

COMMENT

THE CONSTITUTIONAL PUBLIC TRUST DOCTRINE

BY

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Courts and commentators often characterize the public trust doctrine as a common law rule created by judges. Recent developments in state constitutional law, however, reveal that the doctrine has structural roots that often emerge upon examination of certain constitutional provisions. This Comment argues it is not unusual for state constitutions to include public trust doctrines, and that as a limitation on sovereign power, a judicially enforceable constitutional trust is appropriate.

This Comment first reviews monumental decisions in Hawaii, Pennsylvania, and Washington developing their respective constitutional public trust doctrines. This Comment then identifies examples of similar provisions in other states' constitutions, analyzing the potential for, and implications of, a constitutional public trust doctrine within those states. Finally, this Comment concludes that the public trust doctrine should be judicially enforceable and safeguarded from statutory preemption and is therefore appropriately located in a constitutional setting.

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I. INTRODUCTION

The public trust doctrine (PTD) is a limitation on the power of the sovereign to privatize or destroy certain property and a guarantee of public access to certain resources.¹ The doctrine maintains that the public owns the trust property in common, and the government holds it in trust for public benefit.² As a precept touching on the powers of all three branches of government, it is hardly surprising that the PTD appears in the language of many state constitutions.³ The government has a fiduciary duty to preserve the trust property for the purposes of the trust.⁴ Courts often interpret these purposes to include uses like navigation, recreation, and ecosystem

¹ See MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 3 (2d ed. 2015).

² *Id.*

³ See discussion *infra* Part II.B.

⁴ BLUMM & WOOD, *supra* note 1, at 7.

services.⁵ All three branches of government carry out public trust duties depending on their role in making decisions concerning the *corpus* of the trust.⁶ A constitutional PTD places courts in an enforcement role—delineating its scope and defining the duties of the sovereign.⁷

Case law interpreting the PTD in the United States dates from the early nineteenth century to the present. For over 200 years, American PTD jurisprudence involved a steady stream of disputes concerning access to resources and title ownership of submerged lands based on common law interpretations of the doctrine.⁸ However, the doctrine in its constitutional manifestation remained mostly dormant.⁹

In America, framers of state constitutions largely modeled their efforts on the U.S. Constitution.¹⁰ However, state constitutions are typically longer, more detailed, and address jurisdiction-specific issues.¹¹ State constitutions explicate the sovereign authority, often called the police power, reserved to

⁵ See, e.g., *Munninghoff v. Wis. Conservation Comm'n*, 38 N.W.2d 712, 713–14 (Wis. 1949) (navigation); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 358, 363 (N.J. 1984) (recreation); *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cty. (Mono Lake)*, 658 P.2d 709, 712, 719 (Cal. 1983) (ecosystem services). Ecosystem services are those services provided by the natural operation of the environment that are of value to humans. See, e.g., Barton H. Thompson, Jr., *Ecosystem Services & Natural Capital: Reconceiving Environmental Management*, 17 N.Y.U. ENVTL. L.J. 460, 460 (2008).

⁶ See BLUMM & WOOD, *supra* note 1, at 5–6.

⁷ See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 557–65 (1970) (observing that, although policy determinations are for the legislature, courts can affect policy by requiring further justification or consideration).

⁸ See, e.g., *Carson v. Blazer*, 2 Binn. 475, 495 (Pa. 1810) (ruling that the right to a fishery was “vested in the state, and open to all”); *Arnold v. Mundy*, 6 N.J.L. 1, 56 (1821) (concerning public shellfish harvesting rights on an allegedly private riverbed); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 413 (1842) (same); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 212 (1845) (determining that the bed and banks of navigable waters are reserved to the states in their sovereign capacity).

⁹ A 1932 decision by the Supreme Court of Virginia provides an example of the inoperative nature of the constitutional PTD prior to the environmental revolution. In *Commonwealth v. City of Newport News*, the court found a constitutional basis for the application of the PTD to oyster beds in what is now VA. CONST. art. XI, § 3: “The natural oyster beds, rocks and shoals, in the waters of this State shall not be leased, rented or sold, but shall be held in trust for the benefit of the people of this State, subject to such regulations and restrictions as the general assembly may prescribe.” 164 S.E. 689, 699 (Va. 1932). However, the court ruled that discharging sewage was a public use that may be regulated at the discretion of the General Assembly, regardless of the subsequent destruction of the oyster beds. *Id.* at 698–99. The right to the oyster fishery was an incident of the *jus privatum* rather than an incident of the *jus publicum*, such as navigation. *Id.* (“Upon principle, as well as upon authority, we think [the use and enjoyment by the people of the tidal waters and their bottoms for the purpose of taking fish and shellfish therefrom] is an incident of the *jus privatum* of the State, not of the *jus publicum*.”).

¹⁰ See Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 12, 18 (1982) (stating that “all constitutions of the United States share a certain common foundation and set of overall philosophic assumptions”).

¹¹ See G. Alan Tarr, *Understanding State Constitutions*, 65 TEMPLE L. REV. 1169, 1170–72, 1176 (1992) (discussing unique features of state constitutions).

the states and recognized in the Tenth Amendment of the U.S. Constitution.¹² The police power includes control of natural resources within a state,¹³ at least where not preempted by federal law.¹⁴

A number of states recognized the PTD in the language of their constitutions, primarily protecting public access to trust resources like waterways to promote navigation.¹⁵ Newly-admitted and resource-rich states enshrined the doctrine in their constitutions as a conservation policy.¹⁶ Some older states with resources in demand emphasized the doctrine by amending or revising their constitutions to limit environmental damage.¹⁷ In recent years, PTD jurisprudence re-emerged in both common law and, as described in this Comment, as a constitutional limitation on state decision-making power.¹⁸

This Comment analyzes how language in state constitutions recognizes the PTD, focusing on recent decisions and unexamined or under-examined constitutional provisions. Part II briefly explains the concept of the PTD and its place in select state constitutions. Part III examines recent groundbreaking constitutional interpretations of the PTD, focusing on the language recognizing the PTD and its structural implications. Part IV inspects state constitutional provisions incorporating the PTD that courts have yet to fully interpret. The Comment concludes that because the PTD is a limitation on the sovereign police power and because the courts play a role in interpreting and enforcing public trust duties, the PTD appears frequently in many state constitutions and is likely to play a more prominent role in the future, at least where state governments do not recognize the inherent limitations it imposes on their police powers.

¹² U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.”).

¹³ See, e.g., ALASKA CONST. art. VIII, § 2; FLA. CONST. art. II, § 7; HAW. CONST. art. XI, § 1; PA. CONST. art. I, § 27; WASH. CONST. art. XVII, § 1.

¹⁴ See, e.g., Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012); Clean Air Act, 42 U.S.C. §§ 7401–7671(q) (2012); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (2012); see also U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

¹⁵ See, e.g., ALASKA CONST. art. VIII, § 6; HAW. CONST. art. XI, § 4.

¹⁶ See, e.g., ALASKA CONST. art. VIII, § 2; HAW. CONST. art. XI, § 1.

¹⁷ See, e.g., PA. CONST. art. I, § 27; MASS. CONST. art. XCVII.

¹⁸ See, e.g., *In re Water Use Permit Applications (Waiahole Ditch)*, 9 P.3d 409, 455 (Haw. 2000) (“[T]he ultimate authority to interpret and defend the public trust in Hawaii rests with the courts of this state.” (citing *State v. Quitog*, 938 P.2d 559, 561 n.3 (1997))); Pa. Env’t Def. Found. v. Commonwealth of Pa. (*PEDF II*), 161 A.3d 911, 933 (Pa. 2017) (interpreting the constitutional PTD to impose two duties on the Commonwealth: 1) “to prohibit the degradation, diminution, and depletion of our public natural resources,” and 2) “act affirmatively via legislative action to protect the environment” (internal citations omitted)); *Chelan Basin Conservancy v. GBI Holding Co. (Chelan Basin II)*, 413 P.3d 549, 558 (Wash. 2018) (“Because of the [PTD’s] constitutional underpinning, any legislation that impairs the public trust remains subject to judicial review.”).

II. THE PUBLIC TRUST DOCTRINE

Before an in-depth examination of the constitutional PTD jurisprudence of select states, this discussion reviews the doctrine's role in American law. The reason why constitutional underpinnings serve a vital purpose in an enforceable PTD requires some explanation.

A. A Brief History of the PTD in America

The PTD traveled to America with the English colonists, who were, at the time, subjects of the Crown and ruled by English common law.¹⁹ As colonies settled and began to self-govern, the PTD evolved independently within each jurisdiction.²⁰ This evolution continued through the Declaration of Independence²¹ and ratification of the United States Constitution.²² As new states joined the union, the PTD spread through ownership of the beds of navigable waters via the court-made yet constitutionally-based equal footing doctrine.²³ Therefore, the parameters of the PTD are varied. Most states base their PTD on the Supreme Court's ruling in *Illinois Central Railroad Co. v. Illinois*²⁴:

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, *when that can be done without substantial impairment of the interest of the public in the waters*, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States.²⁵

¹⁹ See *Shively v. Bowlby*, 152 U.S. 1, 14 (1894) ("The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and laws of the United States.").

²⁰ See *id.* at 26.

²¹ "For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." See *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842).

²² See *Munn v. People of State of Illinois*, 94 U.S. 113, 124 (1876) ("[W]hen it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.").

²³ See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 216 (1845).

²⁴ 146 U.S. 387 (1892); see, e.g., *Cty. of Hawaii v. Sotomura* 517 P.2d 57, 63 (Haw. 1973).

²⁵ *Ill. Cent. R.R. Co.*, 146 U.S. at 435 (emphasis added).

Typically, courts characterize the PTD as a common law doctrine,²⁶ perhaps due to its English origins;²⁷ however, the nature of the doctrine as a *trust* requires some judicial oversight.²⁸ A constitutional PTD allows courts to adopt a supervisory role that cannot be displaced by statute.²⁹ Therefore, a constitutional PTD allows the doctrine to function as a true trust—“the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*).”³⁰ A court sitting in equity, therefore, may ensure the people’s beneficial enjoyment of public trust resources despite legal title ownership in the state or a private transferee.

B. The PTD in State Constitutions

A constitutional PTD ensures equitable enforcement of a state’s fiduciary obligations.³¹ A traditional trust includes:

- (1) a trustee, who holds the trust property and is subject to duties to deal with it for the benefit of one or more others; (2) one or more beneficiaries, to whom and for whose benefit the trustee owes the duties with respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries.³²

Trusts are judicially enforceable.³³ Explicit “terms of the trust” facilitate judicial enforcement.³⁴ Constitutional provisions ensure enforceability,

²⁶ See BLUMM & WOOD, *supra* note 1, at 5.

²⁷ See *supra* note 19 and accompanying text.

²⁸ *Trust*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁹ Cf. William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 395, 441–43 (1997) (arguing that the PTD can serve as a process-based enforcement mechanism to ensure implementation of the substantive values enshrined in state constitutions).

³⁰ *Trust*, BLACK’S LAW DICTIONARY (10th ed. 2014). In the common law PTD context, a settlor is typically absent. However, in a constitutional PTD, the citizens at the time of the provision’s adoption may be considered both the settlors and the beneficiaries, while future generations of citizens are also beneficiaries. This relationship highlights the inter-generational equity concerns inherent in the PTD. See, e.g., John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 721 n.133 (1999) (discussing the interplay between resource conservation and inter-generational equity).

³¹ Cf. BLUMM & WOOD, *supra* note 1, at 9 (discussing different methods of enforcing the PTD).

³² RESTATEMENT (THIRD) OF TRUSTS ch. 1, § 2 cmt. f (AM. LAW INST. 2003).

³³ See RESTATEMENT (THIRD) OF TRUSTS ch. 18, § 94 (AM. LAW INST. 2012) (indicating standing for beneficiaries to have trusts judicially enforced).

³⁴ See RESTATEMENT (THIRD) OF TRUSTS ch. 1, § 4 cmt. a (AM. LAW INST. 2003) (“[A]ny manifestations of the settlor’s intention at the time of the creation of the trust, whether expressed by written or spoken words or by conduct, to the extent the intention is expressed in a manner that permits proof of the manifestation of intent in judicial proceedings.”).

because the legislature cannot easily displace them,³⁵ and they provide governing principles by adopting substantive values.

The PTD, as embodied in state constitutions, typically appears in one of three forms: 1) an assertion of state ownership, public navigation rights, or fishery rights,³⁶ 2) a conservation policy,³⁷ and/or 3) a recognition of individual rights to a healthful environment.³⁸ The provisions in the first category are often the oldest, aiming to protect interests that were pressing in colonial or pre-industrial America.³⁹ The second and third categories often appear in constitutions ratified or amendments adopted in the mid-twentieth century, as resource depletion and public health concerns emerged into the political arena.⁴⁰ Some constitutional provisions do not fit neatly into one of the above categories, but otherwise clearly invoke the PTD.⁴¹

III. RECENT JUDICIAL ENFORCEMENT OF A CONSTITUTIONAL PUBLIC TRUST

In recent years, constitutional PTD jurisprudence has come roaring to life. Courts are reaffirming their role as the ultimate authority in interpreting constitutional public trust duties. This section provides a survey of three notable states—Hawaii, Pennsylvania, and Washington—all of which have renewed interpretations of the PTD via their constitutions.

³⁵ See, e.g., ALASKA CONST. art. XIII, § 1 (amendments require two-thirds approval by both houses of the legislature to be proposed and then majority support in the general election to be adopted).

³⁶ See *infra* Parts III.C, IV.A.

³⁷ See *infra* Parts III.A, IV.B.

³⁸ See *infra* Parts III.B, IV.C.

³⁹ See, e.g., BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY 49 (1998) (discussing the role of oyster-based disputes in forming the PTD in America).

⁴⁰ See generally RACHEL CARSON, SILENT SPRING (1962) (describing the effects of industrial pollution on the natural world).

