9-1-1993

Judicial Interpretation of State Constitutional Rights to a Healthful Environment

Mary Ellen Cusack

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr
Part of the Constitutional Law Commons, and the Environmental Law Commons

Recommended Citation
Mary E. Cusack, Judicial Interpretation of State Constitutional Rights to a Healthful Environment, 20 B.C. Envtl. Aff. L. Rev. 173 (1993), http://lawdigitalcommons.bc.edu/ealr/vol20/iss1/7

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
JUDICIAL INTERPRETATION OF STATE CONSTITUTIONAL RIGHTS TO A HEALTHFUL ENVIRONMENT

Mary Ellen Cusack*

What is pure water? . . . . If 'natural' refers to 'nature' are we to let it proceed without intervention in regard to floods . . . . What is beauty? . . . . What is clean air?1

I. INTRODUCTION

Each time we hear news of an oil spill destroying marine life and vegetation or read another warning about the depleting ozone layer, it reminds us of the importance of preserving our environment. Nevertheless, these events seem far removed from our daily life, not requiring our immediate attention. Our lack of concern changes drastically when the environmental hazards enter our own communities. Perhaps the threat arrives in the form of a nearby sanitary landfill or a nuclear power plant. Maybe the morning newspaper has announced plans for the construction of a new local shopping center. Whatever the scenario, the potential for environmental harm and the resulting endangerment to our own health and well-being suddenly becomes real. Yet, we often lack legal recourse against these threats. Our interests in breathing clean air, drinking clean water, and enjoying a natural, unblemished environment are affected profoundly, perhaps irreparably. Although ensuring the health and safety of our environment is of fundamental importance, the importance of an interest does not necessarily make a "fundamental" right,


at least not in the constitutional sense. For courts to accord constitutional protection to a fundamental right, that right must either be explicitly or implicitly stated within our federal or state constitution.

Congress has entertained proposals for an amendment to the United States Constitution recognizing the right to a healthful environment on two occasions, in 1968 and 1970. Both attempts at amendment were unsuccessful. Undaunted, environmental groups sued in federal court, asserting that the right to a healthful environment should be recognized under the Due Process Clause of the Fifth and Fourteenth Amendments, or within the penumbra of the Ninth Amendment. Like the attempted constitutional amendments, the suits failed to achieve recognition of this right, although some courts did acknowledge the environment's importance and the future possibility of constitutional environmental protection.

In contrast to the reluctance of the federal legislature and judiciary to expand their interpretation of fundamental rights, individual states have recently begun to increase their recognition of such rights and liberties. Environmental issues in particular have been at the forefront of state constitutional reform. State legislatures and judiciaries have been much more willing than their federal counterparts to create and enforce a constitutional right to a clean environment.

This Comment argues that a state constitutional right to a healthful environment could serve as a valuable source of protection for individuals' health and well-being. Ideally, our federal government should recognize a constitutional right to a healthful environment.

---

3 Id. at 33–34.
5 Legal writers commonly use the term "penumbra" to refer to those rights, not explicitly stated, that stem from or arise out of rights specifically enumerated in the Constitution. See Dronenburg v. Zech, 741 F.2d 1388, 1392 (U.S. App. D.C. 1984) ("The 'penumbra' was no more than a perception that it is sometimes necessary to protect actions or associations not guaranteed by the Constitution in order to protect an activity that is.").
7 Envtl. Defense Fund, 325 F. Supp. 728. "Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition." Id. at 739. See also Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061, 1064 (N.D. W. Va. 1973).
Concentrating on state rights, however, may be more successful in the immediate future. The reasons are two-fold. Federal environmental legislation emphasizes the role of the states in implementing and overseeing various programs. States are also more familiar with their regional environment and are therefore better suited to adjudicate related issues. In those states that have taken the initiative in acknowledging individual rights to a healthful environment, the constitutional provision usually falls within one of four identifiable types: provisions granting citizens the right to a healthful environment; public policy statements concerning the preservation of natural resources; financial provisions for environmental programs; or clauses that restrict the environmental prerogatives of state legislatures. This Comment focuses on those states whose constitutions expressly grant individuals a right to a healthful environment, and argues that the value of recognition far outweighs any problems of implementation.

