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Decarbonizing Constitutions

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The threat of climate change demands far-reaching, systematic changes to the global economy—and similar changes to how governments around the world set environmental policies. In recent years, many environmental policymakers have developed plans to "decarbonize" the economy. These plans provide detailed, sector-specific plans for how the latest scientific consensus on climate change can be incorporated into the policymaking process and for how the Sustainable Development Goals can be achieved. But articulating the policies is one thing—actually setting them is another.

Frequently absent from this conversation is the role that American constitutions can play in averting climate change. Other countries, however, do not have this problem. Around the world, many countries' supreme courts have issued bold and far-reaching decisions in the climate change arena. Many of these decisions have forced governments to comply with their commitments under the Paris Agreement; others have recognized environmental "rights," possessed either by individual people or even by nature itself. And many of these decisions have been predicated on supportive language in national constitutions. In the United States, however, no court has issued a similarly sweeping ruling—and few constitutions contain provisions that are meant to systematically address climate change or other environmental crises.

Accordingly, in this Article, I argue that state constitutions could serve a vital role in decarbonizing the American economy. I conduct a comprehensive

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survey of provisions in nineteenth-century state constitutions that affected the environment—through resource allocation, land management, water rights, eminent domain, and so on—and argue that many of the principles underlying these provisions could be adapted to contemporary constitutional drafting. I also critically survey the handful of environmental "bills of rights" in state constitutions and explore why these provisions have been largely ineffective so far. Ultimately, I argue for the ratification of state constitutional amendments that set environmental policies to decarbonize the American economy—and outline what these amendments might look like in practice.

INTRODUCTION

In 1965, the environmental movement was gaining steam. *Silent Spring* had been published just a few years earlier, drawing international attention to the devastating effects of pesticides. The need to address air pollution resulted in in the Clean Air Act of 1963—which ultimately created the framework for the more successful Clean Air Act amendments of 1970.[1] Though Congress had passed legislation to mitigate water pollution in decades prior, the flaws of its past statutory schemes prompted it to pass the Water Quality Act of 1965,[2] which in turn formed the basis for the Clean Water Act.[3]

In the decades that followed, federal and state authorities beefed up existing environmental regulations—and layered new ones on top—inaugurating what many scholars have called the "command-and-control" regime. Put simply, the government guided the conduct of private actors, requiring them to reduce their emissions of certain chemicals or compounds and to incorporate into their processes the "best available technology" for environmental compliance.[4] Over time, however, the scholarly consensus began shifting against "command-and-control"

1. Christopher D. Ahlers, *Origins of the Clean Air Act: A New Interpretation*, 45 ENV'T L. 75, 84–96 (2015); John P. Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183, 1190–93 (1995).

2. *See, e.g.,* Frank J. Barry, *Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1114–16 (1970); Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards under the Clean Water Act*, 36 VAND. L. REV. 1167, 1177–80 (1983).

3. Gaba, *supra* note 2 at 1180.; *see also* William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 537 n.6 (2004).

4. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1334–40 (1985); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1235–41 (1995); Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887, 910–14 (1999); Peter Lehner, *The Logjam: Are Our Environmental Laws Failing Us or Are We Failing Them?*, 17 N.Y.U. ENV'T L.J. 194, 196 (2008).

regulation and toward economic incentives,[5] which rely on market principles to effect positive environmental change—through subsidies, trading systems, and price-setting.[6]

But the primary environmental challenge of today is climate change, and though the federal government's response to pollution has arguably been effective,[7] climate change may necessitate a different solution.[8] That is to say, even if carbon dioxide *can*, or *must*, be regulated by the U.S. Environmental Protection Agency as a pollutant under the Clean Air Act,[9] it may not be possible to "Clean Air Act" our way out of climate change.[10] Moreover, even assuming that it is possible for the federal government to develop a workable solution to climate change within the existing regulatory framework, intractable problems still remain. Modern

5. *E.g.,* Cary Coglianese*, The Limits of Performance-Based Regulation*, 50 U. MICH. J.L. REFORM 525, 525–30 (2017); Cole & Grossman, *supra* note 4 at 887 ("It has become an article of faith among economists, legal scholars, and policy makers that economic forms of regulation such as effluent taxes and emissions trading are inevitably more efficient than traditional command-and-control regimes for environmental protection."); Timothy F. Malloy, *The Social Construction of Regulation: Lessons from the War Against Command and Control*, 58 BUFFALO L. REV. 267, 312–43 (2010); Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83, 83–85 (2000).

6. Daniel C. Esty, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 ENV. L. 1, 10 (2017) ("I argue, in particular, for a *sustainability* strategy that goes beyond 'red lights' that tells polluters what they cannot do, and creates an expanded structure of 'green lights'—incentives to spur fresh thinking and creative responses to persistent pollution challenges.").

7. *E.g.*, David A. Keiser & Joseph S. Shapiro, *US Water Pollution: Regulation over the Past Half Century: Burning Waters to Crystal Springs?*, 33 J. ECON. PERSPECTIVES 51, 71 (2019) ("In 1970, the United States created the Environmental Protection Agency, then passed two sweeping laws designed to improve water quality—the Clean Water Act and the Safe Drinking Water Act . . . . A half century later, many measures of drinking and surface water quality have improved, in part because of these laws.").

8. *E.g.,* Matthew D. Zinn, *Adapting to Climate Change: Environmental Law in a Warmer World*, 34 ECOLOGY L.Q. 61, 82–84 (2007).

9. *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

10. William F. Pedersen, *Adapting Environmental Law to Global Warming Controls*, 17 N.Y.U. ENV'T L.J. 256, 260–63 (2008) (describing difficulties of regulating greenhouse gases under the Clean Air Act).

environmental policymaking is fraught with difficulties in coordination,[11] depends too much on consistent enforcement by executive branches, and faces considerable headwinds in the federal courts.[12]

But the problems with the current environmental regulatory sphere are not insurmountable. Many modern environmental scholars argue that one of the best solutions to climate change is the "deep decarbonization" of the economy.[13] Deep decarbonization should be understood as the ambition of not only reducing the world's annual greenhouse gas emissions but also actively taking steps to *remove* carbon from the atmosphere and dismantling the infrastructure that supports carbon-based energy generation. International organizations, countries, and private companies have set aspirational targets of "net-zero" greenhouse gas emissions—which collectively encompass the idea that achieving *literally* zero

11. More specifically, coordination problems exist among federal agencies with different portfolios, J. B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 64–65 (2010); among the federal and state governments, Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 807–08 (2005); and among global governments, William Boyd, *Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32 U. PA. J. INT'L L. 457, 497–513 (2010).

12. *E.g.*, SAMUEL MOYN & AARON BELKIN, TAKE BACK THE COURT, THE ROBERTS COURT WOULD LIKELY STRIKE DOWN CLIMATE CHANGE LEGISLATION (Sept. 2019), https://www.takebackthecourt.today/scotus-will-overturn-climate-change-legislation [https://perma.cc/LZ4F-HXLH]. For an analysis of how the Court could strike down climate change legislation on Commerce Clause grounds, see Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENV'T L. REV. 1 (2003), and on anti-commandeering grounds, see Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After NFIB v. Sebelius*, 43 ECOLOGY L.Q. 671 (2016).

13. For some ambitious, but realistic, views of what this might look like, see generally PRINCETON UNIVERSITY, NET-ZERO AMERICA: POTENTIAL PATHWAYS, INFRASTRUCTURE, AND IMPACTS (2020), https://netzeroamerica.princeton.edu/the-report [https://perma.cc/226Q-2RNE] [hereinafter NET-ZERO AMERICA]; NAT'L ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, ACCELERATING DECARBONIZATION OF THE U.S. ENERGY SYSTEM (2021) [hereinafter ACCELERATING DECARBONIZATION]; SUSTAINABLE DEVELOPMENT SOLUTIONS NETWORK, AMERICA'S ZERO CARBON ACTION PLAN (2020), https://www.unsdsn.org/Zero-Carbon-Action-Plan [https://perma.cc/Q9S7-LTUT] [hereinafter ZERO CARBON ACTION PLAN].

emissions is impossible and the belief that a balance of emissions-reduction and natural carbon storage strategies is likely necessary.[14] In support of these ambitious targets, U.S. policymakers have proposed a variety of different mechanisms, including aggressive carbon-pricing or -trading strategies, that work through detailed, careful policymaking that deconstructs our country's carbon infrastructure. Others argue—simultaneously, not alternatively—that the enactment of a "Green New Deal" to aggressively adapt built infrastructure throughout the country and to stimulate the generation of carbon-free energy is also a necessary path.

Signaling the urgency of the moment, leading policymakers have sought to integrate environmental and climate change policies into (seemingly) unrelated policy efforts, as well. In his first months in office, President Joe Biden has explicitly called for an "All-of-Government" approach to climate change, in which he seeks to incorporate climate action into every aspect of the federal government.[15] But this "all-of-government" approach, while ambitious, necessarily assumes that the powers of *existing* governmental institutions can be corralled in support of the climate change agenda and are sufficient for the task at hand. There has been little dialogue about whether the existing institutions of the federal government are properly equipped to decarbonize the U.S. economy or whether they are the best ones to do so.

In sum, all of the well-known proposals for combatting climate change, whether through carbon pricing, emissions limits, or even federal constitutional amendments, face complex, perhaps impossible, legal and political hurdles. There is much to be said, however, for using state constitutions as a tool for decarbonization. Unlike the federal constitution, state constitutions are usually quite easy to amend. In many states, the threshold for legislative approval of a constitutional amendment is considerably lower than it is for federal amendments;[16] while the U.S. Constitution requires a two-thirds vote by Congress to propose an amendment,[17] most states have set lower thresholds for state legislative

14. *E.g.*, Joeri Rogelj, Oliver Geden, Annette Cowie & Andy Reisinger, *Net-Zero Emissions Targets Are Vague: Three Ways to Fix*, 591 NATURE 365 (2021).

15. *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, BIDEN FOR PRESIDENT, https://joebiden.com/environmental-justice-plan/ [https://perma.cc/X5DC-FQGR] (last visited July 31, 2021).

16. Bruce E. Cain & R. G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1523–24 (2009).

17. U.S. CONST. art. V.

votes.[18] Moreover, though all states but Delaware require ratification of any proposed amendment by the electorate, no state has any sort of ratification procedure mirroring the U.S. Constitution's requirement that three-fourths of state legislatures ratify any proposed amendment.[19] (Indeed, some scholars have suggested that state constitutions are perhaps *too* easy to amend.[20])

Perhaps most significantly, while the overall structure of the federal government has remained intact since the Constitution was first ratified in 1789, the structures of state government have *radically* changed. At the time the Declaration of Independence was signed in 1776, the typical state had an indirectly elected governor, an executive council, and no statewide elected officials.[21] Over the last two-and-a-half centuries, these structures have been torn down and reimagined.[22] The most significant of these changes typically occurred in response to exogenous crises or societal concerns. Increased public dissatisfaction with the anti-democratic institutions in many original state constitutions and pressure from Jacksonian democratic reformers led state governments to open themselves

18. John Dinan, *State Constitutions*, *in* BOOK OF THE STATES 3, 8–10 (Council of State Gov'ts ed. 2019).

19. *See id.*

20. Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 95 (1982); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 820 (1992) ("The Alabama Constitution has been amended over five hundred times, the California and South Carolina Constitutions over four hundred times, and the Texas Constitution more than two hundred times. If these histories also reveal the character of the people of the states, they reveal people who are fickle and unreflective—people who do not know what they want, who change their minds frequently, and who are apparently incapable of learning from their mistakes.").

21. *See* Sturm, *supra* note 20, at 61–62.

22. *See generally* T. Quinn Yeargain, *Democratizing Gubernatorial Selection*, 14 NE. U. L. REV. 1 (2022) (describing the creation of popularly elected governors in every state); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 496–98 (2017) (describing the vast reforms to executive branches); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 882 (2021) (describing the wave of democratization in nineteenth-century constitutional development).

up to unprecedented public participation.[23] State governments were radically democratized and the electorate was expanded.[24] As the century continued, the number of statewide elected officials increased—largely with subject area-specific roles—in response to the increased complexity of the economy.[25] During the Progressive era, governors emerged as increasingly powerful figures in state government, as they were intended to use the regulatory power granted to them by progressive reformers.[26]

Though it is, for obvious reasons, difficult to appreciate the historical significance of a moment while simultaneously living through it, climate change presents a once-in-a-generation threat to the future of the human race. But as of now, this crisis has *not* provoked significant changes in state constitutions. Efforts to reimagine state constitutions as governing documents for a green future have remained largely nonexistent and disappointingly unsystematic. In light of this vacuum, state constitutional scholars and environmental scholars alike should ask: *Why shouldn't the existential threat of climate change result in profound changes to the organization and powers of state government?*

After all, state constitutions are *already* environmental documents. Beginning in the mid-nineteenth century, states were admitted to the Union with constitutions that set out clear environmental policies.[27] They may not have been conceived that way at the time, given the virtual non-existence of the environmental movement and the absence of adequate vocabulary,[28] but many original state constitutions adopted policies with direct, lasting, consequential effects on environmental policymaking.[29]

Experts in water law will recognize, for example, the extent to which western states constitutionalized water rights—and in so doing, wrought environmental havoc on future generations.[30] Property law scholars can

23. Seifter, *supra* note 22 at 495–96; Sturm, *supra* note 20, at 63–66; Quinn Yeargain, *Administrative Capacity in Direct Democracy*, 57 UC DAVIS L. REV. (forthcoming 2023).

24. Bulman-Pozen & Seifter, *supra* note 22, at 872.

25. *See* Sturm, *supra* note 20 at 67–68.

26. Seifter, *supra* note 22, at 496–98; Sturm, *supra* note 20, at 68–70.

27. *See infra* Part I.

28. *See, e.g.*, RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 47–50 (2004) (noting the modern emergence of the environmental movement in the mid-twentieth century).

29. *See infra* Part I.

30. *See infra* Part I.A.2.

similarly appreciate how broad grants of eminent domain power and land-grant provisions that tied land sales to education funding encouraged economic development and massive population growth.[31] Those interested in energy law would see how railroad regulations in state constitutions, and the creation of railroad commissions, set the scene for modern-day public utility regulation.[32] That is not to say that these were *good* policies, or environmental*ist* policies—merely that they did set *environmental* policy.

State constitutions are also environmental documents in more abstract ways. By including provisions guaranteeing access to public lands, frequently through amendments that have guaranteed the right to hunt and fish, state constitutions incorporated the (much older) public-trust doctrine.[33] Following Joseph Sax's popularization and advancement of the public-trust theory in the 1970s,[34] the theory became a significant part of environmental litigation at the state level—especially in states where the public-trust doctrine was constitutionalized.[35]

And during the zenith of the environmental movement, several states also adopted so-called "environmental bills of rights" in their constitutions. These provisions sought to provide each member of the public with a general right to live in a clean environment free of pollution.[36] And in the last few decades, state-level environmental activists have amended their constitutions in piecemeal fashion through the initiative process in ways that sought to lock in green policies.[37]

Up against this robust history of environmental constitutionalism, there exists a unique opportunity. From the past, we can learn what worked well (and what did not) and use the lessons of environmental constitutionalism to illuminate the task of constitutionalizing environmentalism. This Article lights the way, by laying out a plausible, ambitious path toward establishing state constitutions as tools of decarbonization—and toward treating decarbonization as *the* animating principle of twenty-first century state constitutional development—through targeted amendments. In laying out this path, I draw on two-and-a-half centuries of institutional growth in state

31. *See infra* Part I.A.1, I.A.4.

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

33. *See nfra* Part II.B.

34. *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

35. *See infra* Part II.B.

36. *See infra* Part II.A.

37. *See infra* Part II.C.

constitutional development, and link together the distinct threads of environmental policymaking in state constitutions.

I begin, in Part I, by outlining the underdiscussed nineteenth-century constitutional provisions that played a role in the development of modern agricultural, energy, land, and water policies. In my taxonomy, these provisions can be divided into two different buckets—those that created environmental rules (which are broader than mere policies and embody guidelines for how state actors can act or what rights are protected) and those that created environmental institutions (which are meant to enforce the former).

In Parts II and III, I lay out more modern efforts to constitutionalize environmental goals. In Part II, I highlight two structures in particular: environmental bills of rights and the public trust doctrine. I evaluate the rights-based approach to environmental constitutionalism critically, ultimately concluding that it has been largely ineffective. My discussion of the public-trust doctrine primarily focuses on its use in contemporary climate-change litigation—most notably, the *Juliana* case—and comes to a similar conclusion of ineffectiveness. Then, in Part III, I discuss the relatively modern adoption of specific environmental commitments and policies, like renewable energy standards or conservation requirements, and explore the outcomes of these proposals.

Finally, in Part IV, I bring the preceding two parts together. Building on my observations about the ineffectiveness of prior efforts, I argue for a new approach to constitutionalizing environmentalism—one that couples the effectiveness of nineteenth-century constitutions with the environmentalist intentions of more recent efforts. In reaching this conclusion, I emphasize my general skepticism of a rights-based approach as a means of achieving meaningful decarbonization, explaining that these approaches have produced largely underwhelming results and inadequate progress. I further note that a widely constitutionalized right to a healthy environment could serve an environmental justice purpose: namely, ensuring that the benefits (and harms) of decarbonization are equitably spread across all communities.

I. NINETEENTH-CENTURY CONSTITUTION-MAKING AND THE ENVIRONMENT

Early state constitutions do not, at first glance, look like environmental documents. Most of them set out the bare-bones structure of state government without much fanfare and did not delve into policy—much less environmental policy. But many constitutions adopted in states west of the Mississippi River deviated from this (general) pattern. Though generally

quite unimaginative documents,[38] most of them included provisions that set out some elements of environmental policy, even if only in the context of laying out *economic* policy.

For this Part, I conduct a survey of environmental provisions in nineteenth-century state constitutions and then categorize these provisions as *rules* (Section A) or *institutions* (Section B).[39] Rules establish standards of conduct, either by private parties or the government. They create rights, mandate specific state procedures, or govern how policy can be adopted. Institutions establish how that conduct is governed and regulated—and specifically, by what arm of the government. By conceptualizing constitutional change as falling into these two categories, decarbonization goals can be structured around creating new rules and establishing new institutions (or modifying existing ones).

A. Environmental Rules

Rules are common features of constitution-making, with every constitution setting out some combination of procedural and substantive rules. In some cases, these rules might be adopted in service of some broader ideological goal—though reasonable people might disagree as to which rules these are and which goals they serve.[40] But in nineteenth-century state constitutions, especially western state constitutions, the substantive rules included with them served a fairly explicit goal: economic development.

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38. Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 21–22 (1982).

39. At the outset, I note that I am careful to avoid casting an overly large net—one that snags provisions that are only tangentially related to specific environmental outcomes. To avoid that over-inclusiveness, I focus this Article's attention on constitutional provisions that (a) adopt *specific* policies, procedures, or principles that (b) have had direct effects on the natural environment or on environmental policymaking specifically.

