

Some authority suggests that Article XI, Section 9 of the Hawaii Constitution might also expand citizen standing, but Hawaii's own courts have never addressed the issue. The Ninth Circuit Court of Appeals, in dicta, noted that the provision's legislative history "suggests the legislature was attempting to remove barriers to standing to sue."[162] Another commentator has also noted that Article XI's legislative history suggests that Section 9 was intended to give standing to private plaintiffs.[163]

158. 763 P.2d 488 (Alaska 1988).

159. *Id.* at 490–91.

160. *Id.* at 491 n.9. The court based its opinion on Owsichek's standing to obtain declaratory relief from the statute he challenged. *See id.*

161. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

162. *Id.*

163. *See* McLaren, *supra* note 4, at 141–42 (citing S.C. REP. NO. 77, PROCEEDINGS OF

The exact effect of constitutions' environmental protection provisions on standing has not been explored in all of those states in which the provisions have had some substantive effect. The available evidence suggests that at least the provisions in the constitutions of Michigan, Alaska, and Hawaii could support a broad reading of traditional standing requirements.

In summary, some of the state courts that use their constitutions' environmental provisions as if they were self-executing, such as courts in Pennsylvania and Louisiana, have also used these provisions to support a liberal interpretation of traditional standing requirements. Cases from Florida illustrate how a constitution's environmental protection provision can affect standing even if it is not self-executing. Either of these strategies might work well for other courts that have until now ducked the standing issue or denied standing to plaintiffs suing under a constitution's environmental protection provision.

IV. JUDICIAL INTERPRETATION OF CONSTITUTIONS' ENVIRONMENTAL PROVISIONS: NEW APPROACHES TO THE PUBLIC TRUST

One or both of the hurdles of self-execution and standing have barred some courts from reaching the merits of citizens' claims brought under state constitutions' environmental provisions. Only after finding ways over or around these hurdles may a court use its state constitution's environmental provision as a substantive guideline when deciding a case. The orthodox opinion is that state courts have not reached this stage,[164] but cases from the states discussed above contradict this notion. In fact, state courts have used their constitutions' environmental protection provisions as substantive law in three ways.

The first use transforms the traditional conception of the public trust, in which courts take a hard look at the reallocation of public resources to private parties,[165] into a requirement that state actions demonstrably benefit the public after environmental costs are considered. The Louisiana Supreme Court uses this approach by requiring the state to show that actions potentially

THE CONSTITUTIONAL CONVENTION OF HAWAII, JOURNAL AND DEBATES (1978)).

164. *See supra* notes 15–18 and accompanying text.

165. *See supra* note 19 and accompanying text.

harmful to the environment pass a cost-benefit analysis and that they have the least possible environmental impact.[166] The Pennsylvania courts purport to use this same kind of calculus, but a twenty-year interpretive history shows that this assertion is hollow.[167] Although the language of the provisions in Hawaii's and Michigan's constitutions suggests that their courts might use the approach that Louisiana courts have used, there is no existing caselaw on this issue.

The second use of constitutions' environmental protection provisions is as a solid basis for expanding the traditional public trust doctrine to resources other than water. Alaska's courts have used their state's provision in this fashion, citing it as authority for protecting public access to a variety of natural resources.[168]

The third use of constitutions' environmental protection provisions is as a point of judicial reference for courts that have not yet ruled on whether a state constitution's environmental provision is self-executing. This use allows courts to refer to a constitution's environmental protection provision and to the larger body of public trust law as persuasive authority. Courts in Florida have done this repeatedly.[169] This technique robs a provision of some of its power, but its conservative nature might make it more appealing to courts that have previously refrained from substantive use of a constitution's environmental protection provisions.

A. *Transformation of the Public Trust into a Cost-Benefit Analysis*

In states where constitutions' environmental protection provisions have had the most effect, courts have interpreted these provisions in a manner that transforms the traditional public trust doctrine into a ban on state actions that do not pass a cost-benefit test. Louisiana is the only state in which this transformation has

166. *See infra* notes 170–91 and accompanying text.

167. *See infra* notes 192–207 and accompanying text.

