The Montana Supreme Court's decisions, unfortunately, may open the door to an array of other, more troubling cases. Future cases, for example, may challenge the constitutionality of existing environmental quality standards, forcing the courts to determine the appropriate standard for pollutants with no safety threshold. Other cases may challenge the state's failure to address some environmental issues at all, presenting the courts with the daunting task of designing and implementing a regulatory system from scratch. In one recent lawsuit, a number of asbestos victims sought damages from the state for failing to regulate asbestos.[62] With some basis in existing constitutional case law, plaintiffs claimed that, by not ensuring them a "clean and healthful environment," the state committed a constitutional tort entitling them to damages for their asbestos injuries.

3. Future Directions

Given the importance of environmental protection to the citizens of most states, Value Declarations that articulate the public's interest in a healthful environment are easily justified. The justification for including Policy Directives, Environmental Rights, or Environmental Duties in state constitutions, however, is open to more question. Some proponents have argued that, absent such provisions, legislatures are likely to slight the public's interest in environmental protection in the face of strong business opposition. Empirical studies of environmental policy-making in the United States, however, provide no basis for concluding that biases in the legislative process are significant enough to justify having courts rather than the legislature make general environmental policy. Rather than being "captured" by industry, most legislatures appear to be responsive to both the need for environmental protection and public calls for environmental regulation.[63]

Proponents of stronger environmental provisions also have argued that a "healthful environment" is a fundamental right that should not be open to democratic derogation. No consensus currently exists, however, on how to address the trade-offs and scientific uncertainty involved in environmental policy-making. Given that trade-offs between the environment and other important policy goals will continue to evade any simple solution, legislatures rather than courts may be the better institutions to grapple with the issues at the current moment.

No matter what form general environmental provisions take, the provisions should furnish greater guidance on the principal issues underlying environmental disputes—trade-offs and scientific uncertainty. References to "clean" and "healthful" environments sound good; they provide effective sound bites. But they do not supply any of the branches of government with useful information for addressing concrete policy matters. As a result, all legislators and regulators can claim that they are acting in compliance with the constitution, and courts feel rudderless undertaking meaningful judicial review.

In drafting more useful environmental provisions, future state constitutions might find guidance in emerging international principles of environmental protection. These principles are still quite general, but they do a better job than existing state constitutions of addressing the key questions. For example, the Rio Declaration explicitly urges a "precautionary approach" to scientific uncertainty: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[64] Even though this provision leaves open many questions (e.g., how should uncertainty be weighed in making decisions?), it supplies two significant policy guidelines: uncertainty should not be used as a justification for postponing decisions, and protective efforts need not be taken if they are not cost-effective.

International environmental agreements set out a number of important principles of relevance to environmental policy. Many are of potential constitutional significance.

- *The Precautionary Principle:* International agreements vary in their framing of the Precautionary Principle. The Rio Declaration includes one of the weaker versions. At the stronger end of the spectrum, the World Charter for Nature provides that "where potential adverse effects are not fully understood, [activities that present a significant risk] should not proceed."[65] All versions of the Precautionary Principle address the problem of uncertainty and emphasize that uncertainty should not be used as an excuse for failing to take any action.
- *The Principle of Prevention:* This principle, which is closely related to the Precautionary Principle, states that governments should prevent pollution or other environmentally harmful activities *before* they cause harm.[66]
- *Balance:* Most international environmental agreements recognize that environmental protection often involves trade-offs with economic development and other interests. Like state constitutions, however, few provide useful guidance on how the trade-offs should be resolved.
- *The Polluter Pays Principle:* Several international environmental agreements emphasize the importance of ensuring that polluters bear the cost of any harm that they cause. The Rio Declaration, for example, states that governments "should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution."[67]

  The Florida Constitution has adopted the Polluter Pays Principle in one narrow context. In 1996, Florida voters approved a constitutional amendment to protect the Florida Everglades from water pollution.

