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FOREVER EVERGREEN: AMENDING THE WASHINGTON STATE CONSTITUTION FOR A HEALTHY ENVIRONMENT

Devra R. Cohen

Abstract: Pollution poses an ongoing threat to the health and welfare of the citizens of Washington State. Air pollution costs Washington approximately \$190 million per year, ocean acidification is contributing to oyster die-offs, and approximately 677,000 acres of land are affected by area-wide soil contamination. Although Washington has aspirational environmental legislation and a narrowly defined duty under article XVII of the Washington State Constitution to protect navigable waters, their shores and tidelands, the State needs to do more if its citizens—present and future—are going to enjoy a healthy environment. Amending the Washington State Constitution to include an extended public trust doctrine that provides broad environmental protection and incorporates an affirmative right to a healthy environment will add a layer of environmental protection and provide the impetus for politically difficult environmental action. Amending the State Constitution to include a positive right to a healthy environment would not be a radical departure from current policy, and is necessary to safeguard the environment for present and future generations.

INTRODUCTION

Washington State, along with the rest of the world, is facing and will continue to face significant environmental challenges. Air pollution, soil pollution, and climate change all pose serious threats to the state's natural environment, economy, and citizens' health. To tackle these threats, this Comment argues for an amendment to the Washington State Constitution that enshrines a broad public trust duty and provides a positive right¹ to a healthy environment. To protect Washingtonians' health and welfare, and to ensure a healthy environment for generations to come, the Washington State Constitution should be amended to include the following provision:

(a) The state of Washington is the trustee of Washington's natural environment, including the air, water, soil, and ocean shores. It is one of the principal duties of the state to protect,

1. A "positive right" is "[a] right entitling a person to have another do some act for the benefit of the person entitled." BLACK'S LAW DICTIONARY 1519 (10th ed. 2014). As one scholar explained, in the context of state constitutions, "'positive' rights provisions or broad normative goals and aspirations . . . require, rather than *prohibit*, government action." Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZAGA L. REV. 41, 75 (2001–2002) (emphasis in original). Positive rights enshrined in state constitutions "impose an obligation on state governments to act." *Id.*

preserve, and restore the state's natural environment for the current generation and for generations to come. Those residing within Washington's borders, now and in the future, have a positive right to live in and enjoy a healthy environment.

(b) This amendment shall take full effect immediately upon the approval and ratification by the qualified voters. The legislature may take action to carry out the purposes of this section, but no such action shall be required for this section to become effective.²

This language provides a positive right to a healthy environment. Like the right to education,³ this proposed language would allow citizens to sue the government⁴ to declare and enforce their rights,⁵ and would encourage both the legislature and the courts to prioritize environmental protection.⁶ The provision is meant to encompass all aspects of the natural environment—including those, like air and water, that are affected by climate change—and enshrine a broad public trust duty in the State Constitution.⁷ Although adding such an amendment may seem

2. A proposed joint resolution to introduce this amendment is attached as Appendix A.

3. WASH. CONST. art. IX, § 1 (“It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”).

4. Individuals can bring constitutional challenges. *See, e.g.,* *McCleary v. State*, 173 Wash. 2d 447, 269 P.3d 227 (2012) (enforcing the right to amply funded education found in article IX, section 1 of the Washington State Constitution). Even if sovereign immunity were to be an issue, the legislature could waive that immunity, as it has in the tort context. *See* WASH. REV. CODE § 4.92.090 (2014) (“The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.”). For an in-depth examination of Washington's waiver of sovereign immunity for tortious conduct, see generally Michael Tardif & Rob McKenna, *Washington State's 45-Year Experiment in Governmental Liability*, 29 SEATTLE U. L. REV. 1 (2005); Debra L. Stephens & Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability*, 30 SEATTLE U. L. REV. 35 (2006).

5. When a plaintiff alleges that the state has violated a constitutional provision, Washington courts have authority to declare the state action unconstitutional. *See* *Svitak ex rel. Svitak v. State*, No. 69710-2-I, 2013 WL 6632124, at *2 (Wash. Ct. App. Dec. 16, 2013) (implying that had the plaintiff “identif[ied] a constitutional basis from which [the court] could find the State's inaction to be unconstitutional” the court could have addressed the issue pursuant to its authority under RCW 7.24.010). Revised Code of Washington 7.24.010 provides the court with the “power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” WASH. REV. CODE § 7.24.010 (2014). *See generally* *McCleary*, 173 Wash. 2d at 477, 269 P.3d at 227 (illustrating that there is a constitutional basis for enforcement of the right to amply funded education).

6. *See infra* Part II.B.

7. The concept of amending state constitutions to include a public trust duty is not new. *See, e.g.,* Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 74 (2009) (recognizing that some state constitutions contain public trust provisions and recommending that states “could amend their constitutions to make the trust duty

radical at first glance, this Comment will demonstrate that it is not radical⁸ and that it is necessary.⁹

This Comment proceeds in two parts. Part I shows that adding this amendment to the Washington State Constitution would not be a radical departure from Washington's history, current policy, existing constitutional structure, and national and international trends. First, this Part provides an overview of the public trust doctrine—both generally¹⁰ and in Washington specifically.¹¹ As this Comment illustrates, Washington's public trust doctrine is well established, in line with the doctrine's ancient origins and its modern interpretation in other states,¹² and that the traditional, narrow public trust doctrine is already enshrined in article XVII, section 1 of the Washington State Constitution.¹³ This Comment then explains how there is room for expansion of Washington's common law public trust doctrine.¹⁴ As Part I demonstrates, codifying a broad public trust duty in a constitutional amendment would not be a radical leap from existing Washington common law.

Part I continues with a discussion of current Washington laws that exemplify an existing commitment to the environment.¹⁵ It then discusses other constitutionally protected positive rights, demonstrating that including one for the environment would not be unprecedented, and would allow the State Constitution to reflect Washingtonians' values.¹⁶ This Part concludes with an overview of the national and international scene.¹⁷ In addition to providing a broad overview of the frequency of constitutional environmental protection provisions, this Part provides six concrete examples—three national¹⁸ and three international¹⁹—of how this right has been utilized elsewhere to protect the environment and tackle major environmental challenges.

explicit”).

8. *See infra* Part I.

9. *See infra* Part II.

10. *See infra* Part I.A.

11. *See infra* Part I.B.

12. *See infra* Part I.B.1.

13. *Id.*

14. *See infra* Part I.B.2.

15. *See infra* Part I.C. This Part highlights some of the aspirational language the Washington State Legislature has adopted in its environmental legislation. Part II.A, *infra*, will show that these aspirations have not been met.

16. *See infra* Part I.D.

17. *See infra* Part I.E.

18. *See infra* Parts I.E.1.a–c.

19. *See infra* Parts I.E.2.a–c.

While Part I lays the groundwork for why the proposed amendment would not be a radical step, Part II explains why such an amendment is necessary to protect the health and welfare of Washingtonians. This Part first explores some of Washington's existing environmental problems, including air,²⁰ water,²¹ and land/soil pollution.²² It then details why a constitutional amendment—not stronger legislation or the common law—is necessary to address these, and other, environmental challenges.²³

The Author freely admits that amending the State Constitution will not immediately solve all environmental problems. However, as this Comment demonstrates, including the right to a healthy environment in the State Constitution is not radical. It is, however, a necessary first step to ensure that the people, the courts, and the legislature have the tools to tackle today's worst environmental problems.

I. AMENDING THE WASHINGTON STATE CONSTITUTION WOULD NOT BE A RADICAL STEP

Amending the Washington State Constitution to include a positive right to a healthy environment that is a codification of a broad public trust duty is not a radical departure from existing Washington law and policy. Washington's long history with the public trust doctrine,²⁴ its inclusion of the traditional doctrine in its Constitution,²⁵ and the possibility of common law expansion of the doctrine²⁶ indicate that the state is ready to accept a broader public trust doctrine. Current Washington law, which demonstrates an ethos of environmental protectionism,²⁷ and a state constitution, which traditionally reflects the people's mores,²⁸ both indicate that including a strong environmental provision in the Constitution would be in line with Washingtonians' convictions.²⁹ Finally, amending the State Constitution would be consistent with both national and international trends of including strong, positive environmental protections directly in states'

20. *See infra* Part II.A.1.

21. *See infra* Part II.A.2.

22. *See infra* Part II.A.3.

23. *See infra* Part II.B.

24. *See infra* Part I.B.1.

25. *Id.*

26. *See infra* Part I.B.2.

27. *See infra* Part I.C.

28. *See infra* Part I.D.

29. *See infra* Parts I.C & D.

constitutions.³⁰

A. *The Deep Roots of the Public Trust Doctrine*

It has long been recognized that the government has a duty to keep and protect certain resources for the public at large.³¹ This duty, known as the public trust doctrine, has its roots in Roman law.³² The Institutes of Justinian declared that certain resources, namely the air, sea, sea-shore, and running water, were “by natural law common to all.”³³ This declaration is recognized as Ancient Rome’s public trust doctrine.³⁴ This expansive public trust doctrine was also present in medieval European law.³⁵ Eleventh-century French law stated that certain resources, including “the public highways and byways, running water and springs, meadows, pastures, forests, heaths and rocks” were open to use by all people, and were not owned or exclusively used by lords.³⁶ Professor Sax, the founding father of the modern public trust doctrine,³⁷ explained that in medieval Europe it was logical for the common places—like the forests and pastures—to be held for the public, since their public use was the basis of the feudal economy.³⁸ This medieval customary law incorporated the developed expectations of the community into the ultimate determination of rights and uses.³⁹ Determinations based on the public trust doctrine were allowed to consider the stability of society along with formalities like title ownership.⁴⁰

The doctrine has persevered through time and place, and was recognized in England and the United States after independence. In

30. See *infra* Part I.E.

31. See Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 699 (2006). See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (describing the public trust doctrine).

32. J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SOUTHEASTERN ENVTL. L.J. 223, 224 (2006); see also *Rettkowski v. Dep’t of Ecology*, 122 Wash. 2d 219, 239, 858 P.2d 232, 243 (1993) (Guy, J., dissenting).

33. *Rettkowski*, 122 Wash. 2d at 239, 858 P.2d at 243 (Guy, J., dissenting) (quoting J. INST. 2.1.1 (J. Moyle trans., 1896)).

34. *Id.*

35. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 189 (1980).

36. *Id.* (quoting M. BLOCH, *FRENCH RURAL HISTORY* 183 (1966)).

37. See Douglas Martin, *Joseph L. Sax, 78, Dies; Pioneered Environmental Law*, N.Y. TIMES, Mar. 11, 2014, at B16.

38. Sax, *supra* note 35, at 189.

39. *Id.* at 192.

40. *Id.* “The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title.” *Id.* at 188.

England, the doctrine established that the Crown held the beds of navigable waters in an unbreakable trust for the people so that they might enjoy commerce, navigation, and the fisheries.⁴¹ The United States⁴² inherited the public trust doctrine from the English Crown upon independence.⁴³ Under the doctrine, states hold the title to navigable waters, to the lands under navigable waters, and to land under tidewaters, in trust for the people of the state.⁴⁴ The trust ensures that the people “may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”⁴⁵ States may grant parcels of this submerged protected land for building structures like docks and wharves, which aid commerce, so long as those parcels, once built upon, “do not substantially impair the public interest in the lands and waters remaining.”⁴⁶ The states have the power to define the boundaries of public trust protection within their borders.⁴⁷ However, at no point may a state generally abdicate its control over water or land held in trust such that it is completely outside of state control and no longer beneficial for the general public.⁴⁸

The modern incarnation of the public trust doctrine in the United

41. Ralph W. Johnson, *Oil and the Public Trust Doctrine in Washington*, 14 U. PUGET SOUND L. REV. 671, 673 (1991).

42. An in-depth and detailed view of the public trust doctrine within the United States more broadly is beyond the scope of this Comment. For a more detailed look at the public trust doctrine in the United States, see generally, e.g., Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781 (2010) (describing the contours of the public trust doctrine in the United States).

43. Johnson, *supra* note 41, at 674.

44. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); see also Craig, *supra* note 42, at 801–02 (“The original 13 states acquired title to beds and banks underlying tidal and, as would later be confirmed, navigable-in-fact, nontidal waters as a matter of their conquest of England. All other states acquired such ownership by operation of the Equal Footing Doctrine, under which all subsequent states were admitted with the same rights as the original 13.” (footnotes omitted)).

45. *Ill. Cent. R.R. Co.*, 146 U.S. at 452.

46. *Id.*

47. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) (stating that “it has been long established that the individual States have the authority to define the limits of the lands held in public trust”); see also, e.g., Patrick Redmond, *The Public Trust in Wildlife: Two Steps Forward, Two Steps Back*, 49 NAT. RESOURCES J. 249, 258 (2009) (noting that the Supreme Court in *Phillips Petroleum Co.* “acknowledged that the states are free to narrow or expand the zone of public trust protection”).

48. *Ill. Cent. R.R. Co.*, 146 U.S. at 452–53 (“The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

States collect various common law rules to protect certain natural resources for the people.⁴⁹ The core of the doctrine is that the state cannot sell or give up its control of navigable waters, their beds and tidelands (“public trust resources”).⁵⁰ The state controls these resources for the benefit of the people, and, “in its strongest formulations, has an affirmative duty to exercise ‘continuing supervision’ over their management to preserve them as fully as possible.”⁵¹

In the United States, the federal government does not determine the bounds of the public trust doctrine. However, some elements are common amongst the states. Throughout the United States, the public trust doctrine protects salt and fresh waters that are navigable-in-fact,⁵² the beds of those waters, and the shoreland up to the high tide/water mark.⁵³ Outside of this traditional scope of the public trust doctrine, each state has the power to expand or contract the protection of the public trust doctrine within its own borders.⁵⁴ This power is limited, however, by the states’ inability to fully abrogate state control over public trust land.⁵⁵

Although the public trust doctrine traditionally protects three rights (navigation, commerce, and fisheries⁵⁶), some states have expanded their public trust doctrine beyond these traditional geographic and/or purpose-based boundaries.⁵⁷ At a basic level, many western states’ public trust doctrines encompass waters that are not navigable-in-fact for commercial vessels, but are navigable-in-fact for small personal pleasure crafts.⁵⁸ Some states have gone even further,⁵⁹ giving greater strength and breadth to the public trust doctrine. For example, when dealing with water extraction in California, the public trust doctrine applies to non-

49. *Rettkowski v. Dep’t of Ecology*, 122 Wash. 2d 219, 239, 858 P.2d 232, 243 (1993) (Guy, J., dissenting) (citing W. RODGERS, ENVIRONMENTAL LAW § 2.16, at 170–71 (1977) (“The public trust doctrine is a collection of common law principles recognizing that some types of natural resources are held in trust by government for the benefit of the public.”)).

50. Redmond, *supra* note 47, at 250; Wood, *supra* note 7, at 80 (2009) (noting that the traditional public trust resources are “navigable waters and soils under them” but arguing that these resources “were part of a broader category of property imbued with the public trust”).

51. Redmond, *supra* note 47, at 250 (footnote omitted).

52. For a more complete explanation of navigable-in-fact see Johnson, *supra* note 41, at 677–78.

53. *Id.* at 678.

54. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988); see also Redmond, *supra* note 47, at 258.

55. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452–53 (1892).

56. Johnson, *supra* note 41, at 678 (citing *Ill. Cent. R.R. Co.*, 146 U.S. at 387).

57. For a more detailed overview of the contours of the public trust doctrine throughout different states in the United States, see generally Craig, *supra* note 42; Klass, *supra* note 31.

