207. *See,* for example, Fla. Const., art. IX, § 1 ("It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders."). *See also* Ark. Const., art. XIV, § 1; Ga. Const., art. VIII, § 1; Haw. Const., art. X, § 1; Ill. Const., art. X, § 1; N.M. Const., art. XII, § 3.

208. *See,* for example, Ala. Const., art. XIV, § 256 ("The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state. . . ."). *See also* Alaska Const., art. VII, § 1; Ariz. Const., art. XI, § 1; Cal. Const., art. IX, § 1; Colo. Const., art. IX, § 1; Conn. Const., art. VIII, § 1; Del. Const., art. X, § 1; Idaho Const., art. IX, § 1; Ind. Const., art. VIII, § 1; Iowa Const., art. IX, § 3; Kan. Const., art. VI, § 1; Ky. Const., § 183; La. Const., art. VIII, § 1; Me. Const., art. VIII, pt. 1, § 1; Md. Const., art. VIII, § 1; Mass. Const., pt. 2, C.V., § II; Mich. Const., art. VIII, § 2; Minn. Const., art. XIII, § 1; Miss. Const., art. VIII, § 201; Mo. Const., art. IX, § 1(a); Mont. Const., art. X, § 1(3); Neb. Const., art. VII, § 1; Nev. Const., art. XI, §§ 1–2; N.H. Const., pt. 2, art. 83; N.J. Const., art. VIII, § IV, par. 1; N.Y. Const., art. XI, § 1; N.C. Const., art. IX, § 2(1); N.D. Const., art. VIII, § 1; Ohio Const., art. VI, § 2; Okla. Const., art. XIII, § 1; Ore. Const., art. VIII, § 1; Pa. Const., art. III, § 14; R.I. Const., art. XII, § 1; S.C. Const., art. XI, § 1; S.D. Const., art. VIII, § 1; Tenn. Const., art. XI, § 12; Tex. Const., art. VII, § 1; Utah Const., art. X, § 1; Vt. Const., § 68; Va. Const., art. VIII, § 1; Wash. Const., art. IX, § 1; W. Va. Const., art. XII, § 1; Wis. Const., art. X, § 3; Wyo. Const., art. VII, § 1.

209. *See,* for example, Ill. Const., art. X, § 2 (creating state board of education to be "elected or selected on a regional basis" and establishing board's duties, while providing that these may be limited by law); Mo. Const., art. IX, § 2(a) (providing for state board of education; number, appointment, term and political affiliation of its members; and their reimbursement for expenses and per diem compensation); Neb. Const., art. VII, § 3 (eight members, elected from eight districts of roughly equal population; four-year terms; no compensation but reimbursement for expenses; nonpartisan ballot; members cannot be "actively engaged in the educational profession"). *See also* Okla. Const., art. XIII, §§ 5, 8 to XIII-B, § 4 (establishing and explaining in detail structure of state board of education and of system of higher education and board of regents). But *see* Idaho Const., art. IX, § 2 (very general, indicating only that board's powers and duties will be prescribed by law).

210. *See,* for example, Kan. Const., art. VI, §§ 2–5 (creating state board of education to oversee educational interests of the state and board of regents to oversee higher education).

211. *See,* for example, Miss. Const., art. VIII, § 202 (state superintendent is elected in same time and manner as governor for four-year term).

212. *See,* for example, Cal. Const., art. IX, § 3.3 (permitting county charters to provide for the election, qualifications and terms of members of county board of education); N.C. Const., art. IX, § 2 (2) (allowing general assembly to assign responsibility for support of public schools to local governing entities "as it may deem appropriate").

213. *See,* for example, Ga. Const., art. VIII, § 5 ("Each school system shall be under the management and control of a board of education"); Kan. Const., art. VI, § 5 ("Local public schools . . . shall be maintained, developed and operated by locally

elected boards."); Ohio Const., art. VI, § 3 ("[E]ach school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education"); Va. Const., art. VIII, § 7 ("The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.").

214. *See,* for example, Fla. Const., art. IX, § 4 (establishes non-partisan election process for county school boards and gives them power to "operate, control and supervise all free public schools within the school district and determine the rate of school district taxes").

215. *See* Fla. Const., art. IX, § 5 (establishes the office and election process of superintendent of schools for individual school districts, who will be employed by the school board); La. Const., art. VIII, § 9(A) (parish school board "shall fix the qualifications and prescribe the duties of the parish superintendent").