⁴¹ See, e.g., ALASKA CONST. art. VIII, § 3; *Owsicheck v. State*, 763 P.2d 488, 493 (Alaska 1988) (“This was a unique provision, not modeled on any other state constitution. Its purpose was anti-monopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.”); see also ARIZ. CONST. art. IX, § 7 (gift clause prohibiting the government from giving advantages to special interests or engaging in private enterprise). Arizona’s constitutionalization of the PTD is unique in that it does not rely on constitutional language addressing navigation, conservation, or individual rights. In *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 168–69 (Ariz. Ct. App. 1991), the court found three bases for the PTD in Arizona law: 1) *Illinois Central’s* finding that the PTD is inherent in statehood, 2) the separation of powers doctrine within the Arizona Constitution allowing for judicial review of legislative action, and 3) the gift clause of the Arizona Constitution requiring a public purpose and fair compensation for any dispensation of public assets. The Arizona Supreme Court adopted this reasoning in *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) (“The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people.”); see also NEV. CONST. art. VIII, § 9; *Lawrence v. Clark Cty.*, 254 P.3d 606, 612 (Nev. 2011) (“[W]e conclude that the constitutional policy contained in the gift clause infers the people’s intent to constrain the Legislature’s ability to alienate public trust lands as well as public funds.”).

A. Hawaii

Before Hawaii was a state, it was a kingdom.⁴² The founder of the kingdom, Kamehameha I, held Hawaii's natural resources in trust for the people.⁴³ In 1973, the Supreme Court of Hawaii recognized the PTD as applicable to all water resources based on a sovereign reservation made during the Great Māhele of 1848.⁴⁴ After statehood, but prior to Hawaii's 1978 Constitutional Convention, the Supreme Court of Hawaii recognized the PTD as applied to land below the high-water mark.⁴⁵ On November 7, 1978, Hawaii ratified a new constitution that included substantial public trust language.⁴⁶ For example, Article XI, section 1 of Hawaii's Constitution states:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are *held in trust* by the State for the *benefit of the people*.⁴⁷

Article XI, section 7 reads, "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people."⁴⁸ In 2000, the Supreme Court of Hawaii analyzed the constitutional language in detail in the context of a dispute over apportionment of a stream that served both ecological and commercial uses.⁴⁹

1. Waiahole Ditch Decision

In Hawaii's most famous PTD case to date, the supreme court answered the question of whether the Hawaii Commission on Water Resource Management's (the "Commission's") 1992 water allocation superseded its common law public trust duties by analyzing the doctrine's common law

⁴² See generally RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM VOLUME 1: 1778–1854 FOUNDATION AND TRANSFORMATION (1938).

⁴³ JAMES T. SHON, HAW. LEGISLATIVE REFERENCE BUREAU, HAWAII CONSTITUTIONAL CONVENTION STUDIES 1978: ARTICLE X & ARTICLE XI 73 (1978).

⁴⁴ See *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330, 1337–39 (Haw. 1973). The Great Māhele was a "separation and identification of the relative rights of the King, the chiefs and the *konohikis* [land agents appointed by chiefs] in the various lands. This event led to the end of the feudal system in the kingdom." Hon. John J. Chinen, *The Hawaiian Land Revolution of the 1840s and 1850s*, HAW. B.J., July 2006, at 46, 52.

⁴⁵ See *Cty. of Hawaii v. Sotomura*, 517 P.2d 57, 63 (Haw. 1973) (describing Hawaii's public trust jurisprudence up to that date).

⁴⁶ PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 VOLUME 1: JOURNAL AND DOCUMENTS, STATE OF HAWAII, at x, 643–44 (1980).

⁴⁷ HAW. CONST. art. XI, § 1 (emphasis added).

⁴⁸ HAW. CONST. art. XI, § 7 (emphasis added).

⁴⁹ See generally *Waiahole Ditch*, 9 P.3d 409 (Haw. 2000).

origins.⁵⁰ After concluding that legislation cannot extinguish the common law public trust,⁵¹ the court turned to the PTD as embodied in the Hawaii Constitution.⁵² The court highlighted the phrases “for the benefit of present and future generations,” “protect and conserve,” “conservation,” and “held in trust for the benefit of the people” as they appear in Article XI, section 1.⁵³ In Article XI, section 7, the court emphasized the language “obligation to protect, control, and regulate” and “for the benefit of its people”⁵⁴ as a reflection of the framers’ intent to constitutionalize the PTD.⁵⁵

The structural role of the constitutional PTD imposed a limitation not only on the Commission, but on the state legislature. The Commission, as the implementing agency of the Hawaii legislature’s Water Code, could not absolve the state of its public trust duties through its lawmaking power: “the [PTD] continues to inform the Code’s interpretation, define its permissible ‘outer limits,’ and justify its existence.”⁵⁶ The court then proceeded to thoroughly analyze the parameters of the doctrine.⁵⁷

First, the Supreme Court of Hawaii addressed the scope of the PTD.⁵⁸ Although all “public natural resources” implicated in Article XI, section 1 may encompass a variety of resources, the court affirmatively identified *all* water resources of the state as subject to the PTD based on sections 1 and 7, including groundwater.⁵⁹ The court rejected rigid adherence to ancient usufruct—construing “water resources” as surface water only—in favor of a practical and science-based definition that incorporates groundwater.⁶⁰ The remainder of the court’s analysis focused on the PTD as it relates to water resources only.⁶¹

Second, the court discussed the substance of the water resources PTD by addressing both the purposes of the trust and the powers and duties of the state under the trust.⁶² The purposes unequivocally identified by the court were those uses relevant to the matter before it: preservation of the resource in its natural state and use of the water by native Hawaiians.⁶³

⁵⁰ See *id.* at 439–45; see also discussion *supra* Part II.A.

⁵¹ *Waiahole Ditch*, 9 P.3d at 442–43.

⁵² See *id.* at 443–45.

⁵³ *Id.* at 443; see also HAW. CONST. art. XI, § 1.

⁵⁴ *Waiahole Ditch*, 9 P.3d at 443; see also HAW. CONST. art. XI, § 7.

⁵⁵ *Waiahole Ditch*, 9 P.3d at 443.

⁵⁶ *Id.* at 445.

⁵⁷ *Id.* at 445–56.

⁵⁸ *Id.* at 445–47.

⁵⁹ *Id.* at 445, 447.

⁶⁰ See *id.* at 447 (“Modern science and technology have discredited the surface-ground dichotomy. . . . Few cases highlight more plainly its diminished meaning and utility than the present one, involving surface streams depleted by ground water diversions and underground aquifers recharged by surface water applications. In determining the scope of the sovereign reservation, therefore, we see little sense in adhering to artificial distinctions neither recognized by the ancient system nor borne out in the present practical realities of this state.” (citations omitted)).

⁶¹ *Id.*

⁶² *Id.* at 447–56.

⁶³ *Id.* at 448–49.

Citing in- and out-of-state precedents, the court reasoned that trust uses evolve according to the needs of the public, including the “use” preserving waters in their natural state.⁶⁴ Additionally, based on Hawaii’s unique history as a kingdom, the court identified “Native Hawaiian and traditional and customary rights” as a trust purpose.⁶⁵ The court recognized that private interests may consume trust resources for private economic gain, and therefore declined to include such uses as within the PTD.⁶⁶ Public trust rights, the court decided, are superior to private interests.⁶⁷

The Supreme Court of Hawaii pinpointed the state’s dual constitutional obligations under the water resources PTD as “1) protection and 2) maximum reasonable and beneficial use.”⁶⁸ These mandates were derived from both the common law origins of PTD, which require the state “to maintain the *purity and flow* of our waters for future generations *and* to assure that the waters of our land are put to *reasonable and beneficial* uses,”⁶⁹ and the constitutional role of the PTD, requiring the state both to protect trust resources and to promote resource development.⁷⁰ The court analogized this dynamic to the one in California’s notable *Mono Lake* decision;⁷¹ however, it found the Hawaiian PTD to offer greater protection to water resources than California’s PTD because California’s constitution makes it more likely that naturally flowing streams will be considered a “waste.”⁷²

Hawaii’s sovereign authority over water resources allows an assertion of paramount public trust rights—even over vested private rights—if those private rights would be detrimental to trust purposes.⁷³ Additionally, Hawaii, in both its legislative and executive capacities, has an affirmative duty to consider the public trust uses in the planning and allocation of water resources and—similar to the Supreme Court of California’s mandate in

⁶⁴ *Id.* at 448.

⁶⁵ *Id.* at 449.

⁶⁶ *Id.* at 449–50.

⁶⁷ *Id.* at 450.

⁶⁸ *Id.* at 451.

⁶⁹ *Id.* at 450 (quoting *Robinson v. Ariyoshi*, 658 P.2d 287, 310 (Haw. 1982)).

⁷⁰ *Id.* at 451.

⁷¹ *Id.* at 452–54. The *Mono Lake* case involved diversion of small non-navigable streams for municipal utility use, which subsequently damaged the ecological value of a navigable lake by removing its sources of freshwater. 658 P.2d 709, 711 (Cal. 1983). The Supreme Court of California balanced the PTD with the appropriative water rights system of California and ruled that although the PTD prevents appropriations damaging the trust, Los Angeles’s need for a fresh water supply overrides this proscription and the only duty incumbent upon the state is to consider the public trust in allocation and protect trust uses where feasible. *See id.* at 727–29.

⁷² *Waiahole Ditch*, 9 P.3d at 452; *see* CAL. CONST. art. X, § 2 (“It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.”). For an analysis of California’s constitution and the PTD, *see* discussion *infra* Part IV.A.1.

⁷³ *Waiahole Ditch*, 9 P.3d at 453.

*Mono Lake*⁷⁴—protect them where feasible.⁷⁵ When faced with competing public and private uses, the court reasoned Hawaii must balance the uses with a presumption in favor of “public use, access, and enjoyment.”⁷⁶ Further, since article XI, section 7 specifically requires an executive agency to carry out its mandate,⁷⁷ the Commission must take an active and affirmative role in managing the public trust by “consider[ing] the cumulative impact of existing and proposed diversions on trust purposes” and “implement[ing] reasonable measures to mitigate” the effect of the diversions.⁷⁸ This ruling ensures that the PTD plays a proactive and pervasive role in state decision making.

Finally, the Supreme Court of Hawaii identified the appropriate standard of review for Commission actions implicating the PTD. Although there is a presumption of validity to an agency’s action when challenged under the judicial review provision of Hawaii’s administrative procedure statute,⁷⁹ the court fulfills its role as the ultimate authority on constitutional questions by taking a “close look” at the agency action.⁸⁰ The court emphasized that courts will not serve as a “rubber stamp” for actions taken by the legislative and executive branches: “the legislative and executive branches are judicially accountable for the dispositions of the public trust. . . . The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.”⁸¹ The Supreme Court of Hawaii’s standard of review discussion suggests that where an act by the Commission allegedly violates the constitutional PTD, it will be subject to heightened scrutiny.⁸² However, if the Commission’s actions are not deemed unconstitutional, the court will conduct a deferential judicial review familiar in the administrative law context.⁸³

⁷⁴ *Mono Lake*, 658 P.2d at 728 (“The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”).

⁷⁵ *Waiahole Ditch*, 9 P.3d at 453.

⁷⁶ *Id.* at 454.

⁷⁷ “The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii’s water resources.” HAW. CONST. art. XI, § 7.

⁷⁸ *Waiahole Ditch*, 9 P.3d at 455.

⁷⁹ See HAW. REV. STAT. ANN. § 91-14(g) (West 2018) (limiting the circumstances under which petitioners may prevail during judicial review of an administrative decision).

⁸⁰ *Waiahole Ditch*, 9 P.3d at 455–56 (quoting *Kootenai Env’tl. All. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092 (Idaho 1983)).

⁸¹ *Id.* (quoting *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 168–69 (Ariz. Ct. App. 1991)).

⁸² See *id.* at 456.

⁸³ See *id.* at 455.

2. *Kelly v. 1250 Oceanside Partners*⁸⁴

In 2006, the Supreme Court of Hawaii elaborated on the scope of the constitutional PTD, applying it to political subdivisions and to resources in which the state does not hold legal title.⁸⁵ *Kelly v. 1250 Oceanside Partners* concerned a direct appeal from a trial court ruling that both the County of Hawaii (County) and the Hawaii Department of Health were subject to the constitutional PTD, and each had breached its duty in failing to supervise the construction of a resort, causing runoff pollution to enter the pristine Kealakekua Bay.⁸⁶ The Supreme Court of Hawaii rejected the County's argument that the constitutional PTD applies only to the state, an argument based on the second clause of article XI, section 1: "All public natural resources are *held in trust by the State* for the benefit of the people."⁸⁷ However, the court found the first clause compelling:

For the benefit of present and future generations, the State *and its political subdivisions* shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.⁸⁸

Based on this language, the court held that political subdivisions such as the County were also subject to public trust duties.⁸⁹ Because the framers of the 1978 Constitution did not intend to tie the PTD to state ownership of resources, the County could be in violation of its public trust duties if it failed to "conserve and protect" the Bay regardless of title ownership.⁹⁰

The state agency, the Hawaii Department of Health (Department) claimed it acted within its discretion, and that the trial court improperly second-guessed the Department's judgment in enforcing Hawaii's water pollution control statute.⁹¹ Although the supreme court affirmed the Department's broad range of discretion, it emphasized that the PTD is a limit on the state's police power, within which the Department's discretion is bounded.⁹² Therefore, the Department's enforcement discretion was not absolute.⁹³ After issuing a permit to the developer including runoff mitigation measures, according to the court, the Department was constitutionally required "to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts

⁸⁴ 140 P.3d 985 (Haw. 2006).

⁸⁵ *Id.* at 1006.

⁸⁶ *See id.* at 985.

⁸⁷ *Id.* at 1003–06; HAW. CONST. art XI, § 1 (emphasis added).