168. *See infra* notes 214–244 and accompanying text. Michigan courts might prefer this use of their provision over the first, since it would better comport with the state's historical use of the public trust doctrine. *See, e.g.*, Obrecht v. National Gypsum Co., 105 N.W.2d 143, 151 (Mich. 1960) (refusing to grant the defendant company the right to construct a loading dock on Lake Huron because of a concern that the project would interfere with the "general public enjoyment" of the lake through fishing and boating); Nedtweg v. Wallace, 208 N.W. 51, 56–57 (Mich. 1926), *adhered to*, 211 N.W. 647 (Mich. 1927) (allowing the state to lease restricted lake bottom lands because the lease would not interfere with the public's use of the lands for hunting, fishing, or boating).

169. *See infra* notes 245–56 and accompanying text.

been effective. Pennsylvania courts have proposed this use of their state's provision but have failed to act on their proposal. Case law on provisions in Hawaii and Michigan is sparse, but the provisions in those states would lend themselves to Louisiana's approach as well.

The original Louisiana case interpreting that state constitution's environmental provision, *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,[170] explained that Article IX, Section 1 is a "rule of reasonableness."[171] Environmental protection is not required to be an exclusive goal of the state, but "environmental costs and benefits must be given full and careful consideration along with economic, social and other factors" whenever a state agency or official approves a proposed action affecting the environment.[172]

The *Save Ourselves* court required the state to implement this standard by addressing the following five "IT" questions:[173]

1. Have the potential and real adverse environmental effects of the activity been avoided to the maximum extent possible?
2. Does a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the activity demonstrate that the latter outweigh the former?
3. Are there alternative projects which would offer more protection to the environment than the proposed activity without unduly curtailing non-environmental benefits?
4. Are there any alternative sites which would offer more protection to the environment than the proposed activity site without unduly curtailing non-environmental benefits?
5. Are there mitigating measures which would offer more protection to the environment than the activity proposed without unduly curtailing non-environmental benefits?[174]

170. 452 So. 2d 1152 (La. 1984).

171. *Id.* at 1157.

172. *Id.*

173. The questions are named after the party seeking approval for a hazardous waste facility, IT Corporation. *See id.* at 1154.

174. The IT questions did not appear as a set in the original *Save Ourselves* opinion, *see id.*, but they have been consolidated by later cases. This formulation is a quote from *In re Dravo Basic Materials Co.*, 604 So. 2d 630, 632 n.1 (La. Ct. App. 1992). More recent cases have collapsed the final three questions into one. *See, e.g., In re* Rubicon, Inc., 670 So.2d 475, 483 (La. Ct. App. 1996) (asking whether there are "alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the activity proposed without unduly curtailing non-environmental benefits").

The supreme court remanded the case to the administrative agency for further findings.[175] The court explained that answers to these questions do not require particular substantive results. Rather, Section 1 "leaves room for a responsible exercise of discretion" by the state.[176]

The cost-benefit analysis described by *Save Ourselves* has subsequently been used repeatedly to evaluate state actions challenged under Article IX, Section 1. In *In re Dravo Basic Materials Co.*,[177] for example, plaintiffs challenged the state Department of Environmental Quality's (DEQ) denial of a water discharge permit for shell dredging operations in Lake Pontchartrain.[178] The reviewing court upheld the denial on the basis that the social and economic benefits of allowing the dredging did not exceed the potential environmental costs of allowance.[179] The court explained that DEQ's inquiry when issuing water discharge permits should include not just an examination of the discharge itself, but an examination of "the entire activity which results in the discharge [and] the effect of the discharge on the environment in general."[180]

In *In re Recovery I, Inc.*,[181] the IT questions ensured that a New Orleans landfill was reopened only after DEQ demonstrated that adverse environmental impacts were avoided to the maximum extent possible.[182] In fact, the court noted a "symbiotic relationship" between the environment and the effect on the economy of

175. *See Save Ourselves*, 452 So. 2d at 1161. Later reported cases demonstrate that the first two IT questions are commonly used in tandem. *See infra* note 186 and accompanying text.