40. For example, many southern constitutions adopted in the late nineteenth century were drafted to undermine the pluralistic, multiracial democracies created by Reconstruction-era constitutions. This goal was accomplished by gerrymandering state legislatures to prevent a Black majority from ever winning a governing majority—and then by dramatically enhancing the legislature's power at the expense of the executive. *See generally* PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860–1902, at 187–225 (2017).

In this section, I lay out the substantive rules adopted in state constitutions that, though not adopted with the explicit *goal* of setting environmental policy, undoubtedly did. These rules set environmental policy by encouraging unsustainable (and environmentally harmful) economic development, especially in the agricultural and extractive industries, and incentivized population growth by rapidly selling off land and natural resources. The most common constitutional provisions fell into four categories: (1) permissive eminent domain rules; (2) water rights; (3) tax policy; (4) public land management. While the specific results of these provisions can be difficult to comprehensively trace out, they created regulatory structures that laid the foundation for a carbon-intensive infrastructure to flourish.

1. Permissive Eminent Domain Rules

Under some of the original constitutions adopted in western states, "public use"—for the purposes of eminent domain—was defined quite broadly. In many western states, "public use" generally extended to the creation of specific infrastructure projects to transport water to agricultural or mining operations. For example, the Colorado Constitution included a general ban on taking private property for private use, but drew out a significant exception for "reservoirs, drains, flumes, or ditches . . . for agricultural, mining, milling, domestic, or sanitary purposes."[41] Other constitutions either created near-identical exceptions to their bans on using eminent domain for private purposes—or explicitly defined these uses as "public."[42]

As Alexandra Klass points out, state legislatures added muscle to these provisions by "grant[ing] eminent domain authority to private companies in connection with mining, oil and gas, and other natural resource development."[43] While it is difficult to track the full extent to which these provisions had a negative effect on the environment,[44] at a *minimum*, they

41. COLO. CONST. art. II, § 14 (1876).

42. COLO. CONST. art. XVI, § 7 (1876); IDAHO CONST. art. I, § 14 (1889); OKLA. CONST. art. II, § 23 (1907); WASH. CONST. art. I, § 16 (1889); WYO. CONST. art. I, § 32 (1889).

43. Alexandra Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 659 (2008)..

44. *E.g.*, James M. Kaze, *Eminent Domain: Exploitation of Montana's Natural Resources*, 35 MONT. L. REV. 279, 284–90 (1974); Klass, *supra* note 43, at 661–

empowered extractive (and often carbon-intensive) industries by creating a regulatory structure that allowed companies to amass significant natural resources.

Moreover, many of them have continued force today. Takings under these permissive eminent domain rules—even by private actors—continue to occur.[45] It is also not clear the extent to which separate state constitutional provisions, like Montana's constitutionalized right to a healthy environment,[46] meaningfully limit the scope of this broad eminent domain power. In *Montana Talc v. Cypress Mines*, for example, the Montana Supreme Court approved a private taking on the part of one mining company against another. In so doing, it approvingly cited a case from nearly a century earlier, in which the court held that "it has been the policy of the state, indicated by its constitutional and statute law, as interpreted by this Court, *to foster and encourage the development of the state's mineral resources in every reasonable way*."[47] At no point did the court mention, even in passing, any of the state constitution's environmental protection provisions or the way in which those provisions might have meaningfully altered state policy.

Additionally, even outside of this context, public utilities retain the ability to exercise eminent domain for their own economic activities. Even in states *without* explicit constitutional provisions that tie "public use" (for the purposes of eminent domain) to any particular industry, most state courts have found public use to exist when the taking pertains to a *public* utility.[48]

Eminent domain serves as a powerful tool for maintaining the hegemony of fossil fuel companies, especially in the context of building pipelines. While these eminent domain rules have been able to be repurposed in recent years to lay transmission lines for some renewable

69; Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 33 J. ECON. HIST. 232, 245–48 (1973).

45. Klass, *supra* note 43, at 669–76.

46. *See infra* Part II.A.

47. Montana Talc Co. v. Cyprus Mines Corp., 748 P.2d 444, 449 (Mont. 1987).

48. *E.g.*, Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENV'T L. 1, 32 (1980).

energy projects,[49] fossil fuel companies remain the primary beneficiaries of the expansiveness of the rules.[50]

But changes to state constitutional rules for eminent domain in the last few decades demonstrate how these rules might be changed in this context, too. The U.S. Supreme Court's decision in *Kelo v. City of New London* expanded the force of the Takings Clause, by allowing the city of New London to take private property and transfer it to another private party, with the rationale that the resulting economic development constituted a permissible "public use." *Kelo* galvanized public opinion against the use of eminent domain for economic development—or, at least, eminent domain that transferred ownership of land from one private party to another. But in the aftermath of the decision, Alexandra Klass and other commentators observed a parallel between what the Court permitted the City of New London to do and what western states had long done in the name of natural resource extraction in their state constitutions.[51]

Nonetheless, after the decision was handed down, state legislators moved to amend their state constitutions, or adopt statutory modifications, that sought to make the practice deemed constitutional in *Kelo* impossible in their states.[52] Exceptions to this shift remain, usually for the benefit of public utility companies, demonstrating how ingrained in state constitutional law these principles are.[53] But the shift demonstrates that

49. James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 702–03 (2019).

50. *Id.* at 680–92.

51. Klass, *supra* note 43, at 652–53. *See generally* Joshua U. Galperin, Note, *A Warning to States—Accepting This Invitation May be Hazardous to Your Health (Safety and Public Welfare): An Analysis of Post-*Kelo *Legislative Activity*, 31 VT. L. REV. 663 (2007).

52. *E.g.*, Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2114–48 (2009). As Somin points out, most of these efforts were "largely symbolic in nature, providing little or no protection for property owners." *Id.* at 2105.

53. *E.g.*, MISS. CONST. art. III, § 17A (amended 2011) (exempting "drainage and levee facilities and usage, roads and bridges for public conveyance, flood control projects with a levee component, seawalls, dams, toll roads, public airports, public ports, public harbors, public wayports, common carriers or facilities for public utilities and other entities used in the generation, transmission, storage or distribution of telephone, telecommunication, gas, carbon dioxide, electricity, water, sewer, natural gas, liquid hydrocarbons or other utility products" from the general prohibition against private party-to-private party eminent domain transfers).

change in this space is possible—especially if the pitch to the public uses the same populist framing that *Kelo* opponents used.

2. Water Rights

In most western states, prior appropriation governs the allocation of water rights.[54] Under prior appropriation, water rights are allocated chronologically and based on "beneficial use."[55] The first use of the water source has priority over later uses, so long as the first use is beneficial and not wasteful.[56] This contrasts with the riparian doctrine, the dominant method in eastern states, which allocates water rights based on geographic proximity to the water source.[57]

Prior appropriation came about somewhat organically in western states as a result of limited water resources.[58] Early settlers to the West needed water for their mining operations, which were water-intensive: "In some cases, the miners were interested in the gravels in and along the streams; in others, they needed large volumes of water under high pressure to blast rock off hillsides."[59] Accordingly, they developed a practice of "taking water where they found it and using it where they needed it," which morphed into a "crude system of notice . . . to indicate the amount taken by and the nature of the use of each appropriator."[60] As governments came into force in the region, prior appropriation was further entrenched in law, reflecting lawmakers' views that the arid lands of the west needed to be *reclaimed*

54. *E.g.*, A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric*, 76 N.D. L. REV. 881, 881 (2000).

55. *Id.* at 882.

56. Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENV'T L. 919, 933–46 (1998) (laying out how courts have defined "waste").

57. Joseph W. Dellapenna, *Adapting Riparian Rights to the Twenty-First Century*, 106 W. VA. L. REV. 539, 555-56 (2003).

58. Tarlock, *supra* note 54, at 890.

59. Lawrence J. Macdonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228, 244 (2015).

60. Chennat Gopalakrishnan, *The Doctrine of Prior Appropriation and Its Impact on Water Development: A Critical Survey*, 32 AM. J. ECON. & SOC. 61, 62 (1973) (citation omitted).

through heavy irrigation.[61] The imposition of prior appropriation, therefore, functioned as a pro-growth measure. It ensured that rapid economic and population growth was able to occur, fully supported by a water-rights system that did not ask whether the water allocation was going toward the *best* use—just the earliest "beneficial" (or *economic*) one.[62]

Unlike in eastern states, where the riparian rights doctrine developed as a matter of common law,[63] in western states, the doctrine of prior appropriation was given constitutional force. Most of the constitutions adopted by western states included provisions specifically adopting prior appropriation.[64] More broadly, and outside the specific context of establishing individual water rights, some state constitutions indicated a strong preference for the use of water for agricultural, mining, or industrial purposes.[65]

Today, western states face demands for water that exceed available supply, experience droughts that further limit their water supply,[66] and are

61. *See, e.g.*, United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 704 (1899) (referring to the need for "the reclamation of arid lands" through aggressive irrigation); *see also* Norman K. Johnson & Charles T. DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 NAT. RESOURCES J. 347, 354 (1989) (noting that the Reclamation Act of 1902 "marked the culmination of years of debate concerning 'reclaiming' western land from its arid state to make it productive for agricultural purposes").

62. Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675 (2012); Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228 (2015).

63. *See generally* T. E. Lauer, *The Common Law Background of the Riparian Doctrine*, 28 MO. L. REV. 60 (1963) (outlining the origin of the riparian doctrine in the common law).

64. COLO. CONST. art. XVI, §§ 5–6 (1876); IDAHO CONST. art. XV, § 1, 3–6 (1889); MONT. CONST. art. III, § 15 (1889); UTAH CONST. art. XVII, § 1 (1895); WYO. CONST. art. VIII, § 3 (1889).

65. *E.g.*, N.D. CONST. art. XVII, § 210 (1889) ("All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and manufacturing purposes."); WASH. CONST. art. XXI, § 1 (1889) ("The use of the waters of the state for irrigation, mining and manufacturing purposes shall be deemed a public use.").

66. *E.g.*, Gabriel Eckstein, *Water Scarcity, Conflict, and Security in a Climate Change World: Challenges and Opportunities for International Law and Policy*, 27 WIS. INT'L L.J. 409, 412 (2009).

projected to lose even more of their supply as climate change continues unchecked. Those realities challenge the effectiveness of prior appropriation in allocating water rights in the twenty-first century. The prior-appropriation doctrine creates two perverse incentives—both of which stand in diametric opposition to the need for water conservation and equitable distribution. First, prior appropriation generally encourages the over-utilization of limited water resources by upstream, first-in-priority users.[67] Second, under prior appropriation, conservation is not considered to be a "beneficial use"—thereby encouraging the use of *all* water.[68]

Moreover, prior appropriation locks in existing allocations in a way that does not easily allow for conservation or recalibration to reflect ecological realities. As Robin Craig has noted, prior appropriation layers water rights on top of each other.[69] It protects the rights of downstream water users by restricting the ability of upstream water users to "alter the overall river flow pattern," which can harm downstream users—a restriction known as the *no-injury requirement*.[70] These restrictions make it difficult to adjust existing rights to respond to droughts or other immediate needs.[71]

While the competing system of water rights, the riparian-rights doctrine, faces its own challenges in adjusting its allocations to respond to climate change,[72] it enjoys substantially less constitutional protection than prior appropriation—which Christine Klein notably argued had acquired the status of "constitutional mythology."[73] Moreover, few states have *constitutionalized* their adoption of riparian rights. The continued constitutional force of prior appropriation-based systems (at least, in the

67. Robert Haskell Abrams, *Prior Appropriation and the Commons*, 37 UCLA J. ENV'T L. & POL'Y 141, 151–57 (2019).

68. *See id.* at 157–60.

69. Robin Kundis Craig, *Drought and Public Necessity: Can a Common-Law "Stick" Increase Flexibility in Western Water Law?*, 6 TEX. A&M L. REV. 77, 84 (2018).

70. *Id.* at 87.

71. *Id.*

72. *E.g.*, Robert H. Abrams & Noah D. Hall, *Framing Water Policy in a Carbon Affected and Carbon Constrained Environment*, 50 NAT. RES. J. 3, 21–22 (2010) (noting that, under the riparian-rights doctrine, "domestic use by a riparian proprietor is exempt from the usual reasonable use rule that requires co-riparians to share the supply," which "allow[s] cities a way to claim whatever water they need ahead of other users").

73. *See generally* Christine A. Klein, *The Constitutional Mythology of Western Water Law*, 14 VA. ENV'T L.J. 343 (1995).

western states where it is still a matter of constitutional law[74]) will cause significant problems as states attempt to deal with the realities of climate change.[75]

3. Tax Policy

By adopting broad eminent domain policies and a system of water rights relying on prior appropriation, original western state constitutions created a relatively business-friendly environment—especially for the agricultural and extractive industries. However, a far less discussed provision in state constitutions, but one with similar effect, was the favorable tax treatment of these same industries. This favorable treatment was accomplished through the use of liberal exemptions, alterations in how taxable value was assessed, and different (and thus non-uniform) tax rules.

First, many constitutions outright exempted lands used in agriculture or mining from taxation. No state wholly exempted either industry—but some got close. In Colorado, mining was exempted for ten years after the constitution was adopted.[76] Nevada and Wyoming exempted mining *lands* from property taxes, though not the products of the mines.[77] These broader exemptions were much more popular for agriculture, however, with California, Montana, Nebraska, and South Dakota exempting agricultural land from property taxes[78] and Oklahoma exempting farm equipment from personal property taxes.[79] And in Colorado and Utah, the constitutions

74. COLO. CONST. art. XVI, § 5; IDAHO CONST. art. XV, § 1; MONT. CONST. art. IX, § 3; UTAH CONST. art. XVII, § 1. *But see* Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675, 704–11 (2012) (noting the weakening of prior appropriation in recent decades).

75. Abrams, *supra* note 67, at 158 ("The constitutionalization of these provisions . . . prevents courts, legislatures, and water administration agencies alike from forbidding future appropriations or from setting aside water and making it unavailable for appropriation.").

76. COLO. CONST. art. X, § 3 (1876).

77. NEV. CONST. art. X, § 1 (1864); WYO. CONST. art. XV, § 3 (1889).

78. CAL. CONST. art. XIII, § 1 (1879); MONT. CONST. art. XII, § 2 (1889); NEB. CONST. art. IX, § 2 (1875); S.D. CONST. art. XI, § 6 (1889).

79. OKLA. CONST. art. X, § 6 (1907).

prohibited the separate taxation of ditches and canals used for agricultural purposes.[80]

Second, some constitutions altered how the value of property used for industrial purposes was assessed. California, Nebraska, and North Dakota all originally specified that improvements to agricultural land—in the form of cultivation or plowing, for example—were not included in the assessed property value.[81]

Third, many states adopted special rules for taxing agricultural and extractive activities—which don't fit cleanly into a broader category. The Montana and Utah constitutions, for example, required that mines and mining claims be taxed at a lower rate than the actual property value.[82] And constitutions in Montana, Utah, and Wyoming imposed higher taxes on mining lands that were only triggered if lands weren't used for mining purposes.[83]

4. Public Land Management

Many state constitutions contain provisions that set aside state land for the benefit of public education.[84] As land is sold, or as profits are made on the land through leases, the proceeds fund schools. This allocation of land reflected Congress's decision to transfer some federally owned lands to states upon their admission into the Union as a means of ensuring that the new states' schools were adequately funded.[85]

The environmental consequences of this policy decision have been significant. For the most part, states sold much of this land to fund their schools—but also to promote economic and population growth, as the

80. COLO. CONST. art. X, § 3 (1876); UTAH CONST. art. XIII, § 3 (1895).

81. CAL. CONST. art. XIII, § 2 (1879); NEB. CONST. art. IX, § 2 (1875); N.D. CONST. art. XI, § 177 (1889).

82. MONT. CONST. art. XII, § 3 (1889); UTAH CONST. art. XIII, § 4 (1895).

83. MONT. CONST. art. XII, § 3 (1889); UTAH CONST. art. XIII, § 4 (1895); WYO. CONST. art. XV, §§ 1-3 (1889).

84. State land trusts are differentiated from land that the state is required to hold in trust, which refers to the *public trust doctrine*, discussed later.

85. *See* Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENV'T L. 797, 806-07 (1992).

federal government intended.[86] Few states took steps to preserve these lands. However, the Colorado and Utah constitutions required their state legislatures to preserve forests on the trust lands,[87] and the Arizona and New Mexico constitutions imposed onerous restrictions on trust land sales,[88] which has led to both states retaining possession of most of their original trust lands.[89]

Today, states maintain more than 150 million acres of surface land in trust (along with 60 million mineral acres), which generate billions of dollars annually.[90] While it is difficult to trace with any meaningful precision, the environmental impact of the revenue generated from these lands, much of the revenue comes from fossil fuel production. There are over 30,000 active oil and gas leases on state trust lands and nearly 70,000 wells in operation,[91] which generate billions of dollars.[92] The revenue from fossil fuel generation *far* outpaces any revenue from renewable energy production. Some of the worst offenders are New Mexico ($961 million from oil and gas, $1.2 million from renewables), North Dakota ($157 million from oil and gas, nothing from renewables), and Texas ($890 million from oil and gas, $436,000 from renewables).[93]

86. *Id.* at 807; Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557, 567-68 (1995).

87. COLO. CONST. art. XVIII, § 6 (1876); UTAH CONST. art. XVIII, § 1 (1895). It is unclear what force these provisions have in practice. *See e.g.*, JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION 199 (2011).

88. ARIZ. CONST. art. X, §§ 1-11 (1910); N.M. CONST. art. XIII, § 1 (1910).

89. Fairfax et al., *supra* note 85, at 832.

90. *See FY21 Member State Data*, NAT'L ASS'N OF STATE TRUST LANDS (2021), https://www.statetrustland.org/uploads/1/2/0/9/120909261/report_-_topic_compilations.pdf .

91. *See id.*

92. Richard G. Newell & Daniel Raimi, *US State and Local Oil and Gas Revenue Sources and Uses*, 112 ENERGY POL'Y 12, 14-15 (2018). Richard Newell and Daniel Raimi's estimate suggests that state and local governments in these states earn $6.5 billion in oil and gas revenue from state leases, but their estimate is for state lands generally, not just state *trust* lands. *See id.*

93. *FY20 Member State Data*, *supra* note 90.

B. Environmental Institutions

The environmental rules adopted by state constitutions set lasting policies. Their lasting effect was achieved, however, not just through their pervasiveness but also because of the institutions created to enforce them. Most of these institutions were created statutorily, not constitutionally, but their origin ultimately lies in the state constitutional provisions that set rules requiring administrative oversight.

The system of selling land to fund school operations required the establishment of a land commissioner's office or a board of land commissioners.[94] Railroad commissions, which have since been reconstructed as public utility commissions, were created by virtue of the specific rules set out by state constitutions regarding railroad companies[95]—though few railroad commissions were constitutionally created offices.[96]

Similarly, the policies adopted by state constitutions with respect to natural resources—namely, water and mines—resulted in the creation of government institutions to see the policies through. State engineers, irrigation districts, and water boards oversaw the implementation of prior appropriation-based water rights in western states,[97] and mining commissioners (or inspectors) and geologists regulated extractive industries.[98] Many of these positions were the precursors to modern environmental regulators and still survive today—but have been shuffled into state departments of natural resources or environmental protection.