The amendment specifically provides that anyone who causes water pollution in the area "shall be primarily responsible for paying the costs of the abatement of that pollution."[68]

- *Environmental Assessment:* International environmental documents also call on states to undertake "environmental impact assessments" for any activity that is "likely to have a significant adverse impact on the environment."[69] In the United States, about a third of the states have environmental quality acts that require such assessments for governmental actions.[70]
- *Information Dissemination and Public Participation:* Another emerging principle of international environmental law is that all citizens should have ready access to "information concerning the environment" in their community, "including information on hazardous materials and activities in their communities," and an "opportunity to participate in decision-making processes."[71]
- *Duty Not to Discriminate Regarding Environmental Harms:* International environmental instruments also emphasize that states should "discourage or prevent the relocation and transfer" of harmful substances or activities from one jurisdiction to another.[72] The environmental justice movement in the United States has similarly objected to environmental protection efforts that simply relocate risks from wealthier to poorer communities.[73]

Resource Management

Approximately a third of the current state constitutions address natural resource policy. Most of these provisions address specific resources, with water (11 constitutions), forestry (6), and fish and wildlife (6) most commonly covered.

1. General Provisions

Although few constitutions address natural resources as a class, a strong case again can be made for Value Declarations that emphasize the importance of conserving and not wasting a state's natural resources. Several state constitutions include Value Declarations emphasizing the importance of conservation (although sometimes balanced with development). Michigan's constitution, for example, declares that "conservation and development of the natural resources of the state" are of "paramount public concern."[74]

Given the importance of resource supplies to future generations, a strong case also can be made for Policy Directives, Environmental Rights, and Environmental Duties promoting resource conservation. Few people would disagree that each generation owes an ethical obligation to conserve resources for future

generations, but people generally act in a more self-interested fashion than philosophers would argue is ethical, and political institutions reinforce this bias. Because politicians have only limited terms in office and future generations cannot vote, the political process tends to favor demands for current consumption over conflicting interests of future generations.

The difficult issue is how to express this obligation in constitutional terms. Most natural resource provisions tend to be quite vague in their directives. The Ohio Constitution thus calls expansively for the "conservation of the natural resources of the state,"[75] without providing any guidance on what is meant by conservation. Several other state constitutions implicitly call for a balancing of "conservation" and economic development without explaining how the two goals should be balanced.[76] The Montana Constitution proscribes the "unreasonable depletion and degradation of natural resources."[77]

Several constitutions go a step further and explicitly call for natural resource management to take into account the interests of future generations. The Hawaii Constitution thus requires the state to "conserve and protect" Hawaii's natural resources "for the benefit of present and future generations."[78] Although still quite general, these provisions at least emphasize the key ethical precept making natural resource policy of constitutional importance—the need to preserve resources for future generations. International environmental agreements make the same point. The Rio Declaration thus requires governments to safeguard natural resources "for the benefit of present and future generations."[79]

Only Alaska's constitution tries to provide more specific guidance for the management of natural resources. Under the terms of the Alaska Constitution, "Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on a sustained yield principle, subject to preferences among beneficial uses."[80] Even this standard leaves open numerous questions. Resources, for example, can be "sustained" at various stock levels. The Alaska standard, however, does not specify whether the yield of a resource should be sustained at the maximum level or some lower amount.[81] By contrast, the World Charter for Nature provides that resources should be "managed to achieve and maintain optimum sustainable productivity."[82]

No current state constitution provides specific guidance on the management of nonrenewable resources (other than general directives for the "conservation" or "reasonable depletion" of all resources). Several international environmental agreements, however, have tried to formulate standards. The Stockholm Declaration dictates that the "non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion."[83] The World Charter for Nature provides, in more expansive terms, "Non-renewable resources which are consumed as they are used shall be exploited with restraint, taking into account their abundance, the rational possibilities of converting them for consumption, and the compatibility of their exploitation with the functioning of natural systems."[84]