176. *Save Ourselves*, 452 So. 2d at 1157. The *Save Ourselves* court repeatedly cites as authority for its holding the landmark decision concerning the National Environmental Protection Act (NEPA), *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). *See Save Ourselves*, 452 So. 2d at 1157, 1159. But the *Save Ourselves* test has a substantive power not shared by NEPA. The former allows state actions to be permanently forbidden on the basis of environmental considerations, while the latter requires only that the government consider the environmental impact of its actions.

177. 604 So. 2d 630 (La. Ct. App. 1992).

178. *See id.* at 632.

179. *See id.* at 636.

180. *Id.* at 635. The court allowed DEQ to consider estimated environmental costs of continued shell dredging, noting that "[h]arm to the environment cannot always be quantified as easily as the economic benefits derived from taxes and salaries." *Id.* at 636.

181. 635 So. 2d 690 (La. Ct. App.), *cert. denied*, 639 So. 2d 1169 (La. 1994).

182. *See id.* at 700.

the reopening of the landfill, because the project would provide New Orleans with an additional waste site while simultaneously generating the funds to eventually close the facility in an environmentally sound manner.[183]

In another Louisiana case, *In re American Waste & Pollution Control Co.*,[184] the court concluded that Article IX, Section 1 allowed citizens' groups to successfully petition for review and remand of an order granting a permit for the construction of a solid waste facility.[185] The court remanded the case because it could not determine from DEQ's initial conclusory order whether it had balanced the benefits of the facility against the risks or whether it had determined that adverse environmental impacts had been minimized.[186]

The power of the IT questions is perhaps best illustrated by *In re Supplemental Fuels, Inc.*[187] In that case, an appellate court upheld DEQ's denial of an operating permit for a hazardous waste treatment facility on the sole ground that the permit application had failed to address IT question four, concerning the existence of alternative sites.[188] In reaching its decision, the court reaffirmed DEQ's "constitutional mandate to determine that the adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare."[189]

These cases all illustrate how the Louisiana courts have fashioned a meaningful cost-benefit standard from out of the public trust provision in their state's constitution.[190] Cost-benefit analysis is open to criticisms of vagueness and unpredictability, as are all balancing tests, but it is a technique with which courts are familiar.[191] By fashioning this standard, Louisiana courts have helped

183. *See id.*

184. 642 So. 2d 1258 (La. 1994).

185. *See id.* at 1262, 1266.

186. *See id.*

187. 656 So.2d 29 (La. Ct. App. 1995).

188. *See id.* at 38.

189. *Id.*

190. For other examples of this provision at work, see *In re* E.I. du Pont Nemours & Co., 674 So.2d 1007 (La. Ct. App. 1996) (en banc); *In re* Rubicon, Inc., 670 So.2d 475 (La. Ct. App. 1996) (en banc); *In re* Browning-Ferris Indus. Petit Bois Landfill, 657 So.2d 633 (La. Ct. App. 1995).

191. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 853 (1990) (using a cost-benefit test to analyze a Sixth Amendment confrontation clause issue); New York v. Quarles, 467 U.S. 649, 657–58 (1984) (using cost-benefit analysis to justify a "public safety" exception to the

give effect to the values expressed in the Louisiana Constitution's environmental provision.

The Pennsylvania Constitution's environmental provision is textually similar to that used in Louisiana, but its application in practice has been vastly different. According to the Commonwealth Court in *Payne v. Kassab*,[192] "Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania."[193] The result, the court claimed, would be "controlled development" instead of "no development."[194]

Payne accompanied this rhetoric with a three-pronged test to ensure that judgments about controlled development in Section 27 cases would be "realistic and not merely legalistic."[195] The test requires that a court answer three questions when faced with a challenge to state action under Section 27:

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?[196]

This test was cited approvingly by the Pennsylvania Supreme Court three years later in a case in which the court examined the same factors.[197]

Questions 2 and 3 of the *Payne* test are weaker versions of Louisiana's IT Questions 1 and 2.[198] *Payne*'s Question 2 requires a "reasonable effort" to minimize adverse environmental effects

exclusionary rule).

192. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd* 361 A.2d 263 (Pa. 1976).

193. *Id.* at 94.

194. *Id.*

195. *Id.*

196. *Id.* The street-widening project at issue in *Payne* was allowed to go forward because the court answered the first two questions affirmatively and the final question negatively. *See id.* at 94–96.

197. *See* Payne v. Kassab, 361 A.2d 263, 273, 273 n.23 (Pa. 1976).

198. *See supra* note 169 and accompanying text.

rather than IT Question 1's requirement that "potential and real adverse environmental effects . . . be[] avoided to the maximum extent possible."[199] Likewise, *Payne*'s Question 3 undercuts the unweighted cost-benefit analysis required by IT's Question 2 (whether the environmental impact costs "outweigh" the social and economic benefits of the activity) by allowing actions to occur unless the environmental harm "clearly outweighs" their benefits.[200] In practice, these differences have combined with judicial interpretations of the *Payne* test to completely rob it of power: the *Payne* test has never been used to overturn a state action.

The first prong of the *Payne* test, which asks whether the challenged act complied with all relevant statutes and regulations, would appear to be superfluous when viewed next to the other two prongs; it would be odd to hold that a self-executing constitutional provision took effect only when a statute or regulation had been violated.[201] In a subsequent case, however, the state appellate court reached exactly this conclusion. *Snelling v. Department of Transportation* held that Article I, Section 27 "does not require consideration of factors beyond those which, by statute, must be considered in evaluating projects which are potentially harmful to the environment."[202] This holding alone eviscerates *Payne* by denying that a violation of Section 27 can occur unless the state has violated a statute.

Other prongs of the *Payne* test have fared no better. The second prong imposes on the state a duty to consider and mitigate the environmental impacts of its actions, but subsequent decisions have defined this duty so restrictively that this prong adds virtually nothing to a court's analysis. Pennsylvania courts have repeatedly used *Snelling's* reasoning to hold that Section 27 does not require government agencies to consider factors beyond those statutorily required when considering actions potentially harmful to the environment.[203] Also, while the duties of trusteeship are shared among the branches of the state government, Section 27 does not

199. *See supra* note 174 and accompanying text.

200. *See id*.

201. Later cases addressing standing, however, have not referred to this prong of the test. *See supra* notes 122–29 and accompanying text.

202. 366 A.2d 1298, 1305 (Pa. Commw. Ct. 1976).

203. *See, e.g.*, Borough of Moosic v. Pennsylvania Pub. Util. Comm'n, 429 A.2d 1237, 1240 (Pa. Commw. Ct. 1981); Community College of Delaware County v. Fox, 342 A.2d 468, 480–82 (Pa. Commw. Ct. 1975).

give the governor the power to disturb the operation of laws passed by the legislature which are otherwise in accordance with the state constitution.[204] In short, the second prong of the *Payne* test boils down to the same question posed by the first prong: has the challenged governmental entity violated a law?

The third prong of the *Payne* test should do the real substantive work. On its face, it would allow a judicial invalidation of a government action even if all relevant statutes had been complied with and environmental impact had been reduced to a minimum, provided that the environmental harm still clearly outweighed the benefits of the action. Despite this theoretical power, in Section 27's twenty-five year history, not a single one of the over thirty reported decisions interpreting Section 27 has ruled that the environmental harm which would result from the challenged decision or action clearly outweighed the benefits to be derived therefrom.[205]

By effectively rejecting any real review under the *Payne* test, the Pennsylvania courts have undermined the intent of the Pennsylvanians who adopted the state constitution's environmental protection provision. The provision's author, Franklin Kury, argues that the *Payne* test has served a useful function as a foundation for a series of state environmental protection statutes and administrative agency decisions,[206] but he acknowledges the "consistent reluctance" of courts to enforce the amendment.[207] Despite the facial resemblance of the constitutional provisions and the cost-benefit tests extracted from those provisions in Louisiana and Pennsylvania, Louisiana's standard has served the apparent purposes of the state citizens in adopting a constitutional provision much better than has Pennsylvania's.