216. *See* Colorado, Amendment 17 (2002), available at http://www.state.co.us/gov_dir/leg_dir/96bp/amd17.html (this unsuccessful proposal to guarantee parents' authority to control their children's upbringing, education, values, and discipline was the first such proposal to be placed on a ballot).

217. *See,* for example, *Pierce v. Society of Sisters,* 268 U.S. 10, 534–35 (1925) (finding that an Oregon statute making attendance of all children between eight and sixteen at public schools compulsory, upon threat of prosecution, unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control," in the context of private schools.); *Wisconsin v. Yoder,* 406 U.S. 205, 215, 234–35 (1972) (recognizing that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests" and holding that "the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16," where compelling attendance would violate respondents Amish religious beliefs).

218. *See* Zelman, supra note ccvi. In that case, the Court rejected an Establishment Clause challenge to Ohio's "pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District." Ibid. at 611. One aspect of the program gave "tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing." Ibid. at 612. The Court found that the challenged program "is a program of true private choice . . . [and] neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district." Ibid. at 617. For an interesting discussion about parental rights versus children's interests, and that the constitutionalization of the former has trumped the latter and "perpetuated a view of the child as parental property," *see* Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own,"* 11 *Cornell J. L. & Pub. Pol'y* 481 (2002).

219. *See* No Child Left Behind, 20 U.S.C.S., § 7201 et seq. (2003) (Title V entitled "Promoting Informed Parental Choice and Innovative Programs").

220. *See Abbott v. Burke V,* 153 N.J. 480, 489, 710 A.2d 450, 454 (1998) (explaining "the remedial measures that must be implemented in order to ensure that public school children from the poorest urban communities receive the educational entitlements that the Constitution guarantees them"). The court intervened again just two years later "to assure that the implementation of preschool in the Abbott districts is faithful to the programs proposed by the Commissioner and accepted by this Court." *Abbott v. Burke VI,* 163 N.J. 95, 101, 748 A.2d 82, 85 (2000).

221. For example, in 1978, California voters responded to *Serrano v. Priest,* 487 P.2d 1241 (Cal., 1971), "on the eve of the implementation of the legislature's response to *Serrano II* [557 P.2d 929 (1976)]" by passing Proposition 13, which limited property tax rates. *See* William A. Fischel, *How Serrano Caused Proposition* 13, 12 *J.L. & Politics* 607, 612 (1996). "Its intended and actual effect was a more than fifty percent reduction in local property tax collections across the state." Ibid. Subsequently, the legislature did meet *Serrano II*'s "equalized spending goal . . . but . . . at a greatly reduced level of spending," effectively leaving the state's "school finance in shambles." Ibid. at 613. In 1996, California voters also passed the controversial Proposition 209, prohibiting affirmative action in public education. Another example is provided by Colorado's "busing clause." *See* Colo. Const., art. IX, § 8 ("nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance"). This amendment was passed in 1974, the year busing began after a federal district court ordered the Denver public schools to desegregate. *See Keyes v. School Dist. No. 1,* 303 F. Supp. 279 (D. Colo., 1969).

222. Newsroom: Illinois Statewide Management Alliance, at wysiwyg://217/http://www.iasbo.org/ newsroom/alliancecont.htm (updated Apr. 10, 2003). *See* Joseph L. Bast, Herbert J. Walberg, and Robert J. Genetski, "The Heartland Report on School Finance Reform Illinois" (May 1996), at http://www.heartland.org/pdf/21245j.pdf, for the text of the proposed amendment.

223. Newsroom: Illinois Statewide Management Alliance, at wysiwyg://217/http://www.iasbo.org/newsroom/alliance_cont.htm (updated Apr. 10, 2003).

224. As indicated supra, predictive efforts by some commentators, *see,* for example, Thro, supra note cxxxiv, heavily based on the language of state education clauses, have been largely unsuccessful. Studies by others suggest that "courts interpreting a state constitution with a 'strong' education clause are [not] more likely to strike down school finance schemes than courts interpreting a 'weak' education clause." *See* Karen Swenson, "School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained," 63 *Alb. L. Rev.* 1147, 1155, 1174–75. (2000). Rather, the best indicator of whether or not a court will invalidate a financing scheme under the education clause is whether the legislature is unable or unwilling to fix the problem. *See* Banks, supra note lxx. What the political affiliation of the court is and whether judges are appointed or elected are other relevant factors. Ibid.

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Chapter Ten

The Environment and Natural Resources

Barton H. Thompson Jr.