Taking a slightly different approach toward the conservation of natural resources, several state constitutions provide for the creation, funding, and use of "natural resources trust funds."[85] These provisions are designed to bypass the standard appropriations processes in the state and guarantee funding for natural resources conservation.[86] Michigan's constitution also creates a board to manage the trust fund.[87] These provisions suffer from several problems. First, the funds only help resource problems that can be solved through money; they do not help avoid the overuse of a resource. Second, the amount guaranteed is not calibrated to relative fiscal needs and thus is likely to be either not enough or too much. Finally, these and similar funding provisions can lead to the balkanization of the state's budget and an inability to weigh alternative funding needs in a rational fashion.

2. Water

Although the most common resource provisions in today's state constitutions address water resources, there is at best a weak case for including water-specific provisions in future state constitutions. The existing provisions are largely historical. Most date back to efforts in the late nineteenth century to ensure use of the "prior appropriation" doctrine, rather than the "riparian" doctrine, in the western United States.[88] A number of western state constitutions thus guarantee the right to appropriate water.[89]

The goal of firmly implanting the prior appropriation doctrine also explains why several western constitutions provide that water belongs to the state or is reserved for the public.[90] As the Colorado Supreme Court has explained, these "public ownership" provisions originally were meant to reject any claims that real property owners enjoyed riparian rights as part of their private land rights.[91] Today, however, these provisions have taken on new meaning and importance in many states. The Montana Supreme Court, for example, has used the public ownership provision in its constitution to meet the public's growing demand for recreational use of Montana's rivers and streams. In 1984, the court held that the public ownership provision authorizes public access and use of all state waterways even over the objection of private property owners.[92]

A number of western state constitutions also encourage water conservation. These constitutions typically permit appropriations only for "beneficial uses."[93] The California Constitution explicitly bans "waste" and permits people to extract only "such water as shall be reasonably required for the beneficial use to be served."[94] Although these provisions can be extremely valuable in ensuring efficient water use,[95] there is little reason to single out water for special constitutional protection rather than barring waste of all natural resources.

3. Fish and Wildlife

Only a few state constitutions include provisions designed to protect fish and wildlife. These constitutions, moreover, eschew directives and instead create

independent expert commissions, insulated to some degree from direct political influence, to oversee fish and game policy.[96] As public concern for wildlife has increased, voters also have amended some constitutions to include hyperlegislation such as California's ban on gill-netting and Colorado's ban on various forms of traps and poisons.[97] Again, there seems little justification for addressing fish and wildlife separately from other important resources.

4. Forestry

Although there also seems little reason to address forestry separately from other renewable resources, half a dozen state constitutions do. Several constitutions provide for the management of forests on "forestry principles"[98] (implying that the state should use scientific tools and principles for managing their forests) or for the prevention or suppression of fires.[99] Several constitutions also establish state foresters or forestry commissions, seeking to affect forestry practices through institutional means.[100]

5. Other Specific Provisions

A smattering of other resource provisions can be found in state constitutions. All seem too specific for constitutional inclusion. Montana thus requires the reclamation of all lands "disturbed by the taking of natural resources."[101] Louisiana requires the conservation of wetlands and the reclamation of oilfield sites.[102]

Protection and Access to Navigation

The earliest "environmental" provisions in state constitutions dealt with public access to tidelands and navigable state waterways. Virtually all of these provisions remain in the state constitutions today. Half a dozen state constitutions, for example, declare that submerged and tidal lands are state public domain.[103] Although these provisions do not explicitly provide for public access, the provisions often emphasize that the lands are held by the state in "trust" for the public, implicitly indicating that the public should have access.[104] Under the public trust doctrine, courts long have held that the public has a right of access to such lands for fishing, boating, or recreational uses.[105]

Approximately the same number of constitutions go a step further and explicitly provide for a public right of navigation, free public access to navigable waterways, or both. The earliest of these provisions, found in several Midwestern and Southern states, guarantee that some or all of the state's navigable waters shall be "public" or "common highways," free to citizens of both the state and the nation without any tax, duty, or toll.[106] California and Alaska prohibit anyone from excluding access to navigable waters.[107]