Looking first at the federal arena, Section II of this Comment describes both the past attempts to enact a federal constitutional amendment recognizing the right to a healthful environment and the relevant cases subsequently brought in the federal circuits. Section III examines the initiatives of individual states to grant more protection for individual liberties than is provided for under the federal constitution. In Section IV, this Comment analyzes state constitutional provisions recognizing the right to a healthful environment and the cases involved with the assertion of rights under these provisions. Finally, Section V suggests principles to guide states in formulating their own constitutional rights to a healthful environment.

II. THE CONTINUING QUEST FOR A FEDERAL RIGHT TO A HEALTHY ENVIRONMENT

More than twenty years ago, Senator Gaylord Nelson first proposed an amendment to the United States Constitution that would

---


11 See McLaren, supra note 9, at 128.
recognize an individual right to a "decent" environment. 12 Two years later, Representative Richard Ottinger made a second, more comprehensive attempt at federal recognition of such an environmental right. 13 Although both proposals were unsuccessful, they brought the issue of environmental protection into the federal arena. In the years that followed, environmental groups made numerous efforts to effect judicial recognition of a fundamental right to a healthful environment. 14 Although a few courts supported the assertion that the right to a healthful environment is fundamental, they refused to grant this right constitutional protection without corresponding legislation or United States Supreme Court recognition. 15 More than one opinion quoted Judge Learned Hand: "[n]or is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." 16

In 1970, the United States Court of Appeals for the District of Columbia Circuit first recognized an environmental group as a plaintiff. In *Environmental Defense Fund, Inc. v. Hardin*, 17 the Environmental Defense Fund (EDF) challenged a decision by the Secretary of Agriculture to cancel the registration for the pesticide DDT and thereby effectively loosen restrictions on its use. 18 Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the

---

12 H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968). The brief proposal simply stated that "[e]very person has the inalienable right to a decent environment. The United States and every State shall guarantee this right." *Id.*


SEC. 1. The right of the people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and esthetic qualities of their environment shall not be abridged.

SEC. 2. The Congress shall, within three years after the enactment of this article, and within every subsequent term of ten years or lesser term as the Congress may determine, and in such a manner as they shall by law direct, cause to be made an inventory of the natural, scenic, esthetic and historic resources of the United States with their state of preservation, and to provide for their protection as a matter of national purpose.

SEC. 3. No Federal or State agency, body, or authority shall be authorized to exercise the power of condemnation, or undertake any public work, issue any permit, license, or concession, make any rule, execute any management policy or other official act which adversely affects the people's heritage of natural resources and natural beauty. . . .

*Id.*


16 Spector Motor Servo Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944).

17 428 F.2d 1093 (D.C. Cir. 1970).

18 *Id.* at 1096.
right of review is available to any party adversely affected by an order.\(^{19}\) The EDF contended that the widespread use of DDT would adversely affect humans.\(^{20}\) The court held that the EDF's allegation of threatened biological harm to people and other living creatures as a result of the Secretary's action was sufficient injury to satisfy standing requirements.\(^{21}\)

Buoyed by this initial success, the EDF then sought to enjoin construction of a government-approved dam across the Cossatot River, demanding that the river remain free-flowing.\(^{22}\) In *Environmental Defense Fund v. Corps of Engineers of United States Army*,\(^{23}\) the EDF contended that the right to live in an environment that preserves the quality of life is constitutionally protected by the Fifth, Fourteenth, and Ninth Amendments.\(^{24}\) The United States District Court for the Eastern District of Arkansas stated that it was not insensitive to the EDF's argument and acknowledged that the EDF's claim eventually could obtain judicial recognition. However, relying on the current state of constitutional law, the court refused to extend such recognition, preferring to leave decisions on this issue to the legislative and executive branches of government.\(^{25}\)

Subsequent decisions have followed the same line of reasoning. In *Ely v. Velde*,\(^{26}\) area residents sought an injunction to prohibit the construction of a prison in an historical neighborhood.\(^{27}\) The petitioners asserted a constitutional right to protection from unreasonable environmental degradation and destruction in their neighborhood.\(^{28}\) The United States Court of Appeals for the Fourth Circuit declined to grant constitutional protection, stating that the petitioners did not present a convincing case for according judicial sanction to an environmental right.\(^{29}\) As in the previous cases, this court based its decision on the lack of past precedent recognizing a right to a healthful environment.\(^{30}\)

\(^{19}\) See 7 U.S.C. § 136n(b) (1988).