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94. *See infra* notes 100-102 and accompanying text.

95. *See infra* notes 115, 117 and accompanying text.

96. *See infra* note 116 and accompanying text.

97. Moses Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1ROCKY MTN. L. REV. 248, 252-62 (1929) (describing the administration of water rights in most western states); Tarlock, *supra* note 54, at 881 ("Administrative agencies, originally the office of the state engineer, supervise and police the acquisition, exercise and transfer of water rights, but administration has not altered adherence to priority.").

98. In some states, mining commissioners (or inspectors) were created in constitutions. *See, e.g.*, COLO. CONST. art. XVI, § 1 (1876) ("There shall be established and maintained the office of commissioner of mines . . . ."); OKLA. CONST. art. VI, § 25 (1907) (creating the office of chief inspector of mines, oil, and gas); OKLA. CONST. art. VI, § 26 (creating the office of assistant mine inspectors).

1. Land Commissions and Commissioners

Congress's transfer of three hundred million-plus acres of land to state governments, coupled with the requirement that the land be sold or leased to help finance public education in those states, understandably required the creation of heretofore unknown state offices and positions. Likely modeled on the land offices created by Congress in the first territories,[99] most new states created land offices (and registers thereof),[100] land commissioners,[101] or land commissions.[102]

99. *E.g.*, C. ALBERT WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM 54-59 (2d ed. 1991) https://www.blm.gov/sites/blm.gov/files/histrect.pdf [https://perma.cc/9ZW9-XAW5] (describing acts of Congress to create territorial land offices in the early nineteenth century).

100. Act of Apr. 10, 1858, ch. 176, 1858 Cal. Laws 127, §§ 1-2 (creating the State Land Office); Act of Jan. 25, 1855, ch. 153, 1855 Iowa Laws 222 (creating the State Land Office); Act of Mar. 4, 1876, ch. 131, 1876 Kan. Laws 303 (creating the State Land Office); KY. CONST. art. III, § 25 (1850) (creating the Register of the Land-Office); Act of Mar. 15, 1855, ch. 290, 1855 La. Laws 350 (creating the Register of Public Lands); MICH. CONST. art. VIII, § 1 (1850) (creating the Commissioner of the Land Office); Act of Mar. 10, 1862, ch. 62, 1862 Minn. Laws 121 (creating the Commissioner of the Land Office); 1892 Miss. Laws 279, ch. 78 (creating a Land Office); MO. CONST. art. VIII, § 9 (amended 1851) (creating the Register of Lands); Act of Mar. 12, 1885, ch. 85, 1885 Nev. Laws 101 (creating the State Land Office); N.Y. CONST. art. V, § 5 (1846) (creating the Land-Office); OKLA. CONST. art. VI, § 32 (1907) (creating the Land Office); ORE. CONST. art. VIII, § 5 (1857) (creating the board of commissioners for the sale of school and university lands); TEX. CONST. art. XII (1845) (creating the Land-Office); WIS. CONST. art. X, § 7 (1847) (creating the board of commissioners for the sale of school and university lands).

101. ARK. CONST. art. VI, § 1 (1874) (creating the Commissioner of State Lands); FLA. CONST. amend. Art. IV (amended 1870) (creating the Commissioner of Lands and Immigration); NEB. CONST. art. V, § 1 (1875) (creating the Commissioner of Public Lands and Buildings); N.M. CONST. art. XIII, § 2 (1910) (creating the Commissioner of Public Lands); S.D. CONST. art. IV, § 12 (1889) (creating the Commissioner of School and Public Lands); WASH. CONST. art. III, § 1 (1889) (creating the Commissioner of Public Lands).

102. Act of June 26, 1915, ch. 5, 1915 Ariz. Laws 2d Spec. Sess. 13 (creating the State Land Department); COLO. CONST. art. IX, § 9 (1876) (creating the State Board of Land Commissioners); IDAHO CONST. art. IX, § 7 (1889) (creating the State Board of Land Commissioners); MONT. CONST. art. XI, § 4 (1889) (creating the State Board of Land Commissioners); N.D. CONST. art. IX, § 156 (1889)

The different titles of these positions signify some varying responsibilities. In some states, the trust lands were primarily sold, not leased, leaving few of them in existence today.[103] These states generally opted for *registers of state land offices* to administer the land grants; the registers kept detailed records of land sales but generally did not have the authority to manage or lease the lands.[104] Most registers were appointed, but a sizable minority were elected statewide. [105]

Alternatively, a state that opted for at least some leasing of state lands generally preferred to create a *land commissioner* or a *land commission*. Many of the land commissioners were elected officials and played a much more direct role in land management.[106] Nebraska designated its land commissioner as commissioner of state lands *and public buildings*, illustrating the more hands-on approach of managing state assets.[107] The land commissions had similar responsibilities but were usually occupied by the state's other elected officials—the governor, attorney general, treasurer, etc.—serving as land commissioners in an *ex officio* capacity.[108]

(creating the Board of University and School Lands); Act of Apr. 2, 1896, ch. 80, 1896 Utah Laws 238, §§ 1, 5 (creating the State Board of Land Commissioners); WYO. CONST. art. VII, § 13 (1889) (creating the Board of Land Commissioners).

103. Fairfax, Souder & Goldenman, *supra* note 85, at 832.

104. *See, e.g.*, Act of Jan. 25, 1855, ch. 153, 1855 Iowa Laws 222; Act of Mar. 4, 1876, ch. 131, 1876 Kan. Laws 303; Act of Mar. 15, 1855, ch. 290, 1855 La. Laws 350; Act of Mar. 12, 1885, ch. 85, 1885 Nev. Laws 101.

105. *See, e.g.*, Act of Jan. 25, 1855, ch. 153, 1855 Iowa Laws 222; KY. CONST. art. III, § 25 (1850); MO. CONST. art. VIII, § 9 (amended 1851).

106. ARK. CONST. art. VI, § 1 (1874); FLA. CONST. amend. art. IV (amended 1870); NEB. CONST. art. V, § 1 (1875); N.M. CONST. art. V, § 1 (1910); S.D. CONST. art. IV, § 12 (1889); TEX. CONST. art. XII (1845).

107. NEB. CONST. art. V, § 1 (1875).

108. Act of June 26, 1915, ch. 5, 1915 Ariz. Laws 2d Spec. Sess. 13; COLO. CONST. art. IX, § 9 (1876); IDAHO CONST. art. IX, § 7 (1889); MONT. CONST. art. XI, § 4 (1889); N.D. CONST. art. IX, § 156 (1889); N.Y. CONST. art. V, § 5 (1846); OKLA. CONST. art. VI, § 32 (1907); ORE. CONST. art. VIII, § 5 (1857); Act of March 5, 1890, ch. 136, 1890 S.D. Laws 296; Act of Apr. 2, 1896, ch. 80, 1896 Utah Laws 238, §§ 1, 5; Act of Mar. 16, 1897, ch. 89, 1897 Wash. Laws 229; WIS. CONST. art. X, § 7 (1847); WYO. CONST. art. VII, § 3 (1889)

Registers of land offices, regardless of how they were selected, did not last long in state government.[109] Few continued as elected officials into the twentieth century, and none are still elected today.[110] However, their influence is still felt. Many states continue to maintain land offices;[111] in others, the responsibilities of registers of land offices were transferred to commissions or departments that eventually had responsibility for administering state parks or other state-owned lands.[112] Land commissioners have proved more durable offices. Though never one of the most common statewide elected officials, most land commissioners that were created still exist today, with Arkansas, New Mexico, South Dakota, Texas, and Washington still electing these officials.[113]

Admittedly, many of these offices were created *statutorily*, not constitutionally. But they were created to execute state constitutional provisions, which indicates the power of constitutionally mandated rules and policies to create long-lasting institutions. Regardless of how these institutions exist today—as (appointed or elected) land commissioners or as state parks departments—the legal infrastructure created around them *does* continue to exist.

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109. The likeliest reason for their removal as elective offices is that, as the nineteenth century came to a close, most trust lands had been allocated—thereby creating little need for registering the lands—or placed in the hands of land commissioners for continued management.

110. Statewide elected land registers were abolished in Maryland in 1867, Iowa in 1883, Kentucky in 1899, and Michigan in 1915. *See* PHILIP B. PERLMAN, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION 38 (1923) ("The Governor will also appoint the Commissioner of the General Land Office . . . "); Act of Mar. 30, 1880, ch. 206, 1880 Iowa Laws 204; Act of Mar. 11, 1898, ch. 11, 1898 Ky. Laws 41; Act of May 8, 1913, ch. 269, 1913 Mich. Laws 524. Louisiana's land register was abolished in its 1974 constitution and Mississippi's was abolished in 1980. Act of July 30, 1976, ch. 326, 1976 La. Laws 892; Act of Mar. 31, 1978, ch. 458, 1978 Miss. Laws 769.

111. *E.g.*, *Kentucky Land Office*, KY. SEC'Y STATE, https://www.sos.ky.gov/land/Pages/default.aspx [https://perma.cc/3DP3-RZUK].

112. *E.g.*, CAL. PUB. RES. CODE §§ 6101, 6102 (West 2022); Act of Apr. 9, 1952, ch. 78, 1952 Mich. Laws 88.

113. ARK. CONST. amend. LV, § 1; N.M. CONST. art. V, § 1; S.D. CONST. art. IV, § 7; TEX. CONST. art. IV, § 1; WASH. CONST. art. III, § 3.

2. Railroad-turned-Public Utility Commissions

Virtually every state constitution adopted or significantly amended in the mid-to-late nineteenth or early twentieth centuries included provisions regulating the railroad industry.[114] After laying out these provisions, most of these constitutions added a short reference that the state legislature "shall enforce by appropriate legislation the provisions of this article"[115]—or something similarly phrased. In the states without constitutionally created railroad commissions,[116] most legislatures responded by creating an elected or appointed railroad commission.[117] Over the course of the twentieth century, most railroad commissions were retooled as public utility (or public service) commissions, with the ability to regulate electricity generation and consumption.[118]

The shared realities of the railroad and energy industries—namely, the perception of both as natural monopolies and the need for rate regulation as a result[119]—made the extension of railroad commissions' portfolios into energy regulation logical at the time. But the effect of treating electric companies like railroad companies—that is, as natural monopolies best

114. *E.g.*, ALA. CONST. art. XIV, §§ 21-25 (1875); ARK. CONST. art. XVII, §§ 1-13 (1874); COLO. CONST. art. XV, §§ 4-7, 11-14 (1876); GA. CONST. art. IV, § 2, paras. 1-7 (1877); IDAHO CONST. art. XI, §§ 5-6, 11-14 (1889); ILL. CONST. art. XI, §§ 9-15 (1870); KY. CONST. §§ 197-201, 209-218 (1890); LA. CONST. arts. 271-74 (1898); MISS. CONST. art. VII, §§ 183-88, 193, 195-97 (1890); MO. CONST. art. XII, §§ 12-24 (1875); MONT. CONST. art. XV, §§ 5-8, 12-15 (1889); NEB. CONST. art. XI (1875); N.D. CONST. art. VII, §§ 139-43 (1889); OKLA. CONST. art. IX, §§ 2-14 (1907).

115. *E.g.*, PA. CONST. art. XVII, § 12 (1873).

116. Most state constitutions did not establish railroad commissions or their equivalent. *But see* CAL. CONST. art. XII, §§ 21–23 (1879); KY. CONST. § 209 (1890); LA. CONST. arts. 283–89 (1898); N.D. CONST. art. III, § 82 (1889); OKLA. CONST. art. IX, §§ 15–35 (1907).

117. *E.g.*, Act of Feb. 26, 1881, ch. 91, 1881 Ala. Laws 84; Act of Apr. 15, 1899, ch. 119, 1899 Ark. Laws 194; Act of Apr. 6, 1885, 1885 Colo. Laws 307; Act of May 8, 1897, ch. 4549, 1897 Fla. Laws 82.

118. *See* Quinn Yeargain, Shadow Districts (March 27, 2023) (unpublished manuscript) (on file with author); *see also, e.g.*, 1 HENRY C. SPURR, GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION 9 (1924).

119. William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1638–39 (2014); Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1086–90 (2020).

kept in check by rate regulation—came at the expense of treating them as state-owned enterprises. In the early days of large-scale electricity generation, many energy companies were city-owned.[120] The ownership of energy could have taken one of several different paths, including widespread state ownership.[121] While railroad commissions were the *dominant* ancestor of public utility commissions,[122] they were certainly not the only one. In Virginia, for example, the state corporation commission, which oversees energy regulation, grew out of the *public works* commission[123]—suggesting that energy production could have fit in neatly as a "public work" owned and operated by the state.

The energy arena would look quite different today if the past century had unfolded with state-owned energy companies. (Perhaps the shift to private ownership would have been accomplished anyway during the push to broadly deregulate the economy in the 1980s and 1990s.[124]) But in any event, it is reasonable to question whether the energy infrastructure in place in the United States under this alternative reality would have been as carbon-intensive as it is today. Under existing rules, it is frequently difficult for carbon-neutral energy sources to break into the energy market—because of what Joshua Macey has referred to as "zombie energy laws" that favor carbon-intensive energy production by default.[125] And public utility commissions face institutional restraints in their ability to actively regulate

120. Robert L. Bradley, Jr., *The Origins and Development of Electric Power Regulation*, *in* THE END OF A NATURAL MONOPOLY: DEREGULATION AND COMPETITION IN THE ELECTRIC POWER INDUSTRY 43, 51–52 (2003).

121. Boyd, *supra* note 119, at 1639–40.

122. SPURR, *supra* note 118, at 9.

123. The Virginia Corporation Commission was created by the 1902 Constitution. *See* VA. CONST. art. XII, § 155 (1902). It replaced, and was the successor to, the Board of Public Works, *see id.* § 156(k), which was first created in 1816 to fund internal improvements throughout the Commonwealth, *see* Preston C. Shannon, *The Evolution of Virginia's State Corporation Commission*, 14 WM. & MARY L. REV. 523, 523–24 (1973). The Corporation Commission was given regulatory authority over public utilities in 1914. *Id.* at 534. Similarly, in 1921, the Washington Public Service Commission (the successor to the Washington Railroad Commission) was reorganized under the Department of Public Works. *See* Act of Feb. 9, 1921, ch. 7, 1921 Wash. Laws 12, 12–13; *History of the Commission*, WASH. UTILITIES & TRANSP. COMM., https://www.utc.wa.gov/about-us/about-commission/history-commission.

124. *E.g.*, Boyd, *supra* note 119, at 1661–74.

125. Macey, *supra* note 119, at 1106–21.

utility companies—resulting in a significant amount of policymaking inertia. The role of public utility commissions is largely separate from the "management of utilities" and primarily revolves around ensuring that the regulated utilities "serve all who requested service, to provide adequate service, and to charge only just and reasonable rates."[126] These challenges would likely not afflict state-run utility companies.

3. Natural Resource Regulators

Finally, many western states created specific offices to enforce the rules developed in constitutions regarding natural resource allocation—specifically in terms of mining and water rights. These offices include geologists, mineralogists, mining commissioners and inspectors, surveyors-general to enforce the former, and state engineers and water boards or commissions to enforce the latter.

The positions created to supervise the mining industry had portfolios with two different substantive tasks. Many mining officials were actually the precursors to modern *labor* regulators; the inspections they conducted of mines were to ensure that the working conditions were safe.[127] Over time, these positions were folded into state labor departments.[128] Other mining officials were responsible for surveying the mineral resources in their states and making reports to policymakers.[129] These positions were later incorporated into state departments of natural resources.[130] Most of these

126. Inara Scott, *Teaching an Old Dog New Tricks: Adapting Public Utility Commissions to Meet Twenty-First Century Climate Challenges*, 38 HARV. ENV'T L. REV. 371, 384–85 (2014). Even the rate-setting aspects of PUCs are subjected to exacting judicial review. *See generally* Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031 (1988); James M. Van Nostrand, *Constitutional Limitations on the Ability of States to Rehabilitate Their Failed Electric Utility Restructuring Plans*, 31 SEATTLE U. L. REV. 593 (2008).

127. *E.g.*, Act of Apr. 16, 1880, ch. 105, 1880 Cal. Laws 115; Act of Apr. 13, 1877, ch. 14, 1877 Nev. 126; Act of Mar. 11, 1895, 1895 Idaho Laws 160.

128. *E.g.*, Act of Mar. 20, 1968, ch. 395, 1968 Kan. Laws 797; Act of Mar. 4, 1974, ch. 39, 1974 Idaho Laws 1023.

129. *E.g.*, Act of Apr. 21, 1860, ch. 254, 1860 Cal. 225; Act of Feb. 10, 1864, ch. 63, 1864 Kan. Laws 109.

130. *E.g.*, Act of Apr. 2, 1968, 1968 Colo. Laws 88. For example, the Colorado Constitution created the office of Commissioner of Mines, COLO. CONST. art. XVI,

officials, regardless of their portfolios, were appointed, not elected, though there are some notable examples to the contrary[131]—most notably, Arizona's elected Inspector of Mines, which is a constitutionally created office that has been consistently elected since statehood.[132]

Turning to water, the use of prior appropriation to allocate water rights necessarily required supervision by a state regulator. Because prior appropriation-based rights date back centuries, the state must, as a practical matter, track these rights—and sometimes cut off the usage of a downstream user if the available water shrinks.[133] Most states in the West adopted a regulatory system that mirrored Colorado's, which originally

§ 1, but state law designates the Executive Director of the Department of Natural Resources as the default Commissioner, COLO. REV. STAT. § 24-1-24(1).

131. Four states—Arizona, Idaho, Nevada, and Oklahoma—have elected mine inspectors, each of which did or has done so for a considerable amount of time. Arizona's Mine Inspector has been elected since 1912; Idaho's was elected from 1897 to 1971; Nevada's was elected from 1911 to 1975; and Oklahoma elected a Chief Inspector of Mines from 1911 to 1979, and four Assistant Mine Inspectors until 1967. *See* ARIZ. CONST. art. XIX (creating elected mine inspector); Act of Mar. 11, 1895, 1895 Idaho Laws 160 (creating an elected inspector of mines); Act of Mar. 4, 1974, ch. 39, 1974 Idaho Laws 1023 (abolishing elected inspector of mines); Act of Mar. 24, 1909, ch. 176, 1909 Nev. Laws 218 (creating an elected inspector of mines); Act of Apr. 30, 1973, ch. 728, 1973 Nev. 1479 (abolishing an elected inspector of mines); OKLA. CONST. art. VI; § 25 (creating an elected inspector of mines); Act of Apr. 6, 1908, ch. 54, 1908 Okla. Laws 521 (creating elected assistant inspectors of mines); H.B. 211, ch. 86, 1927 Okla. Laws 130 (creating fourth assistant inspector of mines); Act of Mar. 16, 1967, ch. 29, 1967 Okla. Laws 28 (abolishing elected assistant inspectors of mines); S.J. Res. 37, 35th Leg., 1st Reg. Sess. (Okla. 1975) (proposing a constitutional amendment to abolish the elected inspector of mines). Additionally, Nevada elected a State Mineralogist from 1871 to 1879. Act of Mar. 1, 1869, ch. 51, 1869 Nev. 97 (creating an elected mineralogist); Act of Feb. 1, 1877, ch. 18, 1877 Nev. Laws 59 (abolishing the elected mineralogist). And outside the west—but still relevant—Indiana elected a State Geologist from 1891 to 1919. Act of Feb. 26, 1889, ch. 33, 1889 Ind. Laws 44 (creating a state geologist); *State* ex rel. *Yancey v. Hyde*, 22 N.E. 644, 650 (Ind. 1889) (requiring state geologist to be elected); Act of Mar. 11, 1919, ch. 60, 1919 Ind. Laws 375 (abolishing the elected geologist).