The original constitutional justification for these provisions—the importance of waterways to commerce—is much weaker today. A new argument, however, can be made that public access to common property, such as waterways and beaches, is critical to both our democratic system and private property. An effective and healthy democracy arguably depends to a degree on the existence of commons where all citizenry can mingle and interact both with each other and with their shared physical environment.[108] Commons provide an opportunity for people to understand each other and learn how to socialize and live together. Commons also contribute to shared values. In addition, commons can help reduce the tensions that otherwise grow out of a highly uneven distribution of private property. The nonlanded majority of today's America may accept the nation's private property system in part because they have free access to roads, parks, beaches, and other public "commons."

Public Land Preservation

These "commons" justifications for public access suggest that the traditional navigation provisions are too narrow in their focus on navigation and in their application only to navigable waterways and foreshore. The "commons" arguments suggest that the public should have access to navigable waterways and foreshore, not just for navigation, but for a broader set of purposes including recreation, aesthetics, and quiet contemplation. "Commons" rationales also argue for extending public access and use to a broader set of lands. Although navigable waterways and foreshore remain important commons, public parks, forests, undeveloped foothills, and other open spaces provide equally important commons today.

A number of state constitutions have responded to the public demand for broader "commons." Historically, one of the most important forms of public recreation was fishing. Not surprisingly, therefore, half a dozen constitutions provide for some common public right to fish, often linked with a public right of access to rivers or other fishery resources.[109] California's constitution, for example, guarantees a public right to "fish upon and from the public lands of the State and in the waters thereof," although the legislature is authorized to regulate fishing seasons and conditions.[110]

In response to increasing public demands for recreation and open space, moreover, a growing number of state constitutions establish and preserve various forms of state land reserves that go beyond the historic preoccupation with tidelands and navigable waterways. In the earliest of these provisions, New York constitutionally created the Adirondack forest preserve in 1895.[111] Within the last two decades, environmental advocates have borrowed and expanded on this idea to constitutionally create the "Alabama Forever Wild Land Trust,"[112]

the "Great Outdoors Colorado Program,"[113] and the North Carolina "State Nature and Historic Preserve."[114] Amendments to several other state constitutions also have dedicated funds or otherwise authorized the state to acquire and preserve land of particular aesthetic, recreational, or historic value.[115]

The purposes of these provisions include not only public access to shared "commons" but also preservation of environmentally or historically important lands. Here again, an argument can be made that society has an obligation to future generations to preserve those lands that are important to preserving a healthy functioning environment or to the historical heritage of the region. The Alabama Constitution explicitly notes that an underlying goal of the Alabama Forever Wild Land Trust is to protect lands of "unique ecological, biological and geological importance" in trust for "succeeding generations."[116]

Provisions creating "commons trusts" must address several issues. First, what lands should be included in the trust? Given the difficulties of specifying which lands now or in the future will be of recreational, ecological, or historical importance to the public, state constitutions should generally leave specification of some lands to legislative discretion. State constitutions might explicitly include all lands covered by the traditional public trust doctrine—that is, tidelands and navigable foreshore—because of their historic and continuing importance as public "commons." For other lands, however, state constitutions should be wary of the time boundedness of current presumptions regarding what lands to include. Rather than specifying particular "commons," constitutions more effectively could specify the criteria by which legislatures should determine what lands to acquire and include: for example, the value of the land for common recreational, social, or aesthetic use by a broad segment of the general public, the land's ecological importance, or the land's historic significance to the state and its citizens.

Second, what types of rights should the public enjoy in the protected lands? Existing constitutional trusts focus solely on acquiring and preserving lands and are silent on the public's rights to use the lands (although public access might be implied). The value of common use of the lands, however, is one of the bases for creating new constitutional trusts. Under a "commons" rationale, state constitutions therefore should provide for open public use of the land, except to the degree that the legislature determines that use must be regulated either to protect the ecological or historical value of the land or to maximize common benefits by restricting overcrowding or inconsistent uses.