The language of the environmental provisions in the constitutions of Hawaii and Michigan is quite similar to the language of Louisiana's provision and might therefore support a similar inter-

204. *See* National Solid Wastes Mgmt. Ass'n v. Casey, 600 A.2d 260, 265 (Pa. Commw. Ct. 1991), *aff'd*, 619 A.2d 1063 (Pa. 1993).

205. *See, e.g.*, Szarko v. Department of Envt'l Resources, 668 A.2d 1232, 1239–40 (Pa. Commw. Ct. 1995), *app. den.*, 683 A.2d 885 (Pa. 1996) (dismissing landowner's claim that the issuance of various permits for a landfill violated Article I, Section 27); *Borough of Moosic*, 429 A.2d at 1239–40 (holding that a public utility commission's transfer of property to a private party without an inquiry into the environmental impact of the grantee's proposed use of the land did not violate Article I, Section 27).

206. *See* Kury, *supra* note 1, at 130–41.

207. Kury, *supra* note 1, at 129.

pretation.[208] Hawaii courts have not dealt with their state constitution's environmental provisions enough to derive a standard from them, although the Hawaii Supreme Court has hinted that Article XI contains some teeth. In one case, the court faced a request for an injunction preventing the Honolulu Board of Water Supply's diversion of a stream flow that was damaging the plaintiff's crops.[209] Although Article IX was not dispositive in that case, the court cited Section 1 of the Article as proof that the public may have an interest in a free-flowing stream for its own sake.[210] Later in the same year, the court cited Article XI, Sections 1 and 7 in support of a holding that:

> The reassertion of dormant public interests in the diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of the public's interests in the utilization of flow of those waters.[211]

The court also suggested that the parameters of this public interest should be developed on a case-by-case basis.[212] Because Article XI creates a public trust for Hawaii's natural resources much like that created by the Louisiana constitution, Hawaii courts could refer to Louisiana cases in developing their constitution's public trust provisions into a requirement of environmental cost-benefit analysis.

Similarly, Michigan cases construing that state constitution's environmental provision have not articulated a substantive standard to guide decisions. Given Michigan's extensive body of common law public trust cases and public trust statutes,[213] such a standard is probably unnecessary. If Michigan courts were to fashion a standard based on the state constitution's environmental protection provision, the similarity of the provision's language to that of Louisiana's and its self-executability could also support reference to Louisiana cases as persuasive authority.

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208. The language in these constitutions' provisions is also similar to the language in Pennsylvania's provision. Even if courts in Hawaii and Michigan were to adopt Pennsylvania's test, they could still give effect to their citizens' desires by interpreting the test in a less lopsided fashion.

209. *See* Reppun v. Board of Water Supply, 656 P.2d 57, 59 (Haw. 1982), *cert. denied*, 471 U.S. 1014 (1985).

210. *See id.* at 76 n.20 (dictum).

211. Robinson v. Ariyoshi, 658 P.2d 287, 311 (Haw. 1982).

212. *See id.* at 312.

213. *See supra* note 157.

B. *Expansion of the Public Trust to New Resources*

The second option for the use of a constitution's environmental protection provision is as an expansion of traditional public trust principles to resources other than navigable waters and the lands beneath them. Alaska courts have led the way here, using Article VIII, Section 3 of the Alaska Constitution as the constitutional embodiment of a desire to apply traditional public trust precepts to a range of natural resources, and as part of Article VIII's larger guarantee of equal access to those resources. Alaska courts have actually developed two different standards to implement this provision—one based on the traditional public trust doctrine and another that operates analogously to equal protection analysis.

Owsichek provides the clearest statement of Section 3's more traditional meaning. There, the court held that common law principles incorporated into Section 3 "impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people."[214] The *Owsichek* court acknowledged that the limits of the state's discretion in implementing this duty were not well-defined, but it rejected the state's contention that its discretion was unbridled.[215] Rather, it held that "a prohibition against any monopolistic grants or special privileges" was a minimum requirement of the duty.[216] This principle has since been reaffirmed by the Alaska Supreme Court.[217]

The prohibition against monopolistic grants or special privileges has been used to void several legislative schemes controlling access to Alaska's natural resources. *Owsichek* overturned a state law which created exclusive guide areas and allowed access only to those hunting guides assigned to those areas.[218] A statute granting a preference to rural residents to take fish and game for subsistence purposes was also held unconstitutional under this stan-

214. *Owsichek*, 763 P.2d at 495.

