TAKING ON THE RIGHTS, RESPONSIBILITIES, AND REMEDIES OF GREEN AMENDMENTS

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ABSTRACT

Climate change is an ever-present and politically polarizing issue. States have responded over time to the environmental anxiety surrounding climate change by amending their state constitutions to recognize a positive right to environmental protection—often referred to as green amendments. At the heart of these amendments are environmental rights, responsibilities, and remedies guaranteed to citizens. This Note briefly explores the history and roadblocks that have faced green amendment proposals at the federal and state level. Green amendments at the state level first must overcome the political scrutiny afforded to them during the state's constitutional amendment process. This Note examines green amendments enacted in Pennsylvania, Montana, and New York as examples of how courts have played a critical role in the evolution of the green amendment

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movement. This Note then concludes that green amendments can, if effectuated and enforced by courts, play a significant role in achieving their aim of providing a tool to combat the devasting effects of climate change.

I. INTRODUCTION

"[T]he gales from the world bring us the sounds of impeding catastrophe. What more do we wish? Why do we sit here idle?"[1] These words, spoken by Patrick Henry on the eve of impending colonial British military invasion centuries ago, are echoed today in the frustrations of prominent environmentalists such as Al Gore concerning United States climate change policy.[2] Environmental scientists have warned us of an imminent, global environmental catastrophe.[3] The degradation in the quality of our water, land, and air has produced dire social and economic consequences.[4] As the surface temperature of the earth rises, so does the risk to human existence.[5] In 2020, the United Nations reported that from 2000 to 2019, 7,348 major natural disasters occurred globally, killing 1.23 million people, and causing $2.97 trillion in global economic loss.[6]

Data collected and analyzed by the Intergovernmental Panel on Climate Change in October of 2018 illuminates the social and economic cost to Americans of increasingly higher global temperatures.[7] At that time, the nation was predicted to face socially destabilizing mass displacement and migration, as well as $500 billion annually in national economic output loss if global temperatures increased

1. FRANKLIN L. KURY, THE CONSTITUTIONAL QUESTION TO SAVE THE PLANET 107 (2021) (quoting Patrick Henry in his infamous speech to the Virginia House of Delegates in 1775).

2. *See Al Gore on Climate Crisis: 'We Have the Solutions, but We've Got to Move Faster'*, HUBERT H. HUMPHREY SCH. OF PUB. AFFS., UNIV. OF MINN. (Oct. 29, 2021), https://www.hhh.umn.edu/research-centers/center-science-technology-and-environmental-policy/advancing-climate-solutions-now/speaker-al-gore [https://perma.cc/DW7M-JWKE].

3. Elizabeth Fuller Valentine, *Arguments in Support of a Constitutional Right to Atmospheric Integrity*, 32 PACE ENV'T. L. REV. 56, 57 (2015).

4. *See id.* at 59.

5. *See* Irma S. Russell, *Listening to the Silence: Implementing Constitutional Environmentalism in the United States*, *in* IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES 209, 211 (Erin Daly & James R. May eds., 2018); Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TULANE ENV'T. L.J. 181, 184–87 (1994).

6. SAMUEL DANAA & ANA THORLUND, UNITED NATIONS DEPT. OF ECON. & SOC. AFFS., STRENGTHENING DISASTER RISK REDUCTION AND RESILIENCE FOR CLIMATE ACTION THROUGH RISK-INFORMED GOVERNANCE 1 (2022), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/PB_139.pdf [https://perma.cc/K767-L49A].

7. KURY, *supra* note 1, at 192.

by 1.5°C.[8] These societal and economic losses further reinforce current social and economic inequities.[9] Societal and economic stability are thus inextricably linked to the health of the natural environment.[10]

The catastrophic deterioration of our social and natural environment did not occur by happenstance. Climate change is the consequence of an accumulation of long-term human behavior, both at an individual and societal level.[11] Herbert Fineman, the speaker of the Pennsylvania House of Representatives, in his speech honoring the first celebration of Earth Day in 1970 described the adverse consequences of human economic development upon the natural environment.[12] In placing economic interest over environmental interest he concluded, "We uglified our land and we called it 'progress.'"[13] The environmental consequences of human economic and technological advancements have only amplified over time, and are seen alongside the danger to our natural biodiversity and human existence.[14]

Since the 1970s, there have been efforts within the United States, and globally, to mitigate the effects of climate change (what was then often referred to as global warming) through environmental constitutionalism.[15] Environmental

8. *Id.*

9. Barry E. Hill, *Environmental Rights, Public Trust, and Public Nuisance: Addressing Climate Injustices Through State Climate Liability Litigation*, 50 ENV'T. L. REP. 11022, 11025 (2020) ("Vulnerable populations such as the disabled, the elderly, children, people who live alone, people of color, and less-resourced communities are more likely to suffer health effects from higher air temperatures, flooding, and air pollution." (quoting Complaint at 67, State v. Am. Petroleum Inst., No. 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020))).

10. *See* Samuel Sellers et al., *Climate Change, Human Health, Social Stability: Addressing Interlinkages*, ENV'T HEALTH PERSPS., Apr. 2019, at 1, 1 (2019); *Social Impacts of Climate Change: It's More Than the Ecosystem*, ASPIRATION (Feb. 13, 2022), https://make change.aspiration.com/social-impacts-of-climate-change/ [https://perma.cc/5P2V-62CC].

11. *See* Jeff Turrentine, *What Are the Causes of Climate Change?*, NAT. RES. DEF. COUNCIL (Sept. 13, 2022), https://www.nrdc.org/stories/what-are-causes-climate-change#natural [https://perma.cc/J7DF-V7SF].

12. Marie Loiseau, *Revived Authority in Article I, Section 27 of the Pennsylvania Constitution: The Commonwealth's New Affirmative Duty to Protect the Atmosphere*, 91 TEMP. L. REV. 183, 183 (2018); KURY, *supra* note 1, at 143–44.

13. Loiseau, *supra* note 12, at 183.

14. *See* Rebecca Lindsey, *Climate Change: Annual Greenhouse Gas Index*, CLIMATE.GOV, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (June 17, 2022), https://www.climate.gov/news-features/understanding-climate/climate-change-annual-greenhouse-gas-index [https://perma.cc/ZWR8-ESQC]; Schlickeisen, *supra* note 5, at 184.

15. Dan L. Gildor, *Preserving the Priceless: A Constitutional Amendment to Empower Congress to Preserve, Protect, and Promote the Environment*, 32 ECOLOGY L.Q. 821, 823

constitutionalism broadly is, "the constitutional incorporation of substantive and procedural environment[al] *rights, responsibilities, and remedies* to protect the natural environment."[16] Advocates of environmental constitutionalism, both at the state and national level, promote it as a vehicle to ensure that environmental rights are constitutionally entrenched.[17] The constitutionalizing of environmental rights is necessary in order to offer sustainable and comprehensive environmental rights protection—protection that is currently unavailable through United States federal constitutional or statutory regimes.[18] Green amendments in state constitutions have been a more successful manifestation of environmental constitutionalism within the United States.[19]

A green amendment throughout this paper will be defined as an amendment to a state's bill of rights guaranteeing the self-effectuating right of individuals to seek monetary or injunctive relief for environmental injustice-based claims—whether against individuals or organizations.[20] The amendment recognizes the state as a public trustee, and thus, the state is obligated to take affirmative action to protect the environment.[21]

(2005); David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV., July–Aug. 2012, at 3, 4 ("As of 2012, 177 of the world's 193 [United Nations] member nations recognize[d] this right through their constitution, environmental legislation, court decisions, or ratification of an international agreement. . . . Regional human rights agreements recognizing the right to a healthy environment have been ratified by more than 130 nations . . . .").