132. ARIZ. CONST. art. XIX.

133. *See, e.g.*, Craig, *supra* note 71, at 84 (noting that during the "California drought, for example, the California Water Resources Control Board sent water shortage notices to water rights holders with priority dates as old as 1858, curtailing water rights that had never before been cut off").

divided the state into irrigation and water districts, overseen locally by water commissioners (or superintendents) and supervised statewide by a state engineer.[134] Most of these positions were appointive, not elective, but there are a handful of counterexamples.[135]

State engineers still exist in western states today—and are represented nationally by the Association of Western State Engineers[136]—but almost all have largely been subsumed into other state agencies or departments, and many of them have been renamed. Today, responsibility for water rights administration is most commonly housed in state departments of natural resources[137] or water resources.[138] A handful of states have delegated administration of water rights to departments of environmental

134. *See, e.g.*, Lasky, *supra* note 97, at 252–56.

135. Kansas elected an Irrigation Board starting in 1914, but it was abolished shortly after the board members took office in 1915. Act of Mar. 14, 1913, ch. 214, 1913 Kan. Laws 379 (creating an elected board of irrigation); Act of Mar. 24, 1915, ch. 236, 1915 Kan. Laws 296 (abolishing the elected board of irrigation). Nevada elected a Board of Reclamation starting in 1890, but it, like the Kansas Irrigation Board, was abolished in the first year of its existence. Act of Mar. 9, 1889, ch. 112, 1889 Nev. Laws 102 (creating an elected board of reclamation commissioners); Act of Mar. 19, 1891, ch. 62, 1891 Nev. Laws 76 (abolishing the elected board of reclamation commissioners). And Oregon elected its State Engineer from 1911 to 1919 and two superintendents of the Water Division from 1911 to 1923. Act of Feb. 24, 1909, ch. 216, 1909 Ore. Laws 319 (creating an elected state engineer and water division superintendents); Act of Feb. 24, 1915, ch. 251, 1915 Ore. Laws 360 (abolishing the elected state engineer); Act of Feb. 24, 1919, ch. 94, 1919 Ore. Laws 130 (abolishing the elected water division superintendents).

136. *Association of Western State Engineers Constitution*, ASS'N OF WESTERN ST. ENGINEERS (Oct. 19, 2011), https://westernstateengineers.files.wordpress.com/2011/10/20111019awseconstitution.pdf. When the AWSE was formed in 1927, its original purpose was to "formulate broad principles applicable to all of the states where irrigation is practiced, for the use, control and regulation of the waters of western states." *State Engineer Body to Study Water Issues: Western Power Officials Unite to Probe Irrigation Problems*, SALT LAKE TRIB., Oct. 27, 1927, at 22.

137. COLO. REV. STAT. ANN. § 24-1-124(3)(a) (West 2022); MONT. CODE ANN. §§ 85-1-102(4), 85-1-204 (West 2021); NEB. REV. STAT. ANN. § 61-205 (West 2022); NEV. REV. STAT. ANN. § 232.100 (West 2021); S.D. CODIFIED LAWS § 1-41-11 (West 2021); UTAH CODE ANN. § 73-2-1 (West 2022).

138. ARIZ. REV. STAT. ANN. § 45-103 (West 2022); IDAHO CODE ANN. § 42-1701 (West 2023); OR. REV. STAT. ANN. §§ 536.032, .080 (West 2022).

protection[139] or independent water commissions.[140] In Kansas, the state Department of Agriculture supervises water rights through its Division of Water Resources.[141] And in Wyoming, the state engineer remains a standalone office[142]—and supervises the state board of water control[143]—demonstrating the durability of offices created by constitutions or to enforce constitutional provisions.

While some eastern states have similar administrative bodies today, they didn't always. States with riparian rights-based systems have usually not needed the same sort of regulatory oversight as prior appropriation-based systems—but nationwide water challenges have created that need. Today, under what has been referred to as *regulated riparianism*, eastern states are increasingly building out institutions to administer water rights.[144] But the newness with which riparian states have built out this administrative infrastructure, coupled with the pervasiveness of state institutions originally established to administer water rights in prior appropriation states, demonstrates the relative effectiveness of western constitutions in setting policy—and then creating institutions to enforce it.

. . .

That constitutions shape government action is not a novel idea. This is true not just in a technical sense—e.g., that constitutions require government action to occur in a certain way and to follow certain processes—but also in a substantive one. The federal constitution constrains the federal government's ability to act in a number of areas, like social policy, because it does not contain a general grant of police power to

139. TEX. WATER CODE § 5.001 *et seq.* (West 2021) (Commission on Environmental Quality); WASH. REV. CODE ANN. § 43.21A.064 (West 2023) (Department of Ecology).

140. N.M. STAT. ANN. § 72-14-1 (West 2023) (Interstate Stream Commission); N.D. CENT. CODE § 61-02-05 (West 2023) (Water Commission); 82 OKLA. STAT. ANN. § 1085.1 (West 2022) (Water Resources Board).

141. KAN. STAT. ANN. § 74-506a (West 2022).

142. WYO. CONST. art. VIII, § 5 ("There shall be a state engineer who shall be appointed by the governor of the state and confirmed by the senate; . . . He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution."); WYO. STAT. ANN. § 9-1-902 (West 2023).

143. WYO. CONST. art. VIII, § 5; WYO. STAT. ANN. § 41-4-201 (West 2023).

144. *See, e.g.*, Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53, 86–89 (2011).

Congress.[145] These constraints are also ideologically asymmetric—the permissibility of congressional action depends on how tightly it can be connected to "interstate commerce," which tips the balance in favor of small-government conservatives and makes big-government policies harder to implement.

These general observations have been true at the state level with respect to environmental policymaking as well. Nineteenth century state constitutions, and especially those in western states, were highly effective in setting policies with a clear ideological bent. Under these constitutions, the adoption of prior appropriation-based water rights,[146] the ability of the state (and private actors) to seize land in the name of agriculture and mining,[147] favorable tax policies,[148] and the sale of public lands[149]—and institutions to enforce those policies[150]—all helped to encourage the creation of carbon-intensive industries.

Not only that, but those policies have been incredibly difficult to dislodge. Prior appropriation governs water rights in most western states today.[151] Many of those eminent domain rules remain the law today—and are still enforced.[152] Though thinned somewhat, state constitutions still have favorable tax rules for agricultural and extractive industries.[153] With the remaining public lands in the hands of state land commissions, states lease them out for mineral extraction at great profit.[154] And though the institutions created to enforce those policies do not usually exist in their original form today, they helped form other state institutions—and their impact is still felt.[155]

145. *See generally* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2003).

146. *Supra* Section I.A.2.

147. *Supra* Section I.A.1.

148. *Supra* Section I.A.3.

149. *Supra* Section I.A.4.

150. *Supra* Section I.B.

151. *E.g.*, Craig, *supra* note 69, at 84.

152. *E.g.*, Klass, *supra* note 51, at 669–76.

153. *Supra* notes 76-83.

154. NAT'L ASS'N OF STATE TRUST LANDS, *supra* note 90.

155. *Supra* Section I.B.

II. MODERN ENVIRONMENTAL CONSTITUTIONALISM

The environmental policies constitutionalized in primarily western nineteenth century state constitutions were not intended to conserve or protect the environment. But, regardless of their intention, the effect on the environment has been clear. Western states have largely constitutionalized a water-rights doctrine that exacerbates water loss. Agricultural and extractive industries have operated for more nearly two centuries with a favorable regulatory climate enshrined in state constitutions. And the institutions created to enforce those rules end up, inadvertently or not, perpetuating carbon-intensive industries and activities. But more recent constitutional changes have attempted to make state constitutions more protective of the environment.

As I explain in this Part, in the past half-century, environmental activists have organized around two primary goals in modifying state constitutions: adopting environmental "bills of rights," which explicitly incorporate a positive right to a healthy environment, and constitutionalizing specific environmental policies. Other activists and litigants, frequently with differing motivations, have attempted to modernize the *public trust doctrine*—an old common-law requirement (not *formally* constitutionalized in most state constitutions) that sovereigns hold the physical space in their dominion (historically, bodies of water) "in trust" for the public.

These efforts have primarily focused around altering existing rules relating to environmental policy or imposing new ones—not creating (or modifying) existing institutions that set environmental policy. And though many modern environmental law scholars extol the virtues of environmental bills of rights in state constitutions, their role in deeply decarbonizing the economy and mitigating climate change has remained largely unexamined.

In this Part, I survey the three most significant ways that environmental activists have sought to modify state constitutions in the past half-century. I begin in Section II.A by evaluating the most popular member of the environmental constitution club—environmental bills of rights. Then, in Section II.B, I consider the public trust doctrine, primarily in the context of modern efforts to revitalize it and incorporate it into state constitutional amendments or contemporary climate-change litigation. Finally, I explore some successful constitutional amendments that incorporated specific environmental policies into state constitutions in Section II.C.

A. Environmental Bills of Rights

Beginning in the 1960s, as the environmental movement was in full swing, activists sought to incorporate environmental protections into constitutions. At the national level, environmentalists attempted to argue that the Ninth Amendment (which theoretically reserves rights beyond those enumerated in the Bill of Rights to the people)[156] encompassed some sort of positive environmental rights.[157] The Ninth Amendment argument was not successful[158]—and so many advocates turned their attention to state constitutions.

During the late twentieth century, a handful of states adopted specific amendments to their constitutions that sought to constitutionalize environmentalism. In eight states and territories —Hawai'i, Illinois, Massachusetts, Montana, New York, the Northern Mariana Islands, Pennsylvania, and Rhode Island—these efforts produced amendments containing positive rights to a healthy environment.[159]

Though all provisions roughly captured the same basic protections, their language differed somewhat:

- **Hawai'i**: "the right to a clean and healthful environment . . . including control of pollution and conservation, protection and enhancement of natural resources."[160]
- **Illinois**: "the right to a healthful environment."[161]
- **Massachusetts**: "the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment."[162]

156. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

157. Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203, 209–11 (1974).

158. *See, e.g.*, Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENV'T L. REV. 107, 111–17 (2017) (detailing the federal court cases litigated by environmentalists in which they raised a Ninth Amendment argument).

159. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 151 (2013).

160. HAW. CONST. art. XI, § 9.

161. ILL. CONST. art. XI, § 2.

162. MASS. CONST. amend. art. XCVII.

- **Montana**: "the right to a clean and healthful environment."[163]
- **New York**: "a right to clean air and water, and a healthful environment."[164]
- **Northern Mariana Islands**: "the right to a clean and healthful public environment in all areas, including the land, air, and water."[165]
- **Pennsylvania**: "a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."[166]
- **Rhode Island**: "rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values."[167]

In some cases, the slight rhetorical differences were inconsequential. But in others, these differences were more meaningful. Only in Hawai'i and Illinois, for example, were these rights accompanied with specific guarantees of a private right of action;[168] in other states, there was no explicit acknowledgement of this fact, but instead, the legislature was usually granted the power to enforce the provisions statutorily.[169]

Other states added environmental provisions into their constitutions that did not explicitly create any sort of "right"—instead merely formalizing a state policy favoring environmental protection and sometimes imposing a "duty" on the state legislature to enact protective policies. For example, Virginia adopted what some have categorized as "environmental rights" provisions.[170] However, I exclude the Virginia provision (and similar

163. MONT. CONST. art. II, § 3.

164. N.Y. CONST. art. I, § 19.

165. N. MAR. I. CONST. art. I, § 9.

166. PA. CONST. art. I, § 27.

167. R.I. CONST. art. I, § 17.

168. HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2.

169. MASS. CONST. amend. art. XLIX; MONT. CONST. art. II, § 3; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17.

170. *See* VA. CONST. art. XI, § 1 ("To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings."); *see also* N.Y. CONST. art. XIV, § 4 ("The policy of the state shall be to conserve and protect its natural

constitutional text) from this discussion because they merely establish *policies* to protect the environment; neither of them contains any affirmative rights themselves.[171] Because these provisions are largely aspirational, they are largely omitted from the discussion of how state constitutions have incorporated environmental policies.

In the years immediately after the ratification of these provisions, activists and legal scholars had high hopes for their reach and effectiveness.[172] But just a few decades later, following the development of

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resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products."); N.C. CONST. art. XIV, § 5 ("It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry.").

171. *See, e.g.*, Robb v. Shockoe Flip Found., 324 S.E.2d 674, 682 (Va. 1985) ("Article XI, § 1, contains no declaration of self-execution, it is not in the Bill of Rights, it is not declaratory of common law, and it lays down no rules by means of which the principles it posits may be given the force of law. Instead, its language invites crucial questions of both substance and procedure."); Leland v. Moran, 235 F. Supp. 2d 153, 168–69 (N.D.N.Y. 2002) ("Plaintiffs next contend that they have a constitutionally protected property interest in the enforcement of the state's environmental laws. In support of this proposition, plaintiffs point to Art. 14, sec. 4 of the New York State Constitution . . . . While the cited constitutional provision and statutes undoubtedly set forth the state's commitment to the environment and it would be desirable for the DEC to eradicate all pollution from the land, air and waters, none of the provisions cited by plaintiffs impose an obligation upon the DEC or its agents to investigate and remediate every possible violation of the [Environmental Conservation Law].").

172. A. E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 203 (1972) ("The implications of stating an individual right to a decent environment are rather more speculative but could be more far-reaching. Potentially a constitutional statement of such a right could be the basis for an individual's right to go into court and challenge virtually any governmental act—and conceivably any private act—which degrades the environment."); Wayne W. Whalen & Paula Wolff, *Constitutional Law: The Prudence of Judicial Restraint Under the New Illinois Constitution*, 22 DEPAUL L. REV. 63, 77 (1972) ("Questions about the definition and the application of the right to a healthful environment are to be resolved . . . by the courts in separate legal proceedings. This is a major, new and difficult responsibility for the courts which cannot be avoided since the duty is expressly imposed by the constitution."); Mary Lee Leahy, *Individual Legal Remedies Against Pollution in Illinois*, 3 LOY. UNIV. CHI. L.J. 1, 14 (1972) ("It should be apparent at this juncture that the ability to sue

litigation in state courts, the retrospective evaluation of these environmental bills of rights was almost universally negative.[173] What happened? While the answer depends on the state, some common themes have emerged: (1) in some cases, courts concluded that the rights weren't self-executing and required legislative action; (2) courts and commentators have both pointed out that the rights contained definitional problems; (3) courts layered on additional procedural requirements; and (4) the rights frequently became rights to a *process* in setting environmental policy, not rights to substance or an outcome.

First, prior to the 2010s, Pennsylvania courts effectively concluded that their state constitutional provision relating to environmental rights was not self-executing. In *Commonwealth v. National Gettysburg Battlefield Tower*, the Pennsylvania Supreme Court split on the question of whether the provision was self-executing and did not reach a binding decision.[174] In a separate case, the Pennsylvania Commonwealth Court ostensibly concluded that it *was* self-executing.[175] But the court's interpretation of the right was so narrow so as to effectively render it unenforceable without legislative action—or, in other words, *not* self-executing.[176]

Relatedly, the Supreme Court of Illinois has repeatedly held that the state constitution does not confer on citizens a private right of action. The constitution expressly grants "[e]ach person . . . the right to a healthful environment," which they could "enforce . . . against any party,

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to enforce the right to a healthful environment granted under the 1970 Illinois Constitution is broader than the ability to allege a violation of the E.P.A. or rules or regulations adopted under the E.P.A.").

173. Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 847 (1990); Tammy Wyatt-Shaw, Comment, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something*," 15 PUB. LAND L. REV. 219, 231–35 (1994).

174. 311 A.2d 588, 591–95 (Pa. 1973).

175. Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973).

176. José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENV'T L. REV. 333, 371 (1993); see also Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENV'T AFF. L. REV. 173, 184–85 (1993); Oliver A. Pollard, III, Note, *A Promise Unfulfilled; Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RES. L. 351, 362–63 (1986).

governmental or private."[177] Nevertheless, the state supreme court held that it did not "create any new causes of action but, rather, does away with the 'special injury' requirement typically employed in environmental nuisance cases"[178]—which effectively required litigants to identify "a cognizable cause of action" *separate from* their constitutional right.[179]

Second, ambiguity regarding the substance of the rights diminished their effectiveness. Though all the rights protected the environment, they usually did so with reference to other, harder-to-define terms, like "clean," "healthful," and "pure." As the Pennsylvania Supreme Court noted in *Gettysburg*, these terms, like "'clean air' and 'pure water,' require technical definitions, since they depend, to some extent, on the technological state of the science of purification."[180] Commentators have raised similar questions about how these rights can be effectively interpreted by courts, given both the abstract nature and the fact- and technology -dependent nature of the provisions.[181] However, is it *really* the case that "healthful" is any more ambiguous than, say, "reasonable"?[182]

Third, even in the cases where everything was procedurally in order—the plaintiffs had standing to sue, they were the correct plaintiffs, and they asserted a viable cause of action—when the courts actually reached the merits, the courts layered additional limitations on the force of the rights. In *Payne v. Kassab*, for example, the Pennsylvania Commonwealth Court noted the "constant and difficult task of weighing conflicting environmental and social concerns" in adjudicating challenges based on the constitutional provision; accordingly, it adopted a three-part balancing test that asked:

177. ILL. CONST. art. XI, § 2.

178. City of Elgin v. Cnty. of Cook, 660 N.E.2d 875, 891 (Ill. 1995).

179. Citizens Opposing Pollution v. ExxonMobil Coal U.S.A., 962 N.E.2d 956, 967 (Ill. 2012) (citing *Elgin*, 660 N.E.2d at 891). This holding is similar to what the Hawai'i Supreme Court held in its recent cases, discussed *infra* pp. 25–27, but Illinois state courts have been less expansive than their sister court.

180. 311 A.2d 588, 593.