58. Johnson, *supra* note 41, at 681.

59. For additional examples other than those provided in this section, see *id.* at 681–83.

navigable tributaries of navigable waters.⁶⁰ Massachusetts' public trust doctrine covers state parks⁶¹ and swamps,⁶² regardless of whether they are connected to navigable waters.⁶³ Similarly, in New York, the public trust extends to parkland, and prohibits the use of parkland for even environmentally friendly activities like recycling and composting.⁶⁴

In Pennsylvania, the public trust doctrine is enshrined in the Commonwealth's Constitution⁶⁵ and is one of the strongest and broadest public trust doctrines in the country. The Supreme Court of Pennsylvania has stated that the public trust doctrine "establishes the Commonwealth's duties with respect to Pennsylvania's commonly-owned public natural resources, which are both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations)."⁶⁶ These so-called negative rights impose upon Pennsylvania "a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether . . . through direct state action . . . [or] because of the state's failure to restrain the actions of private parties."⁶⁷ In addition to the prohibition on state conduct, Pennsylvania's public trust doctrine also imposes a positive duty on the Commonwealth "to act affirmatively to protect the environment, via legislative action."⁶⁸ Combined, the public trust doctrine imposes upon Pennsylvania "a duty to prevent and remedy the degradation, diminution, or depletion of [Pennsylvania's] public

60. *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 721 (Cal. 1983) (Mono Lake case holding that the public trust doctrine applies to "diversion of nonnavigable tributaries" to protect navigable waters); *see also* Johnson, *supra* note 41, at 681 ("The California court made it clear that 'if the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest.'" (emphasis in original) (quoting *Nat'l Audubon Soc'y*, 658 P. 2d at 720)); Redmond, *supra* note 47, at 258–59.

61. Johnson, *supra* note 41, at 682 (citing *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1966)).

62. *Id.* (citing *Robbins v. Dep't of Pub. Works*, 244 N.E.2d 577 (Mass. 1969)).

63. *Id.*

64. *In re Raritan Baykeeper, Inc. v. City of New York*, No. 31145/06, 2013 WL 6916531, at *5 (N.Y. Sup. Ct. Dec. 20, 2013).

65. The third clause of section 27 of the Declaration of Rights in the Pennsylvania Constitution states, "As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." PA. CONST. art. 1, § 27. This provision "establishes the public trust doctrine with respect to these natural resources (the corpus of the trust), and designates 'the Commonwealth' as trustee and the people as the named beneficiaries." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956 (Pa. 2013). Pennsylvania's constitutional provision will be discussed at greater length *infra* Part I.E.1.c.

66. *Robinson Twp.*, 83 A.3d at 955–56.

67. *Id.* at 957.

68. *Id.* at 958.

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.”⁶⁹ Pennsylvania must uphold its fiduciary duty to protect and safeguard the Commonwealth’s natural resources for both the present and future generations.⁷⁰ It must consider both short- and long-term environmental impacts of proposed action—or inaction—and ensure that future generations have “equal access” to the Commonwealth’s natural resources.⁷¹ Pennsylvania’s clear articulation of its expansive and duty-imposing public trust doctrine is a prime example of how states may extend their public trust doctrine beyond the traditional protection⁷² of navigable waters, their beds, and their shorelands.

The public trust doctrine has a long and well-accepted history. It has been part of American law since independence. Although it is traditionally applicable only to navigable waters, their beds and tidelands, each state can determine the bounds of its public trust doctrine. Indeed, many states have expanded the doctrine to include additional lands and waters, giving state protection to great swaths of the environment.

B. The Public Trust Doctrine: Washington’s Duty to Its Current and Future Citizens

Washington’s adoption, interpretation, and application of the public trust doctrine are in line with the doctrine’s ancient origins and modern interpretation elsewhere in the United States. The public trust doctrine has been recognized in Washington since at least 1901.⁷³ The doctrine has, from its inception, been used to protect the water resources for public purposes.⁷⁴ Safeguarding natural resources for citizens is a concept that is not new—not for Washington, and not in the law more broadly.⁷⁵

This Section describes the history and evolution of the public trust doctrine in Washington. It then shows how Washington’s acceptance of

69. *Id.* at 957.

70. *Id.* at 959.

71. *Id.*

72. See Johnson, *supra* note 41, at 676–78.

73. *City of New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 499–500, 64 P. 735, 737–38 (1901); see also F. Lorraine Bodi, *The Public Trust Doctrine in the State of Washington: Does it Make Any Difference to the Public?*, 19 ENVTL. L. 645, 646 (1989).

74. *Caminiti v. Boyle*, 107 Wash. 2d 662, 667 & n.7, 732 P.2d 989, 993 & n.7 (1987); Bodi, *supra* note 73, at 646.

75. See Klass, *supra* note 31, at 702.

the public trust doctrine is consistent with the doctrine's historic roots and with its acceptance elsewhere in the United States. This section wraps up with a discussion of the traditional public trust doctrine that is codified in article XVII, section 1 of the Washington State Constitution, and a discussion of how Washington's common law public trust doctrine has room for expansion.

1. *Washington's Public Trust Doctrine*

Washington has a long history of accepting the public trust doctrine: it has been recognized in the state for over a century. In 1901, in *City of New Whatcom v. Fairhaven Land Co.*,⁷⁶ the Washington State Supreme Court explained the essential characteristics of the State's ownership of navigable waters, their beds, and the tidelands, which passed to the states from the English Crown after the American Revolution:

The title to lands under tide waters in the sea, arms, and inlets thereof, and in tidal rivers . . . was, by the common law, deemed to be vested in the king, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property; but his grant was subject to the paramount right of the public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right.⁷⁷

The traditional, limited doctrine was codified in 1889 in article XVII, section 1 of the State Constitution.⁷⁸ That section provides:

The [S]tate 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.⁷⁹

The Washington State Supreme Court has held repeatedly that under article XVII, section 1, Washington may sell or otherwise dispose of the

76. 24 Wash. 493, 64 P. 735 (1901).

77. *Id.* at 499, 64 P. at 737.

78. *Caminiti*, 107 Wash. 2d at 666–67, 732 P.2d at 992–93.

79. WASH. CONST. art. XVII, § 1 (emphasis in original). For a history of this amendment, see ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 229–34 (2d ed. 2013).

tidelands and shorelands to private individuals.⁸⁰ However, even private ownership of tidelands and shorelands is subject to “the paramount public right of navigation and the fishery.”⁸¹ The Court has defined navigable waters to include those that can be used for boats, modes of water transportation, and floating logs.⁸²

The Washington State Supreme Court revisited the public trust doctrine in 1969 in *Wilbour v. Gallagher*.⁸³ In *Wilbour*, a class action was brought against landowners who had filled in a portion of their land that had previously been artificially submerged for a portion of the year by closing a dam, which raised the level of navigable Lake Chelan.⁸⁴ The Court found that for the thirty-five years prior to the defendants filling in their land, that land—when submerged—was openly used by the public “for fishing, boating, swimming and for general recreational use.”⁸⁵ The Court held that the submerged land was subject to the public right of navigation and the incidental public rights of fishing and recreation.⁸⁶ The defendants could not infringe on the public’s use of the navigable water, and thus the Court ordered that the fill be removed.⁸⁷ However, when the land was not submerged, the Court held that the landowners could “keep trespassers off their land, and may do with the land as they wish[ed] consistent with the right of navigation when it is submerged.”⁸⁸ The Court treated the artificially fluctuating waters the same as it would have treated naturally fluctuating waters: when the land is submerged, the public can exercise its right to utilize the waters; when the land is not submerged, the private owners’ rights prevail and the public does not have the right to access that land.⁸⁹

Wilbour expanded the public trust doctrine in Washington in two

80. *Caminiti*, 107 Wash. 2d at 666–67 & n.7, 732 P.2d at 993 & n.7.

81. *Id.* at 667, 732 P.2d at 993.

82. *See Dawson v. McMillan*, 34 Wash. 269, 274, 75 P. 807, 809 (1904); Craig, *supra* note 42, at 817.

83. 77 Wash. 2d 306, 462 P.2d 232 (1969).

84. *Id.* at 309, 462 P.2d at 234–35.

85. *Id.* at 312, 462 P.2d at 236.

86. *Id.* at 316, 462 P.2d at 239.

87. *Id.*

88. *Id.*

89. *Id.* at 315, 462 P.2d at 238 (“[I]n 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.”).

ways.⁹⁰ First, it established that even if water level fluctuates, and even if that fluctuation is artificial, the public right to use navigable waters was paramount.⁹¹ Second, the Court defined the “incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes” as “corollary to the right of navigation and the use of public waters.”⁹² The public can exercise these corollary rights in the same way it may exercise its right of navigation.⁹³ For determining the scope of public use for purposes of the public trust doctrine, there is no distinction between the right of navigation and the incidental rights of recreation and fishing.

In 1987, the Washington State Supreme Court provided the “classic exposition”⁹⁴ of the state’s modern public trust doctrine in *Caminiti v. Boyle*.⁹⁵ In *Caminiti*, the Court explained that “the state’s ownership of tidelands and shorelands is . . . comprised of two distinct aspects.”⁹⁶ The first—*jus privatum* (private property interest)—provides that, “[a]s owner, the state holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands. Thus, the state may convey title to tidelands and shorelands.”⁹⁷ The second—*jus publicum* (public authority interest)—is the “principle that the public has an overriding interest in navigable waterways and [t]he lands under them.”⁹⁸ *Jus publicum* is the public trust doctrine,⁹⁹ and it constrains the state in what it may and may not do. The Court explained: “[t]he state can no more convey or give away this *jus publicum* interest than it can ‘abdicate its police powers in the administration of government and the preservation of the peace.’”¹⁰⁰ In Washington, the *jus publicum* right includes navigation and fishery, as well as the right to other incidental recreational purposes.¹⁰¹ Under its *jus publicum* obligations, the state holds these lands “in trust for the public,” and “[i]t is this principle which is referred to as the ‘public trust

90. Bodi, *supra* note 73, at 647.

91. *Wilbour*, 77 Wash. 2d at 315–16, 462 P.2d at 238 (“[T]he public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands.”); *see also* Bodi, *supra* note 73, at 647.

92. *Wilbour*, 77 Wash. 2d at 316, 462 P.2d at 239; *see also* Bodi, *supra* note 73, at 647.

93. *Wilbour*, 77 Wash. 2d at 316, 462 P.2d at 239.

94. Redmond, *supra* note 47, at 296.

95. 107 Wash. 2d 662, 732 P.2d 989 (1987).

96. *Id.* at 668, 732 P.2d at 993.

97. *Id.* The emphasis of this Comment is on the second aspect of ownership, *jus publicum*, and thus will not further discuss *jus privatum*.

98. *Id.* at 668, 732 P.2d at 994.

99. *Id.* at 669, 732 P.2d at 994.

100. *Id.* (quoting Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892)).

101. *Id.* (citing *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (1969)).

doctrine,” which “has always existed in the State of Washington.”¹⁰²

The same year that the Washington State Supreme Court decided *Caminiti*, it also ruled on *Orion Corp. v. State*.¹⁰³ In *Orion Corp.*, the Court reaffirmed that the public trust doctrine does, and has always, existed in Washington, and that the doctrine “requires the state to maintain its dominion in trust for the people.”¹⁰⁴ In addition, the Court reiterated that where there is a public trust issue—for example, the sale of tidelands, which affects the people’s need to access navigable waters—the right of fishery and navigation is the “paramount public right” that the State must protect.¹⁰⁵ The Court also added a new layer to the public trust doctrine, describing it as a doctrine that “resembles ‘a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land’s dependent wildlife.’”¹⁰⁶ Importantly, the Court explicitly refused to “decide the total scope of the doctrine,”¹⁰⁷ indicating that the doctrine in Washington is still developing and growing.¹⁰⁸

Eleven years after *Caminiti* and *Orion Corp.*, the Court took another step toward expanding the public trust doctrine in *Weden v. San Juan County*.¹⁰⁹ After finding that noise and traffic from personal watercrafts threatened birds and mammals throughout San Juan County, and conflicted with other traditional uses of the shoreline, the county banned the use of personal watercrafts (PWCs).¹¹⁰ The Court upheld this ordinance.¹¹¹ In response to a public trust challenge to the ordinance, the Court held that, although the ordinance did prohibit a specific form of recreation, the waters were still open to the public, including PWC owners who used a different form of recreation.¹¹² The Court defined the public trust doctrine as protecting “public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, *and environmental quality*.”¹¹³ The

102. *Id.* at 669–70, 732 P.2d at 994.

103. 109 Wash. 2d 621, 747 P.2d 1062 (1987).

104. *Id.* at 639, 747 P.2d at 1072.

105. *Id.* at 640, 747 P.2d at 1072.

106. *Id.* at 640, 747 P.2d at 1072–73 (quoting Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 118 (1986)).

107. *Id.* at 641, 747 P.2d at 1073.

108. *See* Bodi, *supra* note 73, at 650.

109. 135 Wash. 2d 678, 958 P.2d 273 (1998).

110. *Id.* at 685–88, 958 P.2d at 276–78.

111. *Id.* at 709, 958 P.2d at 288.

112. *Id.* at 699, 958 P.2d at 283–84.

113. *Id.* at 698, 958 P.2d at 283 (emphasis added) (quoting Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 524

Court concluded, “it would be an odd use of the public trust doctrine to sanction an activity that actually harms and damages the waters and *wildlife* of this State.”¹¹⁴ The court seemingly assumed that the protection of wildlife fell within the scope of Washington’s public trust doctrine¹¹⁵ and stated that the public trust doctrine includes protection of environmental quality.¹¹⁶ This common law extension of the doctrine has had practical effects. After *Weden*, the Shoreline Hearings Board,¹¹⁷ which reviews permits under the Shoreline Management Act,¹¹⁸ indicated that “the public interest in access to and enjoyment of the shoreline ‘necessarily includes a component of environmental and habitat protection.’”¹¹⁹

Of course, the Court has recognized limitations on the public trust doctrine. In *Rettkowski v. Department of Ecology*,¹²⁰ the Washington State Supreme Court declined to invoke the public trust doctrine in deciding whether the Department of Ecology had authority to issue cease-and-desist orders to prohibit irrigation farmers from making groundwater withdrawals.¹²¹ Although the Court admitted that the public trust doctrine is “partially encapsulated” in article XVII, section 1 of the State Constitution, it declined to apply the doctrine to the issues in *Rettkowski* for two reasons.¹²² First, because the court had never extended the public trust doctrine to apply to ground water or non-navigable waters.¹²³ Second, because the state—not any particular state

(1992)).

114. *Id.* at 700, 958 P.2d at 284 (emphasis added).

115. Redmond, *supra* note 47, at 298.

116. *Weden*, 135 Wash. 2d at 698, 958 P.2d at 283 (quoting Johnson et al., *supra* note 113, at 524).

117. The Shoreline Hearings Board is “invested by the [Shoreline Management Act (SMA)] with authority over permitting reviews under section 90.58.180, [and] has viewed the SMA’s primary mandate as maintaining ‘public use and enjoyment of the shorelines,’ which covers the right to navigation but includes other forms of public access and even visual impacts.” Redmond, *supra* note 47, at 299 (quoting Ass’n of Wash. Bus. v. Wash. Dep’t of Ecology, SHB No. 00-037, 2001 WL 1022097, at *9 (Wash. Shorelines Hearings Bd. 2001)). The SMA will be discussed at greater length *infra* Parts I.C & II.A.2.

118. The Shoreline Management Act was passed in 1971 and was prompted, at least in part, by *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (1969), and the Court’s “question[ing] the appropriateness of filling and other tideland development absent a state regulatory process.” Bodi, *supra* note 73, at 647.

119. Redmond, *supra* note 47, at 299 (quoting Ass’n of Wash. Bus., 2001 WL 1022097, at *9).

120. 122 Wash. 2d 219, 858 P.2d 232 (1993).

121. *Id.*

122. *Id.* at 232, 858 P.2d at 239.