16. Erin Daly & James R. May, *Introduction* to IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES, *supra* note 5, at 1, 1 (emphasis added).

17. Lael K. Weis, *Environmental Constitutionalism: Aspiration or Transformation?*, 16 INT'L J. CONST. L. 836, 862 (2018).

18. *See* RICHARD K. LATTANZIO ET AL., CONG. RSCH. SERV., R46947, U.S. CLIMATE CHANGE POLICY 5–8 (2021).

19. GENEVIEVE BOMBARD ET AL., CTR. FOR L. & POL'Y SOLS., ROCKEFELLER INST. OF GOV'T, THE PRECEDENTS AND POTENTIAL OF STATE GREEN AMENDMENTS 5 (2021), https://rockinst.org/wp-content/uploads/2021/07/CLPS-green-amendments-report.pdf [https://perma.cc/CKG2-99HR].

20. *Id.* at 5–6.

21. *Id.* at 8.

State legislators have picked up the torch of the green amendment movement. For example, Pennsylvania,[22] Montana,[23] and New York[24] have all ratified green amendments into their respective state constitutions. The majority of states have added various forms of constitutional environmental protection provisions.[25] However, adding these words into their constitutions is only half the battle, states must then do the difficult work of establishing environmental protection as a norm, both for individual behavior and for governmental and judicial decision-making.[26] Green amendments have been a vehicle propelling environmental rights forward within the United States where Congress seems to have stalled (for example, in addressing climate change concerns).

The question that must be asked now is how can the green amendment movement keep itself from idling? Green amendments have opened the door to unprecedented environmental justice-based claims before state courts.[27] These amendments highlight the nuances in state constitutional construction of environmental rights in the face of a complex, patchworked federal regulatory system.[28] The environmental rights, responsibilities, and remedies in green amendments have also confronted the barrier of judicial idleness.[29] Across states,

22. 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. 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.").

23. MONT. CONST. art. II, pt. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.").

24. N.Y. CONST. art. I, § 19 ("Each person shall have a right to clean air and water, and a healthful environment.").

25. Sara Zaat, Note, *Constitutional Environmental Rights as Tools of Environmental Justice: Applications in the United States Based on Examples from Brazil and France*, 34 GEO. ENV'T. L. REV. 543, 546 (2022).

26. *See* Wendy Kerner, *Making Environmental Wrongs Environmental Rights: A Constitutional Approach*, 41 STAN. ENV'T. L. J. 83, 91–93 (2022).

27. Zaat, *supra* note 25, at 545. Environmental justice can be conceptualized as the "inequitable impact of environmental harms on underserved communities—such as people of color, lower-income people, women, immigrants, and many others . . . ." *Id.*

28. *See* LATTANZIO ET AL., *supra* note 18, at 2.

29. Joshua J. Bruckerhoff, Note, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615, 615 (2008) ("These constitutional environmental rights remain largely untested in the courts; however, when they have been invoked, most courts have construed the right very narrowly.").

the prominent claims based upon these amendments have only recently garnered serious judicial attention.[30] Only by breaking down this barrier can the green amendment movement continue to advance.

II. THE FEDERAL ENVIRONMENTAL RIGHTS STATUS QUO

The United States Congress has seen calls for environmental constitutionalism in the past.[31] These amendment efforts succumbed to the weight of the immense procedural and political burden of the federal constitutional amendment process.[32] A prominent and influential example was the amendment proposed by New York Congressman Richard L. Ottinger in 1968.[33] It established that, "The right of the people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural scenic, historic, and esthetic qualities of their environment shall not be abridged."[34] The amendment then vested in Congress the obligation to not abridge this right through statute.[35] Agencies, both at the state and federal level, were required to provide procedural due process to those affected if their decisions allowed for the abridgement of that right by private companies.[36] This amendment proposal illustrated an attempt by Congress to constitutionalize a balance between environmental rights and corporate interests.[37]

Since the 1970s, Congress has become increasingly polarized.[38] One polarizing issue is that of climate change policy.[39] Republicans believe that protection of the environment can be achieved by individuals planting trees or government subsidization of taxes for environmentally conscious businesses.[40]

30. BOMBARD ET AL., *supra* note 19, at 6.

31. J.B. Ruhl, *Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 247 (1999).

32. *Id.* at 250–51; *see* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CAL. L. REV. 2005, 2007 (2022) [hereinafter Albert, *The World's Most Difficult Constitution to Amend?*].

33. *See* Rutherford H. Platt, *Toward Constitutional Recognition of the Environment*, 56 AM. BAR ASS'N J. 1061, 1062 (1970).

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.*

38. Patrick J. Egan & Megan Mullin, *US Partisan Polarization on Climate Change: Can Stalemate Give Way to Opportunity?*, 57 POL. SCI. & POL. 30, 30 (2024).

39. *Id.* at 30–31.

40. Alec Tyson, *On Climate Change, Republicans Are Open to Some Policy Approaches, Even as They Assign the Issue Low Priority*, PEW RSCH. CTR. (July 23, 2021),

They largely reject the proposals of environmentalists on the Democratic side for direct mandates of environmentally conscious actions upon individuals and businesses.[41] Such rejections by Congressional representatives may also be influenced by profitable oil and gas companies' lobbying efforts.[42] The expansion of green amendments across states would expand the role of government involvement in environmental regulation beyond the current system.[43]

This partisan division has produced a largely incentive-based, rather than penalty-based, federal environmental regulatory system.[44] Comprehensive, mandatory efforts, such as those found in the American Clean Energy and Security Act, have gotten lost in the labyrinth of Congressional procedure and partisanship.[45] Alternatively, investment in individual and corporate environmental action has the potential to garner bipartisan support—$370 billion of the funding allocated through the Inflation Reduction Act of 2022 was set aside to incentivize individuals and businesses to reduce greenhouse gas emissions.[46] However, this funding ties the value of environmentally conscious corporate initiatives to their profitability, only further perpetuating a system that allows corporate polluters to pollute unceasingly with limited (if any) regulatory repercussions.[47]

https://www.pewresearch.org/short-reads/2021/07/23/on-climate-change-republicans-are-open-to-some-policy-approaches-even-as-they-assign-the-issue-low-priority/ [https://perma.cc/APE7-KHST].

41. *See id.*

42. *See* J. Alberto Aragón-Correa et al., *The Effects of Mandatory and Voluntary Regulatory Pressures on Firms' Environmental Strategies: A Review and Recommendations for Future Research*, 14 ACAD. MGMT. ANNALS 339, 355 (2020).

43. *See* Maya Van Rossum & Kacy Manahan, *Constitutional Green Amendments: Making Environmental Justice a Reality*, AM. BAR ASS'N (Dec. 1, 2021), https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2021-22/fall/constitutional-green-amendments-making-environmental-justice-reality/.

44. *See* LATTANZIO ET AL., *supra* note 18, at 7.

45. Egan & Mullin, *supra* note 38, at 31.

46. *A "New Day for Climate Action in the United States" as U.S. Congress Passes Historic Clean Energy and Climate Investments*, THE NATURE CONSERVANCY (Aug. 10, 2022), https://www.nature.org/en-us/newsroom/us-house-passes-landmark-climate-bill/ [https://perma.cc/V6UA-VFQQ].

47. *See* Aragón-Correa et al., *supra* note 42, at 343.

