
Constitutional Experiments: Protecting the Environment and Future Generations

If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.

Rachel Carson (1962)

The great beauty of U. S. constitutional law is that there are actually 51 constitutions, not just one big, old, fossilized document. All 50 states have constitutions, and many regularly revise them through constitutional conventions. These conventions provide the citizenry with an opportunity to experiment and amend these venerable documents so that they reflect changes in the contemporary world rather than the antiquated conditions of centuries ago.

Several state constitutions have environmental provisions, most of which were drafted and adopted in the 1970s. These provisions often grant a right to a healthy environment (Illinois^a), establish a duty to maintain a healthy environment for future

generations (Illinois and Pennsylvania^b), or even improve the environment (Montana) and give the public a right to enforce these provisions (Illinois). Some state constitutions also assert that public natural resources are the common property of all people (Pennsylvania and Hawaii). These basic constitutional ideas embody the precautionary principle and the public trust doctrine that David Orr mentions in his essay.

Two states, Montana and Hawaii, reinforced their constitutional environmental provisions through innovative, far-reaching lawsuits. The resulting court decisions are reverberating throughout the nation and likely will eventually affect the Supreme Court's interpretation of U.S. constitutional rights. The provision in Montana's 1972 constitution that was challenged in a 1999 mining lawsuit says that "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." This provision was invoked in a lawsuit brought by Montana environmental groups suing the Montana Department of Environmental Quality for granting a permit to the Seven-Up Pete Joint Venture to

pump millions of gallons of arsenic-tainted water into the Landers Fork and Blackfoot Rivers. In October of 1999 the Montana Supreme Court ruled unanimously that Montanans' constitutional right to a clean and healthful environment is a fundamental right.

As important, this right is intended to *prevent*, not just redress, harm. In an opinion written by Justice Terry Trieweiler, the Montana Supreme Court concluded that Montanans have a right to prevent harm. In an often-quoted phrase, Trieweiler said, "Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." The Court also said, "We conclude that the delegates' (to the Constitutional Convention) intention was to provide language and protections which are both anticipatory and preventative." This opinion is significant because environmentalists could actually sue to prevent damage; they did not have to wait until the harm had occurred to get justice. Anticipation and prevention are at the heart of the precautionary principle, which is designed to prevent harm, not measure and manage it.

In a similarly visionary decision, the Hawaiian Supreme Court explicitly adopted the precautionary principle to further the public trust doctrine that is embedded in Hawaii's state constitution. The article of public trust doctrine in the constitution says that "For the benefit of present and future generations, the State and its political subdivisions shall

^aArticle XI of the Illinois Constitution, adopted in 1970: "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy. Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."

^bIn 1971, voters approved an environmental amendment to the Pennsylvania Constitution. Article I, Section 27 provides that "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people" (Article XI, Conservation, Control and Development of Resources, Conservation and Development of Resources Section 1.).

The Hawaiian Supreme Court used this constitutional provision of public trust in its *Waiahole Ditch Decision* (Water Use Permit Applications, 94 Hawaii 97; 9 P.3d 409, 2000). The *Waiahole Ditch* case was brought by small family farmers and Native Hawaiians challenging the decision by the Commission on Water Resource Management to allocate water from the *Waiahole Ditch*. Water in the ditch had been diverted for 80 years by sugar plantations of central Oahu. The court said, "The duty to protect public water resources is a categorical imperative and the precondition to all subsequent considerations, for without such underlying protection the natural environment could, at some point, be irrevocably harmed and the duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses could be endangered."

The Court in Hawaii not only reinforced the public trust doctrine but argued that the precautionary principle was essential for implementing the doctrine: "The absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest." The Court said,

Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt 'precautionary principles' in protecting the resource. That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.

For those who are ruling on the U.S. Constitution, Hawaii and Montana may seem distant. But court watchers have argued that the Supreme Court is constantly monitoring state court decisions as a barometer for the will of the people. This suggests that both the environmental constitutional provisions and the state court decisions will filter up to the U.S. Supreme Court and influence environmental cases.

We can be assured that cases will make it to the U.S. Supreme Court. For instance, the U.S. Fish and Wildlife (USFWS) is a trustee for

wildlife. Many of its decisions about endangered species are challenged in federal court as a matter of course. Those creatures under the care of the USFWS are part of the public trust, so the public trust doctrine applies to them. The USFWS has often made precautionary wildlife decisions. We need to support them with the basic philosophies of the public trust doctrine and the precautionary principle so that these ideas will eventually be adopted in as elegant and muscular a manner on the federal level as they have been in Hawaii and Montana.

Rachel Carson was right: the Bill of Rights does not mention the environment. But the glory of the federal system is that we have 50 ongoing constitutional experiments. Carson's work influenced many of those constitutions and guaranteed that, even if the federal government casts a jaundiced eye on environmental protection, many states have ensured an inalienable right for this and future generations to a safe and healthy environment. Those states are taking seriously their trustee responsibilities and acting to prevent harm.

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