⁸⁸ *Kelly*, 140 P.3d at 1004–05; HAW. CONST. art XI, § 1 (emphasis added).

⁸⁹ *See Kelly*, 140 P.3d at 1004.

⁹⁰ *See id.* at 1005–06. The court ultimately found that the County did not, in fact, violate its duty. *Id.* at 1006–08.

⁹¹ *Id.* at 1008–09.

⁹² *Id.* at 1010.

⁹³ *Id.* at 1011.

the development would have on the State's natural resources."⁹⁴ The Department lacked the discretion to rely solely on the terms of the permit as a self-enforcing mechanism, rather, it had an ongoing PTD duty to supervise the construction.⁹⁵

The Supreme Court of Hawaii ultimately held that neither the County nor the Department had in fact breached their public trust duties.⁹⁶ However, the ruling made clear that the constitutional PTD in Hawaii 1) applies to political subdivisions,⁹⁷ 2) is not tied to state ownership of the resource,⁹⁸ and 3) is a limitation on the police power and therefore also a limitation on agency discretion.⁹⁹

B. Pennsylvania

The Commonwealth of Pennsylvania, the birthplace of America's petroleum and steel industries,¹⁰⁰ was—and is now again¹⁰¹—a resource-rich state with a substantial share of legacy and ongoing environmental contamination.¹⁰² In 1971, the citizens of Pennsylvania voted overwhelmingly to amend their constitution to ameliorate environmental degradation.¹⁰³

Pennsylvania's "Environmental Rights Amendment" proclaims:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. *Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.*¹⁰⁴

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See id.* at 1014.

⁹⁷ *See id.* at 1004.

⁹⁸ *See id.* at 1005–06.

⁹⁹ *See id.* at 1010–11.

¹⁰⁰ *See Oil Region National Heritage Area*, U.S. NAT'L PARK SERV., <https://perma.cc/LWT8-MVWR> (last visited Feb. 16, 2019); *Rivers of Steel National Heritage Area*, U.S. NAT'L PARK SERV., <https://perma.cc/VGY8-2LSU> (last visited Feb. 16, 2019).

¹⁰¹ *See* TOM WILBER, UNDER THE SURFACE: FRACKING, FORTUNES, AND THE FATE OF THE MARCELLUS SHALE 2 (2012) (detailing the effects of natural gas development in Pennsylvania).

¹⁰² *See, e.g.,* *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 960–61 (Pa. 2013) (Castille, J., plurality) (describing historical environmental degradation and catastrophe); Dan Majors, *Pennsylvania Officials: Do Not Eat Fish Caught in Shenango River*, PITTSBURGH POST-GAZETTE (Aug. 21, 2017), <https://perma.cc/Y3WB-DTWT> (polychlorinated biphenyl contamination); Susan Phillips, *Fire Fighting Foam Contamination Sites Clustered Along Delaware River*, STATEIMPACT PA. (June 8, 2017), <https://perma.cc/JA59-J3ET> (perfluorinated chemical contamination); Sam Wood, *Study: Bad Air in Philly Causes 126 Early Deaths, Hundreds of ER Visits Annually*, PHILLY.COM (Aug. 11, 2016), <https://perma.cc/6ZLT-54V4> (ozone pollution).

¹⁰³ *See Robinson Twp.*, 83 A.3d at 962.

¹⁰⁴ PA. CONST. art. I, § 27 (emphasis added).

The first clause establishes individual environmental rights;¹⁰⁵ the second and third clauses include language recognizing a public trust.¹⁰⁶ Early judicial interpretations of the Amendment rendered it toothless.¹⁰⁷ Early judicial review under the Amendment consisted of an easily defeated three-part test.¹⁰⁸ This highly deferential test stymied the ability of citizens to challenge government under the Environmental Rights Amendment, which had no limiting effect on government action for forty years.¹⁰⁹

1. *Robinson Township v. Commonwealth*

In 2013, a plurality opinion from the Supreme Court of Pennsylvania restored an enforceable PTD as originally intended by the framers of the Environmental Rights Amendment.¹¹⁰ The plurality noted the Environmental Rights Amendment appears in article I of the Pennsylvania Constitution, which emphasized the Amendment's function as a limit on the power of the legislature, not a grant of power or statement of policy.¹¹¹

The plurality identified the second and third sentences of the Amendment as a constitutional endorsement of the PTD.¹¹² The second sentence recognizes the public's common ownership of the *corpus* of the trust: the "public natural resources," an open-ended category subject to change.¹¹³ The third sentence describes the duty of the Commonwealth in

¹⁰⁵ See *Robinson Twp.*, 83 A.3d at 951 (describing the meaning and effect of the first clause as a "limitation on the state's power to act contrary to [the] right").

¹⁰⁶ See *id.* at 954–59 (describing the meaning and effect of the second and third clauses).

¹⁰⁷ See *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 594–95 (Pa. 1973) (concluding that the public trust clauses of the Environmental Rights Amendment "merely state[d] the general principle of law" that the government has the power to regulate public natural resources).

¹⁰⁸ *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd on other grounds*, 361 A.2d 263 (Pa. 1976), *invalidated by* Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF II*), 161 A.3d 911 (Pa. 2017) ("The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?").

¹⁰⁹ Richard Rinaldi, *Dormant for Decades, the Environmental Rights Amendment of Pennsylvania's Constitution Recently Received a Spark of Life from Robinson Township v. Commonwealth*, 24 WIDENER L.J. 435, 436–37 (2015).

¹¹⁰ See *Robinson Twp.*, 83 A.3d at 953–56 (Castille, J., plurality); *id.* at 950 (majority opinion) ("[T]he jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways."). *Robinson* involved a municipality's challenge to a state statute preempting local regulation. *Id.* at 913.

¹¹¹ *Id.* at 947–48; see also PA. CONST. art. I, § 25 ("To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.").

¹¹² See *Robinson Twp.*, 83 A.3d. at 957.

¹¹³ See *id.* at 955. The plurality reasoned that "public natural resources" currently include "state-owned lands, waterways, and mineral reserves, but also resources that implicate the

relation to the *corpus* as the trustee, interpreted “according to the intent of the settlor.”¹¹⁴ In Pennsylvania’s Environmental Rights Amendment, the people are both settlor and beneficiary.¹¹⁵

The *Robinson Township* plurality interpreted the Amendment’s PTD as coterminous with a Pennsylvania common law trust, concluding that the Commonwealth has a fiduciary duty to “conserve and maintain” the *corpus* of the trust.¹¹⁶ This duty includes both a prohibitory obligation to refrain from acting unreasonably in allowing “degradation, diminution, or depletion” of the *corpus* and an affirmative obligation to legislate for the protection of the trust resources.¹¹⁷ Although the portions of the *Robinson Township* opinion discussing the nature of the Amendment’s PTD were written by the plurality,¹¹⁸ the analysis provided a solid foundation for further judicial development.

2. *Pennsylvania Environmental Defense Foundation v. Commonwealth*

In June 2017, the Supreme Court of Pennsylvania resoundingly reaffirmed the *Robinson Township* plurality’s interpretation of the Environmental Rights Amendment in *PEDF II*.¹¹⁹ The case concerned the constitutionality of legislation transferring proceeds from the sale of natural gas out of a specially designated fund and into the Commonwealth’s general fund.¹²⁰ The court declared two Pennsylvania Fiscal Code amendments unconstitutional because they allowed revenues from oil and gas leases on state park lands to be allocated to non-trust purposes.¹²¹ After concluding natural gas beneath state park land was a trust resource protected by the Amendment, the court ruled “the legislature violates Section 27 when it diverts proceeds from oil and gas development to a non-trust purpose without exercising its fiduciary duties as trustee.”¹²² Essentially, the people of the Commonwealth retained equitable title in the proceeds from the

public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Id.*

¹¹⁴ *Id.* at 956.

¹¹⁵ *Id.* The beneficiaries also include “future generations,” requiring the Commonwealth to “balance the interests of present and future beneficiaries.” *Id.* at 959.

¹¹⁶ *Id.* at 957 (“The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.”).

¹¹⁷ *Id.* at 957–58.

¹¹⁸ Parts III and VI.C of the opinion, discussing the public trust, were joined by only two justices for a total of three justices—the remainder of the opinion was joined by three justices for a total of four. *See id.* at 913. The Supreme Court of Pennsylvania consists of seven total justices. PA CONST. art. V, § 2.

¹¹⁹ *See PEDF II*, 161 A.3d 911, 930 (Pa. 2017) (“[W]e rely here upon the statement of basic principles thoughtfully developed in that plurality opinion.”).

¹²⁰ *Id.* at 937–38.

¹²¹ *Id.* at 938.

¹²² *Id.* at 939.

corpus of the trust, and these proceeds must be managed in accordance with trust purposes.¹²³

The court emphasized first that because of the Amendment's placement in Article I of the Pennsylvania Constitution, it is an exception from the powers of the legislature delineated in Article III.¹²⁴ The second sentence of the Amendment recognizes common ownership of public natural resources to the people of the Commonwealth and removes those resources from other property owned by the Commonwealth.¹²⁵ The third sentence establishes the substantive standard by which the legislature must manage the resources.¹²⁶

At the urging of every party to the litigation, the court explicitly rejected the three-part *Payne v. Kassab* test.¹²⁷ Finding the test substantively unrelated to section 27, the court proceeded to analyze the proper standard under the plain text of the Amendment and Pennsylvania trust law.¹²⁸

The drafters of the Amendment used the words "trust" and "trustee" to incorporate Pennsylvania trust law as it existed at the time of drafting.¹²⁹ The Supreme Court of Pennsylvania interpreted the Amendment to forbid the Commonwealth from dealing with its citizens at arms' length and profiting from the use of their resources.¹³⁰ The Commonwealth must comply with the duties of prudence, loyalty, and impartiality in dealing with trust resources.¹³¹ The court emphasized that the "phrase 'for the benefit of all the people' is unambiguous, clearly indicating that assets of the trust are to be used for conservation and maintenance purposes."¹³² The court ruled that the legislature cannot merely assert that its chosen allocation of the funds are for the "benefit of the people" generally—the purposes of the trust confine the legislature's discretion.¹³³ With this, the Supreme Court of Pennsylvania

¹²³ *Id.*

¹²⁴ *Id.* at 930–31.

¹²⁵ *See id.* at 931.

¹²⁶ *Id.* at 932.

¹²⁷ *Id.* at 930. The three-part test that the *PEDF II* court refused to extend consists of:

- (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?

Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd on other grounds*, 361 A.2d 263 (Pa. 1976), *invalidated by* Pa. Env'tl. Def. Found. v. Commonwealth (*PEDF II*), 161 A.3d 911 (Pa. 2017).

¹²⁸ *See PEDF II*, 161 A.3d at 930.

¹²⁹ *Id.* at 932.

¹³⁰ *Id.*

¹³¹ *Id.* at 932.

¹³² *Id.* at 935.

¹³³ *Id.* at 934–35.

firmly established that the legislature cannot act as proprietor towards trust resources.¹³⁴

The facts of *PEDF II* led to an interesting dynamic—the judiciary admonishing the legislature for its method of appropriation. This unusual interplay between governmental branches highlights the power of a constitutional PTD, and the leverage it creates for citizens who fear mismanagement of public resources. Although the Supreme Court of Pennsylvania refrained from instructing the legislature as to exactly where the revenues may be spent and how they may be designated, it made clear that “if proceeds are moved to the General Fund, an accounting is likely necessary to ensure that the funds are ultimately used in accordance with the trustee’s obligation.”¹³⁵

Justice Baer’s concurring and dissenting opinion highlights the discomfort some judges may face when asked to apply private trust principles in the context of the PTD—a searching review of the legislature’s fiscal actions may be seen as a step too far in the enforcement of the PTD.¹³⁶ Despite Justice Baer’s disagreement with the majority’s use of private trust principles, his opinion reaffirms the legislature’s PTD duty to use funds to “conserve and maintain the public’s natural resources regardless of the Commonwealth’s current financial status.”¹³⁷ In Justice Baer’s view, a windfall from the sale of natural resources that exceeds the amount needed to fulfill public trust duties may be used for other purposes, and conversely, the general fund may be used to fulfill public trust duties when resources themselves cannot provide the needed funding.¹³⁸ Justice Baer’s analysis, therefore, does not diminish the court’s oversight role in enforcing the PTD—it only disagrees with the majority’s substantive standard.

C. Washington

Unlike both Hawaii’s and Pennsylvania’s relatively modern constitutional PTD provisions, Washington’s PTD is rooted in nearly 130-year-old language.¹³⁹ Article XVII, section 1 of its 1889 constitution states:

The state of Washington *asserts its ownership* to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.¹⁴⁰

¹³⁴ *Id.* at 935.

¹³⁵ *Id.* at 939.

¹³⁶ *Id.* at 940–41 (Baer, J., concurring and dissenting).

¹³⁷ *Id.* at 944 (Baer, J., concurring and dissenting).

¹³⁸ *Id.* at 944–45 (Baer, J., concurring and dissenting).

¹³⁹ Compare WASH. CONST. art. XVII, § 1 (adopted 1889), with HAW. CONST. art. XI, §§ 1, 7 (adopted 1978), and PA. CONST. art. I, § 27 (adopted 1971).

¹⁴⁰ WASH. CONST. art. XVII, § 1 (emphasis added).