\(^{20}\) Hardin, 428 F.2d at 1096.

\(^{21}\) Id. at 1097.


\(^{23}\) Id.

\(^{24}\) Id. at 739.

\(^{25}\) Id.

\(^{26}\) 451 F.2d 1130 (4th Cir. 1971).

\(^{27}\) Id. at 1132.

\(^{28}\) Id. at 1139.

\(^{29}\) Id.

Tanner v. Armco Steel Corp.\textsuperscript{31} is one of the only federal cases in which a court gave additional reasons, beyond lack of precedent, for declining to recognize the right to a healthful environment as constitutionally protected.\textsuperscript{32} The plaintiffs in Tanner brought an action to recover for personal injuries allegedly sustained from air pollution caused by the defendant corporation's chemical refineries.\textsuperscript{33} The plaintiffs based their constitutional claim on the Ninth and Fourteenth Amendments.\textsuperscript{34} Like the courts in previous cases, the district court in Tanner refused to recognize a healthful environment as one of the rights protected under the Ninth Amendment, believing that to do so would be a judicial usurpation of legislative power.\textsuperscript{35}

The court also rejected the plaintiffs' Fourteenth Amendment claim, stating four specific reasons.\textsuperscript{36} First, the court found no evidence in the Fourteenth Amendment's words, origin, or history supporting the recognition of environmental rights.\textsuperscript{37} Second, according to the court, neither the Fourteenth Amendment, nor any of the rights incorporated into it, provides standards to guide the court in determining when a party has infringed the asserted environmental rights.\textsuperscript{38} Third, the court reasoned that the judicial process is ill-suited to solving environmental problems; rather, the court believed the legislature is the more appropriate branch of government to recognize individual rights under the federal constitution.\textsuperscript{39} Finally, the court believed that the tort of nuisance provided sufficient remedies for environmental claims like the plaintiffs'.\textsuperscript{40}

\begin{flushleft}
\textsuperscript{32} Id. at 535.
\textsuperscript{33} Id. at 534.
\textsuperscript{35} Tanner, 340 F. Supp. at 535. The court stated that “[t]he parties have cited and the Court has found no reported cases in which the Ninth Amendment has been construed to embrace the rights here asserted. Such a construction would be ahistorical and would represent essentially a policy decision. In effect, plaintiffs invite this court to enact a law. Since our system reserves to the legislative branch the task of legislating, this Court must decline the invitation. The Ninth Amendment through its 'penumbra' or otherwise, embodies no legally ascertainable right to a healthful environment.” Id.
\textsuperscript{36} See id. at 536–37.
\textsuperscript{37} Id. at 536.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 537. The common law action of nuisance is the oldest and most frequently used basis for environmental claims. To obtain relief, however, the aggrieved party must be able to prove an injury to a property interest. In many environmental cases, this may be difficult, if not impossible, to prove. See John Y. Pearson, Jr., Toward a Constitutionally Protected Environment, 56 VA. L. REV. 458, 458 n.3 (1970).
\end{flushleft}
In every subsequent federal case in which plaintiffs asserted the right to a healthful environment, the court dismissed the claim using the precedents of these earlier cases. While the lower federal courts have been loathe to recognize a constitutional right to a healthful environment without Supreme Court precedent or legislative support, these courts nonetheless anticipate that this right will eventually achieve constitutional status. In contrast to the reluctance of the federal courts and legislature, some state legislatures have drafted constitutional provisions acknowledging the importance of the environment and granting individuals the right to a healthful environment.

III. THE INCREASE IN STATE CONSTITUTIONAL REFORM

States are not limited to recognizing only those rights explicitly provided for under the federal constitution. The standard for federal protection of individual rights is meant as a minimum level that states must honor but may exceed provided their actions do not conflict with federal law. Consequently, state courts increasingly have relied on their own state constitutions to protect individual rights and liberties. A study begun in 1985 has found that more than four hundred fifty state supreme court decisions have interpreted their state constitutions to afford more individual rights than those included in the Bill of Rights and the Fourteenth Amend-

41 See, e.g., In Re Agent Orange, 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (no constitutional right to be free from allegedly toxic chemicals used in agricultural sprays); Hawthorne Envtl. Preservation Ass’n v. Colman, 417 F. Supp. 1091, 1096 (N.D. Ga. 1976), aff’d 551 F.2d 1055 (5th Cir. 1977) (injunction granted against construction of highway bypass solely on grounds of alleged statutory violations even though the statutory rights did not reach level of constitutional rights); Pinkney v. Ohio Envtl. Protection Agency, 375 F. Supp. 305, 310 (N.D. Ohio 1974) (constitutional claims of landowners seeking to enjoin construction of nearby shopping mall without merit).