123. *Id.* It is important to note that the Court said that it had “never *previously* interpreted” the doctrine to cover these waters; it did not say that it could *never* interpret the public trust doctrine to apply to groundwater and non-navigable water. *Id.* (emphasis added). Indeed, the Court included a

agency—carries the duty established by the public trust doctrine.¹²⁴ Later, in *State v. Longshore*,¹²⁵ the Washington State Supreme Court held that the public trust doctrine does not protect the public’s right to gather all water-dependent creatures.¹²⁶ The doctrine “does not encompass the right to gather naturally occurring clams on private property.”¹²⁷ The Court reasoned that, “because of the characteristics of clams, clamming activity is more closely related to ownership of underlying land than to utilization of public waters.”¹²⁸ However, even in *Longshore*, the Court reiterated one of the central holdings in *Caminiti*: Although the state can “invest individuals with ownership of tidelands and shorelands,” it can do so only as long as that investment does not interfere with “the paramount public right of navigation and fishery.”¹²⁹ Most recently, in *Biggers v. City of Bainbridge Island*,¹³⁰ the Court reiterated that the duties imposed by the public trust doctrine as codified in article XVII of the State Constitution are imposed only on the state, and therefore can be utilized only by the state and not by a municipality.¹³¹

In sum, Washington has a clearly established public trust duty, dating back to at least 1901. This doctrine—at least in its traditional, narrow form—is partially codified in article XVII, section 1 of the State Constitution. The fact that the public trust doctrine is enshrined in the State Constitution has not only allowed the Court to expand the state’s obligations under the public trust doctrine through case law, but also indicates that codifying this broader public trust duty in the Constitution would be consistent with the existing Constitution. Although the Washington State Supreme Court has not defined the outer limits of the doctrine, the Court seems to be expanding public trust protection to the natural resources associated with the state’s navigable waters. The Court’s semi-frequent and relatively contemporary application of the doctrine indicates that it is alive and well, and remains a vibrant, if vulnerable,¹³² tool that could be used to further environmental protection

footnote directly after this statement expressing this sentiment. *Id.* at 232 n.5, 858 P.2d at 239 n.5 (“We similarly do not need to address the scope of the doctrine today.”). This point will be addressed in greater detail *infra* Part I.B.2.

124. *Retowski*, 122 Wash. 2d at 232, 858 P. 2d at 239.

125. 141 Wash. 2d 414, 5 P.3d 1256 (2000).

126. *Id.* at 429, 5 P.3d at 1263.

127. *Id.* at 428, 5 P.3d at 1263.

128. *Id.* at 427, 5 P.3d at 1263.

129. *Id.* (citing *Caminiti v. Boyle*, 107 Wash. 2d 662, 667, 732 P.2d 989, 993 (1987)).

130. 162 Wash. 2d 683, 169 P.3d 14 (2007).

131. *Id.* at 695–96, 169 P.3d at 21–22; *see also* Redmond, *supra* note 47, at 302–03.

132. Aside from the navigable waters and their beds, shorelands, and tidelands protected by

in Washington.

2. *There Is Room for Expansion of Washington's Common Law Public Trust Doctrine*

The public trust doctrine provides the state with a mechanism to reduce pollution in the state's waters, and protect the public's interest "in clean water, environmental quality, fish and wildlife, and recreation."¹³³ Although the traditional doctrine—protecting navigable waters and their attendant lands—is enshrined in the State Constitution, it seems unlikely that the Court would find constitutional public trust protection for resources that are not directly tied to navigable waters and their lands.¹³⁴ That being said, while the Washington State Supreme Court has provided some guidance on the bounds of the public trust doctrine, it has

article XVII, any application of the public trust doctrine is based solely on common law. This leaves the doctrine vulnerable to encroachment and erosion by the legislature and the courts. *See infra* Parts II.B.1–2.

133. Ralph W. Johnson, *The Emerging Recognition of a Public Interest in Water: Water Quality Control by the Public Trust Doctrine*, WATER & THE AM. W. 127, 128 (1988).

134. Article XVII, section 1 specifically refers to the State's ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide . . . and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." WASH. CONST. art XVII, § 1. *Caminiti v. Boyle* specifically referred to this constitutional provision, and cases dealing only with navigable waters and other lands covered by this provision, when that case held that the public trust doctrine had always existed in Washington. 107 Wash. 2d 662, 666–70, 732 P.2d 989, 992–94 (1987). After discussing *Caminiti's* holding, the Court in *Orion Corp. v. State* also expressly referred to the State's ownership of tidelands and shorelands as the basis for the application of the public trust doctrine to the tidelands at issue in the case. 109 Wash. 2d 621, 639, 747 P.2d 1062, 1072 (1987) ("Because title in and sovereignty over Washington's tidelands and shorelands vested in the state upon admission into the Union, the public trust doctrine applies to Orion's Padilla Bay tidelands."). The Court also recognized that the State's public trust duty in tidelands and shorelands was based on the public's need to access navigable waters. *Id.* at 640, 747 P.2d at 1073; *see also* Steven W. Turnbull, Note, *The Public Trust Doctrine: Accommodating the Public Need Within Constitutional Bounds—Orion Corp. v. State*, 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 108 S. Ct. 1996 (1988), 63 WASH. L. REV. 1087, 1096, 1107 (1988).

In the foundational cases regarding the constitutionally enshrined public trust doctrine, the Court has dealt only with those waters and lands that are protected under article XVII, section 1. It seems unlikely that the Court would hold that the constitutionally enshrined public trust expands beyond those waters and lands specified in article XVII, section 1. *See Svitak ex rel. Svitak v. State*, No. 69710-2-I, 2013 WL 6632124, at *1 (Wash. Ct. App. Dec. 16, 2013). In *Svitak ex rel. Svitak v. State*, the court of appeals dismissed a complaint for declaratory and injunctive relief that alleged the public trust doctrine created an affirmative duty on the state to protect the atmosphere because, at least in part, "the issue is not justiciable as there is no allegation of violation of a specific statute or constitution." *Id.* By finding that there was no allegation of a constitutional violation, the court necessarily did not extend the constitutionally enshrined public trust doctrine to include the atmosphere. Had the court concluded that the constitutional public trust doctrine—outlined in article XVII, section 1—included natural resources like the atmosphere, there *would* have been a violation of a constitutional provision. Thus it seems likely that any expansion of the public trust doctrine beyond those waters and lands would not be grounded in the Constitution, and would instead necessarily have to be based in common law.

repeatedly refused to explicitly define the limits of its scope.¹³⁵ The Court has thus left at least the common law aspect of Washington's public trust doctrine open to expansion.¹³⁶

Washington courts have utilized the public trust doctrine as the basis for regulations that restrict an individual's right of fishery by applying it in situations where the state was protecting its natural shellfish resources.¹³⁷ In *Washington Geoduck Harvest Association v. Washington State Department of Natural Resources*,¹³⁸ Division 2 of the Washington State Court of Appeals upheld the Department of Natural Resources' (DNR) geoduck management system.¹³⁹ First, the court held that because the geoducks were being harvested from the beds of navigable waters on state-owned land, the public trust doctrine applied.¹⁴⁰ The court then stated that the DNR's harvesting regulations—which regulated when individuals could harvest geoducks from particular tracts of state land—promoted the public interest, and thus were not improper.¹⁴¹ The court found that “[t]he public trust doctrine, as applied to DNR's regulation of commercial geoduck harvesting, protects the public right to recreation, commerce, and commercial fishing, all of which are bolstered by the state's system of facilitating sustainable geoduck harvesting and natural regeneration of the resource.”¹⁴² The court thus utilized the public trust doctrine to support the DNR's regulation of geoduck harvesting, recognizing that although the regulation did constrict individuals' rights of fishery, it was for the overall benefit of the natural resource and therefore the public.¹⁴³ The court upheld the DNR's regulations and procedures as constitutional,

135. *See* *Rettkowski v. Dep't of Ecology*, 122 Wash. 2d 219, 232 n.5, 858 P.2d 232, 239 n.5 (1993); *Orion Corp. v. State*, 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073 (1987).

136. The Court has stated in dicta that “we have never previously interpreted the doctrine to extend to non-navigable waters or groundwater,” but it did not indicate that that would not be possible in the future. *Rettkowski*, 122 Wash. 2d at 232, 858 P.2d at 239. As previously indicated, states are free to expand the public trust doctrine beyond the traditional bounds of navigable waters, and their beds and tidelands. *See supra* Part I.A. However, any expansion of the common law public trust doctrine would be vulnerable to legislative encroachment and could not act as the basis for litigation. *See infra* Part II.B.

137. *See* *Craig*, *supra* note 42, at 828.

138. 124 Wash. App. 441, 101 P.3d 891 (2004).

139. *Id.* at 452, 101 P.3d at 897.

140. *Id.* at 451, 101 P.3d at 896.

141. *Id.* at 452, 101 P.3d at 897 (“[T]he state's action is improper only where it does not promote, or where it substantially impairs, the public interest. Here, the opposite is true.” Please note that the language in the Pacific report varies slightly in that it says “the state's action is only improper where . . .”).

142. *Id.*

143. *See id.*

finding that they “serve[d] the public, satisfie[d] the public trust doctrine’s requirements, and [were] not an unconstitutional infringement on the public’s rights.”¹⁴⁴ The court has shaped the public trust doctrine in Washington by using it as a restriction on individuals’ personal rights for the benefit and preservation of the public resources.

State supreme court justices and court of appeals judges have expressed a need to expand the public trust doctrine. The *Weden* court defined the public trust doctrine as protecting environmental quality and wildlife.¹⁴⁵ The general protection of environmental quality and wildlife (other than fisheries) is beyond the traditional scope of the public trust doctrine, which only protected navigable waters and their attendant lands, for navigation, fisheries, and commerce.¹⁴⁶ In his *Rettkowski* dissent, Justice Guy argued that the navigability requirement of the public trust doctrine should be abandoned.¹⁴⁷ Following Professor Sax’s assertion that “[t]he function of the public trust as a legal doctrine is to protect such public expectations against destabilizing changes,”¹⁴⁸ the scope of the doctrine “is defined by the public’s need in those natural resources necessary for social stability.”¹⁴⁹ Justice Guy argued that it was time for the state to “recognize . . . the public’s interest . . . in water as an essential natural, finite resource, not in water just as a public highway or playground.”¹⁵⁰ To protect water as “an essential natural, finite resource,” it is necessary to protect the environment overall.¹⁵¹ In addition, Justice Guy’s conceptualization of the public trust doctrine, its scope, and its purpose, could reasonably be expanded to protect other non-water natural resources that are needed for social stability because they are “an essential natural, finite resource.”¹⁵²

144. *Id.*

145. *Weden v. San Juan Cnty.*, 135 Wash. 2d 678, 698–700, 958 P.2d 273, 283–84 (1998).

146. *See Johnson*, *supra* note 41, at 677–78.

147. *Rettkowski v. Dep’t of Ecology*, 122 Wash. 2d 219, 239, 858 P.2d 232, 243 (1993) (Guy, J., dissenting).

148. Sax, *supra* note 35, at 188.

149. *Rettkowski*, 122 Wash. 2d at 242, 858 P.2d at 244 (Guy, J., dissenting).

150. *Id.* at 242, 858 P.2d at 245.

151. *See, e.g., Wood*, *supra* note 7, at 83–84 (recognizing that all natural resources—both those traditionally protected by the public trust doctrine and those, like groundwater and forests, that are outside the scope of the traditional doctrine—are interconnected and arguing that to comport with “ecological reality” the public trust doctrine must protect all natural resources); *Air Pollution and Water Quality*, U.S. ENVTL. PROTECTION AGENCY, http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/airdeposition_index.cfm (last visited Dec. 28, 2014) (illustrating the link between air pollution and water quality); *infra* Part II.A.2.

152. Indeed, at least one scholar has suggested that Washington’s forests—which are an important source of income for the state—could be found to be public trust resources. *See Daniel Jack Chasan, A Trust for All the People: Rethinking the Management of Washington’s State Forests*, 24 SEATTLE U. L. REV. 1, 44–47 (2000).

Lower court judges have also indicated that the public trust doctrine should or does encompass more than traditional navigable waters, navigation, fisheries, and recreation. Court of Appeals, Division 2, Chief Judge Quinn-Brintnall defined the state's public trust duty as encompassing the state's "natural resources."¹⁵³ The public trust doctrine encompasses animals *ferae naturae* (wild animals), and "under Washington's inherent public trust doctrine the State and its people hold this title [to animals *ferae naturae*] in trust for the use and the benefit of all the people of this state, including those yet unborn."¹⁵⁴ Chief Judge Quinn-Brintnall cited *Graves v. Dunlap*¹⁵⁵ for this proposition. In *Graves*, the Washington State Supreme Court stated that "the recognized doctrine is that the title to game belongs to the state in its sovereign capacity, and that the *state holds this title in trust for the use and benefit of the people of the state.*"¹⁵⁶ This language, recognizing the traditional common law doctrine relating to wild animals,¹⁵⁷ echoes public trust language used in *Caminiti*¹⁵⁸ and indicates that the public trust doctrine could be applied to non-water resources.

Finally, the public trust rights established in *Caminiti* require protection of the environment that goes beyond just navigable waters. *Caminiti* established that the right of navigation—and the incidental right of fishing—is a protected interest of the public trust doctrine, as codified in the State Constitution.¹⁵⁹ In addition, *Caminiti* explicitly stated that the right to recreation in navigable waters is protected by the public trust.¹⁶⁰ To protect the recreational values of water, the state must protect the environment at large.¹⁶¹ Similarly, protection of the fishery "implicitly includes protection of water quality,"¹⁶² and thus the overall

153. *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wash. App. 566, 576, 103 P.3d 203, 208 (2004) (Quinn-Brintnall, C.J., concurring).

154. *Id.* (citing *Graves v. Dunlap*, 87 Wash. 648, 651, 152 P. 532, 533 (1915)).

155. 87 Wash. 648, 152 P. 532 (1915).

156. *Id.* at 651, 152 P. at 533 (emphasis added).

157. *Id.*

158. *Caminiti v. Boyle*, 107 Wash. 2d 662, 669, 732 P.2d 989, 994 (1987) ("[T]he state holds such dominion [over this state's tidelands and shore lands] in trust for the public. It is this principle which is referred to as the 'public trust doctrine.'").

159. *Id.* at 669, 732 P.2d at 994.

160. *Id.* (citing *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (1969)).

161. In addition to negatively affecting fisheries, water pollution can have a negative effect on recreation. For example, swimming in water that has toxic algal blooms (caused by nutrient pollution) can result in liver or stomach illness, rashes, respiratory problems, and neurological affects. See *Nutrient Pollution: The Effects: Human Health*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/nutrientpollution/effects-human-health> (last visited Dec. 24, 2014).

162. Johnson, *supra* note 41, at 678.

environment.¹⁶³

If codified,¹⁶⁴ the public trust doctrine could be used as a check on both state action and inaction. *Caminiti* adopted the United States Supreme Court's understanding of the duty of the state with regard to trust lands. Quoting *Illinois Central Railroad Co. v. Illinois*,¹⁶⁵ the Washington State Supreme Court wrote, "[t]he 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 interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."¹⁶⁶ Under the Court's precedent, the state must retain control over its public trust resources so that it can protect them. Although the Court adopted this language to determine if legislation violated the public trust doctrine, it could readily be used to determine if state *inaction* violates the public trust doctrine. If the state, by its inaction, failed at any time to manage and protect its natural resources for the benefit of the people,¹⁶⁷ it would be breaching its public trust duty because it would no longer be maintaining control sufficient to execute its duty to protect the resources for the people.

Protecting the overall environment is necessary for the State to fulfill its mandate to protect public trust resources, lands, and waterways for present and future generations. Expanding the public trust doctrine to include broader environmental protections would be in line with the existing constitutional provision, and follow the direction the Court has been going. Enshrining the right to a healthy environment¹⁶⁸ in a

163. Water pollution can have devastating effects on fish populations. For example, excessive amounts of phosphorous and nitrogen (nutrient pollution) from sources like agriculture, stormwater, wastewater, and fossil fuels, can wash into water bodies, causing algal blooms which can create toxins killing fish, reduce fish's abilities to find food, and "cause entire populations to leave an area or even die." *Nutrient Pollution: The Effects: Environment*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/nutrientpollution/effects-environment> (last visited Dec. 24, 2014); *Nutrient Pollution: Sources and Solutions*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/nutrientpollution/sources-and-solutions> (last visited Dec. 24, 2014).

164. The common law public trust doctrine alone cannot be the basis for litigation based on state inaction. *Svitak ex rel. Svitak v. State*, No. 69710-2-I, 2013 WL 6632124, at *1-2 (Wash. Ct. App. Dec. 16, 2013).

165. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

166. *Caminiti v. Boyle*, 107 Wash. 2d 662, 669-70, 732 P.2d 989, 994 (quoting *Ill. Cent. R.R. Co.*, 146 U.S. at 453).

167. See *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wash. App. 566, 577, 103 P.3d 203, 208 (2004) ("[T]he sovereign's duty to manage its natural resources recognized in the public trust doctrine is not time limited, and the primary beneficiaries of the sovereign's exercise of its public trust are those who have not yet been born or who are too young to vote. Thus, the sovereign authority to regulate natural resources is circumscribed by its duty to manage natural resources well for the benefit of *future* generations." (emphasis in original)).