181. Linda J. Bozung, *Resource Uses*, *in* RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 151, 153 (Practising L. Inst. ed. 1985); Richard J. Tobin, *Some Observations on the Use of State Constitutions to Protect the Environment*, 3 B.C. ENV'T. AFF. L. REV. 473, 478–81 (1973); Cusack, *supra* note 176, at 192–93.

182. Cusack, *supra* note 176, at 191–92; Robert A. McLaren, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 135–37 (1990).

(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[183]

As several commentators noted, by giving "the same weight to considerations of economic development that it did to constitutionally-protected environmental values," the court "limit[ed] the force and effect of the Environmental Rights Amendment."[184]

Fourth, in some states, the rights afforded by their constitutions have largely proven to be rights related to *process*, not *substantive* rights. This is true even in a state like Montana, which has *ostensibly* given force to its environmental bill of rights. The Montana Supreme Court ruled that "the right to a clean and healthful environment is a *fundamental right* because it is guaranteed by the Declaration of Rights" in the constitution—"and that any statute *or rule* which implicates that right must be strictly scrutinized."[185] But, in practice, the fundamental nature of the right notwithstanding, it has become a chimera. The primary thrust of this "fundamental right" has not been in grand challenges to macro-level policies; it has been in challenges to the state government's conduct surrounding environmental impact assessments and reviews.[186] This synthesized constitutional–administrative legal reality has allowed the Montana Supreme Court to pay lip service to its own caselaw. In *Northern Plains Resource Council v. Montana Board of Land Commissioners*, for

183. 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

184. Margaret J. Fried & Monique J. Van Damme, *Environmental Protection in a Constitutional Setting*, 68 TEMP. L. REV. 1369, 1390 (1995); John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I – An Interpretative Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 696 (1999).

185. Mont. Env't. Info. Ctr. v. Dep't of Env't. Quality, 988 P.2d 1236, 1246 (Mont. 1999) (first emphasis added).

186. *See, e.g.*, Clark Fork Coalition v. Mont. Dep't of Nat. Res. & Conservation, 481 P.3d 198, 217–24 (Mont. 2021) (constitutional challenge to nondegradation review under the Montana Water Quality Act); Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs, 288 P.3d 169, 173–75 (Mont. 2012) (constitutional challenge to Board of Land Commissioners' lease of state land to coal companies without environmental impact review).

example, the court rejected a constitutional challenge to a lease of state land to coal companies. It reasoned that because "the leases themselves do not allow for any degradation of the environment, conferring only the exclusive right to apply for State permits," there was no implication of the environmental bill of rights—and, therefore, strict scrutiny didn't apply.[187]

And in other states, the bills of rights have been dead letters not as the result of tacit abrogation, but because they have never been meaningfully invoked. The Massachusetts environmental rights provision "has been a 'sleeping giant,'" with no court addressing what rights, if any, it confers.[188] More recently, the Massachusetts Supreme Judicial Court summarily rejected, without explanation, a claim by several litigants "that their constitutional right to clean air and clean water . . . entitles them to standing to challenge the Secretary [of Environmental Affairs's] decision" to approve the construction of a sewage treatment plant.[189] Rhode Island's provision has similarly never been meaningfully tested,[190] and Hawai'i's provision initially seemed to confer no meaningful rights on would-be litigants.[191] Ultimately, though the reality differs depending on the state. As John Horwich succinctly put it, "the courts ruled that they create no new rights, impose no new obligations and establish no new limits on government or private action in the absence of state legislation implementing their terms."[192]

However, in recent years, state supreme courts in Hawai'i and Pennsylvania have breathed new life into these constitutional provisions. In a 2013 case, *Robinson Township v. Commonwealth*, the Pennsylvania

187. *Northern Plains Res. Council, Inc.*, 288 P.3d at 174.

188. Kenneth L. Kimmell, *Two Courts in Search of Jurisdiction: Judicial Review Under the Massachusetts Environmental Policy Act*, 79 MASS. L. REV. 67, 73 n.75 (1994).

189. Enos v. Sec'y of Env't Aff., 731 N.E.2d 525, 532 n.7 (Mass. 2000).

190. *See, e.g.*, Cusack, *supra* note 174, at 197; *see also* PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 102–10 (2007).

191. *See, e.g.*, David Kimo Frankel, *Enforcement of Environmental Laws in Hawai'i*, 16 U. HAW. L. REV. 85, 134–36 (1994).

192. John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion*, 57 MONT. L. REV. 323, 326 (1996); *see also* William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 439 (1997) ("Courts have consistently refused to interpret the Constitution as providing protection to natural resources or a general right to a clean environment.").

Supreme Court held that plaintiffs could challenge the constitutionality of the Pennsylvania Oil and Gas Act under the state constitutional right in article I, section 27, "to an environment of quality."[193] It then concluded that several sections of the act were unconstitutional under section 27.[194] In so doing, the court placed the environmental rights protected in section 27 on equal footing with the "political rights" protected by the state constitution.[195] While the court did not wholly displace the previous caselaw in the state—and specifically, the Commonwealth Court's balancing test in *Payne v. Kassab*[196]—it largely discarded it.[197]

Similarly, in the 2010s, the Hawai'i Supreme Court apparently expanded the force of its state's constitutional provision. In *County of Hawai'i v. Ala Loop Homeowners*, the Hawai'i Supreme Court held that article XI, section 9, of the Hawai'i constitution—which confers the "right to a clean and healthful environment"—was self-executing.[198] In three subsequent cases, the state supreme court held that the right afforded citizens the ability to challenge the actions of the state public utilities commission.[199]

193. Robinson Twp. v. Commonwealth, 83 A.3d 901, 951–52 (Pa. 2013) [hereinafter *Robinson II*].

194. *Id.* at 974–85, 1000.

195. *Id.* at 969.

196. 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

197. *Robinson II*, 83 A.3d at 966–67 ("[W]e conclude that the non-textual Article I, Section 27 test established in *Payne* and its progeny is inappropriate to determine matters outside the narrowest category of cases, *i.e.*, those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests."). While the *Robinson II* court did not overrule *Payne* entirely, it did so just a few years later. *See Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017) ("The *Payne I* test, which is unrelated to the text of Section 27 and the trust principles animating it, strips the constitutional provision of its meaning. Accordingly, we reject the test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges.").

198. 235 P.3d 1103, 1125 (Haw. 2010).

199. *In re* Gas Co., LLC, 465 P.3d 633, 636–38, 646–50 (Haw. 2020); *In re* Haw. Elec. Light Co., 445 P.3d 673, 677, 694–97 (Haw. 2019) (requiring public utilities commission to consider greenhouse gas emissions); *In re* Maui Elec. Co., 408 P.3d 1, 5–7, 12–17 (Haw. 2017) (challenging a power purchase agreement entered into by the public utilities commission requiring the commission to hold a due process hearing in suit brought by Sierra Club).

The Pennsylvania Supreme Court's decision in *Robinson Township*, and the decisions from the Hawai'i Supreme Court over the last few years, have been heralded by environmental law scholars as revolutionary.[200] And it is certainly possible that, in the years to come, state courts in other states with similar provisions (but those that are currently dormant or narrowly construed) could reach similar results. But seriously discussing this possibility supposes that the Hawai'i and Pennsylvania decisions are landmark decisions. Is this the case? Have they substantially altered the legal landscape surrounding environmental litigation—or, more relevantly, decarbonization—in either state?

Take Pennsylvania. The decision in *Robinson Township* was not nearly as far-reaching as advocates suggested at the time. While the court spoke effusively about the environmental rights protected by the state constitution, it drew a significant line with respect to how far those rights would go in practice. The court held that section 27's "express directions to conserve and maintain public natural resources *do not require a freeze of the existing public natural resource stock*[.]"[201] In other words, the rights did not protect anyone against the production and consumption of fossil fuels and other carbon-intensive resources—they just required the *responsible* use thereof. We can see how this played out in a case decided just a few years later. In *Frederick v. Allegheny Township Zoning Hearing Board*, the supreme court heard a challenge to a local zoning ordinance that made "oil and gas development a permitted use by right in all Zoning Districts[.]"[202] When the township issued a permit to a gas company for an oil well, several township residents living near the property objected. The court affirmed its commitment to its holding in *Robinson Township* and subsequently held that the township's actions in *Frederick* were constitutional. It concluded that the ordinance did not violate the objectors' "rights under the Environmental Rights Amendment" because they "did not prove that [the zoning

200. *E.g.*, John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 358–59 (2015) ("The *Robinson Township* case, and particularly Chief Justice Castille's plurality opinion, is already being described as a landmark decision."); Erin Daly, *Environmental Constitutionalism in Defense of Nature*, 53 WAKE FOREST L. REV. 667, 677 (2018) (noting that the *In re Maui* decision was a "landmark decision[]").

201. *Robinson II*, 83 A.3d at 958.

202. 196 A.3d 677, 680 (Pa. 2018) (internal quotation marks omitted).

ordinance] does not reasonably account for the natural, scenic, historic and esthetic values of the Township's environment."[203]

Though no decision by the Hawai'i Supreme Court has so limited the scope of its decisions, the context in which those decisions were made, once again, suggests that they are not quite so far-reaching as commentators have suggested. As the court explained, "the right is defined by existing law relating to environmental quality."[204] "Accordingly," the court concluded, "the parameters of the property interest . . . under article XI, section 9 is defined by reference to laws related to environmental quality."[205] In other words, plaintiffs need to point to an environmental statute on point before they can assert their rights under the constitution. In evaluating whether the statute provides an adequate foundation for the constitutional claim, the court considers whether it "is a law relating to environmental quality within the meaning of article XI, section 9."[206]

B. The Public Trust Doctrine

Sitting somewhat uncomfortably in this conversation is the public trust doctrine. It is, as far as common-law protections go, quite old, dating back to the Roman Empire. At its core, it requires sovereign governments to preserve bodies of water (and tidal lands) in trust for the public—though for reasons relating to the economic value of water for transportation, access, and livelihoods, not for the purpose of environmental protection. As with many common-law concepts, it immigrated across the Atlantic into American laws, but has remained largely absent from written state constitutions—with just a handful of exceptions.

Beginning in the 1970s, the public trust doctrine was revitalized, repurposed, and deployed in environmental litigation. In his landmark 1970 article on the subject, Joseph Sax argued that the doctrine gave the public the ability to challenge the environmental effects of government actions—by approving a commercial project, issuing a regulation, and so on—when it affected public land.[207] He argued that the doctrine could serve as an

203. *Id.* at 697–98.

204. *In re* Maui Elec. Co., 408 P.3d 1, 13 (Haw. 2017).

205. *Id.*

206. *Id.* at 13–15 (concluding that the regulations imposed under Section 269-6 of Hawai'i Statutes "appear to be precisely the type of 'laws relating to environmental quality' that article XI, section 9 references").

207. Sax, *supra* note 34, at 556–57.

effective vehicle for pursuing environmental claims in court and that its "breadth and substantive content" could "make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems."[208] Time would reveal, he said, "the appropriate limits of the public trust doctrine as a useful judicial instrument."[209]

And it has been useful—to a point. In the decades following Sax's article, state courts frequently cited it[210] and its broader principles have been used "to impose limits both on the government's ability to alienate natural resources" and on its "ability to use such resources" where incompatible with the public trust doctrine.[211] But as Richard Lazarus has pointed out, two separate developments—the liberalization of standing rules in federal court and the expansion of governmental police powers to encompass environmental protection—have rendered the public trust doctrine largely irrelevant.[212]

But if Sax originally resurrected the public trust doctrine, some modern activists have sought to *re*-resurrect it. I'll begin with the more bizarre invocation—the growth of the state constitutional right to hunt and fish. A handful of original state constitutions, drawing on the common-law right to hunt and fish, explicitly incorporated this right.[213] In the last few decades, many other states have adopted similar constitutional amendments, frequently with the support of gun-rights organizations.[214] Some of these amendments *theoretically* expand the public-trust doctrine by requiring the state government to maintain public lands for hunting and fishing. But their practical effect has been negligible, and as a result, the right to hunt and fish,

208. *Id.* at 474.

209. *Id.* at 557.

210. Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past and Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 667–70 (2012).

211. Araiza, *supra* note 192, at 387 (1997).

212. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 658–60, 665–68, 674–75 (1986).

213. Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 75 (2009)

214. *E.g.*, Candice Norwood, *The Right to Hunt Is Now Constitutionally Protected in North Carolina*, GOVERNING MAG. (Nov. 7, 2018), https://www.governing.com/archive/gov-right-to-hunt-north-carolina-ballot-gun-rights.html [https://perma.cc/6HS6-F9GN].

as conceived in modern state constitutions, has failed to accomplish much of anything.[215] State supreme courts have been reluctant to attach any special significance to the rights,[216] and even in states where the right theoretically imposes some affirmative duty of protection on the state government,[217] there is no meaningful record of environmentalists centering their litigation on the violation of this duty.

Separately, in recent years, environmental activists have sought to invoke the public trust doctrine in court to argue that governments have an affirmative obligation to protect their citizens from the harm of climate change. This was the crux of the plaintiffs' argument in *Juliana v. United States*. There, the plaintiffs contended that the federal government violated their substantive due process rights in two ways: First, the government violated their right "to a climate system capable of sustaining human life." Second, by failing to protect against "ocean acidification and rising ocean temperatures," the government violated their public trust rights.

Consider what the *Juliana* plaintiffs would've needed to do to succeed:

- First, they would have needed to establish that they had standing to raise their constitutional claims. (The Ninth Circuit found that the plaintiffs didn't have standing on the grounds that the injury wasn't redressable,[218] but it is not difficult to imagine the Supreme Court instead, and more fatally, concluding that they hadn't suffered a "concrete and particularized injury."[219]).
- Second, they would have needed to demonstrate that they did actually have a substantive due process right to a healthy environment—or to be protected from the threat of climate change, however they specifically conceived the right.

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215. *E.g.*, Stacey L. Gordon, *A Solution in Search of a Problem: The Difficulty with State Constitutional "Right to Hunt" Amendments*, 35 PUB. LAND & RESOURCES L. REV. 3, 29–46 (2014) (arguing that these amendments do little in practice, even with respect to their intended purposes).

216. Usman, *supra* note 213, at 85–91; *see also* Jason J. Czarnezki, *Environmentalism and the Wisconsin Constitution*, 90 MARQ. L. REV. 465, 470–72 (2007) (discussing the inoperativeness of the right to hunt and fish in the Wisconsin Constitution).

217. Usman, *supra* note 213, at 78 & n.171.

218. Juliana v. United States, 947 F.3d 1159, 1169-70 (9th Cir. 2020).

219. *Cf.* Massachusetts v. EPA, 549 U.S. 497, 540–41 (2007) (Roberts, C.J., dissenting); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–67 (1992). With a 6–3 conservative majority on the Court, it is quite easy to imagine *Massachusetts* being decided differently today.

- Third, they would have needed to convince the courts that the remedy they sought—"an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions"[220]—was proportionate.

Even supposing that the *Juliana* plaintiffs had managed to prove standing and that their alleged constitutional right existed, they would have run into an insurmountable separation-of-powers problem in getting a court to order the relief they sought. As the Ninth Circuit noted, "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."[221]

The *Juliana* plaintiffs, in making out their public trust claims, did not rely on *state* constitutional principles. Instead, their claims were rooted in the Federal Constitution. But state-court plaintiffs in Alaska, Oregon, and Washington, who made nearly identical claims as the *Juliana* plainiffs, *did* rely on state constitutional principles.[222] In *Chernaik v. Brown*, which involved many of the same plaintiffs as *Juliana*, the plaintiffs raised nearly identical claims. Specifically, they argued that "the state was required to act as a trustee under the public trust doctrine to protect various natural resources in Oregon from substantial impairment due to greenhouse gas emissions and resultant climate change and ocean acidification."[223] Though the bulk of their public trust claims were predicated on common law, not

220. *Juliana*, 947 F.3d at 1170 (describing the plaintiffs' requested relief).

221. *Id.* at 1171 (citation omitted).

222. Several other cases are still pending in state courts, including *Held v. State* in Montana, which will soon go to trial on whether the plaintiffs are entitled to declaratory relief. David Gelles, *In Montana, It's Youth vs. the State in a Landmark Climate Case*, N.Y. TIMES (Mar. 24, 2023, https://www.nytimes.com/2023/03/24/climate/montana-youth-climate-lawsuit.html [https://perma.cc/5J2D-PC2E]. And *Natalie R. v. State* in Utah saw the plaintiffs' case dismissed by a state trial court judge, but plaintiffs are currently preparing an appeal. Kaitlyn Bancroft, *Is a Healthy Environment a 'Fundamental Right'? Utah Supreme Court to Hear Climate Case*, DESERET NEWS (Mar. 17, 2023), https://www.deseret.com/utah/2023/3/17/23644462/healthy-environment-fundamental-right-utah-supreme-court-to-hear-case [https://perma.cc/TF2D-45G8].

223. Chernaik v. Brown, 475 P.3d 68, 71 (Ore. 2020).

the Oregon Constitution,[224] the plaintiffs did partially ground their argument in a state constitutional provision relating to the State Land Board's obligation to preserve state lands;[225] the state court of appeals had apparently held that this provision constitutionalized the state's common-law public trust obligations.[226] Regardless, the Oregon Supreme Court rejected the plaintiffs' arguments. It noted that "the core purpose of the doctrine" was "to obligate the state to protect the public's ability to use navigable waters for identifiable uses," and that "the interconnectedness of natural resources within Oregon (or of resources within and outside Oregon) does not mean that all natural resources, including the atmosphere, must be considered public trust resources under Oregon's public trust doctrine."[227]

In *Aji P. v. State*, a similarly situated group of plaintiffs raised similar claims before the Washington Court of Appeals. There, they made nearly identical claims—that the state had an affirmative duty to preserve the water, land, and atmosphere of the state and had failed to do so.[228] But unlike in *Chernaik*, in *Aji P.*, the plaintiffs could point to a provision of the state constitution: article XVII, section 1. There, the constitution "asserts state ownership" of navigable water and adjacent shorelines.[229] But, as the court of appeals pointed out, article XVII only "partially encapsulates the public trust doctrine" because, by its own language, it only applies to waterways.[230] The court noted that "[t]he public trust doctrine has never

224. *See id.* at 78 (noting that, "[a]s a common law doctrine, the public trust doctrine is not necessarily fixed at its current scope," and that "[i]t is within the purview of this court to examine the appropriate scope of the doctrine and to expand it or to mold it to meet society's current needs, as we have done in the past").

225. Petitioners' Brief on the Merits at 35, *Chernaik*, 475 P.3d 68 (No. S066564) (quoting ORE. CONST. art. VIII, § 5(2)).

226. *Id.* (quoting Brusco Towboat Co. v. State, 567 P.2d 1037, 1044 (Ore. Ct. App. 1977)).

227. *Chernaik*, 475 P.3d at 79, 81.

228. Aji P. v. State, 480 P.3d 438, 446 (Wash. Ct. App. 2021).

229. *Id.* at 457 (quoting WASH. CONST. art. XVII, § 1).