215. *See id.* at 495–96.

216. *Id.* at 496.

217. *See* McDowell v. State, 785 P.2d 1, 5–6 (1989). This principle had also appeared in prior cases. *See* CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1120 (Alaska 1988); State v. Ostrosky, 667 P.2d 1184, 1189, 1191 (Alaska 1983); Herscher v. State Dep't of Commerce, 568 P.2d 996, 1003 (Alaska 1977).

218. *See Owsichek*, 763 P.2d at 498.

dard as a special privilege.[219] In *State v. Ostrosky*,[220] the Alaska Supreme Court upheld the state's limited entry fishing law against a Section 3 challenge only because another portion of the constitution had been specifically amended to allow such limits.[221] The court has also held that Section 3 required that state tidelands conveyed to private parties remain subject to a public trust easement, unless the conveyance either was made in furtherance of a specific public trust purpose or would not substantially impair the public's interest in the tidelands.[222] Finally, the Alaska Supreme Court relied on Article VIII to invalidate an initiative to control access to salmon in *Pullen v. Ulmer*.[223] The court held that "the public trust responsibilities imposed on the State by the provisions of article VIII of our constitution compel the conclusion that fish occurring in their natural state are property of the state for purposes of carrying out its trust responsibilities."[224]

The Alaska Supreme Court has also used Section 3 in a more novel fashion. In *Ostrosky*, the court first suggested that Section 3's common use directive might be read along with other portions of Article VIII seemingly dedicated to the idea of equal access so as to require that any system of limited entry imposed on state fisheries entails the "least possible impingement" of equal access.[225] Justice Jay Rabinowitz's dissent advocated a least-restrictive alternative requirement for Article VIII cases because of the "highly important interest [in natural resources] running to each person within the state."[226] The *Owsichek* opinion cited this portion of the dissent with approval.[227]

In *McDowell v. State*,[228] the court wholeheartedly approved this position for cases brought under Sections 3, 15, or 17 of Ar-

219. *See McDowell*, 785 P.2d at 12.

220. 667 P.2d 1184 (Alaska 1983).

221. *See id.* at 1190. *But see McDowell*, 785 P.2d at 9 (noting that the state constitution does not bar exclusion from resources if that exclusion is required for species protection).

222. *See CWC Fisheries*, 755 P.2d at 1119–20 (citing Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435, 453 (1892)).

223. 923 P.2d 54, 60–61 (Alaska 1996).

224. *Id.* at 60.

225. *Otrosky*, 667 P.2d at 1191. This standard was reaffirmed in *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256, 1266 (Alaska 1988).

226. *Ostrosky*, 667 P.2d at 1196 (Rabinowitz, J., dissenting).

227. *See Owsichek*, 763 P.2d at 492 n.10.

228. 785 P.2d 1 (Alaska 1989).

ticle VIII.[229] McDowell and the other plaintiffs in the case challenged an act that granted a preference to rural residents over urban residents to take fish and game for subsistence purposes.[230] The plaintiffs were urban residents who had hunted for subsistence in the past and wanted to continue to do so.[231] The court held first that the residence requirement violated the common-use provision in Section 3.[232] As an alternate ground for its decision, the court overturned this statute with a least-restrictive-alternative analysis.[233] This analysis operated much like strict scrutiny in a standard equal protection case.[234] The court deemed "important" the state's interest in ensuring that those residents who needed to could engage in subsistence hunting and fishing, but it rejected the statute's urban-rural distinction as an "extremely crude" method of achieving its goal.[235] It recommended a classification scheme that used individual characteristics as the least restrictive means of accomplishing the statute's goals.[236]

Several years later, the Alaska Supreme Court relied on *McDowell* to overturn a portion of a new statute governing subsistence hunting and fishing.[237] The stricken provision of the statute impermissible conditioned permit eligibility on the proximity of permit applicants' residences to the relevant fish or game popula-

229. *See id.* at 9. Section 15 provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

ALASKA CONST. art. VIII, § 15.