168. This Comment is meant to introduce the general proposition that amending the State Constitution to include a right to a healthy environment is not radical and is necessary. However,

constitutional amendment would be a natural extension of the state's existing public trust doctrine, which protects navigable waters and their beds and tidelands, and is already enshrined in the Constitution.

c. Current Washington Laws Demonstrate an Existing Commitment to Environmental Protection

The Washington Legislature, as the voice of the people, has demonstrated an existing commitment to environmental protection by passing a variety of laws that seek to protect every aspect of the natural environment. A comprehensive examination or even an overview of all existing environmental laws in Washington is beyond the scope of this Comment. What this Comment seeks to do is highlight a few examples of such laws to demonstrate that there is an existing commitment to environmental protection.

A primary example of the State's commitment to environmental protection is found in the Shoreline Management Act. The Act recognizes the value and fragility of the shoreland, and the concern throughout Washington relating to these fragile lands' use, preservation, and restoration.¹⁶⁹ The Act declares that:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which . . . will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.¹⁷⁰

The Shoreline Management Act reflects the State's commitment to maintain the ecological health and natural character of shoreline areas.

Similarly, the Water Pollution Control Act¹⁷¹ calls for pure waters throughout the state, and the protection and proliferation of wildlife. The Act declares that it is Washington's policy "to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and

precisely defining a "healthy environment" would require political debates and an analysis of scientific data that are beyond the expertise of the Author and outside the scope of this Comment.

169. WASH. REV. CODE § 90.58.020 (2014).

170. *Id.*

171. *Id.* §§ 90.48.010–90.48.906.

protection of wild life, birds, game, fish, and other aquatic life, and the industrial development of the state.”¹⁷² The Water Pollution Control Act recognizes the necessity of industrial development, but includes the protection of wildlife as part of the official policy of the state, even before it recognizes development.

Washington’s existing laws do not just protect water and shorelands. The State’s commitment to environmental protection goes beyond those narrow bounds to include the preservation of aquatic resources in their natural form.¹⁷³ The Natural Area Preserves legislation¹⁷⁴ calls for the protection of natural lands, along with their eco-systems.¹⁷⁵ Natural lands are protected for current and future generations as areas “of scientific research, teaching, as habitats of rare and vanishing species, as places of natural historic and natural interest and scenic beauty, and as living museums of the original heritage of the state.”¹⁷⁶

These laws are just a few of the many examples of Washington’s existing legislative commitment to protecting and preserving the environment for current and future generations. However, as will be illustrated in Part II,¹⁷⁷ despite this commitment, Washington has not lived up to these aspirational goals. As these laws demonstrate, a constitutional amendment enshrining the right to a healthy environment would be in line with Washington’s existing ethos. An amendment would not only create a constitutional mandate that would force the state to do better, but it would also provide the legislature with a clear signal indicating the importance of protecting the environment in fact, not just in aspirational statements.

D. The Washington State Constitution Already Includes Positive Rights and Reflects Washingtonians’ Values

Amending the Washington State Constitution to include a right to a healthy environment would not be a radical step because the State Constitution already includes positive rights, and the Constitution has traditionally reflected Washingtonians’ values. First, the Washington State Constitution already has enshrined positive rights. A “positive

172. *Id.* § 90.48.010.

173. *Id.* § 79.70.010 (2014) (“It is, therefore, the public policy of the state of Washington to secure for the people of present and future generations the benefit of an enduring resource of natural areas by establishing a system of natural area preserves, and to provide for the protection of these natural areas.”).

174. *Id.* §§ 79.70.010–79.70.900.

175. *Id.* § 79.70.010.

176. *Id.*

177. *See supra* Part II.A.

right” is one that requires government action, rather than restricts it.¹⁷⁸ There are at least four constitutional provisions that enshrine positive rights. Article II, section 35 requires the legislature to “pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same.”¹⁷⁹ Article XIII, section 1 requires that the state provide “[e]ducational, reformatory, and penal institutions.”¹⁸⁰ Article X, section 3 requires that the legislature “provide by law for the maintenance of a soldiers’ home for honorably discharged” members of the Union’s armed forces and “members of the state militia disabled while in the line of duty and who are *bona fide* citizens of the state.”¹⁸¹ It should be noted that although article II, section 35, article XIII, section 1, and article X, section 3, are positive rights (meaning that they require government action), none of those provisions are fully self-executing.¹⁸² The plain language of article II, section 35 requires the legislature to pass laws to protect workers.¹⁸³ Article XIII, section 1 “is not fully self-executing but requires supplementation by ‘such regulations as may be provided by law.’”¹⁸⁴ Similarly, the plain language of article X, section 3 requires that the legislature “provide by law” for veterans’ care.¹⁸⁵

Article IX, section 1 provides a positive right that is self-executing. It provides for the positive right to education: “[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders.”¹⁸⁶ In *McCleary v. State*¹⁸⁷ the Washington State Supreme Court held that this constitutional provision “confers on children in Washington a *positive constitutional right* to an amply funded education.”¹⁸⁸ Although the legislature must implement

178. Clayton, *supra* note 1, at 75.

179. WASH CONST. art. II, § 35.

180. WASH CONST. art. XIII, § 1.

181. WASH. CONST. art. X, § 3.

182. A self-executing constitutional provision is one that takes effect without any sort of legislative action. See 16 CORPUS JURIS SECUNDUM CONSTITUTIONAL LAW § 89, available at WestLaw.

183. WASH. CONST. art. II, § 35.

184. See UTTER & SPITZER, *supra* note 79, at 214.

185. WASH. CONST. art. X, § 3; see also UTTER & SPITZER, *supra* note 79, at 181 (noting that the legislature provided for the Washington Soldiers’ Home in chapter 72.36 of the Revised Code of Washington).

186. WASH. CONST. art. IX § 1.

187. 173 Wash. 2d 477, 269 P.3d 227 (2012).

188. *Id.* at 483, 269 P.3d at 231 (emphasis added).

guidelines to fulfill its mandate under the Constitution,¹⁸⁹ the provision does not require any legislative action to become effective.¹⁹⁰ Children have a right to education directly under the Constitution—no legislative action is required. Including a positive right to a healthy environment would not be a significant departure from existing Washington constitutional law because the Constitution already provides for positive rights.¹⁹¹

Second, the Constitution has always reflected Washingtonians' values. The Washington State Constitution was drafted during the populist movement, and the document reflects the values of that time.¹⁹² In response to people's concerns about special interests, distrust of railroads and corporations, and a "general objection to the concentration of power in elites," the Constitution "imposed numerous restrictions on the legislature, scattered executive authority among independently elected officials, intentionally hamstrung corporations, and provided strong protections of individual liberties."¹⁹³ These restrictions reflected the populist beliefs of the majority farming community: "protection of a self-sufficient way of life in the face of powerful commercial forces that threatened to manipulate or control the common people."¹⁹⁴

The Constitution accurately reflected the people's ideals then, and for many Washingtonians, it still does today.¹⁹⁵ However, "a component of the state's modern self-image that is absent from the document is a provision entrenching the state's strong outdoor recreation and environmentalist spirit."¹⁹⁶ In 2008, Washington joined the Pacific Coast Collaborative, which prioritizes making the Pacific coast region a world-leader in reducing greenhouse gas emissions to fight climate change,¹⁹⁷

189. See UTTER & SPITZER, *supra* note 79, at 170.

190. See *McCleary*, 173 Wash. 2d 477, 483, 269 P.3d 227, 231 ("The judiciary has the primary responsibility for interpreting article IX, section 1 to give it meaning and legal effect.").

191. WASH. CONST. art. VIII, § 10; see also Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1464, 1474 (2010) (listing this amendment as a positive environmental right provided for in the Washington State Constitution). These loans are used "for the conservation or more efficient use of water, energy, or stormwater or sewer services." WASH. CONST. art. VIII, § 10. This provision was passed to encourage conservation efforts, as "[c]onservation was seen as a good alternative to new power plants." UTTER & SPITZER, *supra* note 79, at 167.

192. UTTER & SPITZER, *supra* note 79, at 4–5.

193. *Id.*

194. *Id.* at 7.

195. *Id.* at 5, 11 ("[I]ndividualism and suspicion of big business (as well as big government) remain strong in Washington State, and in that respect its constitution continues to reflect populist attitudes.").

196. *Id.* at 11.

197. *Climate Change*, PAC. COAST COLLABORATIVE, <http://www.pacificcoastcollaborative.org/priorities/climateaction/Pages/ClimateAction.aspx> (last visited Dec. 23, 2014).

and “leading the world in sustainable environmental management” to protect the ocean and coastlines.¹⁹⁸ In 2013, Washington elected current governor, Jay Inslee, “an environmental champion,”¹⁹⁹ who is making environmentalism and clean energy a priority.²⁰⁰ Washingtonians are committed to protecting the environment, and it is time to amend the Constitution to reflect these mores. The flexibility inherent in state constitutions,²⁰¹ allows them to better reflect the aspirations of the current generation.²⁰² Amending the Constitution to include a right to a healthy environment would accurately reflect the values of the people, something that the Constitution has done since it was first drafted.

E. Amending the Washington State Constitution Would Be in Line with National and International Trends

In recognition of the importance of strong environmental protections, states nationally and internationally have incorporated broad environmental protection principles into their constitutions. This section demonstrates that there is a national and international trend toward incorporating broad environmental protections into state constitutions. Although not all states with these provisions utilize them,²⁰³ some states and countries have successfully relied on them to tackle serious environmental problems. This Comment highlights six such cases—three national, three international—to showcase the potential power of these provisions and to demonstrate that courts have invoked

198. *Ocean Conservation, PAC. COAST COLLABORATIVE*, <http://www.pacificcoastcollaborative.org/priorities/resource/Pages/ResourceConservation.aspx> (last visited Dec. 23, 2014).

199. *My Position on Key Issues*, JAY INSLEE: DEMOCRAT FOR GOVERNOR, <http://www.jayinslee.com/issues/key-issues> (last visited Dec. 23, 2014).

200. *Issues*, WASH. GOVERNOR: JAY INSLEE, <http://www.governor.wa.gov/issues/default.aspx> (last visited Dec. 23, 2014).

201. State constitutions can be amended more easily than the federal Constitution. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. (forthcoming 2014) (manuscript at 129), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416300. Amendments to the Washington State Constitution must be proposed by one of the branches of the legislature, approved by two-thirds of both branches of the legislature, and then approved by a majority vote of the people. WASH. CONST. art. XXIII. This process is arguably easier than amending the federal Constitution. See U.S. CONST. art. V. (requiring two-thirds of both the House of Representatives and the Senate—or two-thirds of state legislatures—to propose an amendment; the proposed amendment must then be approved by three-fourths of state legislatures).

202. See Versteeg & Zackin, *supra* note 201, at manuscript at 129, 135.

203. Indeed, it has been argued that, “these constitutional provisions have [in general] had very little observable impact on the environmental laws and policy of the states that adopted such provisions.” James M. McElfish, Jr., *State Environmental Law and Programs*, 1 L. ENVTL. PROTECTION § 7:3 (2014).

constitutional provisions to strengthen environmental protection.²⁰⁴ An amendment to the Washington State Constitution that provides for broad environmental protections would be in line with this national and international trend,²⁰⁵ and would be a powerful tool for tackling some of the State's most pressing environmental challenges.

1. *Nationally, States Are Incorporating a Right to a Healthy Environment into Their Constitutions*

Throughout the United States of America, states have incorporated the right to a healthy environment in their own state constitutions. Every state constitution drafted since 1959 addresses natural resources preservation and environmental issues.²⁰⁶ Six states with constitutions enacted before 1959 address environmental issues through constitutional amendments.²⁰⁷ Forty-two state constitutions²⁰⁸ “at least mention environmental protection or natural resources.”²⁰⁹ As of November 2014, sixteen states have a constitutional provision that explicitly protects the environment.²¹⁰ Some states, like Alaska,²¹¹ Montana,²¹² and

204. A comprehensive overview of every example of courts invoking or not invoking these constitutional provisions is beyond the scope of this Comment.

205. Parts I.E.1.a-c & I.E.2.a-c, *infra*, provide specific examples of where states and countries have utilized these constitutional environmental protections to address environmental needs and problems.

206. Klass, *supra* note 31, at 714. For additional information and examples of these varying provisions, see Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 160-63 (2003).

207. Klass, *supra* note 31, at 714; Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 871-73 (1996).

208. For additional information on how other states have incorporated the public trust doctrine into their constitutions, see Klass, *supra* note 31, at 714-19.

209. *Id.* at 714. Of these forty-two state constitutions, “eight states have clear language granting citizens environmental rights, eleven states include public policy statements on environmental protection, and the remaining twenty-three states at least refer to natural resources or environmental protection.” *Id.* at 714 n.85 (citing 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, 167 (2005)).

210. McElfish, *supra* note 203.

211. ALASKA CONST. art. VIII, § 2 (“The legislature shall provide for the utilization, development, and *conservation*, of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.” (emphasis added)); ALASKA CONST. art. VIII, § 3 (“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”); ALASKA CONST. art. VIII, § 4 (“Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.”); *Constitutional Amendment Summary: 1966-2004 Proposed Amendment Titles & Vote Counts*, OFF. OF THE LIEUTENANT GOVERNOR BYRON MALLOTT, <http://ltgov.alaska.gov/treadwell/services/alaska-constitution/amendment-summary.html> (last visited Jan. 4, 2015). Taken together, the Alaska Supreme Court has interpreted the aforementioned provisions of the Alaska Constitution to

Louisiana,²¹³ included provisions protecting the environment and natural resources directly in their constitutions, without utilizing amendments.

Other states began adopting constitutional amendments in the late 1960s and early 1970s which “were generally put in terms of declaring the policy of the state, of establishing a ‘public trust’ over the environment, or creating environmental ‘rights’ for the citizens of the states.”²¹⁴ New York, for example, amended its Constitution in 1969 to declare that “[t]he policy of the state shall be to conserve and protect its natural resources and scenic beauty.”²¹⁵ Similarly, Pennsylvania amended its Constitution in 1971 to include a right to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”²¹⁶

Although it has been argued that these constitutional provisions protecting the right to a healthy environment have generally “had very

“constitutionaliz[e] common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.” Redmond, *supra* note 47, at 255 (quoting *Owsichek v. State*, 763 P.2d 488, 493 (Alaska 1988)); *see also Pullen v. Ulmer*, 923 P.2d 54, 60–61 (Alaska 1996).

212. MONT. CONST. art. II, § 3 (“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment”); MONT. CONST. art. IX, § 1 (“(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.”); *see also Thompson, supra* note 206, at 158 (highlighting the important position environmental protection provisions were given in Montana’s 1972 Constitution).

213. This article refers to the 1974 Louisiana Constitution. 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.”).

214. McElfish, *supra* note 203.

215. N.Y. CONST. art. XIV, § 4 (adopted Nov. 4, 1969) (“The policy of the state shall be to conserve and protect its natural resources and scenic beauty The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution . . . [.] the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters . . . which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people.”).

216. PA. CONST. art. 1, § 27 (adopted May 18, 1971) (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”); *Article 1, Section 27. Added by Amendment of May 18, 1971*, DUQUESNE U., <http://www.duq.edu/academics/gumberg-library/pa-constitution/historical-research/legislative-histories/a1-s27-1971> (last visited Feb. 17, 2015).

little observable impact on the environmental laws and policy of the states that adopted” them,²¹⁷ some states have certainly put their provisions to use. The following are three specific examples where a state’s constitutional right to a healthy environment has been used to strengthen environmental protection for the people’s benefit.

a. Montana

Environmental protection was one of the major themes delegates considered when drafting the 1972 Montana Constitution.²¹⁸ This theme is reflected throughout the text of the Montana Constitution. Its preamble begins with the statement: “We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains . . . establish this constitution.”²¹⁹ Article II of the 1972 Montana Constitution provides that, “[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment.”²²⁰ Article IX reiterates this sentiment and creates an obligation to safeguard the environment for the state and the people of Montana:

(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.²²¹

The right guaranteed in article II and the rights provided for in article IX are “interrelated and interdependent.”²²² Although it is clear that environmental protection was a priority for the drafters of the new Constitution, what precisely this provision required of the State was left open for the courts to decide.²²³ As one Missoula delegate to the

217. McElfish, *supra* note 203; *see also* Thompson, *supra* note 206, at 158–59, 163–65 (noting that constitutional provisions protecting the environment have had little impact).