This partisan division is further embedded within the current super-majoritarian Republican Supreme Court.[48] The Court has passed the buck on environmental justice to Congress and the states.[49] It has done so through advancing narrow originalist arguments to reject the environmental rights claims that do make it to the Court.[50] Environmental advocates' arguments have been stymied in state and federal courts, particularly in raising the public trust doctrine.[51] Environmental rights claims have been further blocked in court through dismissal based on standing[52] and the political question doctrine.[53]

A. Textual Limits of Environmental Claims

The textual environmental silence of the United States Constitution has continued to constrain the current generation in addressing climate change.[54] There are two prominent theories as to why there was not an explicit mention of environmental rights within the Constitution. First, the drafters could have felt that state constitutions would offer protection to natural resources; second, they felt as though they did not need to do so because environmental rights were implied in order to exercise the enumerated rights within the Constitution.[55] To put it simply, it would make no logical sense to invest time and effort into crafting a governing charter for the posterity of a nation if its drafters believed that the nation would become uninhabitable—consumed by wildfires or floods—within two or three centuries.[56]

48. Vincent M. Bonventre, *6 to 3: The Impact of the Supreme Court's Conservative Super-Majority*, N.Y. STATE BAR ASS'N (Oct. 31, 2023), https://nysba.org/6-to-3-the-impact-of-the-supreme-courts-conservative-super-majority/?srsltid=AfmBOopfcmIZ5rl-6n5A7u5iUb1pq13K0bo9pRp4i3BCq_d_lCQ6AH9k [https://perma.cc/23FZ-3RXV].

49. *See id.* Mr. Gildor's grim prediction of the ability of environmental law to overcome judicial partisanship continues to hold true. *See* Gildor, *supra* note 15, at 840, 860–61.

50. Myles Douglas Young, *The Public Trust Doctrine: A Cracked Foundation*, THE GEO. ENV'T L. REV.: BLOG (Apr. 15, 2021), https://www.law.georgetown.edu/environmental-law-review/blog/the-public-trust-doctrine-a-cracked-foundation/ [https://perma.cc/ESR6-J7U5].

51. *See* Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 740 (2019).

52. For clarity, when referring to "standing" in this context, this Note is speaking to it only in reference to prudential standing, not federal court jurisdictional standing that is established in Article III. *See* U.S. CONST. art. III, § 2, cl. 1.

53. Kuh, *supra* note 51, at 734.

54. *See* Caleb Hall, *A Right Most Dear: The Case for a Constitutional Environmental Right*, 30 TUL. ENV'T L.J. 85, 100–02 (2016).

55. *Id.*; Russell, *supra* note 5, at 212–15; KURY, *supra* note 1, at 33–34.

56. *See* Hope M. Babcock, *The Federal Government Has an Implied Moral Constitutional Duty to Protect Individuals from Harm Due to Climate Change: Throwing Spaghetti Against the Wall to See What Sticks*, 45 ECOLOGY L.Q. 735, 739 (2018).

The concept of the state as a conservator of natural resources through the public trust doctrine far preceded the drafting of the Constitution.[57] The public trust doctrine traces its origins to the Roman Empire and was later firmly established in English Common Law.[58] The premise was that public use of waterways formed a public duty to protect them.[59] The Court has provided a narrow interpretation of the doctrine, not applying it to actions against the federal government nor to any other natural resources beyond public waterways.[60]

The applicability of the doctrine to a state constitutional provision was a key issue in *Sanders-Reed ex rel. Sanders-Reed v. Martinez*.[61] A nonprofit group argued that the repealing of greenhouse gas regulations by New Mexico's Environmental Improvement Board (EIB) violated the public trust doctrine.[62] They argued "that the common law public trust doctrine empowers the judicial branch to independently establish the best way to implement . . . its judicial review function" for the EIB.[63]

The organization was unsuccessful in this claim, as the court found New Mexico already had a duty to regulate greenhouse gas emissions—one rooted in legislation and through Article XX, Section 21 of its constitution.[64] New Mexico, like other state courts, limited the applicability of the public trust doctrine to one that requires effectuation through legislative or constitutional change.[65] In

57. Hill, *supra* note 9, at 11032.

58. *Id.*

59. Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cnty., 658 P.2d 709, 724 (Cal. 1983) (The public trust doctrine "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.").

60. Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 785, 786–87 (2015); Alicia Muir, Note, *Trust Issues: Using States' Public Trust Doctrines to Advance Environmental Justice Claims*, 46 WM. & MARY ENV'T L. & POL'Y REV. 707, 726 (2022).

61. 350 P.3d 1221, 1222 (N.M. Ct. App. 2015).

62. *Id.* at 1223.

63. *Id.* at 1226.

64. *Id.* at 1225. The amendment states:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

N.M. CONST. art XX, § 21.

65. *Sanders-Reed*, 350 P.3d at 1227; *see* Muir, *supra* note 60, at 722.

Sanders-Reed the effectuating action was the ratification of Article XX, Section 21.[66]

B. Interpretive Limits of Environmental Claims

Even if environmental rights are not explicitly protected within the federal constitution, environmental advocates have analogized them to recognized substantive due process rights, such as the right to parent and procreate.[67] Environmental justice claims have thus tested the bounds of the implied liberty interests recognized under the Due Process Clause of the Fourteenth Amendment.[68] Jurists and scholars argue that courts cannot recognize a *positive* constitutional right to environmental protection because liberty has long been defined as protection from undesirable government action, not an individual entitlement to a desired environmental action.[69]

Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army is an excellent example of courts passing on the responsibility of protecting the environment.[70] In *Environmental Defense Fund* a federal court denied injunctive relief seeking to prevent the construction of a river dam.[71] The ruling rejected as a due process right, "the right to 'enjoy God's creation, and to live in an environment that preserves the unquantified amenities of life.'"[72] The court would not open the door for the environmental justice claim asserted in *Environmental Defense Fund*; however, the court also did not block the possibility of a window for future claims.[73]

This narrow interpretation of substantive due process was further reinforced in *Ely v. Velde* and *Tanner v. Armco Steel Corp*.[74] In *Ely*, a federal court held the environmental effects of the proposed construction of a prison did not amount to a constitutional due process violation.[75] In *Tanner*, the plaintiffs' air pollution claims

66. *See Sanders-Reed*, 350 P.3d at 1226–27.

67. Hall, *supra* note 54, at 94–95.

68. *See id.* at 93.

69. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 5–6 (2013).

70. 325 F. Supp. 728 (E.D. Ark. 1971).

71. Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L LEGAL PERSP. 185, 212 (1999).

72. *Id.*

73. *Id.*

74. Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972).

75. Eurick, *supra* note 71, at 212.

against petroleum refineries were deemed to be outside the interpretative bounds of the Fifth and Fourteenth Amendments due to a lack of state action.[76]

Environmental justice claims have met a similar fate before the Ninth Circuit.[77] The plaintiffs in *Stop H-3 Ass'n v. Dole* argued that Congressional approval of an interstate highway should be subjected to heightened judicial scrutiny under the Fifth Amendment's Equal Protection Clause.[78] The court in *Dole* confronted the familiar question of whether to recognize the interconnectedness of environmental protection and individual rights.[79] In *Dole*, the court ultimately placed the government's interest in interstate travel above its environmental consequences.[80] In each case, the federal court rationalized its decision by holding there was not a proper foundation for it to disrupt its tradition of deferring environmental protection to the executive and legislative branches.[81]

Environmental advocates have faced the barrier of connecting environmental rights to "history and tradition."[82] Specifically, a history that did not recognize the threat of climate change.[83] *Julianna v. United States* presents an exact counter to this narrow interpretation of due process protections.[84] The district court in *Juliana* framed government responsibility for the environment as a substantive due process right, one supported by history and tradition.[85] It analogized environmental rights to other fundamental rights recognized under the Due Process Clause of the Fourteenth Amendment.[86] *Juliana* concluded, "I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[87]

76. *Id.* at 212–13.

77. *See* Stop H-3 Ass'n v. Dole, 870 F.2d 1419 (9th Cir. 1989).

78. *Id.* at 1430 ("We agree that it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources. The centrality of the environment to all of our undertakings gives individuals a vital stake in maintaining its integrity.").