Introduction

A majority of state constitutions seek to protect the public's interest in natural resources and the environment.[1] The constitutional provisions, however, vary substantially among states both in what they protect and in the nature and extent of the protections. Some provisions set out broad public rights to clean air and healthy environments; others guarantee very specific public rights, such as the right to use navigable waters or to fish; several merely authorize the legislature to pass environmental laws. A number of constitutional provisions establish new institutions or procedures for the management, allocation, and preservation of fish and wildlife, water, or other natural resources. Yet other provisions create and protect various categories of state public lands.

The environmental focus of state constitutions has evolved over time as public concerns have changed. Navigable waterways were of greatest concern to citizens in the nineteenth century because of the immense commercial importance of waterways. As a result, the earliest constitutional provisions established rights of navigation and of access to navigable waters.

As Americans immigrated to the western United States in the late nineteenth century, citizens of the new western states confronted the need both to protect and to allocate scarce water resources. Many of the new western states therefore adopted constitutional provisions asserting "public ownership" over water resources, while authorizing private appropriation of water resources on a first-in-time, first-in-right basis. Some western constitutions also banned nonbeneficial or wasteful uses of water.

The conservation movement of the early twentieth century generated interest in protecting fish, wildlife, and other natural resources from overexploitation. A number of state constitutions responded by creating new governmental institutions such as fish and game commissions, insulated from direct political

influence, to manage such resources. Other constitutional provisions set out general guidelines for the management and conservation of natural resources.

Increasing public interest in the environment since the 1950s has generated the latest and largest body of constitutional provisions addressing the environment. Approximately a third of all state constitutions, including all constitutions written since 1959, contain provisions either directing the legislature to protect the environment or guaranteeing public rights to a clean and healthy environment. A handful of states also have created state land reserves, designed to protect undeveloped land for aesthetic, recreational, ecological, or historic purposes.

Yet questions remain about both the rationale for and effectiveness of broad environmental provisions in state constitutions. Although the public widely supports environmental protection, how to balance environmental protection with economic growth generates heated debate. At the same time, environmental advocates have been disappointed with the impact of many modern environmental provisions on actual policy. Most state courts have shied away from actively using the provisions and instead deferred to legislative judgments as to the appropriate level and types of environmental protection. Nor is there evidence that the recent growth in environmental provisions has had a significant impact on legislative and executive decision-making in the environmental field.

The drafters of twenty-first-century constitutions thus face several critical questions: Although environmental protection is an important subject of state policy, is there justification for addressing the environment in state constitutions? If there is sufficient justification, what provisions should be included? And finally, can environmental provisions be drafted in a fashion that makes them more effective than in the past?

UNDERSTANDING THE CONTESTED TERRAIN OF ENVIRONMENTAL POLICY

Environmental provisions are doomed to failure unless they build on a clear understanding of environmental problems and the constraints and trade-offs involved in solving them. Environmental policy encompasses a diverse array of issues, usefully divisible into three broad subject areas—control and cleanup of pollution and toxic products (health issues), conservation and allocation of natural resources (resource issues), and public access to and preservation of resources of recreational or other importance to the general population (public access issues). Each set of issues raises unique public policy questions that cannot be addressed effectively through a single universal provision. Many environmental issues, moreover, involve trade-offs. Environmental protection often comes at economic or other cost. Constitutional provisions that fail to address the trade-offs are avoiding the tough policy questions that the government must address.

Health Issues

The last third of the twentieth century generated scores of new federal and state statutes regulating pollution and toxic substances. While state governments once took the lead in pollution regulation, national laws from the Clean Air Act to the Safe Drinking Water Act now play the principal role.

The principal question in controlling pollution is how great of a health risk society should tolerate. Many forms of pollution do not have a safe threshold of exposure below which everyone is safe from injury. The cost of reducing pollution, moreover, generally increases as the government imposes stricter regulations. In deciding how much ambient lead to permit in the air or how much arsenic to permit in drinking water, the government thus inevitably is engaging in a trade-off between the health benefits of reduced pollution and the economic costs of increased regulation. People, moreover, differ strongly over how to resolve the trade-off between health risks and economic costs. Constitutional provisions that simply promise a "healthful" environment ignore these central issues. Additional pollution reductions can reduce the health risks but seldom to zero and, in most cases, only at a cost.