1. *Early Cases*

In 1969, the Washington Supreme Court concluded that a property owner's right to exclude the public from land owned in fee advanced and receded along with the artificial tide of Lake Chelan.¹⁴¹ The court remanded with instructions to order the removal of fill the property owner had discharged into the lake to raise their land above "high tide," ensuring that their property remained dry land year-round.¹⁴² The court rested its decision on the state's power to remove obstructions to navigation, reaffirming the common law precept that any property owned between high and low tides is qualified by the public's right to navigation.¹⁴³ The precedential value of this Washington Supreme Court decision had the potential to affect the title of many waterfront properties statewide.¹⁴⁴

Responding to this uncertainty, the Washington legislature included a savings clause¹⁴⁵ in its Shoreline Management Act of 1971 (SMA).¹⁴⁶ The effect of the savings clause was to give a *post hoc* legislative blessing to obstructions placed in navigable waters prior to December 4, 1969—the date of the *Wilbour* decision.¹⁴⁷ Following this enactment, there were few legal controversies surrounding pre-*Wilbour* fills.¹⁴⁸

In 1987, the Washington Supreme Court in *Caminiti v. Boyle*¹⁴⁹ ruled on the constitutionality of a Washington statute that allowed private landowners abutting navigable waters to build docks along those waters without paying rent to the state.¹⁵⁰ Individuals with navigational and recreational interests in the public waters of Washington State challenged the statute and argued that its enactment violated article 17, section 1 of the Washington Constitution by abdicating control over trust resources in a

¹⁴¹ See *Wilbour v. Gallagher*, 462 P.2d 232, 238 (Wash. 1969). Thus, in the situation of a naturally varying water level, the respective rights of the public and of the owners of the periodically submerged lands are dependent upon the level of the water. As the level rises, the rights of the public to use the water increase since the area of water increases; correspondingly, the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights. As the level and the area of the water decreases, the rights of the public decrease and the rights of the landowners increase as the waters drain off their land, again giving them the right to exclusive possession until their lands are again submerged. *Id.*

¹⁴² *Id.* at 240.

¹⁴³ *Id.* at 237–38.

¹⁴⁴ See, e.g., Charles E. Corker, *Thou Shalt Not Fill Public Waters Without Public Permission—Washington's Lake Chelan Decision*, 45 WASH. L. REV. 65, 71–76 (1970) (questioning whether all fills within navigable waters must be abated); Edward A. Rauscher, *The Lake Chelan Case—Another View*, 45 WASH. L. REV. 523, 524 (1970) (arguing that the holding of *Wilbour v. Gallagher* is confined to its specific facts).

¹⁴⁵ WASH. REV. CODE ANN. § 90.58.270 (West 2018).

¹⁴⁶ WASH. REV. CODE ANN. ch. 90.58 (West 2018).

¹⁴⁷ See *id.* § 90.58.270(1); *Chelan Basin II*, 413 P.3d 549, 555 (Wash. 2018) (discussing the effect of the savings clause on pre-*Wilbour* obstructions).

¹⁴⁸ *Chelan Basin II*, 413 P.3d at 553.

¹⁴⁹ *Caminiti v. Boyle*, 732 P.2d 989 (Wash. 1987) (en banc).

¹⁵⁰ See *id.* at 992; WASH. REV. CODE ANN. § 79.105.430 (2005) (originally codified at § 79.90.105).

manner either contrary to the public interest or substantially impairing the resource.¹⁵¹

Although the court recognized article 17, section 1's endorsement of the PTD, it characterized the provision as simply an acknowledgement of the common law PTD and a formal vesting of *jus privatum* title in "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."¹⁵² Therefore, in analyzing whether the statute impermissibly impaired the *jus publicum*, the court applied the common law test expressed in the U.S. Supreme Court's *Illinois Central* opinion:

The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."¹⁵³

Based on this test, the court analyzed whether the legislature had abdicated control over the *jus publicum*, and if so, whether such abdication promoted the public interest or at least did not substantially impair it.¹⁵⁴

Concluding that the SMA as a whole—of which the rent-free dock statute was a part—contained controls fully satisfying the requirements of the PTD, the Washington Supreme Court noted that the challenged statute was consistent with these controls.¹⁵⁵ The court decided that the state had not abdicated control over the *jus publicum* because it granted only a revocable license subject to regulation and did not convey title.¹⁵⁶ The court added that the rent-free dock statute ostensibly furthered the public interest by allowing homeowners and guests to access the water, and in any case, decided that the *jus publicum* was not substantially impaired.¹⁵⁷ This outcome suggested that because the PTD remained a common law doctrine despite its constitutional status,¹⁵⁸ any question implicating the PTD in Washington had been legislatively resolved by the SMA, and any further legislation consistent with the SMA would not be subject to a more penetrating judicial review.

¹⁵¹ *Caminiti*, 732 P.2d at 992.

¹⁵² *Id.* at 992–93 (“[Article 17, § 1] was but a formal declaration by the people of rights which our new state possessed by virtue of its sovereignty, and which declaration had the effect of vesting title to such lands in the state.”) (quoting WASH. CONST. art. XVII, § 1).

¹⁵³ *Id.* at 994 (quoting *Ill. Cent. R.R. Co.*, 146 U.S. 387, 453 (1892)).

¹⁵⁴ *Id.* at 994–95.

¹⁵⁵ *Id.* at 997.

¹⁵⁶ *Id.* at 995.

¹⁵⁷ *Id.* at 996–97.

¹⁵⁸ *See id.* at 994.

2. Chelan Basin Conservancy v. GBI Holding Company

The Washington Supreme Court recently reaffirmed the constitutional basis of the PTD in reviewing legislative action, but declined to apply the *Illinois Centra*-based *Caminiti* test in holding that the SMA's savings clause was a permissible abdication of public trust resources.¹⁵⁹ The defendant, GBI, filled once-submerged privately-owned property along Lake Chelan now known as the "Three Fingers Fill" eight years prior to the court's *Wilbour* decision, and therefore was a beneficiary of the SMA's savings clause, which retroactively granted legislative permission to all fills within navigable waters.¹⁶⁰ When GBI sought to develop the Three Fingers Fill in 2010, the Chelan Basin Conservancy—an environmental group—sued in state court, alleging that the fill unreasonably interfered with access to the beach and navigable waters and seeking removal of the fill as inconsistent with the PTD and *Wilbour*.¹⁶¹

On appeal from a trial court decision finding that the SMA's savings clause did not apply to the Three Fingers Fill, the Washington Court of Appeals reversed the lower court's decision.¹⁶² After finding that the SMA's savings clause prevented the Conservancy from bringing either a public trust or public nuisance claim against the Three Fingers Fill, the Washington Court of Appeals applied the test enunciated in *Caminiti* to determine whether the savings clause was a permissible abdication of the *jus publicum*.¹⁶³ Because the court characterized the PTD as "quasi-constitutional", the burden of proving the statute's unconstitutionality rested with the Conservancy.¹⁶⁴ The Washington Court of Appeals ruled the Conservancy failed to meet this burden because it applied the *Caminiti* test to the Three Fingers Fill, rather than to the savings clause as a whole.¹⁶⁵

The case reached the Washington Supreme Court, where the court first determined the savings clause applied to the Three Fingers Fill and that it legislatively barred any challenge based on Washington's PTD.¹⁶⁶ The next question was whether the savings clause was within the scope of the legislature's authority.¹⁶⁷ GBI argued that because the PTD is a common law doctrine, the savings clause preempted any further challenge.¹⁶⁸ The Washington Supreme Court chided GBI for "overlook[ing] the doctrine's constitutional footing" and declared that "any legislation that impairs the

¹⁵⁹ See *Chelan Basin II*, 413 P.3d 549, 558–59 (Wash. 2018).

¹⁶⁰ See *id.* at 552–53; WASH. REV. CODE ANN. § 90.58.270 (West 2017).

¹⁶¹ See *Chelan Basin Conservancy v. GBI Holding Co.* (*Chelan Basin I*), 378 P.3d 222, 224–25 (Wash. Ct. App. 2016); *Chelan Basin II*, 413 P.3d at 553.

¹⁶² *Chelan Basin I*, 378 P.3d at 224.

¹⁶³ *Id.* at 229–30.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 230.

¹⁶⁶ *Chelan Basin II*, 413 P.3d at 557.

¹⁶⁷ *Id.* ("Unless that legislative authorization itself violates public trust doctrine, the Conservancy's claims . . . must be dismissed.")

¹⁶⁸ See *id.* at 557–58.

public trust remains subject to judicial review.”¹⁶⁹ However, the court cautioned, the state’s title ownership of submerged lands based on article XVII, section 1 does not limit the geographical scope of the PTD because that provision “recogniz[es] two distinct interests: the State’s responsibility to protect Washington’s public trust interests and the State’s title ownership in specific lands.”¹⁷⁰ Therefore, the fact that the Three Fingers Fill was privately owned and never owned by the state did not prevent the Washington Supreme Court from identifying a public trust interest.¹⁷¹

Even though the Three Fingers Fill affected the public trust and the court retained jurisdiction to examine the legislature’s post-hoc approval, the court declined to find a violation of the constitutional PTD.¹⁷² Although all parties to the litigation based their arguments on the *Caminiti* test, for practical reasons reflecting economic concerns, fairness, and preservation of settled property titles, the court chose not to apply it to the SMA’s savings clause.¹⁷³ Justice Madsen, in a penetrating concurring opinion, took issue with this choice, although she was able to reach the same result through an application of the *Caminiti* test:

In applying the *Caminiti* test, we must first decide if the legislature gave up its right of control over the *jus publicum* by enacting the savings clause. I would hold that it did not. The legislature has merely consented to fills and other impairments existing before December 4, 1969. The State still maintains control over the *jus publicum* in all other respects. Second, I would hold that the savings clause promotes the public’s interests . . . because it protects the improvements to our tidelands and shorelands that were made before our public trust doctrine jurisprudence was fully developed.¹⁷⁴

The majority assured that its decision did not overrule *Caminiti*, which may still be applied in a typical challenge to legislative action affecting the public trust.¹⁷⁵ Although the *Chelan Basin II* decision raises questions about Washington courts’ substantive analysis of alleged PTD incursions,¹⁷⁶ it provides a clear constitutional basis for judicial review by affirming that

¹⁶⁹ *Id.* at 558.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See id.* at 561.

¹⁷³ “The *Caminiti* test does not adequately account for the special circumstances leading to the development of these fills, the awakening of the public trust doctrine from judicial slumber, and the critical need for settled property titles in these fills for Washington’s economy, resident companies, and private citizens. For these reasons, we decline to apply it in this case.” *Id.* at 559.

¹⁷⁴ *Id.* at 564 (Madsen, J., concurring).

¹⁷⁵ *See id.* at 560 n.11.

¹⁷⁶ *Id.* at 562 (Madsen, J., concurring) (“I acknowledge the importance of the majority’s concerns, but we would have reached the same conclusion by relying on our established precedent, avoiding the uncertainty created by the majority as to when to apply the *Caminiti* test and when to simply declare it to be so.”).

Washington's constitutional PTD is not merely a restatement of common law, but is an elevation of the doctrine binding the legislature.¹⁷⁷

IV. "DORMANT" CONSTITUTIONAL PUBLIC TRUST LANGUAGE

The language found in the Hawaii, Pennsylvania, and Washington constitutions is not unique.¹⁷⁸ Several state constitutions include provisions that invoke PTD principles by using similar words or phrases.¹⁷⁹ These similarities indicate there is an untapped potential in several state constitutions to provide a judicial check on government by enforcing the public trust.

State constitutional provisions invoke the PTD in three primary ways, either through 1) an assertion of public navigation rights, 2) a conservation policy, or 3) a recognition of individual rights to a healthful environment.¹⁸⁰ This section focuses on a sample of state constitutional language that, based upon judicial interpretations of similar provisions in other jurisdictions, may recognize the PTD.¹⁸¹

A. Assertions of State Ownership, Public Navigation Rights, and Fishery Rights

The rights of navigation and fishery are directly traceable to English common law.¹⁸² Sovereign ownership of the bed and banks of navigable

¹⁷⁷ *Id.* at 557–58 (majority opinion).

¹⁷⁸ *See* constitutions cited *infra* note 181.

¹⁷⁹ *Id.*

¹⁸⁰ *See* discussion *supra* Part II.B.

¹⁸¹ Several additional constitutional provisions that may be susceptible to a PTD interpretation include: 1) ALA. CONST. art. XI, § 219.07 (“The Legislature of Alabama finds that Alabama is endowed with a rich diversity of natural areas having unique ecological systems, plant and animal life, geological formations, wildlife habitats, recreational values and scenic beauty. As a part of the continuing growth of the population and the economic development of the state, it is necessary and desirable that certain lands and waters be set aside, managed and preserved for use as state parks, nature preserves, recreation areas, and wildlife management areas.”); 2) COLO. CONST. art. XVIII, § 6 (“The general assembly shall enact laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the state, or upon lands of the public domain, the control of which shall be conferred by congress upon the state.”); 3) N.Y. CONST. art. XIV, § 4 (“The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.”); and 4) TENN. CONST. art I, § 29 (“That an equal participation in the free navigation of the Mississippi, is one of the inherent rights of the citizens of this State; it cannot, therefore, be conceded to any prince, potentate, power, person or persons whatever.”).

¹⁸² *See* *Arnold v. Mundy*, 6 N.J.L. 1, 11–12 (N.J. 1821) (describing the history of common property subject to the public trust in English law and its transfer into American law); *see also*, e.g., *Martin v. Waddell's Lessee*, 41 U.S. 367, 434 (1842) (rights to an oyster bed).

waters served as the legal mechanism preserving use and access.¹⁸³ These historic rights (and concomitant duties) originated in the thirteen colonies, and then spread to every state upon admission into the union based on the “equal footing” doctrine enunciated by the U.S. Supreme Court in 1845.¹⁸⁴ Many older constitutional provisions expressly acknowledge some permutation of such rights, duties, and/or ownership.¹⁸⁵ This section analyzes constitutional language from California and Virginia, explaining those states’ recognition of the PTD’s navigable water-based rights.

1. California’s “Always Attainable” Access

Although California jurisprudence includes a long-acknowledged common law PTD,¹⁸⁶ its recent decisions have not made explicit the connection between the PTD and a provision appearing in the California Constitution since 1879 protecting the navigation rights of the public:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is *required for any public purpose*, nor to destroy or obstruct the *free navigation* of such water; and the Legislature shall enact such laws as will give

¹⁸³ See *Ill. Cent. R. Co.*, 146 U.S. 387, 453 (1892) (“It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found[.]”).