218. KRYS HOLMES, MONTANA: STORIES OF THE LAND 425 (2008), *available at* <http://svcalt.mt.gov/education/textbook/TBTGPreOrder.asp> (follow link provided; then click on “Part 4: The Modern Montana Constitution”; then follow hyperlink for “Chapter 21”; then follow hyperlink for “Online textbook: Chapter 21.” The direct link to Chapter 21 is <http://svcalt.mt.gov/education/textbook/Chapter21/Chapter21.pdf>).

219. MONT. CONST. pmb1.

220. MONT. CONST. art. II, § 3.

221. MONT. CONST. art. IX, § 1.

222. *Mont. Envtl. Info. Ctr. v. Dep’t of Envtl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999).

223. HOLMES, *supra* note 218, at 429.

Constitutional Convention indicated, the drafters intended to leave the extent of environmental protection open for litigation.²²⁴

The Montana Supreme Court first addressed the level of scrutiny the court must utilize “when the right to a clean and healthful environment guaranteed by [a]rticle II, [s]ection 3 or those rights referred to in [a]rticle IX, [s]ection 1 are implicated” in *Montana Environmental Information Center v. Department of Environmental Quality*.²²⁵ In that case, the court examined whether a statute²²⁶ that allowed water test discharges that degraded high quality waters without review violated articles II and IX of the Montana Constitution, and if plaintiff environmental groups had standing to challenge the constitutionality of the act.²²⁷ After an extensive review of the history of the 1972 Constitution looking at the drafters’ intent, the Court interpreted article II, section 3 and article IX, section 1 to give substantial protection to the environment.²²⁸ The Court held that a concrete showing of harm was not required for plaintiffs to have standing.²²⁹ The court further held that, “the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at [a]rticle II, [s]ection 3 of Montana’s Constitution”²³⁰ and therefore that strict scrutiny must be applied to all rules and statutes that implicate those rights.²³¹ By reading the constitutional provisions with the drafters’

224. Missoula delegate Mae Nan Ellingson said, “What did it mean to have a right to a clean and healthful environment? To me, it meant that the citizen had the right to go to court to protect that environment.” HOLMES, *supra* note 218, at 430 (quoting delegate Mae Nan Ellingson).

225. 988 P.2d 1236, 1244 (Mont. 1999).

226. Plaintiffs specifically contended that section 75-5-317(2)(j), MCA (1995) “to the extent that [it] allow[ed] discharges of water from watering well or monitoring well tests, which degrade[d] high quality waters without review pursuant to Montana’s nondegradation policy” was void for violating the constitutional provisions protecting the environment. *Id.* at 1237.

227. *Id.* at 1242.

228. *Id.* at 1249 (“[T]o give effect to the rights guaranteed by [a]rticle II, [s]ection 3 and [a]rticle IX, [s]ection 1 of the Montana Constitution they must be read together and consideration given to all of the provisions of [a]rticle IX, [s]ection 1 as well as the preamble to the Montana Constitution. In doing so, we conclude that the delegates’ intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. 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. The delegates repeatedly emphasized that the rights provided for in subparagraph (1) of [a]rticle IX, [s]ection 1 was linked to the legislature’s obligation in subparagraph (3) to provide adequate remedies for degradation of environmental life support system and to prevent unreasonable degradation of natural resources.”).

229. *Id.*

230. *Id.* at 1246.

231. *Id.* The Court further held that to survive strict scrutiny, the State must “establish[] a compelling state interest and that its action is closely tailored to effectuate that interest and is the

intent in mind, the Court interpreted the Montana Constitution to include expansive environmental protections meant to guarantee not only a healthful environment, but one that was free from degradation—the strongest possible protections that the drafters could provide for the environment.²³²

b. Louisiana

Like Montana, Louisiana included environmental protections directly into its Constitution when it adopted the current Constitution in 1974. Article IX provides that:

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.²³³

In Louisiana, the environmental protections enshrined in article IX of the Constitution are a codification of a broad public trust doctrine.²³⁴ The Louisiana Supreme Court explained that in Louisiana, “[a] public trust for the protection, conservation and replenishment of *all natural resources* of the state was recognized by art. VI § 1 of the 1921 Louisiana Constitution.”²³⁵ The court further explained that the 1974

least onerous path that can be taken to achieve the State’s objective.” *Id.* This holding was recently revisited in *Northern Plains Resource Council, Inc. v. Montana Board of Land Commissioners*, 288 P.3d 169 (Mont. 2012). In *Northern Plains Resource Council*, the Montana Supreme Court reiterated that “[t]he right to a clean and healthful environment is a fundamental right,” and that a statute that interferes with the exercise of that right is subject to strict scrutiny, “requiring the State to provide a compelling interest for its existence.” *Id.* at 174. The Court also indicated that “middle-tier” scrutiny is appropriate for a statute that impacts constitutional rights provided in article IX. *Id.*

In *Northern Plains Resource Council*, the Court upheld mineral development leases issued by the State to a mining company that were entered into without an environmental review. *Id.* at 174–75. The Court held that “[b]ecause the leases themselves do not allow for any degradation of the environment, conferring only the exclusive right to apply for State permits, and because they specifically require full environmental review and full compliance with applicable State environmental laws, the act of issuing the leases did not impact or implicate the right to a clean and healthful environment in [a]rticle II, [s]ection 3 of the Montana Constitution.” *Id.* at 174. Similarly, because the leases did require an environmental review before any mining could take place, the leases did not impact rights conferred by article IX. *Id.* at 174–75. Because no constitutional rights were impacted, the Court looked for a rational basis and found that there was one to defer the environmental review until the permitting stage of a specific mining project. *Id.* at 175. The Court thus upheld the leases. *Id.*

232. *Mont. Env'tl. Info. Ctr.*, 988 P.2d at 1248.

233. LA. CONST. art. IX, § 1.

234. *In re Am. Waste & Pollution Control Co.*, 642 So. 2d 1258, 1262 (La. 1994) (noting that article IX, section 1 “continues the Public Trust Doctrine in environmental matters”).

235. *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n.*, 452 So. 2d 1152, 1154 (La. 1984)

Constitution expanded the public trust doctrine by explicitly categorizing water and air as natural resources, and commanding the legislature to implement policies to conserve, protect, and replenish those natural resources “insofar as possible and consistent with health, safety and welfare of the people.”²³⁶ Although these protections are broad and go beyond the scope of the traditional public trust doctrine, environmental protection is not “an exclusive goal.”²³⁷ Rather, there is a balancing test weighing environmental benefits and costs against other economic and social factors.²³⁸

Although environmental protection is not an exclusive goal, agencies cannot escape the constitutional mandate to try to protect the environment as much as possible. In *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,²³⁹ the Louisiana Supreme Court held that agencies that “act as the primary public trustee of natural resources and the environment” must provide “active and affirmative protection” of the public’s right to a safe and healthy environment.²⁴⁰ In order to ensure that this duty is met, an agency must provide a record of decision that clearly articulates the basis for its decision.²⁴¹ The agency must thus demonstrate that it has acted in the public’s best interest, balancing environmental factors against the general welfare of the people.²⁴²

Louisiana courts have recognized that while environmental protection is mandated by the State Constitution, it must also be balanced against sometimes competing economic and social factors.²⁴³ However, this balancing test does not negate the State’s duty to provide “active and affirmative protection” of the environment.²⁴⁴ Instead, the state must clearly, and on the record, articulate the basis for its decisions when they affect environmental quality.²⁴⁵ This requirement ensures that decision-makers execute their “duty to see that the environment would be

(emphasis added) (footnote omitted).

236. *Id.*

237. *Id.* at 1157.

238. *Id.*

239. *Id.* at 1152.

240. *Id.* at 1157.

241. *Id.* at 1159–60.

242. *See id.* at 1157.

243. *Id.*

244. *Id.*

245. *Id.* Agency officials must follow the “rule of reasonableness,” which “requires 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.” *Id.*

protected to the fullest extent possible consistent with the health, safety and welfare of the people”²⁴⁶ and are more deliberate with their decisions that affect the environment.

c. *Pennsylvania*

Pennsylvania amended its Constitution in 1971 to include broad environmental protections.²⁴⁷ Article I, section 27 provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.²⁴⁸

As discussed above,²⁴⁹ Pennsylvania’s interpretation of article I, section 27 provides some of the strongest public trust constitutional protections of natural resources in the United States. The provision is self-executing, and “create[s] a right in the people to seek to enforce the obligations” that the Commonwealth incurs as the trustee responsible for the maintenance and conservation of the “public natural resources.”²⁵⁰

The Commonwealth’s obligations related to this constitutional provision were recently addressed in *Robinson Township v. Commonwealth*.²⁵¹ In that case, the Pennsylvania Supreme Court invalidated various provisions of Act 13, which aimed “to provide a maximally favorable environment for [oil and gas] industry operators to exploit Pennsylvania’s oil and natural gas resources, including those in the Marcellus Shale Formation.”²⁵² Among other things, Act 13 required local government “to authorize oil and gas operations, impoundment areas, and local assessment operations . . . as permitted uses in all zoning districts throughout a locality,” to authorize both natural gas compressor stations and natural gas processing plants, and prohibited local governments from imposing more stringent conditions on oil and gas

246. *Id.* at 1160.

247. Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123–24 (1990).

248. PA. CONST. art. I, § 27. For a detailed analysis of all of article I, section 27 of the Constitution of Pennsylvania, and the associated case law, see *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 951–69 (Pa. 2013).

249. See *supra* notes 65–72 and accompanying text.

250. *Robinson Twp.*, 83 A.3d at 974.

251. 83 A.3d 901 (Pa. 2013).

252. *Id.* at 975.

operations.²⁵³ The Act also entitled oil and gas operators “to automatic waivers of setbacks”—meant to protect sensitive water resources—upon submission of a plan that identified additional measures, as prescribed by the Department of Environmental Protection, that would be utilized during construction, drilling, and well operations.²⁵⁴

The Court found that Act 13 implicated the public’s natural resources “essential to life, health, and liberty: surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest,” all of which are part of the public trust.²⁵⁵ The Court found that three provisions of the Act were “incompatible with the Commonwealth’s duty as trustee of Pennsylvania’s public natural resources,” in violation of article I, section 27.²⁵⁶ One provision unlawfully required local governments “to ignore their obligations under [a]rticle I, [s]ection 27” and instead required them “to take affirmative actions to undo existing [environmental] protections.”²⁵⁷ Another provision fell short of the legislature’s constitutional duty to enact legislation that restrains private parties from causing environmental degradation.²⁵⁸ Finally, the Court found that the third challenged provision “fail[ed] both to ensure conservation of the quality and quantity of the Commonwealth’s waters and to treat all beneficiaries equitably in light of the purpose of the trust,” in violation of the Commonwealth’s trustee duties.²⁵⁹ Despite recognizing that the oil and gas industry “offer[ed] the very real prospect of jobs and other important economic benefits,”²⁶⁰ the Court invalidated provisions of an Act that provided more favorable conditions for the oil and gas industry because they violated the people’s right to a clean and healthy environment.

253. *Id.* at 971–72. For more detail on Act 13, see *id.* at 969–74.

254. *Id.* at 973.

255. *Id.* at 975.

256. *Id.* at 985.

257. *Id.* at 978.

258. *Id.* at 979. The Court noted there were two reasons the Act violated the legislature’s duty to restrain private parties. “First, a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life.” *Id.* Second, the “requirement that local government permit industrial uses in all zoning districts [results in] some properties and communities . . . carry[ing] much heavier environmental and habitability burdens than others. This disparate effect is irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of ‘all the people.’” *Id.* at 980 (citations omitted). It is important to note, however, that the Court did recognize that there were competing constitutional requirements and “that sustainable development may require some degradation of the corpus of the trust,” thus implying that a balance must sometimes be struck between environmental protection and development. *Id.* at 980.

259. *Id.* at 984.

260. *Id.* at 976.

2. *Internationally, Countries Are Incorporating a Right to a Healthy Environment into Their Constitutions*

States in the United States are not alone in incorporating constitutional provisions that protect the environment. Internationally, countries have included environmental provisions in their constitutions since 1948.²⁶¹ The 1970s marked the start of a worldwide trend in which countries began amending their constitutions to include stronger environmental protections.²⁶² As of 2012, 147 out of 193 of the world's constitutions—approximately three-quarters—“include explicit references to environmental rights and/or environmental responsibilities.”²⁶³ Countries from all regions (except North America) and from all levels of development have these provisions.²⁶⁴

Although not all countries utilize their constitutional environmental protection provisions,²⁶⁵ some countries do. This section provides just a few examples of countries utilizing those provisions to tackle major environmental challenges and increase government accountability.²⁶⁶

a. *Argentina*

Argentina revised its Constitution in 1994, and in doing so incorporated strong environmental protections.²⁶⁷ Section 41 provides that:

All inhabitants are entitled to a healthful and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law.

The authorities shall provide for the protection of this right, the

261. Italy was the first country to have such a provision. DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 50 (2012). A full examination of the international trend of incorporating environmental provisions into constitutions is beyond the scope of this Comment. For a detailed analysis of this topic, see generally BOYD, *supra*.

262. *Id.* at 3.

263. *Id.* at 47.

264. *Id.*

265. For example, although throughout Africa the right to a healthy environment is recognized, economic, political, and social, challenges have generally prevented its effective implementation and enforcement. *Id.* at 283.

266. For additional examples and a more comprehensive look at international constitutional environmental provisions, see generally *id.*

267. *Id.* at 50.

rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education.²⁶⁸

The Constitution further states that the national government must set the “minimum protection standards,” and that the provinces also may pass complementary laws to further protect the environment.²⁶⁹ This constitutional provision is the foundation of environmental law in Argentina, and the basis of much of the environmental litigation in that country.²⁷⁰ This provision, combined with an increasingly active judiciary (in 2007 there were 151 cases dealing with the right to a healthy environment), has resulted in Argentina being the regional leader “in judicial recognition and enforcement of the constitutional right to live in a healthy environment.”²⁷¹

Argentineans have utilized their constitutional right to live in a healthy environment to tackle major pollution in their country’s capital city. In *Beatriz Silvia Mendoza v. National Government*,²⁷² the leading case based on Section 41, a group of concerned citizens sued the national and local government, the City of Buenos Aires, and forty-four industrial facilities for polluting the Matanza-Riachuelo River.²⁷³ The Matanza-Riachuelo River is one of the most polluted rivers on the continent with millions of people—many of whom are poor—living near its banks.²⁷⁴ The National Supreme Court of Justice responded to the suit in a series of decisions. In 2006, the Court ordered the government to conduct an environmental assessment of the river and begin an environmental education program.²⁷⁵ In 2007, the Court ordered the government “to establish a comprehensive cleanup and restoration plan for the river” with input and evaluation from independent experts, the plaintiffs, non-governmental organizations, and the public.²⁷⁶ The Court issued its final comprehensive ruling in 2008 with three objectives: “improved quality of life for the inhabitants of the basin,” “reconstruction of the environment in the basin in all of its components,”

268. Art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

269. *Id.*

270. *See* BOYD, *supra* note 261, at 129.

271. *Id.*

272. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, “Mendoza, Beatriz Silvia y otros c. Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza – Riachuelo),” M. 1569. XL (Arg.).

273. BOYD, *supra* note 261, at 129.

274. *Id.*

275. *Id.* at 130.