79. Eurick, *supra* note 71, at 213–14.

80. *Id.*

81. *See id.* at 212–14.

82. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020).

83. Elaine Kamarck, *The Challenging Politics of Climate Change*, THE BROOKINGS INST. (Sept. 23, 2019), https://www.brookings.edu/articles/the-challenging-politics-of-climate-change/ [https://perma.cc/3SED-YL6D].

84. 217 F. Supp. 3d at 1250.

85. *Id.* at 1249–50.

86. *Id.*

87. *Id.* at 1250.

These due process arguments were not lost upon review of the case by the Ninth Circuit; however, the case was dismissed based on the lack of Article III redressability.[88] Putting justiciability concerns aside for the moment, if the district court's broader interpretation of substantive due process were to be further judicially adopted, it could leave space to realize the environmental justice goals of green amendment advocates.

C. Justiciability Limits of Environmental Claims

Federals courts' narrow interpretations of prudential standing have further stymied environmental justice claims. Standing requires a plaintiff to identify a redressable harm directly caused by a specific party.[89] There is judicial economy in forcing all parties to have a sufficient stake in obtaining a ruling that remedies a "concrete and particularized" injury.[90] Environmental litigation, however, often involves "plaintiffs who have not suffered a personal injury but are trying to vindicate a general environmental interest."[91] Thus, these claims are often held by jurists to be nonjusticiable and "never get their day in court."[92]

Held v. State illustrates a more liberal approach to the issue of standing by Montana courts.[93] The challenged state action in *Held* was the enactment of the Montana Environmental Policy Act (MEPA).[94] The crux of the act forced state agencies to ignore climate change as a factor in their decision-making, and Montana courts were to allow this unless they had another basis for challenging the agency's action unrelated to climate change.[95] A group of young climate activists challenged the MEPA for the direct harm it caused them.[96]

88. Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).

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

90. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016).

91. Barton H. Thompson, Jr., *The Environment and Natural Resources*, *in* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 307, 314 (G. Alan Tarr & Robert F. Williams eds., 2006).

92. Robin Kundis Craig, *Constitutional Environmental Law*, *or, the Constitutional Consequences of Insisting That the Environment Is Everybody's Business*, 49 ENV'T L. 703, 729 (2019).

93. *See* Findings of Fact, Conclusions of Law, and Order, Held v. State, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 14, 2023), *aff'd*, 560 P.3d 1235 (Mont. 2024).

94. *Id.* at 2.

95. *Id.* at 100; Sam Bookman, Held v. Montana*: A Win for Young Climate Advocates and What It Means for Future Litigation*, CAL. RIVER WATCH (Jan. 6, 2024), https://criverwatch.org/2024/01/06/held-v-montana-a-win-for-young-climate-advocates-and-what-it-means-for-future-litigation/ [https://perma.cc/5WU9-24HB].

96. Bookman, *supra* note 95.

The court found that young people faced "lifelong hardships resulting from climate change," manifesting in harmful effects on their physical and mental health.[97] The disruption of the natural environment by climate change harmed the healthy lives of Montana's youth, and thus they had a right to seek to remedy the destructive environmental actions allowed by the MEPA.[98] The court recognized the effects of global climate change as a judicially cognizable individual claim protected in Montana's constitution.[99]

The plaintiffs' environmental justice-based claims in *Native Village of Kivalina v. ExxonMobil Corp.* were not as fortunate as those in *Held.*[100] Villagers in the remote Alaskan island of Kivalina were forced to relocate due to climate change.[101] They sought judicial relief for the cost of this upheaval, specifically identifying air pollution, which the defendant energy companies contributed to, as the source of their harm.[102] The court reaffirmed the applicability of judicial standing limitations in environmental justice claims, dismissing these claims based on lack of standing and the political question doctrine.[103]

The right of the government and private entities to pollute has been reinforced through the barring of environmental rights claims from federal courts as nonjusticiable political questions.[104] It has been argued that adjudication of environmental justice claims should be barred as they would blur the carefully crafted judicial line between making law and "say[ing] what the law is."[105] The political question doctrine is fundamentally based on a concern for the separation of judicial from legislative powers.[106]

The concern is that through these claims a court would be placed in the position to decide, for example, what the acceptable amount of waste disposal from a nuclear energy plant facility might be.[107] Providing a federal court with such power arguably disrespects the role of legislatures to manage nuclear power plants

97. *Id.* (quoting Findings of Fact, Conclusions of Law, and Order, *supra* note 93, at 33).

98. *Id.*

99. *Id.*

100. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

101. *See id.* at 868–69.

102. *See id.* at 868–69, 878.

103. *Id.* at 883.

104. *See id.*; Baker v. Carr, 369 U.S. 186, 210–11 (1962).

105. Marbury v. Madison, 5 U.S. 137, 177 (1803); *see* Babcock, *supra* note 56, at 753.

106. *Kivalina*, 663 F. Supp. 2d at 871.

107. *See* Babcock, *supra* note 56, at 753.

effectively.[108] Legislatures further have the authority to call nuclear power experts to testify at a hearing—experts that can assure waste disposal is being handled properly. Enforcement and administration of any limitation on nuclear waste disposal would cost money, money that the judiciary does not have the constitutional authority, nor capacity, to provide at the federal level—only Congress does.[109]

Groups seeking accountability from automobile manufacturers and power companies for air pollution have been thwarted in federal court by the political question doctrine.[110] The dismissal by a federal court in the case of *California v. General Motors Corp.* was premised upon the finding that, "The balancing of those competing interests [environment vs. business] is the type of initial policy determination to be made by the political branches, and not [the] [c]ourt."[111] A public nuisance claim based on greenhouse gases brought forth in *American Electric Power Co. v. Connecticut* before the United States Supreme Court was dismissed under the same rationale of appropriate legislative deference.[112] The Court noted, "The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a [judicial] vacuum."[113]

The *Kivalina* court in part dismissed the claims of Alaskan villagers by finding that regulating air pollution was a non-justiciable political question.[114] The court opined that, "Plaintiffs ignore that the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance."[115] *Kivalina* reinforcing the view that environmental rights are too complex to be adequately adjudicated by a court.[116] Instead, it is Congress', the states', and EPA's role to recognize and enforce these rights, should they choose to do so.[117]

The general premise is that members of the federal and state judiciary cannot uphold environmental rights in the same way that they do individual rights.[118] The

108. *See Kivalina*, 663 F. Supp. 2d at 876.

109. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

110. *See Kivalina*, 663 F. Supp. 2d at 883; California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871, at *13 (N.D. Cal. Sept. 17, 2007).

111. 2007 WL 2726871, at *8.

112. 564 U.S. 410, 429 (2011).

113. *Id.* at 427.

114. 663 F. Supp. 2d at 877.

115. *Id.*

116. *Id.* at 876.

117. *See id.* at 876–77; Ruhl, *supra* note 31, at 274.

118. *See* Craig, *supra* note 92, at 729, 734.

court can, and should, intervene to extricate environmental rights from the "vicissitudes of political controversy,"[119] and to ensure that the Constitution lives up to its promise that, "persons in every generation can invoke its principles in their own search for greater freedom."[120] The freedom to live in a natural environment free of pollution, within the context of environmental justice, arguably necessitates a broader conception of the current federal standing doctrine.

Overall, recognition of environmental justice claims has been largely stymied both at the federal and state judicial benches—the courts have seemed to "not know what to do" with environmentalism.[121] They often shy away from "meaningful judicial review" or substantive interpretation to avoid the complexity of jurisprudential issues that are prompted by green amendments.[122] When it comes to implementing the aims of green amendment advocates, not just federal, but "state courts have let America down."[123] Ultimately, green amendment drafting within states is comparatively easy, judicially implementing environmental rights is harder.