Scientific uncertainty further complicates pollution regulation. Scientists often do not know whether a particular pollutant presents a health risk or how large the risk is. The government must decide whether to err on the side of public safety, and restrict the pollutant as if it were hazardous (exercising what has come be called the "precautionary principle"), or err on the side of the economy and permit the pollution absent further evidence of risk. References in constitutions to general and vague terms such as "clean air" and "healthful environment" again provide little guidance on how to address uncertainty.

Resource Issues

1. Resource Extraction

States still play the principal role in regulating the extraction and use of natural resources. In managing each natural resource, states must decide the maximum extraction, if any, to allow in any time period and how to allocate that amount among competing users.

How much extraction to allow depends on whether the resource is "renewable" or "depletable." Nature continually replenishes renewable resources such as fish, wildlife, timber, and groundwater. So long as the rate of human consumption does not exceed the rate of natural replenishment, future generations can continue using the resource; consumption rates that exceed natural replenishment, by contrast, can risk destroying the resource. By contrast, depletable resources such as petroleum, coal, and hard minerals are finite, requiring government to apportion

use across generations. Higher consumption today means less of the resource available in the future. Today's extraction decisions thus can affect the welfare of future generations. Although most people agree that renewable resources should be managed in a sustainable fashion for their optimum yield, there is little consensus on how to apportion depletable resources across generations.

2. Ecosystem Preservation

In recent years, society increasingly has recognized the importance of protecting wildlife habitat, instream waterflows, and other ecosystems. Although the federal government has taken the lead through laws such as the Endangered Species Act, a number of states have adopted their own laws providing greater or broader protections of various ecosystems.

There is no clear public consensus on either the goals to be achieved in protecting ecosystems or on how much protection to provide. To some people, the goal should be to avoid species extinction; to others, the goal should be to maximize the overall biodiversity in a region; yet others seek to protect and enhance ecosystems in order to maximize the "natural services," such as clean drinking water or flood control, that healthy ecosystems can provide. More important, people again differ on whether the appropriate degree of protection is an issue of ethics or of maximizing human utility. Many environmentalists argue that species, as well as individual animals and plants, have a right to protection even if the animals and plants are of no practical importance to humans. But other Americans believe that we should protect species, and thus their habitats, only to the degree that they provide value to humans.

The absence of "safe thresholds" again frustrates those looking for simple answers. Habitat destruction is the principal cause of species endangerment. By the time a species is listed as endangered, most of its historic habitat typically already has been destroyed or degraded. There is therefore no "safe" amount of development. Each additional acre of lost habitat generally will reduce the species' chances of survival and recovery, posing a difficult trade-off for policy makers.

Who should bear the burden of ecosystem protection is another contentious issue. In the view of many environmentalists, property owners should not have the right to develop or destroy environmentally sensitive lands and waters. Property owners, by contrast, often argue that, if society wishes to preserve such resources, society should pay for the protection. Arguments can be mustered for both views.

Public Access Issues

A final set of environmental issues focuses on public access to recreational and other resources of importance to the general population. Many state constitutions include a public right to use navigable rivers and waterways. The

public also has long enjoyed a right in most states to use navigable waterways and tidal areas under what is known as the "public trust doctrine." To further meet public demands for recreation and open space, the fifty states have acquired and set aside over ten million acres of land as state parks and other public areas.

As public demand for recreational and aesthetic access has continued to increase in recent years, public advocacy groups have called on legislatures, courts, and voters to act. Most states have responded by acquiring and dedicating additional lands, often as part of comprehensive open-space programs or ballot initiatives. Courts in several states also have invoked the public trust doctrine or other common law doctrines to open access across or to privately owned beaches or waterways.[2] Finally, a number of states and local jurisdictions have begun to condition the development of beachfront or other properties by requiring the property owner to provide public rights of access.

Drafting Environmental Provisions

Basic Drafting Choices

1. Issue Focus

As cataloged in the previous section, environmental issues comprise a wide and diverse range of issues, having as their only overarching theme the relationship of humans to their natural environment. Only a handful of constitutions attempt to address the environment comprehensively, and those typically do so through broad policy announcements or prescriptions. The Virginia Constitution, for example, states that "it shall be the Commonwealth's policy to protect its atmosphere, lands, and water from pollution, impairment, or destruction,"[3] while the Michigan Constitution directs the legislature to "provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction."[4]

Most state constitutions deal with only a subset of environmental issues, but in greater detail. California's constitution, for example, addresses fishing, wildlife conservation, water use, and tidelands, but says nothing about pollution, biodiversity, forestry, or energy.[5] Some constitutions address only a very limited class of environmental issues. The North Carolina Constitution provides for water conservation and forestry preservation, but is otherwise silent on the environment.[6] Idaho's and New Mexico's constitutions address only water allocation.[7] The particular issues singled out for constitutional attention, moreover, vary tremendously from state to state.