276. *Id.*

and “prevention of injury with sufficient degree of predictability.”²⁷⁷

To attain these objectives, the Court ordered that the government and other defendants undertake a variety of actions, including “the creation and implementation of plans for wastewater treatment,” “development of a regional environmental health plan” with “ongoing judicial oversight of the implementation plan,” “improvement of drinking-water, sewage treatment, and stormwater discharge systems,” and “closure of all illegal dumps, redevelopment of legal landfills, and cleanup of the riverbanks.”²⁷⁸ The Court based its decision on Section 41 and Section 43 (which allows citizens to “defend their rights through recourse to the judicial system”).²⁷⁹ The Court’s decision triggered the World Bank to approve two billion U.S. dollars for the Matanza-Riachuelo Basin Sustainable Development Project.²⁸⁰ As of mid-2011, major progress had been made toward cleaning up the river, including providing one million people with clean drinking water and half a million people with a new sewage system; the closure of 167 polluting companies and 134 garbage dumps; and “the creation of 139 sampling points for monitoring water, air, and soil quality.”²⁸¹ As of 2014, more than 1500 polluting enterprises are being continuously monitored “to track progress in reducing industrial pollution.”²⁸² In addition, the contracts for civil works related to the project have been signed, and construction is expected to begin in 2015.²⁸³

Argentina is the Latin American leader in relying on its constitutional amendment to ensure that individuals live in a healthy environment.²⁸⁴ Utilizing their constitutional rights, community members from one of the poorest and most polluted areas of Buenos Aires were able to sue the government and begin tackling one of the country’s worst environmental problems.

277. *Id.*

278. *Id.*

279. *Id.* at 131; *see also* Art. 43, CONST. NAC. (Arg.).

280. BOYD, *supra* note 261, at 131.

281. *Id.*

282. THE WORLD BANK, IMPLEMENTATION STATUS & RESULTS: ARGENTINA MATANZA-RIACHUELO BASIN (MRB) SUSTAINABLE DEVELOPMENT ADAPTABLE LENDING PROGRAM (P105680) (2014), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/LCR/2014/06/16/090224b0825031f0/1_0/Rendered/PDF/Argentina000Ma0Report000Sequence009.pdf.

283. *Id.*

284. *See* BOYD, *supra* note 261, at 129.

b. *South Africa*

South Africa included a right to a healthy environment in its 1996 Constitution.²⁸⁵ Article XXIV declares that:

Everyone has the right—

(a) to an environment that is not harmful to their health or wellbeing; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.²⁸⁶

The Constitutional Court has interpreted this provision as imposing a trusteeship position on the current generation.²⁸⁷ This position requires the current generation to protect the Earth for future generations.²⁸⁸ The court is responsible for making sure that the current generation fulfills its obligation to future generations.²⁸⁹

In addition to recognizing its own role in protecting the environment, the Court “observed that the protection of the right to a healthy environment will depend not only on the diligence of public officials but also on the active participation of civil society and, in some cases, on public interest litigation.”²⁹⁰ To foster public interest litigation—like that protecting the environment—the Constitutional Court held that unsuccessful plaintiffs are exempt from reimbursing their opponents’ legal costs.²⁹¹

Perhaps most striking, the constitutional right to a healthy environment has had a major impact on legislation in South Africa. The 1996 Constitution resulted in a “complete overhaul” of South Africa’s environmental law, resulting in the National Environmental

285. *Id.* at 50, 151.

286. S. AFR. CONST., 1996.

287. BOYD, *supra* note 261, at 153 (“[T]he present generation holds the Earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.” (quoting *Fuel Retailers Ass’n of S. Afr. v. Director-General: Env’tl. Mgmt., Dep’t of Agric., Conservation and Env’t, Mpumalanga Province* 2007 (10) BCLR 1059 (CC) at para. 102 (S. Afr.)).

288. *Id.*

289. *Id.*

290. *Id.* (citing *Biowatch Trust v. Registrar, Genetic Resources* 2009 (6) SA 232 (CC) (S. Afr.)).

291. *Id.*

Management Act.²⁹² The preamble of the Act states that the Act's purpose is "to provide for co-operative, environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state; and to provide for matters connected therewith."²⁹³ The first and second paragraph of the preamble recognize that many people living in South Africa live in an unhealthy environment,²⁹⁴ but that "everyone has the right to an environment that is not harmful to his or her health or well-being."²⁹⁵ The preamble continues, explaining that both present and future generations have the right to have the environment protected via legislation and other means.²⁹⁶ To reach this end, the Act establishes—among other provisions—management principles, which reiterate the importance and centrality of environmental protection and management to protect people;²⁹⁷ and enforcement/compliance mechanisms which include the right to information,²⁹⁸ protection for whistleblowers,²⁹⁹ and standing for individuals suing to enforce environmental laws.³⁰⁰

In addition to the National Environmental Management Act, other legislation addressing air quality, water, biodiversity, and local governments also include a right to a healthy environment.³⁰¹ South Africa's strong environmental laws and constitutional protection of the environment "represents a beacon of hope" in the movement toward greater environmental protection in Africa.³⁰²

c. *Philippines*

Article II, Section 16 of the Constitution of the Philippines provides that "[t]he State shall protect and advance the right of the people to a

292. *Id.* at 149; National Environmental Management Act 19519 of 1998 (S. Afr.), available at https://www.environment.gov.za/sites/default/files/legislations/nema_amendment_act107.pdf.

293. National Environmental Management Act 19519. Professor Boyd explains that the Act "repeatedly refers to the right to a healthy environment." BOYD, *supra* note 261, at 149.

294. National Environmental Management Act 19519 (recognizing "many inhabitants of South Africa live in an environment that is harmful to their health and well-being").

295. *Id.*

296. *Id.*

297. *Id.* § 2.

298. *Id.* § 31(1).

299. *Id.* § 31(4), (8).

300. *Id.* §§ 32–33.

301. BOYD, *supra* note 261, at 149–50.

302. *Id.* at 160.

balanced and healthful ecology in accord with the rhythm and harmony of nature.”³⁰³ This provision was enacted as part of the present 1987 Constitution.³⁰⁴ In 1993, the Supreme Court of the Philippines decided the first precedent-setting case implicating this provision. In *Oposa v. Factoran, Jr.*,³⁰⁵ a lawsuit was “filed on behalf of children and future generations” with the goal of cancelling all timber-harvesting licenses in the country.³⁰⁶ The Supreme Court of the Philippines held that the right to a healthful ecology was self-executing, and pressed the “urgent need to protect the environment on behalf of both present and future generations.”³⁰⁷

In 2008, the Supreme Court of the Philippines issued the *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*³⁰⁸ decision, which was aimed at cleaning up Manila Bay.³⁰⁹ The Court held that “different government agencies and instrumentalities cannot shirk from their mandates; they must perform their basic functions in cleaning up and rehabilitating the Manila Bay.”³¹⁰ To effectuate this order, the Court required that within six months a dozen government agencies had “to develop a comprehensive plan . . . to rehabilitate and restore Manila Bay.”³¹¹ Specifically, the Court ordered the agencies to perform specific actions including the clean-up of toxic and hazardous waste, the development of facilities and programs for disposal of solid waste, the reintroduction of indigenous aquatic species, and the development of an environmental education program.³¹² Responsible agencies were required to “allocate a budget sufficient to

303. CONST. (1987), art. II, sec. 16 (Phil.).

304. BOYD, *supra* note 261, at 167; *Philippine Constitutions*, OFFICIAL GAZETTE, <http://www.gov.ph/constitutions/> (last visited Jan. 4, 2015).

305. *Oposa v. Factoran, Jr.*, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).

306. BOYD, *supra* note 261, at 167. Although *Minors Oposa* did not result in the cancellation of all timber-harvesting licenses, when the case was filed there were ninety-two licenses in the Philippines, but “by 2006, there were only three, and the rate of deforestation had fallen.” *Id.* Furthermore, in a case brought by a timber company, “the Supreme Court upheld the government’s ability to cancel licenses, based in part on the *Minors Oposa* precedent.” *Id.*

307. *Id.*

308. *Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48 (S.C., Dec. 18, 2008) (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm>.

309. BOYD, *supra* note 261, at 168.

310. *Concerned Residents of Manila Bay*, G.R. Nos. 171947-48, at 23; see also BOYD, *supra* note 261, at 168.

311. BOYD, *supra* note 261, at 168.

312. See *Concerned Residents of Manila Bay*, G.R. Nos. 171947-48, at 24–27; BOYD, *supra* note 261, at 168–69.

carry out the restoration plan.”³¹³ To ensure that its order was actually carried out, the Court has continuing mandamus, “the power to supervise implementation of the restoration plan,” and government agencies must submit quarterly reports that are reviewed by a court-established expert committee.³¹⁴ This case demonstrates that the right to a healthy environment is used as a powerful tool, and creates real responsibilities for the state. The Court held that “the responsible government agencies ‘cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay as clean and clear as humanly possible. Anything less would be a betrayal of the trust reposed in them.’”³¹⁵ The government has allocated approximately one hundred million U.S. dollars to begin clean-up of the Bay.³¹⁶

In addition to these groundbreaking cases, the Supreme Court of the Philippines designated 117 courts as “green courts,” which would be headed by judges that are specially trained to deal with violations of environmental law.³¹⁷ In 2010 the Supreme Court of the Philippines issued specific procedural rules applicable to environmental cases.³¹⁸ The rules had four objectives: “protecting and advancing the constitutional right to a balanced and healthful ecology; providing a simplified, speedy, and inexpensive procedure for enforcing environmental rights; adopting innovations and best practices for enforcing environmental laws; and enabling courts to monitor and ensure compliance with orders in environmental cases.”³¹⁹ In addition, the Supreme Court created the writ of *kalikasan* (nature)—a type of civil action that allowed any natural or legal person to bring a case that would result in the court ordering a respondent “to cease an environmentally harmful activity; protect the environment; or carry out restoration or rehabilitation activities.”³²⁰ The Supreme Court’s interpretation of the environmental protections enshrined in the Constitution has led to strong environmental decisions and procedural maneuvers to help ensure that

313. BOYD, *supra* note 261, at 169.

314. *Id.*; see also *Concerned Residents of Manila Bay*, G.R. Nos. 171947-48, at 27.

315. BOYD, *supra* note 261, at 169 (quoting *Concerned Residents of Manila Bay*, G.R. Nos. 171947-48, at 23).

316. *Id.*

317. *Id.* (citing Supreme Court of the Philippines, 2008, Resolution A.M. No. 07-11-12, authorized by CONST. (1987), art. VIII, § 5 (Phil.)); Julie M. Aurelio, *Environmentalists Hail Creation of ‘Green’ Court*, PHILIPPINE DAILY INQUIRER (Jan. 27, 2008), available at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080127-115049/Environmentalists-hail-creation-of-green-court>.

318. BOYD, *supra* note 261, at 169.

319. *Id.* (citing *Rules of Procedure for Environmental Cases* (2010)).

320. *Id.*

the constitutional mandate is satisfied.

Countries around the world have included provisions enshrining a right to a healthy environment in their constitutions. As the examples in this section show, these amendments are not just rhetoric—they can and have been used to tackle serious environmental challenges and foster real environmental change. Although the United States has not included this right in the Constitution,³²¹ numerous states have. This right has, at least in some states, also been used to foster environmental change and address serious environmental problems. Washington should follow the national and international trend and amend its Constitution to include an explicit, positive right to a healthy environment.

II. AMENDING THE WASHINGTON STATE CONSTITUTION IS NECESSARY TO ADDRESS WASHINGTON'S ENVIRONMENTAL PROBLEMS AND TO PROTECT THE ENVIRONMENT FOR THIS AND FUTURE GENERATIONS

Not only would a constitutional amendment be in line with existing Washington mores, and national and international trends, it is necessary to secure a healthy environment in Washington. This Part, which explains why an amendment is necessary, proceeds in two sections. The first demonstrates that despite Washington's apparently strong environmental legislation, the state faces significant air, water, and soil pollution, indicating that existing laws are not doing enough.³²² The second explains that a constitutional amendment is the necessary mechanism to address the state's environmental challenges because an amendment will enshrine an otherwise weak and vulnerable common law, give individuals a private right of action, give the courts a constitutional hook to require private and state action, and send a strong signal to the legislature that it must prioritize the environment.³²³

A. *Despite Legislative Efforts, Washington Is Facing Pervasive and Costly Environmental Problems*

Washington's legislature has passed a variety of strong-sounding

321. At least one scholar argues that substantive due process under the Fifth and Fourteenth Amendments could be used to recognize a right to a healthy environment in the federal Constitution. See generally Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L LEGAL PERSP. 185 (2001). However, there is currently no explicit right to a healthy environment in the Constitution of the United States.

322. See *infra* Part II.A.

323. See *infra* Part II.B.

legislation that is meant to address pollution in the state.³²⁴ For example, the legislature has declared that:

Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.³²⁵

Although the language and sentiment are encouraging, the reality is that all Washingtonians do not live in a healthy environment. Despite the legislature's lofty ambition, Washington continues to face serious air, water, and soil pollution that negatively affects the health and welfare of Washingtonians.

1. Air Pollution Poses an Ongoing Challenge to Health and the Economy

The Washington State Legislature has attempted to address air pollution.³²⁶ In passing the Washington Clean Air Act³²⁷ the legislature declared that it is

the public policy to preserve, protect, and enhance the air quality for current and future generations. Air is an essential resource that must be protected from harmful levels of pollution. . . . It is the intent of this chapter to secure and maintain levels of air quality that protect human health and safety . . . [,] to prevent injury to plant, animal life, and property, to foster the comfort and convenience of Washington's inhabitants, to promote the economic and social development of the state, and to facilitate the enjoyment of the natural attractions of the state.³²⁸

To realize this sweeping goal, the legislature explicitly stated that, "it is the intent of this chapter to prevent any areas of the state with acceptable air quality from reaching air contaminant levels that are not protective of human health and the environment."³²⁹ The legislature has failed to

324. A full review of all of the environmental laws that have a protectionist aspect is beyond the scope of this Comment. The following examples are merely exemplary of the fact that the legislature has passed legislation with the goal of eliminating a particular type of pollution, and that those goals have not been met.

325. WASH. REV. CODE § 70.105D.010 (2014).

326. A full review of the legislature's actions to prevent air pollution is beyond the scope of this Comment. The example provided is meant to illustrate that the legislature has taken action, and that the action has failed to reduce air pollution to a level where human health is not negatively affected.

327. WASH. REV. CODE §§ 70.94.011–70.94.990.

328. *Id.* § 70.94.011.

329. *Id.* The statute also states that, "[t]he legislature recognizes that the problems and effects of air pollution cross political boundaries, are frequently regional or interjurisdictional in nature, and

achieve this goal, and air pollution continues to have negative health impacts on the residents of Washington.

Air pollution can cause lung disease, and it makes existing lung and heart disease worse.³³⁰ It is also associated with cancer.³³¹ In 2009, the Washington State Department of Ecology estimated that fine particulate pollution contributed to 1500 nonfatal heart attacks, 1900 incidents of acute bronchitis, and thousands of cases of worsened asthma annually.³³² Overall, the direct and indirect costs of these air pollution-related diseases are about \$190 million per year.³³³

The main sources of air pollution in Washington—wood smoke, motor vehicles, and outdoor burning³³⁴—come from within the state’s own borders.³³⁵ Each one of these sources of pollution brings health risks to Washingtonians and the environment. For example, air pollution from motor vehicles can trigger asthma, and is linked to heart attacks and cancer.³³⁶ More than a third of Washingtonians “are in an age group

are dependent upon the existence of human activity in areas having common topography and weather conditions conducive to the buildup of air contaminants.” *Id.* While the legislature clearly recognizes that air pollution within Washington is not completely within the State’s control, this statement does not negate that it is the policy of the State to reduce air pollution to levels where it is not harmful.

330. *Air Quality*, DEP’T OF ECOLOGY, ST. OF WASH., <http://www.ecy.wa.gov/programs/air/airhome.html> (last visited Dec. 12, 2014).

331. *Id.*

332. AIR QUALITY PROGRAM, WASH. STATE DEP’T ECOLOGY, HEALTH EFFECTS AND ECONOMIC IMPACTS OF FINE PARTICLE POLLUTION IN WASHINGTON 3 (2009), available at <https://fortress.wa.gov/ecy/publications/publications/0902021.pdf>.

333. *Id.*

334. *Air Quality*, DEP’T OF ECOLOGY, ST. OF WASH., <http://www.ecy.wa.gov/programs/air/airhome.html> (last visited Dec. 12, 2014).