¹⁸⁴ See *Pollard’s Lessee v. Hagan*, 44 U.S. 212, 223 (1845) (“When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the [Declaration of Independence.]”).

¹⁸⁵ See, e.g., ALASKA CONST. art. VIII, §§ 6, 14, & 15; FLA. CONST. art. X, § 11; MINN. CONST. art. II, § 2; MONT. CONST. art. IX, § 3(3); *Mont. Coal. for Stream Access v. Curran*, 682 P.2d 163, 170 (Mont. 1984) (“If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public’s right to recreational use of the surface of the State’s waters.”); R.I. CONST. art. I, § 17; *Champlin’s Realty Assoc., L.P. v. Tillson*, 823 A.2d 1162, 1166 (R.I. 2003) (“[The *jus publicum* and the *jus privatum*] form the basis of the public trust doctrine, which first was embodied in this state in the Rhode Island colonial charter and currently is codified in article 1, section 17, of the Rhode Island Constitution.”); S.C. CONST. art. XIV, §§ 1 & 4; TENN. CONST. art. I, § 29; TEX. CONST. art. XVI, § 59(a). “The State’s ownership of State water is a public trust and the State is under a constitutional duty to conserve the water as a precious resource. This duty permeates and governs the State’s administration of the whole fabric of rights and obligations relative to water rights and water usage in our State.” *Lower Colo. River Auth. v. Tex. Dep’t of Water Res.*, 638 S.W.2d 557, 562 (Tex. App. 1982) (citing *Tex. Water Rights Comm’n v. Wright*, 464 S.W.2d 642 (Tex. 1971)), *rev’d on other grounds*, 689 S.W.2d 873 (Tex. 1984); WASH. CONST. art. XVII, § 1; WIS. CONST. art. IX, § 1.

¹⁸⁶ See, e.g., *Mono Lake*, 658 P.2d 709, 718–19 (Cal. 1983) (identifying the common law basis of the PTD in California); *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1159 (Cal. 1884) (stating that it is “beyond the power of the legislature” to destroy or abridge the public’s navigational rights).

the most liberal construction to this provision, so that *access to the navigable waters of this State shall be always attainable for the people thereof*.¹⁸⁷

Article X, section 4 contains PTD language such as “required for any public purpose,” “free navigation,” “shall enact,” “access to the navigable waters,” and “shall always be attainable.”¹⁸⁸ If California courts followed Washington’s lead by recognizing the PTD’s constitutional footing in this provision, any state action affecting the *jus publicum*, as recognized in article X, section 4, could be subject to judicial review.¹⁸⁹ As a limitation on the sovereign, the PTD recognized in article X, section 4 would be self-executing and not subject to alteration by statute.¹⁹⁰

In an early case, *People ex. Inf. Webb v. California Fish Co.*,¹⁹¹ the California Supreme Court acknowledged article X, section 4 (then article XV, section 2) as a constitutional limitation on the legislature’s power to alienate tidelands “so as to entitle the grantee to destroy or interfere with the public easement for navigation.”¹⁹² Despite this prohibition, the *California Fish* court ruled that the PTD permits alienation of the *jus publicum* when the legislature does so explicitly in furtherance of navigational or commercial interests.¹⁹³ Nearly six decades later, in *Marks v. Whitney*,¹⁹⁴ the California Supreme Court reaffirmed *California Fish’s* enunciation of the PTD,¹⁹⁵ but described the interests thereunder as not limited to navigation and commerce, but as “sufficiently flexible to encompass changing public needs.”¹⁹⁶ The *Marks* court recognized both recreation and ecological preservation as valid public trust uses.¹⁹⁷ Subsequently, in *City of Berkeley v. Superior Court*,¹⁹⁸ the California Supreme Court reaffirmed the *California Fish* rule in reviewing an 1870 statute authorizing the sale of tidelands:

¹⁸⁷ CAL. CONST. art. X, § 4 (emphasis added).

¹⁸⁸ *Id.*

¹⁸⁹ *Cf. supra* Part III.C.

¹⁹⁰ *See, e.g., Fitts v. Super. Ct. in Los Angeles Cty.*, 57 P.2d 510, 512 (Cal. 1936) (“[T]he State Constitution, as distinguished from the Federal Constitution, does not constitute a grant of power, or an enabling act, to the Legislature, but rather constitutes a limitation upon the powers of that body. . . . [U]nless restrained by constitutional provision, the Legislature is vested with the whole of the legislative power of the state.”); *Flood v. Riggs*, 80 Cal. App. 3d 138, 154 (Cal. Ct. App. 1978) (establishing that a constitutional provision is self-executing “if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced”); *Modern Barber Colls. Inc. v. Cal. Emp’t Stabilization Comm’n*, 192 P.2d 916, 921 (Cal. 1948) (“[I]f the right to be vindicated is one granted by the Constitution, an injunction may be granted regardless of the statute if injunction is an appropriate remedy, because the right is one which the Legislature cannot abridge.”); *but see Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 165 (Cal. 1971) (holding that constitutional restrictions on the legislative power are to be construed strictly).

¹⁹¹ 138 P. 79 (Cal. 1913).

¹⁹² *Id.* at 88.

¹⁹³ *See id.* at 82–83, 87–88.

¹⁹⁴ 491 P.2d 374 (Cal. 1971).

¹⁹⁵ *See id.* at 379–80.

¹⁹⁶ *Id.* at 380.

¹⁹⁷ *Id.*

¹⁹⁸ 606 P.2d 362 (Cal. 1980).

“statutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public’s interest in tidelands, the court must give the statute such an interpretation.”¹⁹⁹ The court ultimately held the 1870 statute did not grant the tidelands free from the public trust easement because the act did not clearly improve navigation—a prerequisite for finding that the legislature intended to abandon the public trust.²⁰⁰

In its *Mono Lake* decision, the Supreme Court of California addressed the role of the PTD in the context of state-administered appropriative water rights.²⁰¹ There, the court reiterated the principle of *California Fish*—that the PTD is “an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”²⁰² The *Mono Lake* court ruled that all uses of the state’s water resources, included uses protected by the PTD, are subject to a constitutionally mandated “reasonable use” standard.²⁰³ Therefore, the court held, the “state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”²⁰⁴ In footnote twenty-seven of the opinion, the court describes the PTD as “judicially fashioned” and “non-codified.”²⁰⁵ This language suggests that although *California Fish* cited article X, section 4 as a constitutional restriction on alienation of property burdened by the public trust, the California Supreme Court does not yet acknowledge all aspects of the PTD as constitutionally-based.

Several questions require judicial resolution. Does the *California Fish* rule now apply to all recognized public trust uses, including recreation and ecological preservation? If so, does the rule encompassing these interests apply to statutes enacted prospectively (as of the date of the *Marks* decision), or retrospectively?²⁰⁶ If California courts were to analyze the constitutional basis of the *California Fish* decision, would the courts recognize the PTD as a doctrine with “constitutional footing” as the Washington Supreme Court did in *Chelan Basin II*?

In that opinion, the Washington Supreme Court “embraced [its] constitutional responsibility to review challenged legislation . . . to

¹⁹⁹ *Id.* at 369.

²⁰⁰ *Id.* at 369–72.

²⁰¹ *See Mono Lake*, 658 P.2d 709, 712 (Cal. 1983).

²⁰² *Id.* at 724.

²⁰³ *Id.* at 725; *see also* CAL. CONST. art. X, § 2 (1928).

²⁰⁴ *Mono Lake*, 658 P.2d at 728.

²⁰⁵ *Id.* at 728 n.27.

²⁰⁶ In *City of Berkeley*, the California Supreme Court faced the prospect of disturbing title expectations to several parcels based on its holding that the 1870 statute did not abandon the public trust easement. *See City of Berkeley*, 606 P.2d 362, 373 (Cal. 1980). In that case, the court chose to burden parcels that were still susceptible to public trust uses, and declare those parcels that were no longer valuable for public trust uses to be free of the easement. *Id.*

determine whether that legislation comports with the State's public trust obligations" in addressing a situation (obstruction of a navigable lake with fill) not contemplated by the language of the relevant constitutional provision (addressing state ownership).²⁰⁷ This decision emphasizes that a state constitutional provision can embrace the PTD as a constitutional limitation on the sovereign's power without explicitly delineating all aspects of the doctrine in the provision's text. The text of Washington's article XVII, section 1 discusses only state ownership of certain tidelands, yet the Washington Supreme Court interpreted it as a judicially enforceable PTD. California's article X, section 4's literal subject matter is similarly limited to public access to tidelands, but may serve as a basis for a full-blown constitutional PTD.

2. Virginia's Oyster Beds

Virginia courts recognize the PTD as a common law doctrine implied in the Virginia Constitution and subject to further definition by statute and, in theory, by the Virginia Constitution itself.²⁰⁸ However, courts have not interpreted the Virginia Constitution to substantively limit the state's authority, despite language clearly delineating how natural resources should be managed.²⁰⁹ A provision included in the Virginia Constitution of 1902 addressed the natural oyster beds found within the state. Article XI, section 3 of the Virginia Constitution states:

The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented, or sold but shall be *held in trust for the benefit of*

²⁰⁷ See *Chelan Basin II*, 413 P.3d 549, 558 (Wash. 2018); see also WASH. CONST. art. XVII, § 1.

²⁰⁸ [T]he right of the people to use the navigable waters of the State for the purposes of navigation is an inherent and inseparable incident of the sovereign governmental power and of the *jus publicum* of the State . . . therefore, the State Constitution impliedly denies to the legislature the power to deprive them of it or substantially impair it.

Commonwealth v. City of Newport News, 164 S.E. 689, 697 (1932) (interpreting the holding of *Ill. Cent. R. Co. v. State of Ill.*, 146 U.S. 387 (1892)) (emphasis added). "[W]hether an activity is a right of the people inherent to the *jus publicum* is a matter of Virginia common law subject to the Constitution of Virginia and the General Assembly's modification by statute." *Va. Marine Res. Comm'n v. Chincoteague Inn*, 757 S.E.2d 1, 7 (Va. 2014).

²⁰⁹ See VA. CONST. art. XI, §§ 1–3. Sections 1 and 2 are analyzed in Part IV.B.1., *infra*. See also Margit Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 681–82 (1983) ("Virginia precedent has spawned a relatively narrow version of the doctrine. Currently, the state holds tidelands in trust for the people only to protect the public right of navigation on navigable waters. The trust does not include protection of public rights of fishing, hunting, or bathing in navigable waters or on tidelands. The Virginia cases establishing this circumscribed view of the public trust date from the 1930's and earlier. Changes in the Virginia Constitution and statutes since that period reflect a concern for a broader range of public rights on navigable waters, including a concern for protecting public waters from environmental degradation and for allowing the maximum desirable public use of such waters. Given these changes, a contemporary Virginia court might well interpret the public trust more broadly." (citations omitted)).

the people of the Commonwealth, subject to such regulations and restriction as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals by surveys or otherwise.²¹⁰

Case law interprets the language in this provision narrowly, without inferring any paramount public right to the oyster fishery.²¹¹ In 1929, the Supreme Court of Virginia acknowledged that article XI, section 3 created a trust, yet concluded the legislature had broad discretion in managing the oyster beds.²¹² The phrase “subject to such regulations and restriction as the General Assembly may prescribe”²¹³ permits the legislature to take action that “is reasonable, is not contrary to the Constitution, but accords with its dominant purpose, i.e., the recovery and preservation of the public grounds for the public benefit.”²¹⁴ Later decisions make clear, however, that the “public benefit” does not need to be related to the preservation of oyster beds.²¹⁵ Despite strong trust language in article XI, section 3, the Supreme Court of Virginia seemingly put the prospect of a robust constitutional PTD to rest in 1932.²¹⁶

In *Commonwealth v. City of Newport News*, the state executive branch challenged the city of Newport News seeking abatement of the discharge of untreated municipal sewage threatening to destroy natural oyster beds.²¹⁷

²¹⁰ VA. CONST. art. XI, § 3 (emphasis added).

²¹¹ [The] Constitution prohibits the Legislature from leasing, renting, or selling, the natural oyster beds, rocks, and shoals in the waters of the state, and declares that the same shall be held in trust for the benefit of the people of this state, but there is no other inhibition in the Constitution on the powers of the Legislature over the beds of navigable waters of the state. The result is that the Legislature has the power to dispose of such beds and the waters flowing over them subject to the public use of navigation, and such other public use, if any, as is held by the state for the benefit of all the people.

James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp., 122 S.E. 344, 346–47 (Va. 1924).

[Article XI, section 3] is the only provision of the Constitution of Virginia which contains any specific restriction upon the power of the legislature to dispose of the tidal bottoms of the state and the waters above them, and that except for this provision, the public waters of the state come under Code, § 62-1, with the right of the legislature to regulate the use thereof, both as to migratory waterfowl *and oysters*.

Avery v. Beale, 80 S.E.2d 584, 592 (Va. 1954) (emphasis added) (citing *Commonwealth v. City of Newport News*, 164 S.E. 689, 699 (Va. 1932)).

²¹² *Blake v. Marshall*, 148 S.E. 789, 793 (Va. 1929).

²¹³ VA. CONST. art. XI, § 3.

²¹⁴ *Blake*, 148 S.E. at 793.

²¹⁵ *But see PEDF II*, 161 A.3d 911 (Pa. 2017) (holding that money generated from the sale of trust resources must benefit trust purposes including, *inter alia*, preservation of the trust resource in its natural state); *see also supra* Part III.B.

²¹⁶ *See Commonwealth v. City of Newport News*, 164 S.E. 689, 695–96 (Va. 1932); *see also* Sharon M. Kelly, Note, *The Public Trust and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia*, 75 VA. L. REV. 895, 905–08 (1989) (providing an in-depth review of Virginia’s narrow interpretation of the PTD).

²¹⁷ *City of Newport News*, 164 S.E. at 689.