III. RATIFYING GREEN AMENDMENTS

The ratification of green amendments of course depends on the federal and state amendment procedural landscape. Both procedures are at their heart political, but do not possess the same level of democratization.[124] "The states have established mechanisms for direct popular participation in the amendment and revision of state constitutions on a scale unmatched by the federal government."[125] The democratization of these processes has opened the door to constitutionalizing environmental rights at a state level that has not been seen in the federal constitution.[126]

119. *See* W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943).

120. Lawrence v. Texas, 539 U.S. 558, 579 (2003).

121. *See* KURY, *supra* note 1, at 62.

122. *See* Thompson, *supra* note 91, at 323; Valentine, *supra* note 3, at 70–71.

123. Robert A. McLaren, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 151–52 (1990) ("Faced with the prospect of continuing environmental degradation, people across America concluded that the time has come to take matters out of the hands of elected officials. They chose to elevate environmental protection to constitutional status where, they hoped, these values would be beyond the political milieu, and where they would receive the highest protection. Citizens counted on the judiciary to guarantee these environmental values. But state courts have let America down.").

124. *See* Janice C. May, *Constitutional Amendment and Revision Revisited*, PUBLIUS: J. FEDERALISM, Winter 1987, at 153, 153–54.

125. *Id.* at 179.

126. *Id.*; Gildor, *supra* note 15, at 823.

The philosophical tension between the competing objectives of constitutional flexibility and endurance embodied in Article V,[127] has only grown with the current hyperpolarized partisan environmental politics.[128] While courts and Congress have sought to define the contours of their roles within the federal amendment process, divisions persist between constitutional law scholars and pro-amendment advocates.[129] While the latter challenge the rigidity of the process, the former view its rigor as a sign of constitutional tenacity that should not be challenged.[130] Constitutional law scholars David Pozen and Thomas Schmidt note that the tenacity argument has seemed to prevail: "The assumption that all revisions to the written Constitution must be pursued through the Article V process continues to hold a powerful sway on the [United States] legal and political community, at least among elites."[131]

Of the almost 12,000 attempts to amend the United States Constitution to date, only 27 have succeeded.[132] Professor Richard Albert explains that there are two main reasons for this low success rate.[133] "First, the supermajority approvals required for an amendment create a formidable labyrinth that is hard to navigate. Second, the current dynamics of constitutional politics have thwarted coordination between the national and state governments, and between the two national political parties."[134] The current rigidity of the amendment process forces collaboration between both diverse groups of citizens and their representatives in Congress.[135] However, environmental justice claims have put on full display the consequences of the cumbrous political and procedural machinery established by Article V.[136]

127. Article V establishes the requirements for ratification of an amendment to the United States Constitution. Specifically, the amendment must be proposed by two-thirds of Congress or state legislatures and ratified by three-fourths of the states. U.S. CONST. art. V.

128. Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1036, 1050 (2014) [hereinafter Albert, *Constitutional Disuse or Desuetude*].

129. *See* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2320–22 (2021).

130. *See id.*

131. *Id.* at 2388.

132. Albert, *The World's Most Difficult Constitution to Amend?*, *supra* note 32, at 2007.

133. *Id.*

134. *Id*.

135. *Id.* at 2010.

136. *See* Albert, *Constitutional Disuse or Desuetude*, *supra* note 128, at 1048.

State constitutional amendment procedures were not always as liberalized as many are today.[137] State convention delegates throughout the nation proposed a multitude of reform ideas to their respective conventions in the nineteenth century.[138] Some of these changes included the establishment of amendment procedures in states that previously lacked them, the elimination of some onerous aspects of existing procedures, and proposals to make state conventions easier to call for the state's voting populous.[139]

The contentious amendment reform debates on the floors of state conventions mirrored those on the national level.[140] On one end of those debates were those who embraced a more liberal amendment process as a means of ensuring individual rights.[141] This view was aptly articulated by a constitutional delegate in Michigan in the early 1900s who stated he feared individual rights were being ignored because "too often the great commercial interests by reason of their great strength, as compared with the numerical strength of the constituency, exercise a preponderating influence upon the minds of the legislators."[142] A liberalized amendment process thus offers a check for citizenry against democratically coercive interests.[143]

The fears of delegates at these state constitutional conventions on the other end of the debate—that malleability in amendment procedures would lead to tyranny and instability—has not played out in environmentalism.[144] A liberal amendment process is not the same as an unconstrained one. Traditions of "higher" and "positive" law pose checks upon overly ambitious environmental legislators.[145] The higher law tradition within state constitutions is embodied within the *aspirational* elements of green amendments, while the positive law tradition is embodied in the *practical* considerations of the responsibilities and

137. John Dinan, "*The Earth Belongs Always to the Living Generation": The Development of State Constitutional Amendment and Revision Procedures*, 62 REV. POL. 645, 650–51 (2000).

138. *Id.*

139. *Id.* at 659.

140. *See id.* at 666; Albert, *Constitutional Disuse or Desuetude*, *supra* note 128, at 1036, 1050.

141. Dinan, *supra* note 137, at 666.

142. *Id.* at 668.

143. *See id.*

144. *See id.* at 654–55; Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 HASTINGS L.J. 123, 175–76 (2022).

145. *See* John J. Carroll & Arthur English, *Traditions of State Constitution Making*, 23 STATE & LOC. GOV'T REV. 103, 103 (1991).

remedies within them.[146] What these two traditions seek to ensure is that any green amendment must carefully balance abstract principles and concrete applications.[147]

The liberalism of state amendment procedures established during the Progressive Era has provided the structural malleableness necessary for states today to begin to discuss evolving issues such as climate change.[148] These liberalized amendment procedures were embedded with the assumption that constitutional convention delegates were not infallible.[149] Delegates were urged to not forget, to take inspiration from the words of Chief Justice John Marshall, that it was a constitution they were amending.[150] While veneration and stability were noble aims, an increasing number of legislators and delegates began to argue that complete rigidity within a state constitution was neither desirable nor realistic.[151] Environmentalists today are advancing similar arguments and applying them to the need to adapt state constitutions to the changing natural environment.[152]

To ratify environmentalism into their state constitutions, there were procedural requirements that environmentalists in Montana,[153] Pennsylvania,[154] and New York[155] had to meet. The balancing of environmental interests with private commercial and property interests was embedded into these procedural requirements.[156] Each green amendment required deliberation and majority approval either by the legislature, the citizenry, or both.[157] The requirements in each of these states for adopting a green amendment are remarkably more liberal and offer more opportunity for citizen initiation than Art. V; however, they are not simply a wide-open door.[158]

The drafters of green amendments were tasked with making the case for why there should be an amendment at all and why it should be the specific one

146. *See id.* at 107–08.

147. *Id.* at 108.

148. *See* Dinan, *supra* note 137, at 650, 665.

149. Albert, *Constitutional Disuse or Desuetude*, *supra* note 128, at 1036.

150. Carroll & English, *supra* note 145, at 104; McCulloch v. Maryland, 17 U.S. 316, 407 (1819) ("[W]e must never forget, that it is a constitution we are expounding.").

151. Dinan, *supra* note 137, at 655, 670.

152. Polk, *supra* note 144, at 126–27.

153. MONT. CONST. art. XIV, §§ 8, 9.

154. PA. CONST. art. XI, § 1.

155. N.Y. CONST. art. XIX, §§ 1–3.

156. *See* Dinan, *supra* note 137, at 668; Polk, *supra* note 144, at 175–76.

157. Andrea White, *Protecting Future Generations from Climate Change in the United States*, 49 ECOLOGY L.Q. 501, 517 (2022).