335. See *Air Quality: Motor Vehicles*, DEP’T OF ECOLOGY, ST. OF WASH., http://www.ecy.wa.gov/programs/air/cars/automotive_pages.htm (last visited Dec. 12, 2014) (“Motor vehicles are one of the main sources of air pollution in Washington.”); *Air Quality: Outdoor Burning (Non-Agricultural)*, DEP’T OF ECOLOGY, ST. OF WASH., http://www.ecy.wa.gov/programs/air/outdoor_woodsmoke/residentialburn.htm (last visited Dec. 12, 2014) (“[B]urning of household yard waste . . . and burning to clear land” is regulated by Washington State’s Department of Ecology); *Air Quality: Wood Stoves, Fireplaces, Pellet Stoves and Masonry Heaters*, DEP’T OF ECOLOGY, ST. OF WASH., http://www.ecy.wa.gov/programs/air/indoor_woodsmoke/wood_smoke_page.htm (last visited Dec. 12, 2014) (“Wood smoke is one of the main sources of air pollution in Washington.”). The fact that the main sources of air pollution are small sources is particularly striking since Washington’s Clean Air Act specifically “recognizes that air emissions from thousands of small individual sources are major contributors to air pollution in many regions of the state. As the population of a region grows, small sources may contribute an increasing proportion of that region’s total air emissions. It is declared to be the policy of the state to achieve significant reductions in emissions from those small sources whose aggregate emissions constitute a significant contribution to air pollution in a particular region.” WASH. REV. CODE § 70.94.011 (2014).

336. *Air Quality: Motor Vehicles*, *supra* note 335.

that is at risk for health problems from this pollution, or have at least one medical condition that is made worse by it.”³³⁷

Wood smoke from fireplaces, stoves, and other wood burning devices is also particularly dangerous to human health, releasing fine particulates, many of which are toxic.³³⁸ These tiny particles are so small that they can go deep into the lungs, scarring the lung tissue.³³⁹ Studies have shown that in some cities, death rates increased “when there were higher levels of fine particles in the air. Wood smoke is most dangerous to the health of infants and children, pregnant women, the elderly, and people with lung or heart disease.”³⁴⁰ Indeed, “children in wood burning neighborhoods are more likely to have lung and breathing problems.”³⁴¹ Wood smoke is a particularly serious problem in Washington because almost all of it is released during winter.³⁴² Winter weather conditions cause stagnant air, which traps smoke close to the ground,³⁴³ making many neighborhoods unhealthy.³⁴⁴

Air pollution is not only damaging to human health, but it is also extremely harmful for the environment. Cars and other transportation-related sources of air pollution “produce nearly half of the greenhouse gas emissions” in Washington.³⁴⁵ As the Washington State Department of Ecology explains, “[g]reenhouse gases cause climate change. Effects of climate change in Washington include reduced snow pack, low summer stream flows, more winter flooding, increased coastal erosion, reduced water supplies for people and agriculture, and further loss of salmon habitat.”³⁴⁶ These environmental consequences are not only

337. *Id.*

338. *Air Quality: Wood Stoves, Fireplaces, Pellet Stoves and Masonry Heaters, supra* note 335.

339. *Id.* There is no “cure” for pulmonary fibrosis (scarring of the lungs)—treatment aims to prevent more scarring, but it cannot fix existing scarring. *Symptoms, Diagnosis and Treatment*, AM. LUNG ASS’N, <http://www.lung.org/lung-disease/pulmonary-fibrosis/symptoms-diagnosis.html> (last visited Dec. 12, 2014). Symptoms of pulmonary fibrosis include: hacking, dry cough; shortness of breath; shallow and fast breathing; tiredness; unintended gradual weight loss; aching muscles and joints; and a “widening and rounding of the tips of the fingers or toes” (clubbing). *Id.*

340. *Air Quality: Wood Stoves, Fireplaces, Pellet Stoves and Masonry Heaters, supra* note 335.

341. *Id.*

342. *Id.* During winter, wood smoke is the state’s third largest source of air pollution. *Id.*

343. *Id.*

344. *Id.*

345. *Air Quality: Motor Vehicles, supra* note 335.

346. *Id.* It should be noted that in 2008 the Legislature passed legislation reducing greenhouse gas emissions by 2020, with continuing reductions through 2050. WASH. REV. CODE § 70.235.020 (2014); *Climate Change*, DEP’T OF ECOLOGY, ST. OF WASH., http://www.ecy.wa.gov/climatechange/ghg_reducing.htm (last visited Jan. 4, 2015). In addition, both former Governor Gregoire and current Governor Inslee signed executive orders aimed at reducing carbon and greenhouse gas pollution. *Id.* The effectiveness of these measures remains to be seen.

damaging to species like salmon, but they have a serious and negative effect on future human health. The decrease in the snowpack and earlier snowmelt will lead to increased water shortages.³⁴⁷ Because of climate change, approximately sixty-seven percent of Washingtonians “now face a higher risk of water shortages by mid-century.”³⁴⁸ Furthermore, “[c]limate change will worsen smog and cause[] plants to produce more pollen pollution, increasing respiratory health threats.”³⁴⁹

In sum, Washington’s aspirational goal of providing clean air that is healthy for both people and nature has not been met. The legislature’s language, while expressing the strong environmental protection ethos of the state, is not enough to actually provide a healthy environment. A constitutional amendment is necessary to bridge the gap between rhetoric and reality.

2. *Ocean Acidification and Rising Temperatures are Negatively Affecting Washington’s Natural Resources*

In 1971, before the catastrophic effects of ocean acidification were recognized, the Washington Legislature passed the Shoreline Management Act,³⁵⁰ pledging to protect the shorelines and their natural resources. The Act was passed after a legislative finding “that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation.”³⁵¹ To realize this goal, when adopting shoreline development guidelines that have a statewide effect, the Department of Ecology is required to give preference to the following seven uses in the following order:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) *Protect the resources and ecology of the shoreline;*
- (5) Increase public access to publicly owned areas of the

347. *Climate Change Health Threats in Washington*, NAT’L RESOURCES DEF. COUNCIL, <http://www.nrdc.org/health/climate/wa.asp#airpollution> (last visited Dec. 12, 2014).

348. *Id.*

349. *Id.*

350. WASH. REV. CODE § 90.58.010–90.58.920 (2014) (Chapter 90.58 is entitled Shoreline Management Act of 1971). A full review of the Legislature’s actions to prevent ocean pollution is beyond the scope of this Comment. The examples provided are meant to illustrate that the Legislature has taken action, and that the action has failed to adequately protect the state’s ocean shoreline.

351. *Id.* § 90.58.020.

shorelines;

(6) Increase recreational opportunities for the public in the shoreline;

(7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.³⁵²

The recent oyster die-offs³⁵³ and the continuing ocean acidification³⁵⁴ demonstrate that the legislature has not met its goal of protecting the ecology of the shoreline—the fourth required use of the shorelines.

The Legislature has taken one step in response to the challenges of ocean acidification. In 2013 the State Legislature passed Engrossed Senate Bill 5603.³⁵⁵ Section 4 of this legislation establishes the Marine Resources Advisory Council.³⁵⁶ In addition to providing a forum for discussion around ocean acidification and its attendant problems,³⁵⁷ the Council provides recommendations to the governor, local agencies, and the legislature on coastal waters issues.³⁵⁸ The effectiveness of this Council remains to be seen.

What is known is that up to this point, the state has failed (and is failing) to protect its citizens and natural resources from ocean acidification, with devastating consequences. One of the leading causes of ocean acidification is atmospheric carbon dioxide.³⁵⁹ Changes in land use, in combination with the burning of fossil fuels, has resulted in massive quantities of carbon dioxide being released into the earth's atmosphere.³⁶⁰ The ocean has absorbed approximately one-quarter of anthropogenic carbon dioxide. This has caused ocean acidification, or the decrease in upper-oceans pH.³⁶¹

This acidification is particularly damaging for Washington given the

352. *Id.* (emphasis added).

353. Elizabeth Grossman, *Northwest Oyster Die-Offs Show Ocean Acidification Has Arrived*, YALE ENV'T 360 (Nov. 21, 2011), http://e360.yale.edu/feature/northwest_oyster_die-offs_show_ocean_acidification_has_arrived/2466/.

354. *See infra* notes 359–369 and accompanying text.

355. *Ocean Acidification and Washington State*, DEP'T OF ECOLOGY, ST. OF WASH., <http://www.ecy.wa.gov/water/marine/oceanacidification.html> (last visited Jan. 4, 2015); Engrossed S. 5603, 63d Leg., Reg. Sess. (Wash. 2013).

356. Wash. Engrossed S. 5603 § 4.

357. *Id.* § 2(2)(c).

358. *Id.* § 2(2)(f).

359. WASH. SHELLFISH INITIATIVE BLUE RIBBON PANEL ON OCEAN ACIDIFICATION, SCIENTIFIC SUMMARY OF OCEAN ACIDIFICATION IN WASHINGTON STATE MARINE WATERS, at xi (Nov. 2012), available at <https://fortress.wa.gov/ecy/publications/publications/1201016.pdf> [hereinafter BLUE RIBBON SUMMARY].

360. *Id.*

361. *Id.*

state's location and geography.³⁶² In addition to atmospheric carbon dioxide, "acidification in Washington State coastal waters is driven by a combination of factors, particularly in the deep waters of Puget Sound and the nearshore regions that are so important to Washington's shellfish industry."³⁶³ These factors include an increase in nutrients like nitrogen, phosphorus, and silicate in Washington waters caused, in part, by fertilizer runoff and erosion.³⁶⁴ These nutrients can lead to algae blooms, which, when they die, drive down pH levels in deeper waters and are indicated by incidences of coastal hypoxia (very low oxygen levels).³⁶⁵ Nutrients in animal waste runoff from large farms can also cause algal blooms, leading to acidification.³⁶⁶ Large factory farms also emit greenhouse gases, which contribute to climate change³⁶⁷ and its attendant negative effects on water quality. In addition, burning fossil fuels releases gases like nitrogen oxides and sulfur oxides, which form acids when dissolved in seawater.³⁶⁸ Finally, industrial wastes that are deposited directly into marine waters can be acidic.³⁶⁹

Ocean acidification is a huge problem for Washington State, and the effects can already be felt. The recent oyster die-offs along the Washington coast were a result of ocean acidification.³⁷⁰ Other species that have cultural and economic importance to Washington and have negative reactions to ocean acidification include clams and mussels.³⁷¹ In addition, marine fish species have shown changes in behavior, survivorship, and growth in response to ocean acidification.³⁷² Ocean acidification is threatening Washington's marine species and consequently the state's economy.³⁷³ Washington is the nation's largest provider of farmed oysters, mussels, and clams.³⁷⁴ The industry supports

362. *Id.*

363. *Id.*

364. *Id.* at xii.

365. *Id.*

366. *Facts About Pollution from Livestock Farms*, NAT. RESOURCES DEF. COUNCIL, <http://www.nrdc.org/water/pollution/ffarms.asp> (last visited Dec. 29, 2014).

367. CARRIE HRIBAR, NAT'L ASS'N OF LOCAL BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 7 (2010), available at http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

368. BLUE RIBBON SUMMARY, *supra* note 359, at xii.

369. *Id.*

370. Grossman, *supra* note 353.

371. BLUE RIBBON SUMMARY, *supra* note 359, at xii.

372. *Id.*

373. WASH. OCEAN ACIDIFICATION CENTER, FOCUSED ON OCEAN ACIDIFICATION IMPACTS AND ADAPTATION IN WASHINGTON 1 (2013), available at <http://www.ecy.wa.gov/water/marine/oa/20131121workplan.pdf>.

374. *Id.*

3200 jobs, and generates \$270 million annually.³⁷⁵ Local coastal economies also benefit greatly from the recreational harvests of clams and oysters.³⁷⁶ Tribes also “depend upon shellfish for food, income and connection to their cultural heritage.”³⁷⁷ Washington’s seafood industry—which could be threatened by changes to marine food webs—is also a major contributor to the state economy, generating a gross of at least \$1.7 billion, and providing over 42,000 jobs.³⁷⁸ Ocean acidification could threaten not only Washington’s natural marine resources, but also its economy and culture.

In addition to ocean acidification, climate change is increasing, or will increase, water temperatures in streams, lakes, and rivers.³⁷⁹ Rising temperatures will have a particularly large impact on cold-water fish, like salmon.³⁸⁰ The United States Global Change Research Program predicts that up to forty percent of Pacific Northwest salmon could be lost by the year 2050.³⁸¹ The loss of the salmon would be particularly devastating in Washington, where salmon is a source of food, employment, and recreation, and plays a central role in culture and tradition.³⁸²

3. *Washington’s Land/Soil Is Polluted, Increasing the Potential for Serious Health Risks*

Washington has also passed environmental legislation that sounded promising in its potential for protecting the state’s land and soil. The Model Toxics Control Act³⁸³ was passed as a voter initiative in November 1988, and became effective in 1989.³⁸⁴ The “main purpose . . . is to raise sufficient funds to *clean up all hazardous waste sites* and to *prevent the creation of future hazards* due to improper disposal of toxic wastes into the state’s land and waters.”³⁸⁵ Twenty-five

375. *Id.*

376. *Id.* Coastal economies receive more than twenty-seven million dollars annually from the recreational harvests of these species. *Id.*

377. *Id.*

378. *Id.*

379. Craig, *supra* note 42, at 793.

380. *Id.*

381. *Id.*

382. *Salmon Recovery in Washington*, WASH. ST. RECREATION & CONSERVATION OFFICE, http://www.rco.wa.gov/salmon_recovery/ (last visited Jan. 4, 2015).

383. WASH. REV. CODE §§ 70.105D.010–70.105D.921 (2014).

384. *Id.* § 70.105D.920.

385. *Id.* § 70.105D.010 (emphasis added). Generally, hazardous substance has a broad definition, including that of hazardous waste, which is “any discarded, useless, unwanted, or abandoned substances . . . which are disposed of in such quantity or concentration as to pose a substantial

years later, not only is hazardous waste still a continuing problem in Washington, but new sources of hazardous waste are adding pollution to the state's soils.

There are approximately 677,000 acres in the state of Washington that are classified as being affected by area-wide soil contamination.³⁸⁶ These contaminated areas are affected by low- to moderate-level soil contamination, which generally have arsenic and lead levels that are higher than levels established under the Model Toxics Control Act and higher than naturally occurring amounts.³⁸⁷ The cause of this contamination is often historic, including contamination from metal smelting operations, the "use of lead-arsenate pesticides," and leaded gasoline.³⁸⁸ However, present-day sources of soil-polluting arsenic include "wood treated with chromated copper arsenic (often called 'pressure-treated' wood), emissions from coal-fired power plants and incinerators, and other industrial processes."³⁸⁹ There are numerous present-day sources of lead that pollute the soil, including "lead-based paint, lead-soldered water pipes, home remedies or health-care products that contain lead, hobbies that use lead (e.g., staining glass or sculpturing), food and beverages, combustion of coal or oil, waste incinerators, and mining and industrial processes (such as battery and ammunitions manufacturing)."³⁹⁰

Both lead and arsenic have negative health implications for children and adults. Although in general the amount of arsenic found in Washington's soils is too low to cause serious effects after short-term exposure,³⁹¹ long-term exposure to amounts that can be found in the environment can have serious health effects. Multiple types of cancer—

present or potential hazard to human health, wildlife, or the environment because such wastes: (a) Have short-lived, toxic properties that may cause death, injury, or illness or have mutagenic, teratogenic, or carcinogenic properties; or (b) are corrosive, explosive, flammable, or may generate pressure through decomposition or other means." *Id.* § 70.105.010(1); *see also id.* § 70.105D.020(13)(a).

386. *Toxics Cleanup Program: Areawide Soil Contamination Project*, DEP'T OF ECOLOGY, ST. OF WASH., available at http://www.ecy.wa.gov/programs/tcp/area_wide/AW/toolbox_chap1.html (last visited Jan. 4, 2015) [hereinafter *Toxics Cleanup Program*].