The state Attorney General invoked the PTD as authority for seeking the abatement, alleging that because the General Assembly failed in its duty as trustee to preserve the public's right of fishery,²¹⁸ the Executive must discharge this duty through litigation:

It is the duty of the General Assembly to make proper provision for the protection and enforcement of the common rights of the people in the tidal waters. But if it authorizes, permits, or suffers an individual or municipality to use the tidal waters or any substantial part thereof in such a way as to destroy or substantially impair the *corpus* of the trust property by destroying or substantially impairing the right of the people to exercise their common rights therein, such as the right of fishery, it is the duty of the executive department of the state government to invoke the aid of the judicial department to restrain the individual or municipality from so doing; and the courts have the jurisdiction to and should restrain him or it from so doing.²¹⁹

Because the discharge of sewage threatened to destroy or substantially impair the public's right to the oyster fishery, the Attorney General sought an injunction against the city.²²⁰

The court recognized the common law PTD implied in the constitution as an incident of sovereignty: in transferring property, the state cannot "relinquish, surrender, alienate, destroy, or substantially impair" the *jus publicum*.²²¹ Surprisingly, however, the court analyzed the public's interest in the oyster shellfishery and ruled that it was a part of the *jus privatum*.²²² By contrasting the right of the fishery with the right to navigation, the court suggested the right to navigation was a part of the *jus publicum* because of its connection with the explicit constitutional right of liberty.²²³ This interpretation of the PTD is unique, considering the doctrine is traceable from English common law to state law, without any reliance on the U.S. Constitution or on state constitutional provisions not invoking the PTD.

The court reasoned that article XI, section 3 prohibited only *private* use that would impair the public's right to the shellfishery, imposing no restrictions on what the General Assembly may deem a beneficial public use.²²⁴ Therefore, the discharge of raw sewage over oyster beds was permissible based on the historical practice of pollution uninterrupted by legislative prohibition.²²⁵ Although the federal Clean Water Act largely

²¹⁸ See *id.* at 700 ("By Acts 1930, c. 148, p. 357, the Legislature authorized the city of Newport News to issue a bond issue for making improvements in its sewage disposal system. . . . [T]he act of 1930 must be construed as authorizing Newport News to discharge its sewage into the Roads untreated.").

²¹⁹ *Id.* at 692 (paraphrasing the Attorney General's petition).

²²⁰ *Id.* at 691.

²²¹ *Id.* at 697.

²²² *Id.* at 698.

²²³ *Id.*

²²⁴ *Id.* at 699.

²²⁵ Indeed, the history of sewers shows that from time immemorial the right to connect them with navigable streams has been regarded as part of the *jus publicum*. . . . Such a use of public waters must necessarily entail some defilement. The degree of pollution to be

abrogates the precedential nature of this ruling as applied to pollution,²²⁶ the law in Virginia is clear: notwithstanding the language of article XI, section 3, the natural oyster beds are not constitutionally preserved for use as a shellfishery.

Despite article XI, section 3's strong trust language and the common association of the rights of navigation with the rights of the fishery,²²⁷ Virginia courts have not interpreted it to constitutionalize the PTD. To the contrary, it imposes a restriction on the *jus privatum*: the state's ability to alienate the oyster beds.²²⁸ To the extent that precedent forecloses a PTD based on the right to the oyster shellfishery, Virginia courts may look to the assertion of ownership in article XI, section 3 as a basis for a constitutional PTD.²²⁹ In Washington, the common law concept of the *jus publicum* coexisted with the constitutional assertion of ownership in article XVI, section 1 until the *Chelan Basin II* decision reaffirmed in 2018 that Washington's PTD enjoyed constitutional status.²³⁰ A court could recognize a similar pattern in Virginia law, and thereby assert its power to review legislative action affecting the *jus publicum* navigational interest.²³¹

permitted is a matter over which the legislature has full power and control. Under the common law and by the authority and sufferance, express or implied, of the General Assembly, the cities, towns and communities on Hampton Roads and its estuaries have been exercising the privilege of discharging raw sewage into these waters from the earliest days of the Commonwealth, and long before chemical treatment of sewage was known of as a practical operation.

Id.

²²⁶ See generally Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012); “There is no defense for the practice of dumping all of the wastes that this country generates into its rivers, lakes, and streams. The [Clean Water Act] stipulated that the Nation’s fresh and marine waters would not be an element of the waste treatment process. That continues to be national policy.” S. Rep. No. 95-370, at 4 (1977).

²²⁷ See, e.g., *Hardin v. Jordan*, 140 U.S. 371, 381 (1891) (“[T]itle to the shore and lands under water is regarded as incidental to the sovereignty of the state,—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery,—and cannot be retained or granted out to individuals by the United States.”); *State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989) (“Fishing and navigation are among the expressly recognized uses protected by the public trust doctrine.”); *Just v. Marinette Cty.*, 201 N.W.2d 761, 768 (Wis. 1972) (“The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty.”).

²²⁸ *Commonwealth v. City of Newport News*, 164 S.E. 689, 699 (Va. 1932) (“The prohibition against leasing, renting, or selling the natural oyster rocks prohibits the legislature from disposing of any of the *proprietary* rights of the state therein.” (emphasis added)).

²²⁹ VA. CONST. art. XI, § 3 (“The natural oyster beds . . . shall be *held in trust* for the benefit of the people of the Commonwealth[.]” (emphasis added)).

²³⁰ See *supra* Part III.C.

²³¹ Cf. *Chelan Basin II*, 413 P.3d 549, 558 (Wash. 2018) (“Because of the doctrine’s constitutional underpinning, any legislation that impairs the public trust remains subject to judicial review.”).

B. Conservation Policies

Although Hawaii's article XI, sections 1 and 7 perhaps exemplify the strongest public trust conservation language,²³² other states have interpreted their constitutions' conservation policies to endorse the PTD, despite a lack of traditional "trust" language.²³³ This Part identifies similar state constitutional provisions that courts have not subjected to a PTD interpretation or that courts currently interpret as insignificant in judicial review of state actions. By looking to the Supreme Court of Hawaii's *Waiahole Ditch* decision as guidance, state courts can utilize these provisions in enforcing the PTD.

1. Virginia's Conservation Policy

As discussed, Virginia's 1902 constitution contained public trust language protecting the natural oyster beds.²³⁴ In 1970, the Virginia Commission on Constitutional Revision added provisions addressing concerns about environmental degradation to the Commonwealth's resources generally.²³⁵ Article XI, section 1 declares a policy of conservation and protection:

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop,

²³² *For the benefit of present and future generations*, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

HAW. CONST. art. XI, § 1 (emphasis added). "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." *Id.* art. XI, § 7 (emphasis added); see also *supra* Part III.A.

²³³ See, e.g., FLA. CONST. art. X, § 11; *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So.2d 339, 344 (Fla. 1986) ("[Article X, section 11] is largely a constitutional codification of the public trust doctrine contained in our case law."); LA. CONST. art. IX, §§ 1, 3; *Save Ourselves, Inc. v. La. Env't'l Control Com'n*, 452 So.2d 1152, 1154 (La. 1984) ("The public trust doctrine was continued by the 1974 Louisiana Constitution, which specifically lists air and water as natural resources, commands protection, conservation and replenishment of them insofar as possible and consistent with health, safety and welfare of the people, and mandates the legislature to enact laws to implement this policy."); MICH. CONST. art. IV, § 52; *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989) (explaining the role of the Michigan Environmental Protection Act, MICH. COMP. LAWS ANN. §§ 324.1701-06 (West 2017), in interpreting art. IV, § 52 as a public trust mandate); N.M. CONST. art. XX, § 21; *Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015) ("We agree that Article XX, Section 21 of our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state.").

²³⁴ See *supra* Part IV.A.2.

²³⁵ See Kelly, *supra* note 216, at 912-13.

and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to *protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.*²³⁶

Section 2 empowers the legislature to enact these policies through agencies and agreements:

In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations.

Notwithstanding the time limitations of the provisions of Article X, Section 7, of this Constitution, the Commonwealth may participate for any period of years in the cost of projects which shall be the subject of a joint undertaking between the Commonwealth and any agency of the United States or of other states.²³⁷

In 1985, the Supreme Court of Virginia ruled that article XI, section 1 was not self-executing because it “contains no declaration of self-execution, it is not in the Bill of Rights, it is not declaratory of common law, and it lays down no rules by means of which the principles it posits may be given the force of law.”²³⁸ In contrast, section 2 provides substantive guidance to the legislature—the court recognized that although section 2 uses the word “may” instead of “shall” in describing the actions the legislature is instructed take, the provision is a constitutional mandate requiring General Assembly to legislate.²³⁹ The Supreme Court of Virginia therefore reasoned that the sole

²³⁶ VA. CONST. art. XI, § 1.

²³⁷ *Id.* § 2.

²³⁸ See *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 676 (Va. 1985). *But see* *Robinson Twp. v. Commonwealth*, 623 Pa. 83 A.3d 901, 964–67 (Pa. 2013) (discussing prior precedent relying on legislative action to trigger Pennsylvania's Environmental Rights Amendment and emphasizing that under the Amendment, all three branches of government have an obligation to carry out its commands). See also William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 441–45 (1997) (arguing that the PTD serves as a process-based solution to vague constitutional policy statements like VA. CONST. art. XI, § 1 and LA. CONST. art. IX, § 1).

²³⁹ *Shockoe Slip Found.*, 324 S.E.2d at 677 (“Shockoe discounts the language of section 2 as purely permissive. But, considered contextually, its import is directory. If permissive only, it is meaningless, because Article IV, § 14, of the Constitution provides that ‘[t]he authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted.’ Since the General Assembly already possessed the authority mentioned in section 2, the only purpose for adding that section to Article XI was to instruct the General Assembly to enact statutes whereby the public policy declared in section 1 could be executed.”).

purpose of section 2 was to require the creation of a statutory mechanism to execute the policy statement in section 1.²⁴⁰ Based on this analysis, it rejected the lower court's decree requiring the state to expressly consider the policies in section 1 before taking action affecting historic structures.²⁴¹ Ultimately, according to the Supreme Court of Virginia, the policies in section 1 are only enforceable insofar as a statute executes those policies. A question left unanswered by the Virginia Supreme Court is whether section 2 may be judicially enforced—could a suit be brought to force the legislature to create law embodying the policies of section 1?²⁴²

Alternatively, if Virginia courts identify article XI, section 1 as a substantive constitutional expression of the PTD in the future, it could be ruled self-executing: “[C]onstitutional provisions . . . merely declaratory of common law are usually considered self-executing.”²⁴³ Because the PTD has its origins in common law as a limitation on the sovereign, its presence in the Virginia Constitution would then be self-executing. In Virginia, self-executing provisions are enforceable against the Commonwealth by a litigant with standing.²⁴⁴

Notably, the language in Virginia's article XI, sections 1 and 2 is substantively identical to the PTD language in Louisiana's constitution, which announced a conservation policy and instructed the legislature to enact laws to further the policy.²⁴⁵ Contrary to the Supreme Court of Virginia,

²⁴⁰ *See id.*

²⁴¹ *Id.* at 676. (“By final decree entered June 2, 1982, the chancellor ruled that ‘[t]he Constitution sets out a very broad public policy which binds all the State agencies and citizens of Virginia’; that ‘[t]he constitutional mandate applies to all projects’; and that ‘the State has not reasonably weighed all the factors that it is required to weigh and to consider under Article XI of the Constitution.’ Accordingly, the chancellor ordered that ‘the defendants are permanently enjoined from taking further action . . . until the defendants have documented their decision-making process in a manner which reflects that they have taken into account the Commonwealth’s constitutionally stated public policy of preserving, utilizing, and developing its historical buildings.’”).

²⁴² A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, *or the duty imposed may be enforced*, and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

Id. (quoting *Newport News v. Woodward*, 104 Va. 58, 51 S.E. 193, 194 (1905)) (emphasis added). *But see* *Gray v. Virginia Sec’y of Trans.*, 662 S.E.2d 66, 73 (Va. 2008) (finding constitutional provisions placing “duties and restrictions upon the Commonwealth itself” to be self-executing).

²⁴³ *Shockoe Slip Found.*, 324 S.E.2d at 676.

²⁴⁴ *See Gray*, 662 S.E.2d at 73 (“The constitutional provisions at issue in this case place duties and restrictions upon the Commonwealth itself and its departments. To give full force and effect to the provisions as self-executing, a person with standing must be able to enforce them through actions against the Commonwealth. Thus, we further hold that the self-executing constitutional provisions before us waive the Commonwealth’s sovereign immunity.”).

²⁴⁵ *See* LA. CONST. art. IX, § 1:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

the Louisiana Supreme Court decided that article IX, section 1 of its constitution encapsulated the PTD, and held that it imposes a duty on Louisiana's Environmental Control Commission "requir[ing] an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare."²⁴⁶ Decisions made pursuant to this duty are subject to heightened scrutiny on review, similar to the standard of review announced by the Hawaii Supreme Court in *Waiahole Ditch*.²⁴⁷

If a Virginia court were to revisit article XI, section 1, a ruling may emerge that embraces the PTD and finds the provision to be self-executing and subject to heightened scrutiny based on persuasive precedent from both Hawaii and Louisiana.²⁴⁸ Such a ruling would likely be based on the similarity in language and purpose among the states' constitutional provisions.

2. *North Carolina's Policy to Preserve for the Benefit of Its Citizenry*

North Carolina's constitution embraces strong trust language by providing:

It shall be the policy of this State to *conserve and protect* its lands and waters for the *benefit of all its citizenry*, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to *preserve as a part of the common heritage* of this State its forests, wetlands,²⁴⁹ estuaries, beaches, historical sites, openlands, and places of beauty.

²⁴⁶ *Save Ourselves, Inc. v. La. Envtl. Control Comm'n*, 452 So.2d 1152, 1157–58 (La. 1984). Additionally,

the agency must act with diligence, fairness and faithfulness to protect this particular public interest in the resources. . . . [T]he commission's role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission.