158. *See id.*

proposed.[159] They had to defend the various choices in issue focus, type of provision, enforcement, and degree of specificity throughout the lengthy amendment ratification process.[160] The scope of environmental rights, responsibilities, and remedies within these amendments were shaped by such processes.[161] Decisions made by the respective legislative bodies of Montana, Pennsylvania, and New York during the drafting and ratification of these green amendments were undoubtedly influenced by federal and state constitutional precedents.[162]

The key to strengthening green amendments in the future is for courts to take the rights, responsibilities, and remedies they establish seriously.[163] The remainder of this Note will highlight judicial actions in Montana, Pennsylvania, and New York where citizens and organizations have sought to actualize their green amendment's promises. It will examine litigation challenges in defining the potentially expansive realm of environmental rights within a singular green amendment in New York. It will then explore the adjudicative scope of environmental responsibilities placed upon the government and private companies by the green amendment in Pennsylvania. Finally, the complexities of judicially formulating a remedy for environmental wrongs will be highlighted through judicial decisions in Montana.

IV. EFFECTUATING THE GREEN AMENDMENT RIGHT

In 1894, New York chartered new constitutional waters, becoming the first state to codify the protection of natural resources in its constitution.[164] New York ratified the following language:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.[165]

159. Thompson, *supra* note 91, at 307–08.

160. *See id.* at 311–16.

161. *Id.* at 316–19.

162. *See id.* at 316–19, 321.

163. *Id.* at 318–19, 321–22.

164. COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, REPORT AND RECOMMENDATIONS CONCERNING THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV) 1–2 (2016), https://nysba.org/app/uploads/2020/02/Report-on-NYS-Constitution-Article-XIV-final.pdf [https://perma.cc/YHP2-HG9D].

165. *Id.* at 2; N.Y. CONST. art. XIV, § 1.

While the scope of its impact was initially relatively limited, the intention of its drafters was clear—there shall be no commercial cutting of timber in the preserved forest.[166] The "forever wild clause" would provide the initial formulation of the constitutional balancing act between New Yorkers' environmental, commercial, and property interests.[167] This balancing of interests formed a critical foundation for the evolution of environmental rights within the state.[168]

In 1977, the court in *Helms v. Reid*, within the context of the forever wild clause, recognized the inherent contradiction that every court faces in constitutional environmental rights cases, stating, "The two concepts [public use and natural conservation] are diametrically opposed as it is precisely man's presence in the preserve which threatens its wild forest character in the first instance."[169] Trees can become hazardous to people and wildlife in the event of wildfires or other natural disasters, thus the *Helms* court held that it is reasonable and consistent with the New York Constitution to allow for the necessary cutting to safeguard the forest.[170]

A. The Effectuation Question in Fresh Air *and* Gettysburg

The most recent change in New York's environmental rights landscape was the ratification of Article I, Section 19 of the New York Constitution—the state's green amendment.[171] *Fresh Air for the Eastside v. People* is the preeminent case within this new constitutional terrain.[172] Residents of a neighborhood nearby one of New York's largest waste landfills sued the State of New York, New York City, New York State Department of Environmental Conservation, and Waste Management of New York, L.L.C. (WM).[173] The landfill not only receives "the second highest quantity" of waste, but "has the largest remaining capacity for disposal of Municipal Solid Waste" in the state.[174]

166. Helms v. Reid, 394 N.Y.S.2d 987, 994 (N.Y. App. Div. 1977).

167. *See id.* at 1000–01.

168. *See id.*

169. *Id.* at 999.

170. *Id.*

171. *See* N.Y. CONST. art. I, § 19. It is important to note the amendment recently passed in 2021, thus there is limited case law surrounding its interpretation. *See id.*

172. *See* Fresh Air for the Eastside, Inc. v. People, 217 N.Y.S.3d 381 (N.Y. App. Div. 2024).

173. *Id.* at 384.

174. Fresh Air for the Eastside, Inc. v. People, No. E2022000699, 2022 WL 18141022, at *1, n.2 (N.Y. Sup. Ct. Dec. 20, 2022), *modified*, 217 N.Y.S.3d 381 (N.Y. App. Div. 2024).

The plaintiffs, Fresh Air for the Eastside, Inc. (FAFE), alleged the operation of the landfill was a constitutional violation under Section 19, arguing that its nauseous smell violated New Yorkers' right to clean air.[175] Judge John J. Ark found that while Section 19 was presumptively self-effectuating, that does not mean that it applies to private entities.[176] Judge Ark thus dismissed the claims against WM.[177] He also dismissed the claims against the New York City because they were merely a customer of WM with no duty to police its actions.[178] However, he did not dismiss the claims against the State of New York or the Department of Environmental Conservation.[179] In what Judge Ark aptly described as a "David versus Goliath legal battle[]" for the State's enforcement of Section 19, FAFE won a small victory in this ruling.[180] However, the victory was short lived as the appellate division subsequently dismissed the complaint as to all defendants because the court cannot compel the State to take enforcement action against WM.[181]

In a related pending case brought forward by FAFE against the City of Perinton, the court established the following paradigm for judges adjudicating environmental rights in New York under Section 19: "First, did the government action comply with the applicable statute? Second, did the government action violate a person's constitutional 'right to clean air and water, and a healthful environment'?"[182] This analysis pits the interests of government and private entities in polluting the land against the right of the people to be free from that waste.[183] This standard thus begs the question of whether the court has the authority to define what a healthy environment is, or if Section 19 requires that to be a legislative determination.

What impact either of these two suits may have on the success of future environmental justice claims within New York or the nation is unclear at this stage.[184] As Judge Ark concluded in his order,

175. *Id.* at *2.
176. *Id.* at *7–8.
177. *Id.*
178. *Id.* at *8.
179. *Id.* at *8, *10.
180. *Id.* at *12.
181. Fresh Air for the Eastside, Inc. v. People, 217 N.Y.S.3d 381, 386 (N.Y. App. Div. 2024).
182. *Fresh Air for the Eastside, Inc.*, 2022 WL 18141022, at *4, n.6.
183. *See id.*
184. *Id.* at *12.

> These lawsuits set forth the apparent failings of the existing regulatory processes and seek added redress through the Green Amendment. Whether the Green Amendment will be an important tool to allow communities to safeguard their environment and compel state and local governments to act to prevent environmental harms is uncertain. Indeed, the vigor of the State's opposition to this lawsuit does not bode well for its enforcement of the Green Amendment.[185]

The courts have an essential role to play in holding the state accountable for the environmentally destructive consequences of this opposition.

Gettysburg, Pennsylvania holds within it a battlefield of significant importance to the history of the American Civil War.[186] The town also holds significance in the history of environmental justice in the state.[187] A lawsuit was sparked by opposition to the proposed construction of a 307-foot-tall observation tower for tourists to view the historic battlefield.[188] The legal challenge to the tower was brought forward by local, affected municipalities.[189]

In 1973, the Supreme Court of Pennsylvania was tasked with answering the critical question of whether the newly ratified Article I, Section 27—its green amendment—would be self-effectuating.[190] The answer to this question would determine whether the tower could be built or not.[191] Self-effectuating in this context means that the amendment is recognized as judicially enforceable without further legislative authorization.[192] The tower was allowed to be built because "the court ultimately found that the state did not provide enough evidence that the tower would harm those [environmental] values outlined in the constitutional amendment."[193] In the process of making this determination, the court splintered on the underlying constitutional question of whether Section 27 was self-effectuating.[194]

185. *Id.*

186. *See* John Latschar, *The Taking of the Gettysburg Tower*, 18 GEORGE WRIGHT F. 24, 24, 32 (2001).

187. *See id.* at 24–25.

188. Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 589–90 (Pa. 1973).

189. *Id.* at 590.

190. *Id.*

191. *Id.*

192. *Id.* at 590–91.

193. BOMBARD ET AL., *supra* note 19, at 10.

194. *See Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d at 594–96.