Section 17 provides: "Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." ALASKA CONST. art. VIII, § 17.

230. *See McDowell*, 785 P.2d at 1.

231. *See id.* at 2.

232. *See id.* at 9.

233. *See id.* at 10.

234. Laws examined under strict scrutiny will not be sustained unless they are necessary to further the achievement of a compelling state interest. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (applying strict scrutiny to find a durational residence requirement for voter registration violated the Equal Protection Clause of the Fourteenth Amendment).

235. *See McDowell*, 785 P.2d at 10.

236. *See id.* at 11.

237. *See* State v. Kenaitze Indian Tribe, 894 P.2d 632, 638 (Alaska 1995).

tion.[238] *McDowell*'s focus on equal access created some tension with the public trust duty to manage the state's natural resources for the benefit of all of its people, since unlimited equal access can lead to resource depletion.[239]

Recognizing this tension, the Alaska Supreme Court explained in *Tongass Sport Fishing Association v. State*[240] that Article VIII is "not implicated unless limits are placed on the admission to resource user groups."[241] The state cannot prevent any group from access to resources, but it may allocate the existing resources among various users.[242] Because allocation does implicate Article VIII concerns in the same way as admission and because allocation decisions are "so complex and multi-faceted," the least-restrictive-means test is not used to review allocation decisions."[243] Rather, allocation decisions are "upheld so long as they are not unreasonable or arbitrary and proper procedures have been followed."[244]

With the advent of this least-restrictive-means test, Alaska courts have derived two substantive standards from their constitution's environmental provision, both of which have been used to invalidate state action. The first standard, an expansion of the traditional public trust prohibition on acts not consistent with the public's interest in access to natural resources, is used more often. This standard would also be much easier for courts in other states to adopt, as it does not require the judicial creation of a doctrine. Courts in Hawaii and Michigan might also prefer this standard over that used in Louisiana for the same reason. The least-restrictive-means standard is more politically radical, but would allow courts to use a clear test and a familiar mode of analysis.

238. *See id.*

239. The phenomenon is commonly known as the "tragedy of the commons." *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

240. 866 P.2d 1314 (Alaska 1994).

241. *Id.* at 1318.

242. *See id.* This distinction was affirmed in *Kenaitze Indian Tribe*, 894 P.2d at 640–41.

243. *Kenaitze Indian Tribe*, 894 P.2d at 641–42.

244. *Id.* at 641.

C. *Use of Constitutions' Provisions as Persuasive Authority*

A third potential use of state constitutions' environmental provisions is as persuasive authority in relevant cases. This use would have particular appeal in states where the provisions are not considered self-executing. Cases from Florida provide the best example of this technique, and demonstrate an opportunity for other state courts to give effect to their state constitution's environmental protection provisions despite theoretical or political pressures to hold that such provisions are not self-executing.

One context in which Florida courts have used their state's provision is to challenge condemnation actions by utilities. *Seadade Industries Inc. v. Florida Power & Light Co.* held that Florida Constitution Article 2, Section 7 allows a court overseeing condemnation proceedings to require, first,

> that the condemning authority reasonably demonstrate that the regulations and requirements of the independent authorities [governing the operation of the industry in question] can and will be met . . . [and] second, that condemnation and taking in advance of project approval will not result in irreparable damage to natural resources and environment, should the independent authorities decline to approve the proposed project.[245]

The environmental provision requires that "[a] rational balance must be struck" between the protection of natural resources and the completion of public works in the public interest.[246] In another utility case,[247] a lower court referred to Section 7 in upholding an order denying a petition for a taking of an individual's personal property.[248] The court faulted the petition because the condemning utility had given no "real ecological consideration" to the uniqueness of a proposed power line route.[249]

Section 7's full substantive reach as a non-self-executing provision is unclear. The Florida Supreme Court has cited it to uphold the state Department of Natural Resources' introduction of a new species of fish into a lake to control aquatic weeds[250] and to dis-

245. 245 So. 2d 209, 214 (Fla. 1971).