230. *Id.*

been applied to the atmosphere," which was the focus of the plaintiffs' argument, and affirmed the dismissal of the claims.[231]

And in *Sagoonick v. State*, a set of youth plaintiffs argued that the Alaska state government's energy policies violated their "fundamental and inalienable constitution right to . . . a stable climate system that sustains human life and liberty" and ran afoul of the state constitution's public-trust obligations.[232] The *Sagoonick* plaintiffs pointed to Article VIII ("Natural Resources") of the Alaska Constitution, which sets policies,[233] rights,[234] and requirements[235] for the use of natural resources, and argued that these provisions "grant each Alaskan an individual fundamental constitutional right to a climate system that is healthy enough to sustain human life, liberty, and dignity."[236] Though the Alaska Supreme Court acknowledged that Article VIII "is not a complete delegation of power to the legislature," it concluded that the plaintiffs' lawsuit "seek[s] to impose ad hoc judicial natural resources management based on case-by-case adjudications of

231. *Id.* at 457–58. The Washington Supreme Court summarily affirmed the Court of Appeals' decision, *Aji P. v. State*, 497 P.3d 350, 350–51 (Wash. 2021), but Chief Justice Steven González and Justice Helen Whitener dissented. They argued that the court should evaluated whether the claims were justiciable and what effect a declaratory judgment would have had. *Id.* at 352–53 (González, C.J., dissenting).

232. Sagoonick v. State, 503 P.3d 777, 791 (Alaska 2022).

233. ALASKA CONST. art. VIII, § 1 ("It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest."); *id.* § 6 ("Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain.");

234. *E.g.*, *id.* § 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."); *id.* § 11 (mineral rights); *id.* § 13 (water rights); *id.* § 14 (access to navigable waters); *id.* § 16 (protection of water rights).

235. *E.g.*, *id.* § 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."); *id.* § 8 (requirements for exploration of state lands); *id.* § 9 (requirements for sales of state lands); *id.* § 12 (requirements for natural resource leases); § 15 (barring state from authorizing any "exclusive right or special privilege of fishery").

236. *Sagoonick*, 503 P.3d at 802 (internal quotation omitted).

individual fundamental rights," which constituted non-justiciable political questions.[237]

Whether we agree or not with these self-imposed prudential limitations, which are certainly applicable outside of the environmental context, they caution against grounding climate litigation on a positive rights-based approach—regardless of whether the rights are explicitly or implicitly constitutionalized. The jurisprudential realities of the American court system are ultimately the biggest drawback of environmental bills of rights in state constitutions. Unless they independently inspire state legislatures and executives to act, bills of rights require that individual plaintiffs litigate their rights. Not only does that open the door to judicial chicanery, even in clear-cut cases, but it also puts the burden on *individual people* to assert their rights—which is a roundabout way of enacting critical national policies.

C. Conclusion

Many environmental law scholars have viewed environmental bills of rights in state constitutions as a fundamentally transformative way of conceptualizing environmental litigation and granting citizens new tools to challenge catastrophic policies. And to be fair, citizens in these states, armed with these new rights, have sometimes been able to successfully challenge some actions by their state governments.[238]

But what have those rights really accomplished? In some states, citizens can challenge government actions—but those challenges are more to inadequate process than they are to policy. And the realization of these rights has not done anything to *actually* decarbonize. It remains the policy of the state of Montana, its environmental-rights provision notwithstanding, "to foster and encourage the development of the state's mineral resources in every reasonable way."[239] In Pennsylvania, the state constitution's environmental-rights provision "do[es] not require a freeze of the existing public natural resource stock[.]"[240]

So, too, do the public-trust provisions of state constitutions have a similar level of ineffectiveness. No state court has been willing to extend

237. *Id.* at 796–97,

238. *See supra* Part II.A.

239. Montana Talc Co. v. Cyprus Mines Corp., 748 P.2d 444, 449 (Mont. 1987) (quoting Kipp v. Davis-Daly Copper Co., 110 P.2d 237, 241 (Mont. 1910)).

240. *Robinson II*, 83 A.3d 901, 958 (Pa. 2013).

their constitution's public trust requirements beyond waterways and tidal zones—even if the affected parts of the natural ecosystem have a clear effect on waterways.[241]

Both theories of environmental constitutionalism pale in comparison to the (quite devastating) effectiveness of the provisions in original state constitutions that aided and abetted carbon-intensive industries. Put another way, the positive rights-based approaches profiled in Part II don't *deconstruct* our country's carbon-intensive infrastructure as much as the constitutional provisions profiled in Part I *construct and maintain* that same infrastructure. With both provisions on the books, the equilibrium currently tips in favor of the latter.

Why is this? To some extent, it is because environmental bills of rights were drafted to respond to one specific problem (namely, pollution and other discrete harms to the environment) and not to the present problem (the need to deeply decarbonize the economy). If an environmental-rights provision applied *perfectly*—that is, if it were self-executing, if it were recognized by a state supreme court as conferring a private right of action, and if the terms in the right were adequately defined—it would be *perfectly* suited to challenging individual acts of pollution. A state public utility commission's decision, for example, to grant a permit to a high-pollution power plant could be stopped by a private lawsuit alleging a deprivation of the plaintiffs' collective rights to a healthy environment. The public-trust doctrine could be similarly effective.

In other words, this dilemma is a microcosm of the debate among environmental policymakers about how to adequately respond to climate change. There are those who argue that a command-and-control response is inadequate to combating climate change[242] (because we cannot, so to speak, "Clean Air Act" or "Clean Water Act" our way to decarbonization[243])

241. *See, e.g.*, *Aji P.*, 480 P.3d at 457–58 (Wash. Ct. App. 2021).

242. Eric Biber, *Cultivating a Green Political Landscape: Lessons for Climate Change Policy from the Defeat of California's Proposition 23*, 66 VAND. L. REV. 399, 451 (2013). ("The challenge in climate policy (as many commentators have noted) is that addressing the problem will require significant changes in behavior by the public at large, such as changes in the form and nature of transportation, the built environment, and consumption choices. This stands in contrast to most of the past efforts to deal with environmental problems, which have emphasized imposing regulatory mandates and costs on industry through command-and control regulation, meaning that industry is faced with the burden of adjustment (instead of the public).").

243. *See, e.g.*, Pedersen, *supra* note 10, at 260–63.

and that a broader, more systemic response is needed, like a price on carbon and strict enforcement mechanisms.[244]

In closing, I wish to emphasize that my skepticism of the constitutional right to a healthy environment, and the ability of individual plaintiffs to use that right to avert climate change, should not be read as skepticism of the *right itself*. I am of the view that we do possess moral rights against societal extinction, along with "lesser" harms, from climate change. I am also of the view that, in thinking about these rights conceptually, this is the correct framing. And I am also of the view that governments have an ethical and moral duty to protect their people from the very clear dangers of climate change—and that they have utterly neglected this duty. My skepticism, therefore, is not of the right in an abstract sense but instead of its usefulness as a tool of decarbonization.

III. ENVIRONMENTAL POLICYMAKING IN STATE CONSTITUTIONS

The ideas behind environmental bills of rights and the public trust doctrine are big and abstract. They relate to grand theories of what rights the government should protect and what the relationship among the state, the people, and the natural world should look like. But environmentally focused state constitutional amendments have also encompassed smaller, more discrete changes. Though the environment (however broadly defined) is not one of the *most* common subject areas for state constitutional amendments to cover,[245] voters nonetheless amend their constitutions to add environmental provisions with some frequency.

In this Part, I explore some of the specific changes that legislators and citizen groups proposed to incorporate environmental policies into constitutions—and the drawbacks of these efforts. In Section A, I show how these amendments vary considerably in their coverage, scope, and theory of change. Some pursue smaller fixes to niche problems, and others attempt to strike a new balance between regulation and economic activity generally or in a particular area. As a result, the practical responses to these amendments are varied. Sometimes, the amendments' specificity results in a short shelf life; other times, their breadth means that they are too easily undermined by state legislatures or abrogated by courts. Of course, this simplifies matters considerably. Legislative drafting is hard work, even for

244. *See, e.g.*, Esty, *supra* note 6, at 14.

245. *See, e.g.*, 51 COUNCIL OF STATE GOV'TS, BOOK OF THE STATES 238, 48 tbl. 6.9A (2019), http://knowledgecenter.csg.org/kc/system/files/6.9a.2019.pdf (listing the topics of 2018 ballot measures, including constitutional amendments).

experienced lawyers and legislators, and drafters balance how future policymakers will implement and future courts will interpret their words with what voters will ratify. Goldilocks problems—text being too specific or too broad—are easy to identify but harder to fix. I discuss these issues in greater detail in Section B.

But regardless of the flaws of these proposals, many of the amendments proposed in the last century provide yet another point of reference for how constitutions have increasingly incorporated environmental policies. Environmental advocates interested in pursuing constitutional change should consider both the implementation successes and problems in drafting their own proposals.

A. The Changes

Beginning in the early twentieth century, the public began to grapple with two of the century's most persistent environmental problems: deforestation and the reduction of wild animal populations. Both issues were treated more as *economic* than environmental problems,[246] but were nonetheless taken seriously by policymakers and voters. State legislators and voters responded to both by adopting some of the first explicitly environmental*ist* provisions in state constitutions. Most of these early attempts can be organized into two separate categories: (1) creating new (or reorganizing existing) commissions and (2) establishing new sources of taxation.

1. Institutional Reorganization

In the early twentieth century, a handful of environmentally focused governmental institutions existed. Two of the most common were fish and game commissions and forestry officials, which were created statutorily beginning in the nineteenth century.[247] Some states constitutionalized these agencies and increased their powers[248]—and created special districts to

246. Quinn Yeargain, *State Constitutions in the Woods*, 40 PACE ENV'T L. REV. (forthcoming 2023).

247. JAMES A. TOBER, WHO OWNS THE WILDLIFE? THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH-CENTURY AMERICA 81–102, 191–225 (1981).

248. ARK. CONST. amend. art. XXXV (1944) (creating Fish and Game Commission); A.C.A. No. 45, Res. ch. 61, 53d Leg., Reg. Sess., 1939 Cal. Laws 3196 (creating Fish and Game Commission); A.C.A. No. 27, Res. ch. 151, 58th Leg., Reg. Sess.,

implement these policies at the local level.[249] As the twentieth century continued, many states continued to add environmentally focused institutions into their constitutions. States experimented with the jurisdiction, powers, and membership of their fish and game commissions and created conservation commissions with a range of powers.

Some states reevaluated their state land management principles. In 1968, Oregon voters ratified a constitutional amendment that required its State Land Board to manage public lands "consistent with the conservation of this resource under sound techniques of land management,"[250] which was supplemented in 1989.[251] And in 1996, Colorado voters dramatically rewrote the constitutional provision governing the board of land commissioners, requiring the board to prioritize long-term conservation over short-term profit.[252]

2. New Sources of Taxation

To encourage forest preservation, some states amended their constitutions to provide special tax incentives to landowners in exchange

1947 Cal. Laws 3660 (modifying membership of Commission); Com. Sub. for S.J.R. No. 28, 27th Leg., Reg. Sess., 1941 Fla. Laws 2812 (creating Game and Fresh Water Fish Commission); H.J.R. No. 560, 27th Leg., Reg. Sess., 1941 Fla. Laws 2820 (vesting Commission with powers); Act of Mar. 5, 1943, Act No. 31, Reg. Sess., 1943 Ga. Laws 28 (creating State Game and Fish Commission); S.B. No. 91, Act No. 328, Reg. Sess., 1944 La. Laws 1008 (creating Department of Wild Life and Fisheries).

249. CAL. CONST. art. IV, § 25 ½ (1902) (establishing fish and game districts); J.R. No. 730, Act No. 990, Gen. Ass., Reg. Sess., 1962 S.C. Laws 2313 (empowering legislature to establish forestry districts).

250. H.J.R. No. 7, 1967 Ore. Laws (emphasis added).

251. BARBARA ROBERTS, ORE. SEC'Y OF STATE, VOTERS' PAMPHLET: STATE OF OREGON SPECIAL ELECTION JUNE 27, 1989, at 7 (1989).

252. COLO. CONST. art. IX, § 10; *see also Amendment 16 Enhances Public-Lands Stewardship*, DAILY SENTINEL (Grand Junction, Colo.), Oct. 14, 1996, at 4 ("At the heart of Amendment 16 is language that says the state lands will be managed to produce reasonable and consistent income over time, rather than maximum profit, along with the recognition that economic productivity and sound stewardship includes 'enhancing the beauty, natural values, open space and wildlife habitat.'").

for maintaining the forests on their lands,[253] set aside state funds for conservation,[254] and allowed municipalities to levy taxes for forest preservation.[255] New York's Forever Wild Clause set aside state-owned lands for permanent preservation,[256] though this was a far less common approach.[257]

To some extent, state constitutions have been amended to increase taxes on carbon-intensive industries. As explored previously, though state constitutions were originally quite accommodating to extractive industries,[258] in a handful of states, the tide has turned. In the 1970s, Montana and Wyoming, facing dwindling state budgets while their coal industries were booming, amended their constitutions to impose a new tax

253. LA. CONST. of 1921, art. X, § 1 (amended 1954); MASS. CONST. amend. art. XLI (1912); MINN. CONST. art. XVII (1926); N.H. CONST. pt. 2, art. V (amended 1942).

254. MINN. CONST. art. XVII (1924) (authorizing state and municipalities to contract debt for preventing forest fires); OR. CONST. art. XI-E (1948) (authorizing state to incur indebtedness for funds for forest rehabilitation, reforestation, and land acquisition); WIS. CONST. art. VIII, § 10 (amended 1910) (authorizing the state to appropriate funds for "acquiring, preserving, and developing the water-power and the forests of the state"); WIS. CONST. art. VIII, § 10 (amended 1924).

255. GA. CONST. of 1877, art. VII, § 6, ¶ 2 (amended 1938) (providing counties with the power to levy taxes for fire protection, forest preservation, and conservation of natural resources); LA. CONST. of 1921, art. X, § 1 (amended 1926) (imposing severance tax on market value of forest product crop and allocating proceeds to parishes for reforestation); LA. CONST. of 1921, art. VI, § 2 (amended 1944) (authorizing parishes to levy acreage taxes to promote forestry); PA. CONST. of 1874, art. IX, § 1 (amended 1958); WASH. CONST. art. VII, §§ 1–4.

256. N.Y. CONST. art. VII, § 7 (1896); *see generally* Philip G. Terrie, *Forever Wild Forever: The Forest Preserve Debate at the New York State Constitutional Convention of 1915*, 70 N.Y. HIST. 251 (1989) (detailing proposed revisions to the Forever Wild Clause at the 1915 state constitutional convention).

257. MINN. CONST. art. VIII, § 7 (1914) (authorizing the state to set aside school trust and public lands for forest preservation).

258. *Supra* Part I.

on coal.[259] Though the link to environmental protection was weak[260] and perhaps simply allowed the states to profit from extractions that would have occurred anyway, the efforts represented a significant change of pace. A similar effort was attempted in 2014, when the Nevada legislature put a constitutional amendment on the ballot that would have remove the state constitution's five percent cap on taxing mining. However, owing in large part to low Democratic turnout, the amendment was narrowly defeated.[261]

A far more recent development, and one that has accelerated in the last decade, has been the use of state constitutional amendments to modify regulatory balances through changes in taxation. In 1996, Floridians approved Amendment 5, which imposed a "polluter-pays" requirement for pollution in the Everglades.[262] The passage of Amendment 5 occurred as state voters rejected Amendment 6, which would have imposed a tax on sugar production, but commentary at the time suggested that the polluter-pays provision could end up costing sugar companies more than the tax.[263]

In the 2010s, these sorts of amendments became more common. New Jersey voters approved an amendment in 2014 partially allocating the proceeds of corporate taxes to land preservation.[264] Mirroring the extent to which many western constitutions excluded carbon-intensive industries from taxation, Florida voters amended their constitution in 2016 to grant tax exemptions to solar energy production.[265] In 2018, Floridians added a

259. MONT. CONST. art. IX, § 5 (1976); WYO. CONST. art. 15, § 19 (1974); LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION 187–88 (2011); ROBERT B. KEITER, THE WYOMING STATE CONSTITUTION 288–89 (2017).

260. *But see* Art Hutchinson, *Coal Generating Alternative Energy Forms*, THE INDEP.-REC. (Helena, Mont.), Dec. 10, 1976, at A7 (noting that the Montana Coal Tax Trust Fund helped finance the development of renewable energy projects, with 2.5 percent of the total funds going to renewable energy investments).

261. *See* Scott Sonner & Kimberly Pierceall, *Anti-tax Fervor Helped Doom Nevada Democrats*, RENO GAZETTE-J. (Nov. 7, 2014), https://www.rgj.com/story/news/politics/2014/11/07/anti-tax-fervor-helped-doom-nevada-democrats/18668695/ [https://perma.cc/S9PH-8DUF].

262. FLA. CONST. art. II, § 7(b) (Amendment 5, 1996).

263. *See, e.g.*, Cyril T. Zaneski, *Amendment 5: The Next Weapon in Sugar Battle*, MIA. HERALD, Nov. 7, 1996, at 21A.

264. N.J. CONST. art. VIII, § 2, para. 6 (Question 2, 2014).

265. FLA. CONST. art. XII, § 34 (Amendment 4, 2016).

ban on offshore oil drilling to the state constitution.[266] Finally, in 2020, Nevada voters approved an amendment that constitutionalized a renewable energy standard, requiring that 34 percent of the state's energy production come from renewable sources by 2024.[267] The success in constitutionalizing a renewable energy standard in Nevada came after high-profile rejections of similar amendments in Michigan in 2012 and in Arizona in 2018.[268]

B. Limitations on Policy-Focused Amendments

Constitutional amendments that ratify specific policies face many of the same institutional challenges as do the constitutional provisions discussed previously. The effectiveness of the amendments is closely tied to whether it is self-executing—or whether the legislature is required (or empowered) to effectuate the provisions itself.[269] If legislative action is required to give the amendment any force, an unfriendly state legislature could undermine the amendment to the point of abrogation. Relatedly, even if an amendment is self-executing, a legislature may nonetheless be able to pass "enabling" legislation that actually serves to *disable* the operative provisions of the amendment.[270] Similarly, depending on how tightly the amendment is drafted, it may need to be enforced through litigation, which can further undermine the policy's intended goals.[271]

Citizen drafters also need to be careful to ensure that their proposed amendment does not violate the "single-subject" rule, which governs the permissibility of voter-initiated constitutional amendments in most

266. FLA. CONST. art. II, § 7(c) (Amendment 9, 2018).

267. NEV. CONST. art. IV, § 39 (Question 6, 2020).

268. Melissa Anders, *Michigan Proposal 3: Voters Reject 25 by 25 Renewable Energy Mandate*, MLIVE.COM (Nov. 7, 2012), https://www.mlive.com/politics/2012/11/proposal_3_michigans_renewable.html [https://perma.cc/PG5V-2RDH]; Bryce Newberry, *Costly and Nasty: Failure of Prop. 127 Won't Stop Renewable Energy Push, Experts Say*, ARIZ. PBS: CRONKITE NEWS (Nov. 8, 2018), https://cronkitenews.azpbs.org/2018/11/08/prop-127-fallout/ [https://perma.cc/2FPM-DN9A].