Justices O'Brien and Pomeroy base their ruling against self-effectuation in *Commonwealth v. National Gettysburg Tower, Inc.* on two fundamental holdings.[195] First, that Section 27 is distinguishable from other self-effectuating amendments in Pennsylvania's bill of rights,[196] and second, that Section 27 is analogous to comparable non-self-effectuating state constitutional amendments—specifically in Illinois, New York, Virginia, and Massachusetts.[197] These justices concluded that without legislatively set parameters the amendment "would pose serious problems of constitutionality, under both the [E]qual [P]rotection [C]lause and the [D]ue [P]rocess [C]lause of the Fourteenth Amendment."[198] To avoid this, they argued that the court should defer to the legislature in effectuating Section 27.[199]

The dissenting opinion of Justice Jones lays out the case for Section 27's self-effectuation.[200] Justice Jones first notes the allocation of a public trusteeship over the Commonwealth's public resources as evidence of a legislative intent for the amendment to be self-effectuating.[201] He questioned his fellow justices' application of the judicial interpretation of the constitutional amendments of other states.[202] Justice Jones argues that Section 27 is different because it establishes a public trusteeship by the Commonwealth over "the preservation of the natural, scenic, historic and esthetic values of the environment."[203] This explicit allocation of responsibility to the Commonwealth, Justice Jones argues, would be superfluous if it were not supported by constitutional self-effectuation.[204]

In *National Gettysburg Battlefield Tower, Inc.* the court did not provide a clear answer on whether Section 27 was self-effectuating.[205] Two of the justices held it is self-effectuating, two justices held that it is not, and three others offered no opinion on the question.[206] This case is indicative of the divisive struggle within state courts to define the unique state responsibilities that come with green

195. *See id.* at 591, 594.
196. *Id.* at 591–92.
197. *Id.* at 594.
198. *Id.* at 594–95.
199. *Id.* at 595.
200. *Id.* at 596. (Jones, J., dissenting).
201. *See id.* at 596.
202. *Id.* at 597.
203. *Id.*
204. *See id.*
205. Robinson Twp. v. Commonwealth, 83 A.3d 901, 964–65 (Pa. 2013).
206. *Id.*

amendments. Section 27 gives the state a responsibility, in Pennsylvania it is then up to the court to decide how far that responsibility goes.[207]

B. The Historic Scope of Pennsylvania's Green Amendment

While *National Gettysburg Battlefield Tower, Inc.* addressed the question of the responsibility of the Commonwealth in initiating a suit under Section 27, *Payne v. Kassab* defined the responsibility of private parties suing under the provision.[208] In *Payne* a group of local college students sued to prohibit Pennsylvania from continuing with a proposed street widening project.[209] The challenged project would lessen the public common area near the Susquehanna River.[210] The court found this common area of the River possessed sufficient environmental value that it was protected under a self-effectuating Section 27.[211] Thus, the students could sue the Commonwealth for widening the street.[212]

Payne then addressed the proper role of the courts in adjudicating an environmental justice claim.[213] It proposed a three-part balancing test:

> (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?[214]

This test would be the relevant analysis for environmental rights claims brought forth under Section 27 until 2013.[215]

207. *See* Scott Fein & Tyler Otterbein, *New York's New Constitutional Environmental Bill of Rights: Impact and Implications*, GOV'T L. CTR., ALBANY L. SCH. (Nov. 12, 2024, 11:59 AM), https://www.albanylaw.edu/government-law-center/new-yorks-new-constitutional-environmental-bill-rights-impact-and [https://perma.cc/Z5PX-NTA6].

208. *Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d at 589–90; Payne v. Kassab, 312 A.2d 86, 88 (Pa. Commw. Ct. 1973).

209. 312 A.2d at 88.

210. *Id.*

211. *Id.* at 97.

212. *Id.*

213. *Id.* at 94.

214. *Id.*

215. John C. Dernbach et al., Robinson Township v. Commonwealth of Pennsylvania*: Examination and Implications*, 67 RUTGERS U. L. REV. 1169, 1182 (2015).

In 2013, the merits of this Section 27 balancing-test were placed under judicial scrutiny in *Robinson Township v. Commonwealth*.[216] The *Robinson* court placed limitations on the applicability of the *Payne* balancing test.[217] Specifically, the constitutional issue in *Robinson* was whether the state could, through its newly adopted chapters of the Pennsylvania Oil and Gas Act (Act 13), prohibit any "local regulation of oil and gas operations" and still meet its environmental protection obligations imposed under Section 27.[218] Pennsylvania argued that "municipalities have no authority to articulate or implement a different [oil and gas] policy [as the Commonwealth], and they have no authority even to claim that the General Assembly's policy violates the Commonwealth's organic charter."[219] In short, the Township's argument was that the environmental impacts of the new chapters of Act 13 were not their problem—it was the Commonwealth's.[220]

A plurality of the *Robinson* court rejected this narrow interpretation of the scope of the environmental obligations imposed by the amendment on Robinson Township.[221] It held that the Township could not bypass its environmental responsibilities under Section 27 through Pennsylvania's Act 13.[222] It identified both affirmative and negative elements of the environmental rights granted to citizens by Section 27.[223] Pennsylvanians set forth not only what they expected their government *to do*—protect its natural resources—but also *what not to do*—allow itself or private parties to destroy these resources.[224] The plurality contended it contravened the text and intent of Section 27 to place the weight of these environmental protection responsibilities entirely upon the Commonwealth itself—instead it must be shared by its municipalities.[225]

The scope of Pennsylvania's responsibility under Section 27 further expanded in 2017 through the decision of *Pennsylvania Environmental Defense Foundation v. Commonwealth.*[226] The court held that the diversion of a million dollars of state revenue generated from oil and gas extraction within the Marcellus

216. 83 A.3d 901, 966 (Pa. 2013).

217. BOMBARD ET AL., *supra* note 19, at 11.

218. *Robinson*, 83 A.3d at 970.

219. *Id.* at 974.

220. *Id.*

221. *Id.* at 977–78.

222. *Id.*

223. *See* Dernbach et al., *supra* note 215, at 1187 n.104.

224. *Robinson*, 83 A.3d at 950.

225. *Id.* at 952 (noting the "constitutional obligation binds all government, state or local, concurrently" (citing Franklin Twp. v. Commonwealth Dep't of Env't Res., 452 A.2d 718, 722 (Pa. 1982))).

226. 161 A.3d 911 (Pa. 2017).

Shale region violated Section 27.[227] The court reasoned that money that is a part of the public trust is reserved exclusively "for conservation and maintenance purposes."[228] *Pennsylvania Environmental Defense Foundation* thus overturned the *Payne* balancing test.[229]

The scope of government responsibility recognized by Section 27 has become increasingly more expansive, encompassing instances of action and inaction.[230] The broad scope of environmental responsibility under Section 27 is why the self-effectuating determination matters. What the Pennsylvania courts have struggled with is when it is fair to put the responsibility of environmental injustice onto a named party in a suit.[231] The power of self-effectuation is in the responsibility it places upon the judiciary and legislatures to ensure constitutionalized environmental rights are adequately protected and their remedies are being enforced.[232]

V. REMEDYING ENVIRONMENTAL INJUSTICES

The ability of Montanans to seek equitable remedies based on Article II, Section 3 of its constitution—its green amendment— was first raised as an issue in 1979, only seven years after Section 3's ratification.[233] In *Kadillak v. Anaconda Co.*, the Montana Department of State Lands was ordered to return the mining operation permit of Anaconda Company, as it was invalidly authorized.[234] The court found the application to be incomplete and thus statutorily invalid under Montana's Hardrock Mining Act.[235] However, it found there was no constitutional claim in *Kadillak* as a result of Anaconda's lack of an environmental impact statement because the enactment of the relevant statutory provisions requiring one predated Section 3.[236] This argument would set the groundwork for a later argument to the same court made by the Montana Environmental Information Center (MEIC).[237]

227. *Id.* at 919, 939; BOMBARD ET AL., *supra* note 19, at 11.
228. *Pa. Env't Def. Found.*, 161 A.3d at 935.
229. BOMBARD ET AL., *supra* note 19, at 11.
230. *See Robinson*, 83 A.3d at 950; KURY, *supra* note 1, at 150.
231. *See* BOMBARD ET AL., *supra* note 19, at 8–11.
232. *See Pa. Env't Def. Found.*, 161 A.3d at 937–38.
233. *See* BOMBARD ET AL., *supra* note 19, at 12, 15.
234. 602 P.2d 147, 157 (Mont. 1979).
235. *Id.* at 154, 157.
236. *Id.* at 154.
237. *See* Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236 (Mont. 1999).