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. "Swallowing relatively large amounts of arsenic (even just one time) can cause mild symptoms, serious illness, or death. Milder effects may include swelling of the face, nausea, vomiting, stomach pain, or diarrhea. Serious effects may include coma, internal bleeding, or nerve damage causing weakness or loss of sensation in the hands, arms, feet, or legs. Levels of arsenic in Washington's soil and water are generally too low to cause health effects from short-term exposure." *Arsenic*, WASH. ST. DEP'T OF HEALTH, <http://www.doh.wa.gov/CommunityandEnvironment/Contaminants/Arsenic.aspx> (last visited Jan. 4, 2015).

including lung, bladder, non-melanoma skin, liver, and kidney—as well as cardiovascular disease, damage to peripheral nerves, and diabetes mellitus, are strongly linked to long-term arsenic ingestion.³⁹² Even if other factors, like genetics, may have a stronger role in the development of these diseases than arsenic, “arsenic can increase the risk of developing these illnesses and is likely to contribute to some of the cases.”³⁹³ In Washington, environmental exposure is most likely to result in a small increased risk in the development of some types of cancer.³⁹⁴

Children and adults can be exposed to lead through the air, food, water, and soil.³⁹⁵ Exposure can “damage the nervous system, kidneys, and reproductive system.”³⁹⁶ Lead exposure can have serious consequences for both children and adults. In children, it can result in behavioral problems, learning difficulties, and diminished growth.³⁹⁷ “In adults, lead can increase blood pressure, affect memory, and contribute to other health problems.”³⁹⁸ The toxins that pollute Washington’s soil can have serious health consequences for Washingtonians of all ages.

In sum, despite Washington’s legislative efforts and ambitious goals, the state continues to face serious pollution problems, which can have negative effects on human health and the economy. Air pollution and the attendant respiratory problems cost the state millions of dollars per year. Ocean and air pollution, and the attendant changes in pH, are warming the waters and creating an aquatic environment that is inhospitable to shellfish and salmon. Continuing exposure to lead and arsenic in the soil increases the chances of serious disease, and can cause additional mental and behavioral problems. The legislature has passed legislation to address each of these areas of pollution, and yet, despite its lofty and admirable goals, the pollution persists. Although Washington cannot solve all of its environmental challenges alone—many of them are affected by outside causes and sources—it must do its part in the fight against pollution. The pervasive and difficult nature of these problems

392. *Id.*

393. *Id.*

394. *Id.*

395. AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, DIV. OF TOXICOLOGY & HUMAN HEALTH SCIS., CAS NO. 7439-92-1, LEAD – TOXFAQS (2007), available at <http://www.atsdr.cdc.gov/toxfaqs/tfacts13.pdf> (explaining that both children and adults can be exposed to lead by “breathing workplace air or dust, eating contaminated foods . . . drinking contaminated water . . . [or by] playing in contaminated soil”).

396. *Id.*

397. *Toxics Cleanup Program: Health Effects of Arsenic and Lead*, DEP’T OF ECOLOGY, ST. OF WASH., available at http://www.ecy.wa.gov/programs/tcp/sites_brochure/dirt_alert/2011/health-effects.html (last visited Jan. 4, 2015).

398. *Id.*

indicates that these challenges need to be given higher priority through a constitutional amendment.

B. Amending the Washington State Constitution Is Necessary to Address These Environmental Challenges

Amending the Washington State Constitution to include an expanded public trust doctrine that codifies a positive right to a healthy environment is necessary to address the state's ongoing environmental challenges. As demonstrated above, despite their ambitious language, legislative measures have not been successful in protecting the environment. Elevating environmental protection to the constitutional level will provide the necessary political clout and technical means to ensure that the citizens of Washington are able to live in a healthy environment, or at least legally fight for one.³⁹⁹

1. The Current Codified Public Trust Doctrine Is Too Narrow to Fully Protect the Environment

As it is currently interpreted, Washington's public trust doctrine does not adequately protect a wide range of natural environments and resources.⁴⁰⁰ Indeed, at least some scholars have argued that the public trust doctrine has "made little difference in citizen rights and the availability of legal remedies in the State of Washington."⁴⁰¹ Although the narrow, traditional public trust doctrine⁴⁰² is codified in the State Constitution,⁴⁰³ a broad public trust doctrine that protects all elements of the environment—not just those connected to navigable waters—is not. Expanding and codifying a public trust doctrine that reaches all elements of the environment, including the land and the air, would provide greater protection for all aspects of an interconnected environment.⁴⁰⁴

399. Amending the Constitution to include a right to a healthy environment that provides a private right of action would give individual citizens a chance to address specific pollution problems. *See generally* Svitak *ex rel.* Svitak v. State, No. 69720-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013). The amendment that this Comment is proposing will be self-executing, meaning that it will not need any legislative action to become functional. Like the right to education, the proposed amendment would provide a private right of action.

400. Bodi, *supra* note 73, at 645.

401. *Id.*

402. The traditional public trust doctrine provides for state ownership and protection of just navigable waters and their beds and shorelands. WASH. CONST. art. XVII, § 1; *see also supra* Part I.B.1.

403. WASH. CONST. art. XVII, § 1; *see also supra* Part I.B.1.

404. The Washington State Supreme Court recognized that some states have extended the public trust doctrine beyond resources connected to navigable waters because modern science identified a public need beyond navigable waters. *See Orion Corp. v. State*, 109 Wash. 2d 621, 641 & n.10, 747

2. *An Expanded Common Law Public Trust Doctrine Is Not Sufficient Because Its Uses Are Limited and It Is Inherently Vulnerable to Erosion*

Even if the public trust doctrine were to be expanded under common law, such an expansion would not adequately protect the environment. As a recent Washington case, *Svitak ex rel. Svitak v. State*,⁴⁰⁵ demonstrates, the common law public trust doctrine cannot be the basis of a suit for injunctive or declaratory relief based on state inaction.⁴⁰⁶ In *Svitak*, a group of minor children and their guardians filed a complaint for declaratory and injunctive relief against the state of Washington and various government officials, alleging “that under the public trust doctrine, the atmosphere is a public trust resource, and the State has an affirmative fiduciary duty as its trustee to preserve and protect the atmosphere from global warming for the benefit of present and future generations.”⁴⁰⁷ The complaint did not allege a failure of any specific law or constitutional provision.⁴⁰⁸

The court dismissed the action for two reasons. First, the court found that it was a political question, and thus was not appropriate for the court to decide.⁴⁰⁹ Second, “the issue is not justiciable as there is no allegation of violation of a specific statute or constitution.”⁴¹⁰ The court found that there was no actual dispute because the plaintiffs did not identify any constitutional provision that would have been “violated by state inaction.”⁴¹¹ Environmental problems are often the result of state inaction,⁴¹² and injunctive and declaratory relief can be powerful tools used to protect the environment.⁴¹³ Amending the Washington State

P.2d 1062, 1073 & n.10 (1987). Scholars have also recognized the importance of applying the public trust doctrine to all natural resources—not just those related to navigable waters—due to the interconnected nature of the environment. *See, e.g.*, Wood, *supra* note 7, at 83–84.

405. No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013).

406. *Id.*

407. *Id.* at *1.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at *2.

412. *See, e.g.*, Michael J. Cohen, *Hazard's Toll: The Costs of Inaction at the Salton Sea*, PAC. INST. (Sept. 2014), available at http://pacinst.org/wp-content/uploads/sites/21/2014/09/PacInst_HazardsToll.pdf (detailing the negative effects and costs—environmental, monetary, and health-related—of state inaction on the Salton Sea in California).

413. Benjamin I. Narodick, Legal Update, *Winter v. Natural Resources Defense Council: Going into the Belly of the Whole of Preliminary Injunctions and Environmental Law*, 15 B.U. J. SCI. & TECH. L. 332, 335 (2009) (“[L]itigants filing claims under environmental law often seek preliminary injunctions or other declaratory relief.”). Although *Winter v. Natural Resources Defense Council*,

Constitution to provide a broader codified public trust doctrine and an affirmative right to a healthy environment would provide the legal, constitutional basis necessary to sustain this type of otherwise nonjusticiable suit.⁴¹⁴

Furthermore, as a common law doctrine alone, the public trust doctrine is limited in what it can achieve.⁴¹⁵ Generally, the common law develops slowly, in reaction to case-specific circumstances.⁴¹⁶ Not only does the common law public trust doctrine fail to support claims for injunctive or declaratory relief,⁴¹⁷ it is subject to the political will of the legislature,⁴¹⁸ which can erode the doctrine at any time or refuse to act in favor of environmental protection. Furthermore, courts can either refuse to expand the doctrine⁴¹⁹ or, if they want to, find that they cannot. The common law nature of the public trust doctrine curtails the courts' ability "[t]o create and impose [a] new duty, [which] would necessarily involve resolution of complex social, economic, and environmental issues."⁴²⁰ Indeed, courts have recognized that under the common law they are constrained from creating programs to protect the environment by the separation of powers doctrine.⁴²¹ The establishment of programs

555 U.S. 7 (2008), scaled back equitable relief, *Narodick, supra* at 344, plaintiffs can and do still seek injunctive relief in environmental cases. See Eric J. Murdock & Andrew J. Turner, *How "Extraordinary" Is Injunctive Relief in Environmental Litigation? A Practitioner's Perspective*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10464, 10473 (2012).

414. Because the amendment is still a hypothetical, it is unclear how its contours would develop. It is possible that the courts, through common law, would determine how the amendment may be utilized and the extent of its protections. On the other hand, it is equally likely that the legislature would play an integral role in determining the meaning of "healthy." Or, like the right to education, the contours of the amendment may be determined by both the legislature and the courts. *Cf. McCleary v. State*, 173 Wash. 2d 477, 483–84, 269 P.3d 227, 231 (2012) (indicating that both the legislature and the court shape the right to education). Because this Comment is meant primarily as an introduction to the idea of an amendment giving the people the right to a healthy environment, a discussion of how that amendment, if adopted, may develop, is outside its scope.

415. See *Klass, supra* note 31, at 712.

416. *Id.* at 713. *But see Wood, supra* note 7, at 78 (arguing that the flexibility of the common law public trust doctrine is a "great strength[]" and that "[i]n the face of climate crisis, which presents an urgency to which the political branches have not responded, the common law's adaptability to new situations may prove crucial").

417. *Svitak ex rel. Svitak v. State*, No. 69710-2-I, 2013 WL 6632124f, at *2 (Wash. Ct. App. Dec. 16, 2013).

418. See Ralph W. Johnson, *Protection of Biodiversity Under the Public Trust Doctrine*, 8 TUL. ENVTL. L.J. 21, 29 (1994). *But see Wood, supra* note 7, at 75–77 (arguing that judges could exercise a powerful public trust "veto" which would allow the court to invalidate "[l]egislative acts inconsistent with the trust," but recognizing that "[m]any courts . . . stay their hand" and grant deference to the legislature).

419. See *Klass, supra* note 31, at 712.

420. *Svitak ex rel. Svitak*, 2013 WL 6632124f, at *2.

421. *Id.* ("Courts have recognized that creation of [programs to protect the environment] under the common law is inappropriate because it invades the prerogatives of the legislative branch,

that have broad social and economic implications is generally the prerogative of the legislative branch.⁴²² Because there is no constitutionally protected right to a healthy environment, the courts' hands are tied where the legislature has either refused to act or has not gone far enough. Amending the Constitution to include a broad public trust doctrine that clearly states the public has a right to a healthy environment would give the courts the constitutional hook necessary to force state (or private party) action.⁴²³

3. *An Amendment Would Provide the Necessary Constitutional Hook for Courts and Impose Duties on the State and Its Agencies*

The amendment that this Comment suggests would, in many ways, be analogous to the right to education enshrined in article IX, section 1 of the Washington State Constitution in that it would provide the courts with a constitutional hook that would allow them to step into an area of law that is traditionally within the purview of the legislature. In the context of education, the Court is monitoring the legislature's implementation of reforms to education funding to ensure that the state is complying with its duty to provide education for the children within its borders.⁴²⁴ As the Court recognized in *McCleary*, while it cannot dictate "the precise means by which the State must discharge its duty," it also "cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education."⁴²⁵ Like the constitutional mandate to fund education, the proposed amendment would create a state mandate to provide for a healthy environment. The proposed amendment would, like article IX, section 1, be "a mandate, not to a single branch of government, but to the entire state."⁴²⁶ A broad mandate ensures that the courts cannot "abdicate [their] judicial role" in ensuring that the mandate is followed.⁴²⁷ A clear, codified right to a healthy environment could also give the court reason to closely scrutinize state action or inaction that may be imposing negative

thereby violating the separation of powers doctrine.").

422. *Id.*

423. If such an amendment is adopted, Washington courts could look to other states that have a similar constitutional provision, like Montana and Pennsylvania (discussed *supra* Parts I.E.1.a & c), for guidance on how to interpret and implement an amendment guaranteeing a right to a healthy environment. A more detailed comparison between the proposed Washington amendment and other states' provisions is beyond the scope of this Comment.

424. See *McCleary v. State*, 173 Wash. 2d 477, 546–47, 269 P.3d 227, 261 (2012).

425. *Id.* at 541, 269 P.3d at 259.

426. *Id.*

427. *Id.*

environmental consequences.⁴²⁸

A constitutional amendment could not only be a judicial hook, but could also impose a mandate (and the authority necessary to carry it out) on state agencies⁴²⁹ and the legislature.⁴³⁰ Passing a constitutional right to a healthy environment has a huge influence on environmental legislation.⁴³¹ In the vast majority of the countries examined by Professor Boyd, countries with a constitutional right to a healthy environment have strengthened national environmental laws, and “incorporat[ed] substantive and procedural environmental rights.”⁴³² A constitutionally enshrined broad public trust doctrine that clearly creates a positive right to a healthy environment could provide the vision and support required for the state to implement controversial environmental protection measures.⁴³³ With a constitutional mandate, neither the legislature nor the courts could avoid their duty to protect the environment. Having constitutional authority for environmental protection is particularly important given the politically controversial and often divisive nature of many environmental problems.⁴³⁴

CONCLUSION

Amending the Washington State Constitution to include a positive right to a healthy environment is not a radical step for Washington. It is a necessary step to ensure the state’s environmental integrity and protect its citizens’ health. Washington, along with the rest of the world, is facing and will continue to face serious environmental challenges. Although Washington cannot control nor solve all of its impending environmental problems by itself, it must do what it can because those problems will negatively affect the state’s citizens, economy, and natural resources. Amending the Constitution, and empowering individuals with a positive right to a healthy environment, is the first crucial step to ensure that the Evergreen State remains forever green.

428. Klass, *supra* note 31, at 719.

429. Craig, *supra* note 42, at 831.

430. *Cf. McCleary*, 173 Wash. 2d 477, 269 P.3d 227.

431. BOYD, *supra* note 261, at 279.

432. *Id.* at 279–80.

433. *See id.* at 28.

434. *See, e.g.,* Wood, *supra* note 7, at 57–59 (discussing the political nature of many environmental decisions); Juliet Eilperin, *The Keystone XL Pipeline and Its Politics, Explained*, WASH. POST (Feb. 4, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/03/the-keystone-xl-pipeline-and-its-politics-explained/> (explaining why the proposed Keystone XL Pipeline is so politically controversial).

Appendix A
Joint Resolution

BE IT RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF WASHINGTON, IN LEGISLATIVE SESSION ASSEMBLED:

THAT, At the next general election to be held in this state the secretary of state shall submit to the qualified voters of the state for their approval and ratification, or rejection, an amendment to Article I of the Constitution of the state of Washington by adding a new section to read as follows:

“Article I, section _____. (a) The state of Washington is the trustee of Washington’s natural environment, including the air, water, soil, and ocean shores. It is one of the principal duties of the state to protect, preserve, and restore the state’s natural environment for the current generation and for generations to come. Those residing within Washington’s borders, now and in the future, have a positive right to live in and enjoy a healthy environment.

(b) This amendment shall take full effect immediately upon the approval and ratification by the qualified voters. The legislature may take action to carry out the purposes of this section, but no such action shall be required for this section to become effective.”

BE IT FURTHER RESOLVED, That the statement of subject and concise description for the ballot title of this constitutional amendment shall read: “The legislature has proposed a constitutional amendment to enshrine a positive right to a healthy environment. The amendment would create self-executing right to a healthy environment and establish the protection, preservation, and restoration of Washington’s air, water, soil, and ocean shores as a principal state duty. Should this constitutional amendment be:

Approved
Rejected”

BE IT FURTHER RESOLVED, That the secretary of state shall cause notice of this constitutional amendment to be published at least four times during the four weeks next preceding the election in every legal newspaper in the state.

— END —