269. *E.g.*, Fernandez, *supra* note 176, at 361-75.

270. *Infra* notes 281–285 and accompanying text.

271. *E.g.*, *infra* note 285 and accompanying text.

states.[272] While my purpose in this article is not to launch an attack on the application of the single-subject rule by state supreme courts, it is worth noting that many scholars argue that "[t]he notion of a subject is inherently incapable of precise definition,"[273] leading to accusations that courts employ the rule inconsistently and in a manner supporting their own ideological preferences.[274] Justice Hans Linde once criticized the single-subject rule as a test that "compels endless conceptual manipulation, controversy, and litigation,"[275] a characterization echoed by other judges given the fact that "almost any two legislative measures may be considered part of the same subject if that subject is defined with sufficient abstraction."[276] It is impossible to describe a "majority rule" or general way in which most states apply their own subject-matter limitations—other than to say that drafters should check their local listings. Subject-matter restrictions are important considerations that potentially limit the ability of an impactful amendment setting environmental policy to make the ballot.[277]

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272. *See, e.g.*, Millard H. Ruud, *"No Law Shall Embrace More than One Subject"*, 42 MINN. L. REV. 389, 447-52 (1958).

273. Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1177 (1993); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 806-07 (2006) ("Legal scholars have spilled much ink debating the merits of the single subject rule, and most agree that, despite its benign intent, it suffers from a fundamental flaw: no one can define a 'subject.'").

274. *See* Gilbert, *supra* note 273, at 807 & nn. 21-25.

275. Ore. Educ. Ass'n v. Phillips, 727 P.2d 602, 612 (Or. 1986) (Linde, J., concurring).

276. Manduley v. Superior Court, 41 P.3d 3, 37 (Cal. 2002) (Moreno, J., concurring).

277. In 1994, for example, the Florida Supreme Court struck an amendment from the ballot that would have created the "Save Our Everglades Trust Fund." The court concluded that the proposed amendment ran afoul of the single-subject rule because it "performs the functions of multiple branches of government." By establishing a trust, providing for funding and operation of the trust, imposing a levy, and determining how revenue would be allocated, the initiative encompassed legislative powers. By empowering the trustees to administer the trust, make expenditures from the trust, build stormwater treatment facilities, and make administrative rules, the initiative encompassed executive powers. And by making a determination "that the sugar cane industry polluted the Everglades and impos[ing] a flat fee on that industry to cover cleanup costs," the initiative "renders a judgment of wrongdoing and de facto liability and thus performs a quintessential judicial

Given the frequency with which the Florida Constitution has been amended to include environmental provisions, the litigation that has taken place to clarify the scope of its amendments presents a reasonable set of case studies for exploring the related concepts of self-execution and single-subject rules. Take, for example, Florida's Amendment 5, which required that "[t]hose in the Everglades Agricultural Area who cause water pollution . . . shall be primarily responsible for paying the costs of the abatement of that pollution."[278] After voters approved the amendment, the Governor requested an advisory opinion from the state supreme court as to whether it was self-executing. The court determined that it was not: "Amendment 5 raises a number of questions such as what constitutes 'water pollution'; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might such a claim be asserted."[279] It further concluded, however, that "legislative action *is* required" to effectuate Amendment 5; "construing [existing statutes] as Amendment 5's implementing legislation would effect no change, nullify the Amendment, and frustrate the will of the people."[280]

Several years later, the court heard a challenge to one of the enabling acts—a challenge to a tax, applied to *non*-polluters, for pollution abatement in the Everglades. The plaintiffs argued that the tax ran afoul of Amendment 5 because it created a constitutional "prohibition against being required to contribute for pollution abatement."[281] The court rejected this argument, holding that Amendment 5 created no such prohibition, and that its use of "primarily" reflected that non-polluters would pay, at least in part, for pollution abatement.[282]

It is difficult to argue that either decision was *wrong*. Amendment 5 included enough vague terms that the legislature clearly needed to specify some aspect of its implementation; moreover, the use of "primarily" does not suggest that polluters are *exclusively* responsible for pollution abatement. Still, if the ambition of Everglades conservationists was to wholly shift the financial responsibility for pollution abatement to the polluters, not the general public, Amendment 5 fell short.

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function." *In re* Advisory Opinion to the Att'y Gen.—Save Our Everglades Trust Fund, 636 So.2d 1136, 1340-41 (Fla. 1994).

278. FLA. CONST. art. II, § 7(b).

279. Advisory Opinion to the Governor, 706 So.2d 278, 281 (Fla. 1997).

280. *Id.* at 281-82 (emphasis added).

281. Barley v. S. Fla. Water Mgmt. Dist., 823 So.2d 73, 83 (Fla. 2002).

282. *Id.*

Similarly, Amendment 1, passed by Florida voters in 2014, suffered a similar fate. Amendment 1 increased the funding to the Land Acquisition Trust Fund, allocating one-third of the state's revenue from its document stamp tax to "the acquisition and improvement of land, water areas, and related property interests," which it defined with a long list of eligible projects.[283] The year after the amendment went into effect, the Florida Wildlife Federation challenged some appropriations made by the state legislature out of the Fund, which it alleged were incompatible with the Fund's constitutional purposes. The state trial court agreed, interpreting Amendment 1 as funding *only* the "acquisition of conservation lands," and improvement thereof, "purchased after the effective date of the amendment."[284] But the state appellate court reversed this conclusion and dismissed the suit, concluding that the Fund's revenues could apply to lands purchased before 2015—and that the Amendment did not even restrict itself to "State owned lands."[285]

The post-ratification interpretation of these two amendments, which narrowed their potential impact on environmental policy, reflects some of the problems faced by voter-initiated amendments that attempt to constitutionalize specific policies. If the amendment is not drafted precisely enough, a court could conclude that it is not self-executing, which could allow the state legislature to effectively sidestep it. Amendment 5 demonstrated the perils of an amendment being too *short*; its brevity and use of undefined terms ultimately limited its effectiveness. On the other hand, Amendment 1 was too *long*; its long list of projects eligible for funding allowed the supreme court to infer a broader purpose, and thus more flexibility, than its framers likely intended.

These tasks—ensuring that an amendment is adequately self-executing and that it complies with subject-matter requirements—are technically separate but undeniably related. A lengthier amendment that leaves less to the imagination of legislatures and courts may be more likely to run afoul of a strict single-subject requirement; inversely, a proposal that complies with even the most stringent subject-matter restrictions may allow for too much legislative discretion.

283. FLA. CONST. art. X, § 28.

284. Oliva v. Fla. Wildlife Fed'n, 281 So.3d 531, 535 (Fla. Dist. Ct. App. 2019) (quoting trial court).

285. *Id.* at 537-38.

IV. STATE CONSTITUTIONS AS PATHS TO DECARBONIZATION

The ambition of deeply decarbonizing the American economy has spurred environmental policy advocates to develop comprehensive how-to guides for policymakers around the country. Though the plans differ at a micro-level, their macro focus is the samesf—successfully combating climate change by replacing our country's carbon-based infrastructure requires coordination and collaboration at federal, state, and local levels.[286] The Biden Administration's "All of Government" approach must be replicated a thousand times over by states and municipalities.

But these paths are dependent on one thing that is frequently lacking—the political will to see them through. In many states, especially those governed by Republicans, there is little appetite for meaningful climate action. Though Republican *voters* frequently see the need for comprehensive reforms in environmental policy to address climate change,[287] Republican *politicians* rarely do.[288]

Accordingly, I argue that state constitutions can serve a vital role in advancing our national commitment to decarbonization. My ultimate argument is that state constitutions should do so not by adding a positive rights-based framework but instead by developing rules and creating state institutions that force state governments to decarbonize. I argue that, just as an admittedly imperfect commitment to democracy and popular rule has animated state constitutional development since the nineteenth century, a commitment to decarbonization *must* animate state constitutional development today. My proposed framework is not a matter of haphazardly

286. *See generally* ACCELERATING DECARBONIZATION, *supra* note 13; NET-ZERO AMERICA, *supra* note 13; ZERO CARBON ACTION PLAN, *supra* note 13.

287. Danielle Deiseroth, Marcela Mulholland & Julian Brave NoiseCat, *Voters—Including Republicans—Think Climate Change Is Making Weather More Extreme*, DATA FOR PROGRESS (Sept. 16, 2020), https://www.dataforprogress.org/blog/2020/9/16/voters-think-climate-change-is-making-weather-more-extreme [https://perma.cc/H597-QFMT]; ANTHONY LEISEROWITZ ET AL., POLITICS & GLOBAL WARMING, APRIL 2020, 4–7 (2020), https://climatecommunication.yale.edu/wp-content/uploads/2020/06/politics-global-warming-april-2020c.pdf [https://perma.cc/3LF5-8BLQ].

288. *See, e.g.*, Ari Drennen & Sally Hardin, *Climate Deniers in the 117th Congress*, CTR. FOR AM. PROGRESS (Mar. 30, 2021), https://www.americanprogress.org/issues/green/news/2021/03/30/497685/climate-deniers-117th-congress/ [https://perma.cc/B67F-NGEX].

constitutionalizing hyper-specific environmental policies; it is instead a matter of developing rules and institutions that are *effective* and *achievable*.

In this Part, I develop a multi-pronged strategy for turning state constitutions into tools of decarbonization. In Section A, I take the philosophy underpinning nineteenth-century constitutional provisions and repurpose them to the cause of decarbonization. I suggest how modern environmental activists, working within the specific political contexts of their states, might develop some workable, achievable, and *impactful* proposals for amendments that constitutionalize our need to decarbonize. Then in Section B, I argue that environmental bills of rights should be reimagined as avenues to ensuring that the strategies of decarbonization are adopted equitably and in a manner consistent with environmental justice.

Finally, in Section C, I defend this approach. In so doing, I argue that a positive rights-based approach to environmental constitutionalism, while effective in almost every other country and in keeping with how we *should* conceptualize the equity challenges of climate change, faces steep odds in the American judicial system. But despite the obstacles that a rights-based approach faces, I note how this framework should play a vital role in ensuring that the specific policies I suggest do not disproportionately harm any community and that decarbonization occurs in an environmentally just manner. I conclude by arguing that the possible provisions I outline are not simply individual policy choices at this point in time, that they are instead appropriate, necessary inclusions in a twenty-first century constitution.

A. A Pragmatic Approach

Though environmental bills of rights have been the primary mechanism through which environmental law scholars have proposed amending state constitutions, they are hardly the only option. As the discussion in Part III showed, state-level advocates routinely amend state constitutions to adopt specific environmental policies. Admittedly, few of these policies are game-changers; a dedicated allocation of some small portion of tax dollars to some vaguely environmental purpose is unlikely to have any significant effect on progress toward dismantling the carbon-based infrastructure in place.[289]

The environmental rules and institutions established in western state constitutions provide several different models for how to craft effective environmentally-focused rules today. These provisions successfully compelled generations of legislators and administrators to slant their

289. *Supra* Section II.C.

policies in one particular direction. The creation of property rights in natural resources like water, the mandate that state land commissions pursue profit in managing state lands at the expense of almost everything else, and the expansive reach of eminent domain provisions very practically limited the extent to which state and local officials could regulate certain economic activities.[290]

While it may not be possible to construct exact inverses of these approaches, the overriding principle—forcing policymakers to put a thumb on the scale in a particular direction—is applicable here. Advocates might consider reorienting the organization of state administrative law and the priorities of state land commissions and public utility commissions, striking a difference balance on how different economic activities are taxed and how the proceeds are allocated, and entrenching new environmental mandates and institutions.

Policy-focused amendments, if imbued with the same idea that animated nineteenth-century constitutional provisions, could serve as an effective means of constitutionalizing decarbonization. What if the specific policy proposed by a constitutional amendment was not, as it has been, the creation of a dedicated fund to preserve state land, but instead a *green bank*? Or, as Nevada did in 2020, the adoption of a *renewable energy standard*?[291] Or, as Colorado did in 1996, a restriction on how state land commissions can lease public lands?[292]

The formula behind a potentially effective amendment involves several components:

- **First**, the amendment needs to accomplish an high-impact policy goal—but discretely enough to avoid a single-subject problem.
- **Second**, it needs to be drafted in such a manner as to give the state legislature relatively little leeway to undermine it.
- And **third**, it needs to have enough specificity and permanency that it has a lasting effect—but not be so rigid or inflexible that it is beyond modification.

The idea behind any such amendment should not be that it is wholly inclusive of the bare-minimum climate policies. This is not possible in the framework of state constitutional law. Most of the aggressive guides to decarbonization call for extremely specific policies that would be poor fits

290. *Supra* Section I.A.

291. NEV. CONST. art. IV, § 39 (Question 6, 2020).

292. COLO. CONST. art. IX, § 10 (Amendment 16, 1996).

for constitutional amendments.[293] Creating a network of electric vehicle charging stations or new building standards requires careful and precise policymaking—and more than anything else, flexibility to account for changed circumstances.[294] Accordingly, the goal in constitutionalizing decarbonization is to lock climate-skeptical state policymakers into courses of action. In outlining the possibilities, I find it helpful, as I did in surveying nineteenth-century constitutional provisions, to break down these proposals into *rules* and *institutions*, which I do in separate subsections below.

It is worth noting that the suggestions for rules or institutions in this section are meant as starting points for further debate and discussion, not ending points. If environmental advocates and scholars begin to think about how to constitutionalize policies that will result in decarbonization, they will develop their own answers—some of which cannot be universalized, but some of which could be. A critical component of decarbonizing constitutions is creating national information-sharing networks so that advocates are able to share best practices.

It is also the case that getting the right policies added to constitutions is a higher priority than shoehorning all aspects of a desired policy into a single amendment. Avoiding single-subject requirements to fully execute a policy may require jettisoning key aspects of that policy or pursuing a somewhat incomplete policy. While these outcomes are undesirable, they are certainly not prohibitive to meaningful action. If a policy takes several separate constitutional amendments to fully implement, advocates should do that rather than avoiding a policy or weakening it.

1. Reorientation of Administration

At both the federal and state levels, the basic rules under which administrative agencies operate—and their positioning in our systems of separated powers—are contested. Debates over whether legislatures have a veto over the rules that agencies promulgate, whether courts should defer to agencies' statutory interpretation, and whether agencies should incorporate principles of diversity and equity into rulemaking have

293. *See, e.g.*, ZERO CARBON ACTION PLAN, *supra* note 13, at 20 ("In the case of reaching zero emissions by 2050, there are pieces of the puzzle that are already solved, but also many that are still to be determined. . . . We must set the goal for mid-century, embark boldly on what we know, and prepare in the spirit of FDR to experiment, learn and adjust course along the way.").

294. *See id.*

frequently trickled down into proposed changes to state constitutions.[295] The outcome of these debates has resulted in some states pulling back on *Chevron*-style deference[296] and enabling legislatures to repeal administrative regulations with ease.[297]

Reorganizing state constitutions around principles of environmental protection may involve pushing back on these changes or requiring agencies to incorporate decarbonization into their decisionmaking processes. Amendments of this variety might fall into the trap of environmental bills of rights in that they are likelier to be enforced through judicial action than on their own. However, Hawaiians' experience with their environmental-rights provision, applied in the context of public utility commission proceedings to require the consideration of decarbonization,[298] presents a model for vindicating these rights in court.

With respect to state land commissions and public utility commissions, advocates might pursue wholesale reform of their basic operating procedures. In the context of public land management, advocates might reorient the priority of state land commissions from pursuing short-term returns to sustainable, longer-term management practices. They might prohibit commissions from leasing state lands for purposes related to

295. John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMPLE L. REV. 1205, 1208-09 & nn. 11-13 (1993) (describing adoption, exercise, and challenge of state legislative vetoes over administrative regulations); Aaron J. Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 557-60 (2014) (describing different state approaches to *Chevron*-type deference).

296. In 2018, for example, Floridians ratified Amendment 6, which was drafted by the state constitutional revision commission and covered a multitude of topics. The amendment, most popularly known for adopting "Marsy's Law," also adopted an anti-*Chevron* rule. With Amendment 6's passage, the Florida Constitution now bars any state court from "defer[ring] to an administrative agency's interpretation" of a statute or rule, instead requiring the court to "interpret such statute or rule de novo." FLA. CONST. art. V, § 21. For a greater discussion of this component of Amendment 6, which has so far escaped scholarly attention, *see* Frank Shepherd, Roberto Martinez, Ben Reaveley & Savannah Padgett, *The Demise of Agency Deference: Florida Takes the Lead*, 94 FLA. BAR J. 18 (2020).

297. Devlin, *supra* note 295, at 1209 n. 13.

298. *Supra* notes 198-199 and accompanying text.

agriculture, grazing, or mineral extraction;[299] they might instead only allow leases for renewable energy production.[300] Similarly, they might supersede state investment (or pension) funds' fiduciary duties by prohibiting state funds from investing in carbon-intensive industries.[301]

Significantly overhauling public utility commissions would be a particularly bold solution. A seemingly minor change—rewriting the grant of authority and stated purpose of PUCs—could have a significant impact. Today, most PUCs have the responsibility to ensure "just and reasonable" rates. But, as Inara Scott has argued, this singular responsibility can prevent PUCs from adopting environmentally and ecologically sound policies.[302] For example, a PUC might view investing in a *smart grid*, which could cut carbon emissions and facilitate a transition to renewable energy sources, with skepticism if its only responsibility were to ensure "just and reasonable" rates.[303] If, however, the responsibility of a PUC were *to create an equitable, carbon-neutral system of energy production and distribution that creates*

299. This has been done, with some limited effect, at the national level with respect to federal lands. *See, e.g.*, Nathan Rott, Scott Detrow & Alana Wise, *Biden Hits 'Pause' on Oil and Gas Leasing on Public Lands and Waters*, NPR (Jan. 27, 2021, 9:02 AM ET), https://www.npr.org/sections/president-biden-takes-office/2021/01/27/960941799/biden-to-pause-oil-and-gas-leasing-on-public-lands-and-waters [https://perma.cc/3FEC-3S88]. But it is always vulnerable to reversal by hostile administrations. *See generally* Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "The Public" in Public Land Law*, 48 ENV'T L. 311 (2018) (noting the extent to which the previous administration allowed fossil-fuel leases on federal public lands).

300. *See, e.g.*, Alexandra B. Klass, *Renewable Energy and the Public Trust Doctrine*, 45 U.C. DAVIS L. REV. 1021, 1063-72 (2012) (suggesting a balance of public land conservation with renewable energy generation).