Id.

²⁴⁷ *Id.* at 1159. ("The regulatory scheme provided by constitution and statute mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties. Reviewing courts should not reverse a substantive decision on its merits, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental protection. However, if the decision was reached procedurally, without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the courts' responsibility to reverse."). *Cf. Waiahole Ditch*, 9 P.3d 409, 455–56 (Haw. 2000). (establishing a standard of heightened scrutiny for legislation affecting the public trust).

²⁴⁸ *See supra* notes 248–49 and accompanying text.

²⁴⁹ N.C. CONST. art. XIV, § 5 (emphasis added).

North Carolina courts embrace a common law PTD—often citing to it in conjunction with article XIV, section 5²⁵⁰—yet the courts have not connected the traditional navigation-based PTD with the trust language of North Carolina’s constitution. There is some indication, however, that the drafters of the provision, known as the Environmental Bill of Rights, intended to adopt the PTD as a constitutional directive.²⁵¹ Despite evidence of this intent, the North Carolina Supreme Court has all but eliminated the possibility of a constitutional public trust, at least in the context of legislative alienation of public trust lands. The court affirmatively stated that the PTD has no constitutional basis, and that the PTD merely creates a presumption, rebuttable by express statutory language, that the legislature did not intend to impair public trust rights.²⁵² If North Carolina courts acknowledge both the framers’ intent and the role of the PTD in “conserv[ing] and protect[ing] its lands and waters for the benefit of all its citizenry,”²⁵³ the state’s courts may begin to identify article XIV section 5 as a constitutional basis for the PTD.

The language in article XIV, section 5 is similar to that of Hawaii’s article XI, sections 1 and 7,²⁵⁴ mandating “conserv[ation]” and “protect[ion]” for the “benefit of all [North Carolina’s] citizenry.”²⁵⁵ In *Waiahole Ditch*, the Supreme Court of Hawaii used a plain-language analysis to conclude that the framers intended to constitutionalize the PTD.²⁵⁶ According to the North Carolina Supreme Court, in interpreting the state constitution, courts must “give effect to the intent of the framers”²⁵⁷ and construe the language “in consonance with the objects and purposes in contemplation” at the time of

²⁵⁰ See, e.g., *State ex rel. Rohrer v. Credle*, 369 S.E.2d 825, 831 (N.C. 1988); *Parker v. New Hanover Cty.*, 619 S.E.2d 868, 875 (N.C. Ct. App. 2005).

²⁵¹ Milton S. Heath, Jr. & Alex L. Hess, III, *The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation*, 29 CAMPBELL L. REV. 535, 540 (2007) (“The original bill introduced by Senator Bowles expressed a State policy of protecting ‘resources which are held in trust for the People of the State.’ This policy declaration reflected the thinking of the bill’s principal drafter, Professor Schoenbaum, who regarded the public trust as a key feature of environmental policy. The phrase ‘held in trust for the People’ was deleted from the bill at an early stage and replaced by the phrase ‘the common heritage of the state.’” (footnotes omitted)).

²⁵² *Gwathmey v. State Dep’t of Env’t, Health, & Nat. Res.* 464 S.E.2d 674, 684 (N.C. 1995) (“No constitutional provision throughout the history of our State has expressly or impliedly precluded the General Assembly from conveying lands beneath navigable waters by special grant in fee simple and free of any rights arising from the public trust doctrine. The public trust doctrine is a common law doctrine. In the absence of a constitutional basis for the public trust doctrine, it cannot be used to invalidate acts of the legislature which are not proscribed by our Constitution. Thus, in North Carolina, the public trust doctrine operates as a rule of construction creating a presumption that the General Assembly did not intend to convey lands in a manner that would impair public trust rights. . . . However, this presumption is overcome by a special grant from the General Assembly *expressly* conveying lands underlying navigable waters in fee simple and without reservation of any public trust rights.” (citations omitted)).

²⁵³ N.C. CONST. art. XIV, § 5.

²⁵⁴ See HAW. CONST. art. XI §§ 1, 7.

²⁵⁵ N.C. CONST. art. XIV, § 5.

²⁵⁶ See *Waiahole Ditch*, 9 P.3d 409, 443–44 (Haw. 2000).

²⁵⁷ *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm’rs*, 681 S.E.2d 278, 282 (N.C. 2009).

the language's adoption.²⁵⁸ Based on the history of the provision,²⁵⁹ and the presence of strong trust language, a North Carolina court could easily conclude that article XIV, section 5 is a constitutional codification of the PTD. Instead of citing merely to the common law PTD and the constitutionally-based policy of conservation as support, North Carolina courts could recognize their authority to interpret and apply the state's PTD duties within article XIV, section 5.²⁶⁰

Article XIV, section 5 includes several guiding principles such as control of air, water and noise pollution, as well as preservation of recreational areas, scenic areas, "forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty."²⁶¹ A reviewing court could use these principles in determining whether legislative and administrative actions comport with North Carolina's PTD, as Hawaiian courts do.²⁶² The implementation of laws adopted pursuant to article XIV, section 5 may be subject to a court's review with analysis favoring the public's interest in the resources identified, rather than a simple requirement that the legislature expressly extinguish the *jus publicum* interest.²⁶³

C. Recognition of Individual Rights to a Healthful Environment

Individual environmental rights are arguably the most promising constitutional provisions for those seeking to adapt the PTD to environmental protection from a public health perspective.²⁶⁴ Pennsylvania's article I, section 27 acknowledges the interlocking nature of individual rights and the PTD, as examined in the Supreme Court of Pennsylvania's *Robinson*

²⁵⁸ State v. Webb, 591 S.E.2d 505, 509 (N.C. 2004)

²⁵⁹ See Heath & Hess, *supra* note 251, at 539.

²⁶⁰ Cf. State ex rel. Rohrer, 369 S.E.2d 825, 832 (stating that the PTD combined with statutes implementing the policy of art. XIV, § 5 creates a presumption in favor of public ownership of natural oyster beds); Parker v. New Hanover Cty., 619 S.E.2d 868, 875–76 (N.C. Ct. App. 2005) (citing to art. XIV, § 5, the PTD, North Carolina's public policy, and legislation as support for finding that the first part of a two-part test weighs in favor of declaring relocation of an inlet to be a public purpose).

²⁶¹ See N.C. CONST. art. XIV, § 5.

²⁶² Cf. *Waiahole Ditch*, 9 P.3d 409, 445 (Haw. 2000) ("[The PTD] continues to inform the Code's interpretation, define its permissible 'outer limits,' and justify its existence.").

²⁶³ Compare *id.* at 455–56 ("[T]he state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state."), with *Gwathmey v. State Dep't of Env't, Health, & Nat. Res.* 464 S.E.2d 674, 684 (N.C. 1995) (stating that the General Assembly has the power to convey the *jus publicum* as long as it does so expressly).

²⁶⁴ See, e.g., Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 166–75 (2005) (arguing that environmental rights provisions can support a state equal protection claim); MAYA K. VAN ROSSUM, *THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT* (2017) (advocating for grassroots efforts to strengthen constitutional environmental protections); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L. J. 711, 711 (2008) (explaining how the concept of environmental rights interact with the PTD).

Township and *PEDF II*.²⁶⁵ In Pennsylvania, the constitution excepts the rights proclaimed in the Environmental Rights Amendment out of the general powers of government²⁶⁶ and codifies the PTD as a limitation on the sovereign.²⁶⁷ Even without PTD language as explicit as Pennsylvania's,²⁶⁸ the PTD serves as an implicit limitation necessary to ensure protection of the express constitutional rights.²⁶⁹ The PTD, however, is not merely a carve-out from the state's police powers, it is also an affirmative duty to manage the *corpus* of the trust for the beneficiaries—the right-holder—whether an individual or the public collectively.²⁷⁰

1. Illinois's Enforceable Right

The Illinois Constitution has two interrelated environmental protection provisions, the second of which establishes individual rights: "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General

²⁶⁵ See *supra* Part III.B.

²⁶⁶ See PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."); *PEDF II*, 161 A.3d 911, 931 (Pa. 2017) ("This clause places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.").

²⁶⁷ See PA. CONST. art. I, § 27 ("Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."); see also Sax, *supra* note 7, at 477 (describing restrictions imposed on governmental authority by the PTD).

²⁶⁸ See, e.g., HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. art. XCVII; MONT. CONST. art. II, § 3.

²⁶⁹ See, e.g., *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 950–51 (Pa. 2013) ("A legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizens' rights or the government has failed in its trustee obligations, or upon both theories, given that the two paradigms, while serving different purposes in the amendatory scheme, are also related and overlap to a significant degree."). In determining whether the state had the power to destroy or impair the *corpus* of the alleged trust—an oyster bed—the Supreme Court of Virginia provided the following analysis:

This question in turn must be determined by these two questions: (1) Does the State Constitution expressly or impliedly give or guarantee to the people the right to use [the oyster beds] for such purpose [a fishery]? If so, it impliedly denies to the legislature the power to take away, destroy, or substantially impair such right. (2) Does the State Constitution expressly or impliedly deny to the legislature the power to take away, destroy or substantially impair the use thereof by the people for such purpose? If so, it impliedly gives and guarantees to the people the right to use them for such purpose. The whole question resolves itself into a question of the construction of the State Constitution.

Commonwealth v. City of Newport News, 164 S.E. 689, 696 (Va. 1932).

²⁷⁰ See, e.g., *Robinson Twp.*, 83 A.3d. at 958 ("The second obligation peculiar to the trustee is, as the Commonwealth recognizes, to act affirmatively to protect the environment, via legislative action. . . . The call for complementary legislation, however, does not override the otherwise plain conferral of rights upon the people.").

Assembly may provide by law.”²⁷¹ The first environmental provision contains a conservation policy to protect the rights declared in section 2: “The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.”²⁷² This strong trust language resembles Pennsylvania’s Environmental Rights Amendment,²⁷³ and is susceptible to judicial interpretation identifying a constitutional PTD.²⁷⁴

Illinois courts have yet to interpret the environmental rights provision to protect any substantive—or even many procedural²⁷⁵—rights despite the language’s clear enunciation of an enforceable right. Although many decisions seem to be based on the procedural implications of the second sentence of section 2,²⁷⁶ exactly what constitutes a violation of a citizen’s right to a healthful environment remains untested.

In *People v. Pollution Control Board*,²⁷⁷ the Illinois Appellate Court gave wide berth to the legislature’s exemption of noise pollution caused by sporting events from the Pollution Control Board’s regulatory regime, despite the constitutional right to a healthful environment.²⁷⁸ The purpose of article XI, section 2, based on the court’s examination of constitutional debates,²⁷⁹ was to modify the judicial doctrine of standing, not to create a

²⁷¹ ILL. CONST. art. XI, § 2. Illinois courts have interpreted this language to lower the bar for standing by eliminating the requirement that a plaintiff show “special damage.” See James W. Hilliard, *The 1970 Illinois Constitution: A Well-Tailored Garment*, 30 N. ILL. U. L. REV. 269, 335 (2010). See also *City of Elgin v. Cty. of Cook*, 660 N.E.2d 875, 891 (Ill. 1995) (requiring a cause of action to be present although “special injury” requirement is not needed).

²⁷² ILL. CONST. art. XI, § 1.

²⁷³ PA. CONST. art. I, § 27.

²⁷⁴ Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENVTL. L. 431, 439–40 (2015).

²⁷⁵ See, e.g., *Prairie Rivers Network v. Ill. Pollution Control Bd.*, 781 N.E.2d 372, 383 (Ill. App. Ct. 2002) (rejecting appellant’s claim that they had a right to participate in the issuance of an NPDES permit equal to that of the permittee and finding that the statutory procedure was sufficient); *Landfill, Inc. v. Pollution Control Bd.*, 387 N.E.2d 258, 265 (Ill. 1978) (rejecting respondent’s assertion that a full hearing is necessary to ensure protection of third parties’ rights to a healthful environment).

²⁷⁶ See *supra* note 271.

²⁷⁷ 473 N.E.2d 452 (Ill. App. Ct. 1984).

²⁷⁸ See *id.* at 455–57. The Attorney General, in general agreement with the court’s interpretation of article XI, section 2, argued that the statute exempting sporting events from the Pollution Control Board’s jurisdiction impermissibly deprived citizens of their constitutionally-granted standing. Because the statute at issue did “not limit the ability of an individual to sue in the public interest to remedy environmental harm caused by noise pollution, but rather simply remov[ed] sporting event noise from the Board’s regulatory regime,” the court found no violation of article XI. *Id.* at 456.

²⁷⁹ The Committee emphasizes that this Section affords individuals the opportunity to seek relief. It wants to be very clear that it does not by this Section (or by any Section in this Article for that matter) create or establish a new remedy. Nor does this Section assume the individual’s ability to prove a violation of his right. It merely declares that individuals have ‘standing’ to assert violations of his right.