42 See Stop H-3 Ass’n v. Dole, 870 F.2d 1419, 1430 (9th Cir. 1989); In re Agent Orange, 475 F. Supp. at 934.

43 The Tenth Amendment of the United States Constitution provides that “(t)he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Const. amend. X.


45 See Brennan, supra note 8, at 11.
ment.46 Dubbing this trend the "new federalism," many legal scholars believe the renewed interest in state constitutions as protectors of individual rights is a reaction to the conservative stance of the Burger and Rehnquist Courts.47 For example, while the Supreme Court has held that there is no fundamental right to an education,48 at least nine states have recognized such a right.49 Similarly, states have granted broader protection to privacy rights50 and expanded individual rights in the criminal context.51

The state courts' expanding interpretation of individual rights accompanied an increase in the adoption of state constitutional amendments.52 Within the past thirty years, many states have revised their constitutions in whole or in part.53 States have been more successful at amending their constitutions than the federal government for several reasons. It is easier to form a consensus at the state level, where interests tend to be similar, than at the national level where many regions have competing interests.54 Moreover, enacting a state amendment is often easier. Usually, a majority in both legislative houses makes the proposal, and a majority vote in a popular election ratifies it.55 In contrast, federal amendments require the approval of two-thirds of both houses of Congress and three-


47 See Utter, supra note 46, at 29 ("[a]fter the consequent period of relative dormancy of state constitutional rights, in the late 1970s and 1980s state courts began to reaffirm their traditional function as the primary protectors and interpreters of those rights."); see also William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. REV. 533, 548 (1986). Brennan stated that "[n]ow, the diminution of federal scrutiny and protection out of purported deference to the states mandates the assumption of a more responsible state court role. And state courts have taken seriously their obligations as co-equal guardians of civil rights and liberties." Id.


50 See Mosk, supra note 49, at 653.

51 See Schluer, supra note 44, at 1105-12. For a more in-depth discussion of the "new federalism," see generally Note, supra note 44 (note examines states' initiatives to grant broader protection to fundamental rights and liberties).

52 See McLaren, supra note 9, at 126.

53 Id.

54 Id. at 127.

55 See Note, supra note 44, at 1353-54.
quarters of the state representative bodies. 56 The United States has ratified only twenty-six amendments in the more than two-hundred-year history of the Constitution.

During this period of state constitutional reform and increased recognition of individual rights, societal awareness of environmental issues has also dramatically increased. 57 Consequently, a large number of states have chosen to grant increased constitutional recognition and protection to their natural resources, and the right to a safe and healthful environment. 58 In acknowledging the importance of a healthful environment, states have used four basic types of constitutional amendments: those granting citizens the right to a healthful environment; public policy statements concerning preservation of natural resources; financial provisions for environmental programs; and clauses that restrict the environmental prerogatives of state legislatures. 59

The first type of constitutional amendment recognizing a right to a healthful environment can be subdivided into three categories: self-executing provisions that specifically grant the individual right and waive traditional barriers to standing; provisions that the judiciary has interpreted as self-executing; and non-self-executing provisions that require additional legislation before an individual can assert a claim. 60 Seven state constitutions recognize individuals' right to a healthful environment, although the wording of the provision differs in each state. 61 The remainder of this Comment focuses on examining the courts' interpretation of these provisions and the different issues