301. *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 385 (2020) (noting that "many American trustees continue to resist explicit use of ESG factors on the grounds that to do so would entail consideration of collateral benefits to third parties in breach of the sole interest rule imposed by the trust law fiduciary duty of loyalty."). *But see* Lachlan Markay, *Scoop: States Warn Banks—Drop Coal, and We Drop You*, AXIOS (May 26, 2021), https://www.axios.com/states-banks-drop-coal-warning-biden-carbon-278bb3fb-2254-41b2-9b94-f986c1c9a3d2.html [https://perma.cc/8K7F-PY6D].

302. Scott, *supra* note 126, at 390–400.

303. *E.g.*, *id.* at 394-97 (describing the decision by the Maryland Public Service Commission to reject investing in a smart grid).

healthier ecosystems,[304] they would likely be more inclined to make investments in renewable energy and to deconstruct the existing carbonized infrastructure.

Another solution could involve deconstructing PUCs altogether, converting them from regulatory commissions to state-run energy enterprises. Though changing the purpose of PUCs could achieve significant progress on decarbonizing the energy system, it could be difficult to force them to take specific actions. Given the legal limitations on a public utility regulator's ability to force industry action,[305] many substantive requirements are converted into watered-down guidance or a recommendation that does little to change action.[306] However, a constitutional amendment could grant the state's public utility commission the power (or the duty) to operate a state energy company. This conversion of the PUC's authority would allow the public a greater degree of control over how energy is generated in their state; it could also enable more aggressive climate action.[307]

2. Striking a New Balance in Taxing and Budgeting

The favorable tax rates afforded to certain kinds of economic activities—especially agricultural and extractive industries—created a regulatory environment favorable to environmental degradation. Today, we can recalibrate that balance in favor of conservation and decarbonization, both by reversing the previous realities and by entrenching new priorities.

Proposals to undo the lower tax rates that certain industries enjoy could accompany lower taxes—or perhaps exemptions altogether—for renewable energy production. Though voters generally disfavor higher taxes and narrowly defeated a proposal in 2014 in Nevada that would have

304. I credit Inara Scott for the suggestion on this language.

305. Scott, *supra* note 126, at 390–400.

306. Jonas J. Monast & Sarah K. Adair, *A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protction Goals*, 38 COLUM. J. ENV'T L. 1, 10-14 (2013); *see generally* Michael Dworkin, David Farnsworth, Jason Rich & Jason Salmi Klotz, *Revisiting the Environmental Duties of Public Utility Commissions*, 7 VT. J. ENV'T L. 1 (2006).

307. Of course, greater democratization of energy is not guaranteed to result in significant progress in decarbonizing, as Professor Shelley Welton points out, but there are good reasons to believe that it might—chief among them the broad base of support for clean energy. Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581, 598-99 (2018).

raised the state constitution's ceiling on mineral taxation, voters are frequently persuaded of the connection between natural resource taxes and benefits to their households and communities. The success of severance taxes on minerals in several western states shows what this looks like in practice. In 1976, voters amended the Alaska Constitution to create the state Permanent Fund, which sets aside royalties and proceeds from state mineral leases. The Fund invests the proceeds and the distributes the profits to Alaskans in the form of the Permanent Fund Dividend. Voters are fiercely protective of the income they receive.

The distribution of the proceeds might also be adjusted. In most states, gas tax funds are allocated exclusively or primarily to state highway construction and repair, which favors carbon-intensive construction and transportation practices over public transportation. Some states have amended their constitutions to allow gas tax proceeds to also be used for mass transit projects. States might adopt similar, and perhaps stronger, provisions, which could obligate states to fund public transportation in absolute or relative terms, or perhaps even entirely reroute gas tax proceeds from highways to mass transit.

3. Entrenching New Mandates and Institutions

Just as nineteenth-century western state constitutions obligated states to recognize and protect certain kinds of property rights in water and in access to land,[308] states can rewrite constitutions today to add analogous mandates and institutions.

Adopting aggressive renewable energy standards is one of the most promising options. Nevada's renewable-energy standard, adopted in 2020, only required 34 percent of energy production to come from renewable sources by 2024—a relatively weak standard.[309] Defeated efforts in Arizona and Michigan were significantly more ambitious, but faced strong opposition from private energy companies.[310] Though many states currently have renewable energy standards on the books, a fair number of

308. *Supra* Section I.A.

309. *Compare* NEV. CONST. art. IV, § 39 (Question 6, 2020), *with* ZERO CARBON ACTION PLAN, *supra* note 13, at 124-32.

310. Anders, *supra* 268; Newberry, *supra* note 268.

these "standards" are voluntary or aspirational and very few have a long-term renewable energy standard that achieves carbon neutrality.[311]

If states increasingly adopt environmentally focused policies into their constitutions, state governments will likely have to create institutions—or modify existing ones—to see these policies through. However, environmental advocates need not leave this process entirely up to state legislatures. They can supplement this institution-building by creating specific and effective institutions of their own to meaningfully advance these priorities.

One of the most effective methods would require the state legislature to charter "a green bank" or equivalent renewable energy investment authority, and to fund it at a certain level. Several states and municipalities throughout the country—most notably, Connecticut and New York—have chartered green banks.[312] The primary benefit of creating an institution like a green bank is that its purpose is not for the state to monopolize the field of renewable energy investment as a profitless public service, but instead to create a market for investment where it does not exist. Its imprint on state government is minimal, therefore, because it uses a little bit of state power to push the market in the right direction and to spur private-sector investment.[313] Similarly, we could require state legislatures to charter a *climate bank*, like one currently under consideration at the U.S. Department of Agriculture, which would pay farmers to capture carbon on their working lands.[314]

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311. *See, e.g.*, Laura Shields, *State Renewable Portfolio Standards and Goals*, NAT'L CONF. STATE LEGISLATURES (Apr. 7, 2021), https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx [https://perma.cc/TH8T-86XS].

312. Whitney Angell Leonard, *Clean Is the New Green: Clean Energy Finance and Deployment Through Green Banks*, 33 YALE L. & POL'Y REV. 197, 209 (2014). For a detailed look at how Connecticut's green bank worked in practice, *see generally* Robert J. Klee, *Response to Vincent P. Pace's Article*, 33 CONN. J. INT'L L. 398 (2018).

313. *See, e.g.*, Jeffrey Schub, *Green Banks: Growing Clean Energy Markets by Leveraging Private Investment with Public Funding*, 21 J. STRUCTURED FIN. 26, 28-32 (2015); *see also* Leonard, *supra* note 312, at 204-08.

314. *See, e.g.*, Zack Colman, Liz Crampton & Helena Bottemiller Evich, *Biden Mulls Giving Farmers Billions to Fight Climate Change. Even Farmers Are Unsure About the Plan.*, POLITICO (Mar. 29, 2021, 4:30 AM EDT), https://www.politico.com/news/2021/03/29/biden-carbon-bank-proposal-478224 [https://perma.cc/K7LB-K6P5]; *USDA National Climate Bank – Concept Note*, AGREE: TRANSFORMING FOOD AND AG POLICY (2021).

B. Using Environmental Bills of Rights to Advance Environmental Justice

In laying out the above strategy, I am cognizant of the need to construct it in a manner that equitably distributes the benefits and the harms of decarbonization. Communities of color, who too often bear the brunt of environmental devastation, too often *also* get left behind by the solutions to environmental devastation. It should not be left to chance or optimism whether constitutionalizing the policies of decarbonization will affect all communities equally. We should see the disproportionately negative impact of environmental devastation on communities of color, as Barry Hill argues, as an "environment-related human rights violation."[315] Accordingly, we should repurpose the ideas behind environmental bills of rights—and the right to a clean environment—to protect vulnerable communities from the unequal, inequitable, and unjust effects of decarbonization.

That a rights-based approach is an ineffective way of *achieving* decarbonization does not mean that it cannot be used to *guide* decarbonization. State environmental advocates could couple the rule- and institution-based constitutional amendments to implement the policies with rights-based amendments to equalize the policies. Moreover, advocates can draw from state experiences with reading different rights provisions "in conjunction with" one another to enhance the protections of each individual right,[316] perhaps by combining environmental-rights provisions and equal protection clauses. For example, some state supreme courts have read their state constitutions' rights to education with their equal protection clauses to mandate equality in school funding.[317]

Here, too, we must acknowledge that the existing environmental-rights provisions are, by themselves, insufficient to adequately safeguard

315. Barry E. Hill, *Environmental Justice for All Must Be a Human Right Enforceable in U.S. State Constitutions*, *in* A BETTER PLANET: 40 BIG IDEAS FOR A SUSTAINABLE FUTURE 183, 186 (Dan Esty ed., 2019).

316. *Cf.* Walker v. State, 68 P.3d 872, 882-83 (Mont. 2003) (reading "the privacy provision of the Montana Constitution in conjunction with the provisions regarding search and seizure to provide Montanans with greater protections from government intrusion.").

317. *See* Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001, 1003-04 (2021); *see also* Sheff v. O'Neil, 678 A.2d 1267, 1281 (Conn. 1996); Bd. of Educ. Of Kanawha v. W. Va. Bd. of Educ., 639 S.E.2d 893, 899 (W. Va. 2006).

environmental justice.[318] They are too general in the rights that that they protect and do not grant any sort of specific right that protects environmental justice, much less reliably confer any independent cause of action. While state equal protection provisions, paired with existing rights to healthy environments, *could* safeguard environmental justice,[319] there has not yet been any such successful case. Therefore, if we are to take this approach, we would need a carefully crafted, specific right with an explicit cause of action.

C. Defending the Approach

In proposing that a state constitution—much less the state constitutions in all fifty states—be amended to include a specific provision, the final question is whether the provision is appropriately suited for inclusion in a governing document as important as a constitution. In other words, we must ask "whether it is sufficiently important to be given this enduring and controlling position."[320] This is not a question about the efficacy of the *policy*, but rather about the efficacy of the policy's *permanence*.

Under the traditional view of state-constitution drafting, only "fundamentals" ought to be included in the final text; all "legislative matter" and specific policies ought to be excluded.[321] Regarding the historical constitutionalization of specific policies, the dominant position in state constitutional scholarship is that it has been to the detriment of the constitution as a whole. "In most cases," James Hurst argued, "such specific enactments of policy did not *direct*, but merely *recorded*, the currents of social change."[322]

Some more modern scholars—including those in the environmental arena, like Buzz Thompson—have concurred in these conclusions

318. 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. ENV'T L. 135, 175–78 (2005); Neil A.F. Popović, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENV'T L.J. 338, 355–66 (1996).

319. Klee, *supra* note 318, at 166-75.

320. *E.g.*, Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 53 VA. L. REV. 928, 950 (1968).

321. *Id.* at 942.

322. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 246 (1950) (emphasis added).

specifically in the context of environmentally focused constitutional amendments. Thompson has argued that, "given that there are likely to be significant changes in environmental norms, conditions, and technology," constitutionalizing specific environmental policies could tie the hands of future policymakers and prevent them from having the tools to adequately respond to the problems of tomorrow.[323]

Acknowledging, as we must, that the line between a "fundamental" and a specific policy is necessarily fuzzy,[324] ascertaining whether a proposed addition is important enough to be ratified into a constitution is a context-specific query. Frank Grad suggested a handful of major factors in answering this question: "popular demand or pressure, the significance of the provision for effective government, the particular ecological, geographical or historical factors operative in the state, and the availability and adequacy of means other than inclusion in the constitution to achieve the desired end."[325]

With the fundamental-versus-specific distinction in mind, consider the proposals that I advance in this article: the adoption of rules and creation of institutions that freeze a commitment to decarbonization in state constitutions. Are these mere legislative matters that we ought to exclude? They might look like it; after all, they seek to guide policy in a certain direction.

I might argue that the proposed amendments are *fundamental* in that they seek to remake, and to alter the powers of, our state government to combat an existential threat. This is especially true with respect to the institutions that I propose to either create or significantly modify.

More to the point, even if these amendments are policies, crystallizing specific policies that help to ensure the survival of our civilization is precisely the point of a governing document. Throughout American history,

323. *See* Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 605 (2004); *see also* Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 915 (1996).

324. Grad, *supra* note 320, at 942. As Professor William Munro observed, with little apparent sense of irony, fundamentals are "hard to define, but everybody knows what it means." If anyone does not, he suggested, "he need only read the Constitution of the United States to acquaint himself with an organic document which comes measurably near fulfilling the requirement." William B. Munro, *An Ideal State Constitution*, 181 ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCI. 1, 5 (1935).

325. Grad, *supra* note 320, at 950.

broad, abstract principles meant to ensure the continuation of our way of life have animated state constitutional development. In early state constitutions, owing to a negative colonial experience with too-powerful executives, governors were subservient to legislatures to protect liberty and prevent despotism.[326] As the nineteenth century progressed, Americans agitated for more representative, democratic government; they amended these same constitutions to place more power directly in the hands of people.[327] During the populist and progressive movements, state constitutions further devolved power by creating even more popularly elected positions,[328] voter-initiated constitutional amendments,[329] and recall provisions for state officials.[330] Taken in isolation, we could view any one of these actions as a discrete policy; together, they serve a fundamental role in state constitutional development.

Accordingly, systematic, widespread, and deep decarbonization should be the animating principle of state constitutions in the twenty-first century, just as the protection of liberty and the creation of democratic governments were the animating principles of state constitutions in previous centuries. It is difficult to imagine a greater need than protecting the American people, and the rest of the world, from the very real harms of unrestrained climate change.[331]

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326. Sturm, *supra* note 20, at 61.

327. Bulman-Pozen & Seifter, *supra* note 22, at 879-94.

328. *Supra* notes 23-26 and accompanying text.

329. Daniel A. Smith & Dustin Fridkin, *Delegating Direct Democracy: Interparty Legislative Competition and the Adoption of the Initiative in the American States*, 102 AM. POL. SCI. REV. 333, 334-36 (2008).

330. Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 14 (1997).

331. "Protecting civilization" is not an uncommon refrain in inserting one's preferred policy preferences into constitutions. Advocates of constitutional amendments that banned gay marriage made identical arguments. *See, e.g.*, *A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 9 (2004) (statement of Sen. Wayne Allard) ("Without much academic examination, most of us understand the historical, cultural and civic importance of marriage. Marriage, the union between a man and a woman, has been the foundation of every civilization in human history."). However, the threat to civilization posed by climate change is widely accepted and based on science—not the ideological or religious preferences of individual members of society.

Although it is true that many of the proposed amendments I suggest in this article represent policy questions that state legislatures might better address, there is no reason to expect legislatures to actually do so. As Miriam Seifter recently argued, state legislatures have long functioned as countermajoritarian institutions—a characterization that extends far beyond the malapportionment prior to one-person-one-vote and the unrepresentative nature of state legislatures as a result of gerrymandering.[332] Republican-dominated state legislatures refuse to even consider meaningful climate action,[333] and Democrat-controlled state legislatures are hardly going far enough.[334] If we could trust that state legislatures would act boldly right now, it would obviate the need to sidestep the formal legislative process. That is the function of voter-initiated constitutional amendments—to serve as an escape valve for democratic pressure when elected officials are unresponsive to public wants.

To put it simply, averting climate change requires bold and immediate action. Prognostications about what sort of collective action is required to avert catastrophe get more dire by the year. The need to deeply decarbonize the global economy—not just by 2050, but now—is paramount. In this context, the survival of the human species, the livability of the planet, and the preservation of our way of life surely must win out over aspirational guidelines of what should and should not be in fundamental governing documents.

Admittedly, most policymakers and scientists urge flexibility in building out aggressive climate policy so as to not lock society into ineffective or counterproductive policies.[335] But my argument that we should see state constitutions as tools of deep decarbonization does not necessitate locking in hyper-specific policies. Instead, my goal in arguing for a rethinking of environmentalism in state constitutions is to redesign state institutions so

332. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 122 COLUM. L. REV. 1733, 1735 (2021) ("[S]tate legislatures are typically a state's least majoritarian branch. Often they are outright countermajoritarian institutions.").

333. *See, e.g.*, Alex Brown, *State Climate Action Unlikely After Democrats Fail to Flip Statehouses*, PEW RSCH. CTR. (2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/16/state-climate-action-unlikely-after-democrats-fail-to-flip-statehouses [https://perma.cc/CE9E-R98X].

334. *See, e.g.*, Timothy Williams, *Why Oregon Republicans Vanished Over a Climate Change Vote*, N.Y. TIMES (June 24, 2019), https://www.nytimes.com/2019/06/24/us/oregon-climate-change-walkout.html [https://perma.cc/MJ3P-CZR9].

335. *See, e.g.*, ZERO CARBON ACTION PLAN, *supra* note 13, at 20.

that *they* are the ones that are drafting, adopting, and implementing specific policies that are finely calibrated to state-specific contexts. And if the institutions are unwilling to lead on setting ambitious climate policy, the adoption of specific rules governing their conduct can help spur them to action. In this way, state constitutions should be reimagined as ecological documents.

The idea of reconceptualizing a governing document as ecological in nature is roughly the argument that William Ophuls made several decades ago in arguing for a new political order centered around ecological balance.[336] He argued that under the social contract theory, because the natural resources of the world were assumed to be "endless and inexhaustible, one has only to solve the problem of achieving social harmony through a just division of the spoils."[337] To that end, "a valid political theory of the steady state will be obligated to give the same weight to ecological harmony as to social harmony."[338] The urgency of climate change has multiplied several times over since Ophuls first raised this argument in 1977[339] and thus the argument has even more impact today.

CONCLUSION

Climate change poses an existential threat to humanity. It demands the rapid decarbonization of the global economy and fundamental shifts in how society is organized. But the current state of American environmental law severely limits our government's ability to make these changes. While environmental litigators haggle over whether the EPA has fully complied

336. Ophuls argued:

> [J]ust as it was the task of the seventeenth- and eighteenth-century political philosophers to create the social-contract theory of government to take account of the new socioeconomic conditions and justify the political ascent of the bourgeois class, so it will be the duty of the next generation of philosophers to create an "ecological-contract" theory promoting harmony not just among humans, but also between humanity and nature.

WILLIAM OPHULS & A. STEPHEN BOYAN, JR., ECOLOGY AND THE POLITICS OF SCARCITY REVISITED: THE UNRAVELING OF THE AMERICAN DREAM 215 (1992).

337. *Id.*

338. *Id.*

339. *See generally* WILLIAM OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY: PROLOGUE TO A POLITICAL THEORY OF THE STEADY STATE (1977).

with the Administrative Procedure Act, and as the Supreme Court teeters closer to overruling *Chevron* and upending the current state of administrative law, the threat of climate change grows nearer.

The response by many environmental activists, who seek to ground twenty-first century environmental protection in a positive rights-based approach, is conceptually appealing. But the self-imposed limitations of the American judiciary, in contrast to courts around the world that are taking bold action on climate change and holding their governments accountable, render this rights-based approach inadvisable and uncompromising.

Accordingly, I argue for a rules- and institution-based approach through which state constitutions are amended to create long-lasting and difficult-to-dislodge, but adaptable, policies that make meaningful progress toward decarbonization. In so doing, I lay out how these provisions can be based on the harmful environmental provisions in western state constitutions—keeping their effectiveness and redirecting the policies they enacted.