In 1992, Seven-Up Pete Joint Venture (SPJV) applied for a mineral exploitation license with the Montana Department of Environmental Quality (DEQ).[238] Its license was granted by the DEQ, and the mining operations that followed led to the introduction of allegedly unsafe levels of arsenic within the Blackfoot River—threatening the health of both endangered fish and human life.[239] MEIC contended that the plan was illegally approved because SPJV's application was not required to include a non-degradation review by the DEQ.[240] MEIC argued that the ability of the DEQ to waive this requirement established in Montana's Water Quality Act violated Montana's Constitution—specifically Section 3.[241] MEIC asked the court to declare that waiver authority as applied by the DEQ was unconstitutional, and that an injunction be placed upon the mining operations.[242]

The Supreme Court of Montana rejected the argument that the injunctive relief sought was inappropriate under Section 3.[243] Support for granting injunctive relief for violations of environmental rights by the state can be found in Article IX.[244] The court found these constitutional provisions were meant to remedy exactly the sort of environmental degradation that MEIC caused.[245] It further opined that the constitutional delegates of the state passed Article XI to clarify its intent to provide injunctive relief for violations of Section 3.[246]

The question of whether equitable remedial measures could be circumscribed through statutory action was brought forward to the Montana Supreme Court most recently in the case of *Park County Environmental Council v. Montana Department of Environmental Quality*.[247] Lucky Minerals, Inc., a mining company, had their operation's licensure challenged by the Park County

238. *Id.* at 1237–38.

239. *Id*. at 1238–40.

240. *Id.* at 1240.

241. *Id.* at 1241.

242. *Id.* at 1239.

243. *Id.* at 1249 ("Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.").

244. *Id.*; MONT. CONST. art. IX, § 1, cl. 3 ("The legislature shall provide ad[e]quate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.").

245. *See Mont. Env't Info. Ctr*., 988 P.2d at 1249.

246. *Id.* at 1247, 1249 (Delegate Mae Nan Robinson argued that monetary damages were inadequate: "[I]t does very little good to pay someone monetary damages because the air has been polluted or because the stream has been polluted if you can't change the condition of the environment once it has been destroyed.").

247. *See* 477 P.3d 288, 304 (Mont. 2020).

Environmental Council and Greater Yellowstone Coalition, an environmental rights group.[248] Lucky Minerals, Inc. was found to not have completed the required environmental impact report for its proposed mining operations, thus the plaintiffs argued DEQ provided them with an illegal licensure.[249] It is notable as well that the parties in this particular case disagreed over the constitutionality of a newly added provision, one that barred equitable remedies to the MEPA.[250]

The distinct issue in *Park County Environmental Council* was whether the bar on equitable remedies under the MEPA violated Section 3.[251] The court held that MEPA, in prohibiting a party from seeking equitable remedies, did not uphold its constitutional obligations under Section 3.[252] The MEPA is superseded in its provision against equitable remedies by Section 3.[253] Thus, the court affirmed the vacatur of the previously permitted mining licensure as an equitable remedy.[254] The message the court sent to the legislature was that it could not take away remedies guaranteed to Montanans through Section 3 and Article IX.[255] These cases exemplify the power of equitable remedies in environmental right claims.

VI. CONCLUSION

"[We are] all in [this physical environment] together and survival is something that we'll do or don't do together."[256] Climate change and the environmental justice concerns that have precipitated from it are not novel. Addressing climate change cannot be a partisan issue. Green amendments have been one avenue through which states have sought to extricate environmental justice from federal partisan gridlock.[257] The legislative intent of these amendments was to create space at the state level for environmental justice claims that are currently absent at the federal level.[258]

248. *Id.* at 294–95.
249. *Id.*
250. *Id.* at 302.
251. *See id.*
252. *Id.* at 308.
253. *Id.* at 310 ("MEPA is an essential aspect of the State's efforts to meet its constitutional obligations, as are the equitable remedies without which MEPA is rendered meaningless.").
254. *Id.* at 310–11.
255. *See id.*
256. ZACKIN, *supra* note 69, at 178.
257. BOMBARD ET AL., *supra* note 19, at 5.
258. *Id.*; Polk, *supra* note 144, at 127.

Constitutionalizing environmental rights at the state level through green amendments has illustrated advocates' ability to persuade recalcitrant courts to recognize the justiciability of environmental justice claims. Examples of this can be seen in the expansion of standing in *Held* and substantive due process in *Juliana.*[259] While there has been stagnation in the expansion of the public trust doctrine at the federal level, the court in *Sanders-Reed* adopted a more expansive application under New Mexico's constitution.[260]

The evolution of the green amendment movement shows the important role of state courts in the fight for environmental justice.[261] The rigidity of the structural amendment barriers within the federal constitution and the narrowing of federal environmental rights jurisprudence have shown no signs of changing; however, change has been seen over time at the state level.[262] The implementation of constitutionalized environmental rights has invited a panoply of philosophical and practical quandaries for state courts, exemplified in recent New York, Pennsylvania, and Montana state court decisions.[263]

The future expansion of green amendments is dependent upon the embeddedness of environmental justice values into the social fabric of a given populous. This entrenchment includes its recognition as a central value within legislative and judicial bodies. It starts with courts holding mining and waste management operations in Montana and New York, for example, accountable for their part in local environmental degradation.[264] Environmental justice is advanced when environmental groups in Pennsylvania can bring suit to prohibit illegally licensed oil and gas drilling in their state.[265] It is advanced when Montanans are able to seek equitable remedies in the face of illegal mining operations.[266]

States taking on the rights, responsibilities, and remedies that come with green amendments are not in an easy position. As former United States Senator Gaylord Nelson put it, "[Green amendments] require "a long, sustained . . . commitment far beyond any effort we made before in any enterprise in the history

259. Held v. State, 560 P.3d 1235, 1260 (Mont. 2024); Juliana v. United States, 217 F. Supp. 3d 1224, 1249–50 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020).

260. Sanders-Reed *ex rel.* Sanders-Reed v. Martinez, 350 P.3d 1221, 1226–27 (N.M. Ct. App. 2015).

261. BOMBARD ET AL., *supra* note 19, at 6.

262. *See* Albert, *The World's Most Difficult Constitution to Amend?*, *supra* note 32, at 2007–08; BOMBARD ET AL., *supra* note 19, at 5.

263. *See* discussion *supra* Parts IV., V.

264. *See* discussion *supra* Sections IV.A., V.

265. *See* discussion *supra* Part IV.

266. *See* discussion *supra* Part V.

of man."[267] Actualizing the promise of green amendments in mitigating the effects of climate change is going to require more states, and ideally the federal government, to adopt them. These states should not—nor do they have to—come into this endeavor unprepared, they can learn from the experiences of legislatures and state courts in implementing green amendments in New York, Pennsylvania, and Montana.

267. KURY, *supra* note 1, at 47.