Id. at 455 (internal citations omitted).

substantive cause of action for environmental harm: “[T]he Committee did not intend article XI to create any new substantive rights, it merely intended to create standing for individuals to represent the public interest.”²⁸⁰ While this statement arguably describes the importance of the second sentence of article XI, section 2, it does not acknowledge the clear language of the first sentence: “Each person has a right to a healthful environment.”²⁸¹ By its plain language, this provision acknowledges a private, individual right held by “each person” to seek redress in court for actions infringing upon a healthful environment.²⁸²

Illinois courts could identify an enforceable PTD in article XI by adopting the rationale of the Supreme Court of Pennsylvania. In *Robinson Township*, the plurality reasoned that deference to the legislature was inappropriate in the context of Pennsylvania’s Environmental Rights Amendment because of the court’s duty to interpret the constitution and enforce the rights embodied therein: “To determine the merits of a claim that the General Assembly’s exercise of its police power is unconstitutional, we inquire into more than the intent of the legislative body and focus upon the effect of the law on the *right allegedly violated*.”²⁸³ The plurality held that unreasonable degradation of the environment serves as a benchmark for finding legislative action unconstitutional in the context of the first clause of Pennsylvania’s article I, section 27.²⁸⁴ This same standard applied to legislative action affecting the PTD resources identified in the second clause of the Amendment.²⁸⁵ The legislature’s affirmative PTD duty to enact laws protecting rights enumerated in the amendment is also subject to review when challenged by right-holders.²⁸⁶ Because Illinois’s article XI, section 2 declares an individual right,²⁸⁷ a reviewing court could rule that enforcement of this right is within its institutional power as the branch of government charged with interpreting the constitution.²⁸⁸

A majority of the Supreme Court of Pennsylvania affirmed the self-executing and enforceable nature of the Environmental Rights Amendment in *PEDF II*: “[W]hen reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial

Because the wrong here has reached crisis proportions and because it affects individuals in so fundamental a way, the Committee is of the view that the ‘special injury’ requirement for standing is particularly inappropriate and ought to be waived. Section 2, therefore, allows the individual the opportunity to prove a violation of his right even though that violation may be a public wrong, or one common to the public generally.

Id. (internal citations omitted).

²⁸⁰ *Id.*

²⁸¹ ILL. CONST. art. XI, § 2.

²⁸² *Id.*

²⁸³ *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 951 (Pa. 2013) (emphasis added).

²⁸⁴ *See id.* at 954.

²⁸⁵ *See id.* at 957.

²⁸⁶ *See id.* at 958. (“The call for complementary legislation, however, does not override the otherwise plain conferral of rights upon the people.”).

²⁸⁷ ILL. CONST. art. XI, § 2.

²⁸⁸ *See Robinson Twp.*, 83 A.3d at 929.

review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.²⁸⁹ The court elucidated the substantive standard the legislature must follow in managing trust proceeds by limiting expenditure to the purpose of the Environmental Rights Amendment—the conservation and maintenance of public resources for the benefit of current and future generations.²⁹⁰ Additionally, actions taken by the Commonwealth regarding the public resources must be “in furtherance of the people’s specifically enumerated rights.”²⁹¹ As the *Robinson* court found and the *PEDF II* court confirmed, because the provision includes a substantive standard and because it creates a right in the people to enforce that standard, the Supreme Court of Pennsylvania has the ability to review legislative action affecting trust resources.²⁹²

Because Illinois’s article XI contains both a declaration of rights²⁹³ and a mandate to protect such rights,²⁹⁴ an Illinois court may review either the state’s alleged infringement on citizens’ rights or its alleged failure to adequately protect those rights. Although article XI does not identify specific trust resources, a reviewing court could identify these resources on a case-by-case basis by evaluating the environmental media through which a plaintiff’s right to a healthful environment is infringed.²⁹⁵ A litigant may challenge both state action and inaction.²⁹⁶

As an example, the Illinois Environmental Protection Agency could issue a permit for a major source of air pollution, causing the ambient air quality in a neighborhood to fall below levels protective of human health. A resident could seek judicial review of this action and claim a violation of the resident’s rights as protected by article XI, section 2. The resident could allege either that the agency failed to analyze the potential impact of the permitted facility on the ambient air quality (an inaction resulting in a violation of the resident’s rights), or that it should not have issued the permit at all (an action that affirmatively violated the resident’s rights).²⁹⁷ The

²⁸⁹ *PEDF II*, 161 A.3d 911, 930 (Pa. 2017).

²⁹⁰ *See id.* at 934–35.

²⁹¹ *Id.* at 934.

²⁹² *See id.* at 937.

²⁹³ ILL. CONST. art. XI, § 2.

²⁹⁴ *Id.* at § 1.

²⁹⁵ The corollary of the people’s Section 27 reservation of right to an environment of quality is an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action. Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.

Robinson Twp. v. Commonwealth, 83 A.3d 901, 952 (Pa. 2013).

²⁹⁶ *Id.*

²⁹⁷ *Cf. Robinson Twp.*, 83 A.3d at 957–58 (“As the parties here illustrate, two separate Commonwealth obligations are implicit in the nature of the trustee-beneficiary relationship. The first obligation arises from the prohibitory nature of the constitutional clause creating the trust, and is similar to other negative rights articulated in the Declaration of Rights. . . . The second

language of Illinois's article XI creates such an enforceable right, and a reviewing court could interpret this right as a constitutional embodiment of the PTD.

2. Massachusetts's Environmental Rights as a Public Purpose

Like Pennsylvania's Environmental Rights Amendment, Massachusetts's Constitution recognizes an individual right to a healthful environment. It also expressly governs the management of property dedicated to conservation purposes. Massachusetts's environmental rights provision announces, in part:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.²⁹⁸

To date, Massachusetts courts have treated this portion of the article as merely hortatory,²⁹⁹ informing the scope of "purposes" for which the state may take or retain property by condemnation or otherwise:

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.³⁰⁰

The property obtained or retained pursuant to these clauses appear at first glance to constitute a public trust *res*; however, by the plain language of the provision, the state may dispose of this property by a simple vote, rather than pursuant to trust principles.³⁰¹ Despite this plain language,

obligation peculiar to the trustee is, as the Commonwealth recognizes, to act affirmatively to protect the environment, via legislative action.").

²⁹⁸ MASS. CONST. art. XLIX.

²⁹⁹ See *Cummings v. City Council of Gloucester*, 551 N.E.2d 45, 46, 51 (Mass. 1990).

³⁰⁰ MASS. CONST. art. XLIX.

³⁰¹ Cf. *Ill. Cent. R.R. Co v. State of Ill.*, 146 U.S. 387, 452–54 (1892) (creating two exceptions to the general prohibition on alienating trust property: 1) the alienated property is "used in promoting the interests of the public therein" or 2) the property "can be disposed of without any substantial impairment of the public interest").

Massachusetts courts have incorporated common law doctrines in article XCVII analyses.³⁰²

Publicly owned property is subject to article XCVII only if originally obtained for one of the enumerated purposes: “conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources.”³⁰³ A recent Supreme Judicial Court of Massachusetts decision explicitly recognized article XCVII as encompassing two common law doctrines that preserve public property interests: the prior public use doctrine, and the doctrine of public dedication.³⁰⁴ Because the PTD is also a common law doctrine that protects public property interests in natural resources, courts could interpret article XCVII to protect public trust resources based on Massachusetts’s common law PTD.³⁰⁵

In an advisory opinion to the Massachusetts Senate, the Supreme Judicial Court of Massachusetts counselled that a statute extinguishing the *jus publicum* over tidelands in Boston Harbor could violate article XCVII if the property in question had not been “adequately identified,” if the public trust interest had not been “sufficiently recognized,” and if “the proper purposes to which the property may be put” had not been “adequately acknowledged.”³⁰⁶ This analysis has roots in Massachusetts’s “prior public

³⁰² See *Mahajan v. Dept. of Env'tl. Prot.*, 984 N.E.2d 821, 829 (Mass. 2013); *Smith v. City of Westfield*, 82 N.E.3d 390, 401 (Mass. 2017).

³⁰³ See *Mahajan*, 984 N.E.2d at 827, 829 (“The critical question to be answered is not whether the use of the land incidentally serves purposes consistent with art. 97, or whether the land displays some attributes of art. 97 land, but whether the land was taken for those purposes, or subsequent to the taking was designated for those purposes in a manner sufficient to invoke the protection of art. 97.”); *Smith*, 82 N.E.3d at 401 (applying article XCVII protection to lands “protected under the common law by the prior public use doctrine or the doctrine of public dedication”). For more analysis on parklands and the PTD, see Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?*, 10 S.C. ENVTL. L.J. 23, 40, 52 (2002).

³⁰⁴ See *Smith*, 82 N.E.3d at 401. (“There is no reason to believe that art. 97 was intended by the Legislature or the voters to diminish the scope of parkland that had been protected under the common law by the prior public use doctrine or the doctrine of public dedication. Such an interpretation would suggest that voters were hoodwinked into thinking they were expanding the protection of such lands . . . when, in fact, they were actually reducing the protection already afforded these lands under the common law.”).

³⁰⁵ Although MASS. GEN. LAWS ANN. ch. 91 (West 2018) is a comprehensive statutory scheme intended to delineate Massachusetts’s PTD, the Supreme Judicial Court has indicated that this statute is not the last word: “[T]he Commonwealth’s authority and obligations under the statute are not precisely coextensive with its authority and obligations under the public trust doctrine.” *Fafard v. Conservation Comm’n of Barnstable*, 733 N.E.2d 66, 71 n.11 (2000).

³⁰⁶ *Op. of the Justices to Senate*, 424 N.E.2d 1092, 1108 (Mass. 1981). The legislative action at issue:

authoriz[ed] the secretary of the executive office of environmental affairs to release and extinguish vestigial rights of the Commonwealth in tidelands in Boston seaward of the 1980 Line if the secretary finds that the present or proposed use will serve a proper public purpose and will not be detrimental to the public navigation of the remaining waters of Boston Harbor. . . . The intention [was] to permit the public interest to be served by relinquishing those vestigial rights so that titles may be marketable and so that the property may be put to constructive uses without fear of the Commonwealth’s asserting some residual interest.

use” doctrine requiring legislation converting land from one public use to another public use to be clear and unambiguous regarding the conversion.³⁰⁷ Massachusetts courts have adopted a modified version of this test to review legislative action that alienates public trust resources:

The legislation must be explicit concerning the land involved; it must acknowledge the interest being surrendered; it must recognize the public use to which the land is to be put; it must be for a valid public purpose, and, where there may be benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose.³⁰⁸

Because the Supreme Judicial Court has interpreted article XCVII to incorporate existing common law doctrines such as prior public use and public dedication,³⁰⁹ a challenge to legislation alienating public trust resources may be judicially reviewed for adherence to both the two-thirds voting requirement and the common law PTD test.

Putting aside article XCVII’s restraint on alienation of protected resources, the effect of the “environmental rights” clause remains largely untested in Massachusetts courts.³¹⁰ The plain language in the first clause of article XCVII establishes an individual right, but the legal effect of this language is unexplored. Litigants wishing to assert these rights may look to Pennsylvania for guidance as to how to bring and sustain an enforcement action.³¹¹

The Supreme Court of Pennsylvania’s description of Pennsylvania’s article I, section 27 could just as easily portray Massachusetts’s article XCVII: “[T]he Environmental Rights Amendment accomplishes two primary

Id.

³⁰⁷ See *Smith*, 82 N.E.3d at 400 (describing Massachusetts’s “prior public use” doctrine); see also *Higginson v. Slattery*, 99 N.E. 523, 527–28 (Mass. 1912) (“Land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end.”).

³⁰⁸ See, e.g., *Moot v. Dep’t of Env’tl. Prot.*, 923 N.E.2d 81, 84–85 (Mass. 2010) (citing *Op. of the Justices to Senate*, 424 N.E.2d at 1100) (illustrating the application of the Massachusetts courts’ PTD test). Interestingly, a minority opinion filed along with the Opinion of the Justices to Senate established a more stringent test:

(1) the Commonwealth may not convey submerged lands so as absolutely to defeat the public’s inalienable trust rights in that property; (2) as to such property, the Legislature may convey such land only for a public purpose, conditioned on its use for the declared purpose, and only after imposing any necessary conditions and making specific findings that such conveyances will not impair the remaining trust rights; and (3) such legislation must meet the requirements of the ‘prior public use’ doctrine.

Id. at 1110.

³⁰⁹ See *Smith*, 82 N.E.3d. at 401 (explaining that the ratification of article XCVII does not limit “the scope of parkland . . . protected under the common law by the prior public use doctrine or the doctrine of public dedication”).

³¹⁰ See, e.g., *Animal Legal Def. Fund, Inc. v. Fisheries & Wildlife Bd.*, 624 N.E.2d 556, 560–61 (Mass. 1993) (suggesting that there is no precedent to challenge effects of the environmental rights clause).

³¹¹ See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 950–51 (Pa. 2013) (describing the alternate theories that a litigant may rely on to bring a legal challenge).

goals, via prohibitory and non-prohibitory clauses: (1) the provision identifies protected rights, to prevent the state from acting in certain ways, and (2) the provision establishes a nascent framework for the Commonwealth to participate affirmatively in the development and enforcement of these rights.”³¹² This similarity of structure indicates that article XCVII is amenable to a judicial interpretation invoking the PTD.

Additionally, because the Massachusetts legislature must determine that a property interest is “necessary to accomplish” certain purposes prior to obtaining the property under article XCVII—including protection of environmental rights—a citizen could challenge any action taken against the property interest having the effect of frustrating the accomplishment of one of these purposes as an infringement on a constitutional right.³¹³ Essentially, if the preservation of land is necessary to the protection of individual citizens’ environmental rights, any governmental action having the effect of diminishing the land’s environmental qualities could be a violation of article XCVII.

V. CONCLUSION

If state citizens are to enjoy trust resources preserved for their benefit, state PTDs must be judicially enforceable. State courts are increasingly recognizing the role of the PTD as a structural limitation on the legislative and executive branches of government, a limitation often acknowledged in the language of a state’s constitution. This language regularly appears as a conservation policy, as in Hawaii, as a declaration of environmental rights, as in Pennsylvania, or as an assertion of state ownership, as in Washington. Like the courts of these three states, other state courts can recognize the role of the PTD in interpreting such constitutional language. Whether characterized as rights retained by the people, or as restrictions on a state’s police power, the PTD is appropriate for constitutional recognition because the legislative and executive branches will not limit their powers without judicial oversight. By identifying the PTD in constitutional provisions, courts can protect the public’s rights to access and use resources threatened with privatization and consumption.

³¹² *Id.* at 950.

³¹³ *Cf. id.* at 951 (“Facing a claim premised upon Section 27 rights and obligations, the courts must conduct a principled analysis of whether the Environmental Rights Amendment has been violated.”).