Whatever choices the drafters of a constitution make, environmental provisions should be as clear as possible as to scope. Where environmental provisions

have been ambiguous as to scope, state courts often have interpreted them narrowly to avoid intervening in policy disputes not clearly within the language of the provisions. Like a number of states, for example, the Illinois Constitution provides that the "public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations."[8] The Illinois Supreme Court has held that this language addresses only those actions such as pollution that might directly harm human health and does not require the state and its citizens to ensure the survival of endangered or threatened species (despite evidence that habitat preservation can promote a cleaner environment).[9]

2. Types of Environmental Provisions

A second question is what type of provisions to use in addressing the selected environmental issues. Environmental provisions array themselves along several overlapping dimensions. One dimension is the degree to which the provision constrains the ability of the legislature and executive branches to decide on the environmental policy of the state. A second distinction is whether the provision seeks to affect environmental policy by modifying traditional governmental *processes* (e.g., by requiring supermajorities in the legislature) or by dictating particular *substantive* results. A final difference among provisions is the degree to which the provision directly proscribes *private* actions that harm the environment.

Authorization Provisions. Some provisions merely empower the legislature or executive branch to address particular environmental issues. The Georgia Constitution, for example, provides that the "General Assembly shall have the power to provide by law for . . . [r]estrictions upon land use in order to protect and preserve the natural resources, environmental, and vital areas of this state."[10]

In most cases, such Authorization Provisions are constitutionally unnecessary. Given the inherent police power of state governments, legislatures generally enjoy the power to enact environmental legislation even absent explicit constitutional authorization.[11] In some cases, however, the framers of an environmental provision might want to clarify that environmental legislation does not violate other constitutional provisions. The Rhode Island Constitution, for example, specifies that environmental regulations "shall not be deemed to be a public use of private property" and thus not subject to challenge as an unconstitutional taking of property for private purposes.[12]

Value Declarations. A few state constitutions set out environmental policy goals for the state. The Virginia Constitution, for example, specifies that it is the "policy of the Commonwealth to conserve, develop, and utilize its natural resources" and "to protect its atmosphere, lands, and waters from pollution."[13] Courts have uniformly held that such Value Declarations do not require anyone, including the government, to take any particular actions. In constitutional

terminology, Value Declarations are not "self-executing," but instead rely on legislative or administrative implementation. Government officials and others, however, often invoke Value Declarations in advocating for or defending particular actions,[14] and such Value Declarations may influence legislative and administrative decisions.

Institutional Specifications. Without directly dictating particular environmental actions, state constitutions also can influence environmental policy either by changing the rules by which governmental branches make environmental decisions or by creating new governmental organizations to manage specific environmental issues. In the first category, the constitution can modify legislative voting requirements or administrative procedures. In order to protect state lands of particular environmental importance, for example, several state constitutions require that the legislature approve any sale of protected tracts of land in multiple legislative sessions or by supermajority votes.[15] Constitutions also can modify the rules by which the courts review and enforce environmental laws. Rhode Island's constitution, for example, mandates that environmental regulations "be liberally construed."[16]

Constitutions also can take environmental issues away from the traditional branches of government and award the issues to new governmental organizations that are specially designed to ensure special expertise, to favor one or another interest group, or to provide a balanced perspective. For example, the California Constitution creates a Fish and Game Commission to manage fish and wildlife in the state.[17] In order to ensure a degree of independence from political influence, that constitution also requires that the five members of the commission be selected by the governor but confirmed by the Senate and serve six-year terms.[18]

Policy Directives. Constitutions also can protect the environment either by directing the government to adopt and implement particular policies or by restricting the actions that the government can take. These Policy Directives can bind all or selected branches of government and can set out the mandated policy in general or detailed terms. The Michigan Constitution, for example, provides broadly that the "legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction."[19] At a more detailed level, California's constitution requires the state, whenever it sells or transfers public lands, to reserve "in the people the absolute right to fish thereupon."[20]

Courts often have held that broad Policy Directives, such as the Michigan directive, do not give citizens the right to sue the state for failing to take particular actions either because the provisions are not "self-executing"[21] or because the constitution does not give private citizens a cause of action or standing to sue.[22] Although such Policy Directives might still play important political roles, directives that are not judicially enforced are effectively the same as Value Declarations.