246. *See id.*

247. Florida Power & Light Co. v. Berman, 429 So. 2d 79 (Fla. Dist. Ct. App. 1983), *review denied*, 436 So. 2d 98 (Fla. 1983).

248. *See id.* at 83.

249. *Id.*

250. *See* Askew v. Game & Fresh Water Fish Comm'n, 336 So. 2d 556, 557, 559–60

miss a challenge to an emergency statute requiring that shrimp nets be used with devices to exclude endangered turtles.[251] It was also used to uphold a property tax exemption claimed by the Trust for Public Land, an organization that buys private land and holds it for sale to public bodies.[252] The court deciding this case cited Section 7 in its holding that land conservation was a "use" of land that served a public purpose.[253]

The most sweeping decision concerning Section 7 is also the most recent. In *Department of Community Affairs v. Moorman*,[254] the Florida Supreme Court relied on Section 7 to uphold the application to a private landowner of an ordinance banning fence construction.[255] The court upheld the ordinance, designed to protect endangered Key deer, against equal protection, privacy, and due process challenges, noting that Section 7 protected Floridians' interests in their economy, health, welfare, and safety.[256]

Read as a group, these cases illustrate that the Florida courts have used their constitution's provision to require environmentally informed decisionmaking. While this use of such provisions is less powerful than those described in Sections IV.A. and IV.B., it does give some force to citizens' desires, as expressed in the provisions themselves. It also allows courts to more easily avoid sticky theoretical issues surrounding self-execution and standing.

CONCLUSION

The environmental protection provision added to the Pennsylvania Constitution on Earth Day, 1971, has been criticized by most commentators, who have viewed efforts to enshrine environmental protection as a state constitutional value as failures.[257] In the context of the other provisions discussed in this Note, however, Pennsylvania's provision is more accurately seen not as a symbol of the complete failure of such provisions, but rather as an em-

(Fla. 1976).

251. *See* State v. Davis, 556 So.2d 1104, 1107–08 (Fla. 1990).

252. *See* Turner v. Trust for Public Land, 445 So. 2d 1124, 1126 (Fla. Dist. Ct. App. 1984).

253. *See id.* (citing Wildlife Preserves, Inc. v. Scopelliti, 321 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1971)).

254. 664 So.2d 930 (Fla. 1995).

255. *See id.* at 932–34.

256. *See id.*

257. *See supra* notes 15–18 and accompanying text.

blem of their mixed ability to support the values for which they were enacted. The promise of efforts to place environmental values within state constitutions is reflected in the Pennsylvania provision's imposition of a new duty of environmental protection on the state and its bolstering of citizens' ability to sue the state for breaches of that duty. Despite these successes, experience with the Pennsylvania Constitution's provision has also demonstrated the state judiciaries' unwillingness to interpret environmental protection provisions so as to give content to the values they contain. Cases construing the Pennsylvania constitution's provision have developed from this provision what could be a workable cost-benefit balancing test, but have found that the balance rested against the environment in every reported case.

The history of Pennsylvania's provision is particularly disappointing because it shares the references to the ideas of conservation, trusteeship, and public access, ideas contained in environmental protection provisions that have been interpreted as having substance in states such as Louisiana and Alaska. By finding ways around theoretical problems of self-execution and standing, courts in these and the other states discussed in this Note have used the ancient public trust doctrine to breathe life into otherwise moribund constitutional provisions.

The wisdom of relying on the public trust doctrine as a modern means of environmental protection is certainly open to debate.[258] However, the decisions of the courts in this minority plainly reflect the common understanding of the citizens who enacted the provisions in the first place. They also give greater respect to the extended commitment to environmental protection reflected in the adoption of these provisions.

Many of the currently dormant environmental protection provisions in state constitutions share the successful minority's references to public trust principles. These provisions might be creatively used by environmentally concerned plaintiffs in other states to force their judiciaries to grapple with the meaning of their citizens' constitutional commitment to environmental values.

258. *See supra* notes 38–46 and accompanying text.