Finally, under what, if any, circumstances should lands be removable from a constitutional trust and its protections? The California Constitution's current restrictions on tideland sales illustrate the dangers of placing inflexible limits on particular lands. Fearful of legislative misadventures, and responsive to the nineteenth century interest in protecting navigation, the 1879 California Constitution strictly prohibited sales of tidelands within two miles of any incorpo-

rated area and bordering on "any harbor, estuary, bay, or inlet used for the purposes of navigation." The rigidity of this prohibition has forced courts over the last century to develop a number of exceptions to the restriction to account for the need to alienate specific tidelands.[117] As the public interest has evolved to focus on other nonnavigable uses of tidelands, moreover, the constitutional protection, with its narrow focus on premium navigation sites, has grown increasingly misaligned with the public's actual interests.

Rather than imposing flat restrictions on alienation, process safeguards often may be more sensible. Requirements that land removals be approved by two separate legislative sessions, as the New York Constitution requires,[118] can help ensure full and deliberate consideration of the potential ramifications. Supermajoritarian requirements, as imposed by Maine and North Carolina,[119] can help protect against legislative tendencies to discount diffuse public values. Both procedural approaches permit land decisions to evolve with changing conditions, information, and needs, while still protecting against unwarranted privatization or development.

Conclusion

State constitutions today contain a varied mishmash of environmental provisions ranging from broad policy directives to hyperlegislation on subjects such as gill netting, mining reclamation, and animal trapping. Because the constitutions seldom provide guidance on the more difficult issues underlying environmental policy, state courts often have ducked enforcement of the existing provisions, and most provisions appear to have had little impact on actual policy decisions.

Future constitutions should return to first principles and address environmental issues at a broader and more fundamental level. Framers of the constitutions should focus on at least three categories of provisions. First, state constitutions for the twenty-first century should include environmental Value Declarations. Whether the constitutions should go further and include specific directives, rights, or duties that constrain the state government's discretion on environmental issues is a more difficult question. Whether or not the environmental provisions constrain governmental discretion, however, the provisions should give greater guidance than current provisions do on such underlying issues as scientific uncertainty and the potential trade-offs between environmental protection and economic development. In developing this guidance, the drafters of future constitutional provisions may find useful models in international environmental agreements.

Second, future constitutions should provide for the conservation of natural resources. The emphasis should be on society's trust responsibility to future generations. Here again, provisions should provide greater guidance on the

appropriate management of both renewable and depletable resources and may be able to use international environmental agreements as models.

Finally, state constitutions for the twenty-first century should provide for "commons trusts." State constitutions' traditional focus on access to tidelands and navigable water for commerce and fishing is outdated. Commons trusts should encompass not only these traditional trust lands, but all lands of significant recreational, aesthetic, ecological, or historical value to the general public. The purposes of the trusts also should be expanded to include recreation, historical preservation, and environmental protection. The legislature should retain discretion to determine which lands should be placed in and removed from the trust, but constitutions should include process safeguards to ensure that land is removed only after careful thought.

NOTES

1. Articles providing general overviews or analyses of these provisions include Bret Adams et al., "Environmental and Natural Resources Provisions in State Constitutions," 22 *J. Land Resources & Envtl. L.* 73 (2002); Barton H. Thompson, Jr., "Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance," 27 *Rutgers L.J.* 863 (1996).

2. *See,* for example, *Concerned Citizens v. Brunswick County Taxpayers Ass'n v. Rhodes,* 404 S.E.2d 677 (N.C., 1991) (using prescriptive easement doctrine to provide beach access); *Matthews v. Bay Head Improvement Ass'n,* 471 A.2d 355 (N.J., 1984) (using public trust doctrine to provide beach access); *Gion v. City of Santa Cruz,* 465 P.2d 50 (Cal., 1970) (using dedication doctrine to provide beach access); *State ex rel. Thornton v. Hay,* 462 P.2d 671 (Ore., 1969) (using doctrine of custom to provide beach access).

3. Va. Const., art. XI, § 1.

4. Mich. Const., art. IV, § 52.

5. For a detailed analysis of California's environmental provisions, see Barton H. Thompson, Jr., *Environmental Policy and the State Constitution: The Role for Substantive Policy Guidance, in Constitutional Reform in California 473* (Bruce E. Cain and Roger G. Noll, eds. 1995).

6. N.C. Const., art. XIV, § 5.

7. Idaho Const., art. XV; N.M. Const., art. XVI, § 2.

8. Ill. Const., art. XI, § 1.

9. *Glisson v. City of Marion,* 720 N.E.2d 1034, 1041–45 (Ill., 1999). In *Glisson,* the construction of a water supply dam by the city of Marion, Illinois, allegedly threatened to destroy the habitat of two species listed by the State of Illinois as endangered or threatened—the least brook lamprey and the Indiana crayfish.

10. Ga. Const., art. III, § VI, par. II(a)(1).

11. *See,* for example, *Hayes v. Howell,* 308 S.E.2d 170, 176 (Ga., 1983) (concluding that environmental legislation would be a legitimate exercise of state police power even absent the Georgia Authorization provision).

12. R.I. Const., art. I, § 16.

13. Va. Const., art. XI, § 1.

14. For an example involving the Montana legislature, see Barton H. Thompson, Jr., "Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions," 64 *Mont. L. Rev.* 157, 182 (2003).

15. *See,* for example, Maine Const., art. IX, § 23 (supermajority); N.Y. Const., art. XIV, § 4 (separate legislative sessions).

16. R.I. Const., art. I, § 16.

17. Cal. Const., art. IV, § 20.

18. Ibid. Many of the fish and game commissions created in state constitutions are modeled after a "Model Fish and Game Commission" developed by the International Association of Game, Fish, and Conservation Commissioners in 1934 to give fish and game decisions to expert entities, partially shielded from direct interest group pressures. See Arguments in Favor of Assembly Constitutional Amendment No. 45, in *Proposed Amendments to Constitution, Propositions, and Proposed Laws* 19 (Cal. Sec. of State, 1940).

19. Mich. Const., art. IV, § 52.

20. Cal. Const., art. I, § 25.

21. *See,* for example, Advisory Op. to the Gov'r, 706 So. 2d 278, 281 (Fla., 1997); Petition of Highway US-24, 220 N.W.2d 416 (Mich., 1974); *Commonwealth v. National Gettysburg Battlefield Tower,* 311 A.2d 588 (Pa., 1973).

22. *See,* for example, *Stop H-3 Ass'n v. Lewis,* 538 F. Supp. 149 (D. Haw., 1982), modified on other grounds, 740 F.2d 1442 (9th Cir., 1984), cert. denied, 471 U.S. 1108 (1985); *Enos v. Sec'y Envt'l Affairs,* 731 N.E.2d 525, 532, n. 7 (Mass., 2000); *City of Elgin v. County of Cook,* 660 N.E.2d 875, 891 (Ill., 1995); *State v. General Dev. Corp.,* 448 So. 2d 1074 (Fla. Dist. Ct. app., 1984), aff'd, 469 So. 2d 1381 (Fla., 1985).

23. Wisc. Const., art. IX, § 1.

24. Colo. Const., art. XVI, § 6.

25. Mass. Const., amend. XLIX.

26. Ill. Const., art. XI, § 1.

27. Haw. Const., art. XI, § 9; Ill. Const., art. XI, § 2.

28. N.Y. Const., art. XIV, § 5.

29. For a general discussion of citizen suit provisions in national environmental laws, see Barton H. Thompson, Jr., "The Continuing Innovation of Citizen Enforcement," 2000 *U. Ill. L. Rev.* 185.