56 See U.S. CONST. art. V; see also Note, supra note 44, at 1353–54.
58 The following state constitutional amendments recognize the environment in some form, ranging from a policy statement acknowledging the importance of the environment, to a public trust doctrine regarding certain natural resources, to the granting of an individual right to a healthful environment: ALASKA CONST. art. VIII, §§ 1–7; CAL. CONST. art X, § 2, art. X(A), §§ 1–3 & art. XIV § 3; COLO. CONST. art XVIII, § 6; FLA. CONST. art. II, § 7; HAW. CONST. art. IX, § 8 & art. XI, §§ 1, 9; ILL. CONST. art. XI, §§ 1–2; LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII; MICH. CONST. art. IV, § 54; MONT. CONST. art. IX, § 1; N.C. CONST. art. XIV, § 5; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, §§ 4,5; OHIO CONST. art. II, § 36; OR. CONST. art. XIII, § 6; PA. CONST. art. I, § 27; R.I. CONST. art I, § 17; TENN. CONST. art. XI, § 13; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVIII, § 1; VA. CONST. art. XI, §§ 1–2.
59 See McLaren, supra note 9, at 128.
60 See, e.g., HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, §§ 1–2; MASS. CONST. art. XCVII; MONT. CONST. art. II, § 3; N.Y. CONST. art. XIV, §§ 8; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17.
61 See id.
and problems courts have encountered when attempting to define the boundaries of this right.

IV. JUDICIAL INTERPRETATION OF THE RIGHT TO A HEALTHFUL ENVIRONMENT

Plaintiffs' assertion of the right to a healthful environment raises a multitude of issues. A court must determine whether the constitutional provision in question is "self-executing"—whether it grants the plaintiff a threshold level of standing absent accompanying legislation. The court also must interpret the boundaries of the environmental right—which causes of action can be asserted and against whom, the remedies available, and the level of proof needed to demonstrate injury or harm. In defining these boundaries, the court must determine exactly what constitutes a "healthful environment." Hawaii, Illinois, Massachusetts, Montana, New York, Pennsylvania, and Rhode Island have constitutional provisions recognizing an individual's right to a healthful environment.62 An analysis of the relevant case law in these states reveals the various issues that the courts have addressed and the process through which they have defined the right to a healthful environment.

A. Is The Provision Self-Executing?

In cases involving the right to a healthful environment, a court's first inquiry concerns whether the constitutional provision invoked is "self-executing." A self-executing provision creates a legally enforceable right in and of itself; it does not require corresponding legislation to enable individuals to assert a claim based on the provision.63 For example, the drafters of the Illinois Constitution anticipated this question, and wrote the constitution with two sections on environmental rights.64 Section 1 of Article XI, sets forth a general public policy regarding the environment and places a duty on the state and each of its citizens to maintain a healthful environment.65 Section 2 explicitly grants individuals a right to a healthful

---

62 Id.
63 See 16 C.J.S. CONSTITUTIONAL LAW § 46 (1984) "A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplementing or enabling legislation." Id.
64 See ILL. CONST. art. XI, § 1, § 2.
65 ILL. CONST. art. XI, § 1. This section provides that "[t]he 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." Id.
environment and allows them to enforce this right against the government or a private party. Similarly, the environmental provisions in the Hawaii and New York constitutions are self-executing because they refer to individuals' right to enforce compliance without any further legislation.

In states whose constitutions do not specify whether a provision is self-executing, the courts may make that determination. Problems arise, however, when the constitutional provision directs the legislature to maintain actively a healthful environment for the people but does not specifically state whether legislation is necessary before a party can sue to enforce the legislature's obligation. The Pennsylvania courts' first encounter with the self-execution issue

66 ILL. CONST. art. II, § 2. According to this section, "[e]ach 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." Id.

67 See HAW. CONST. art. XI, § 9. This section provides that "[e]ach person has the right to a clean and healthful environment, as defined by the laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law." Id.

68 See N. Y. CONST., art. XIV, § 4. This section states that [t]he policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the protection of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.

Id.

Section 5 further provides that "[a] violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney general at the suit of any citizen." N.Y. CONST., art. XIV, § 5.

69 See Commonwealth v. Nat'l. Gettysburg Battlefield Tower, Inc. 311 A.2d 588, 594 (Pa. 1973). The court must decide whether the legislative intent is "to provide a presently effective rule, by means of which the right given may be enjoyed and protected and the duties imposed may be enforced without supplementary legislation." Student Gov't Ass'n of Louisiana State University v. Bd. of Supervisors, 264 So.2d 916, 919 (La. 1972).

amply demonstrates the difficulties of interpreting such a constitutional provision.

In *Commonwealth v. National Gettysburg Battlefield*, the Commonwealth of Pennsylvania brought an action to enjoin the construction of an observation tower near the historic Gettysburg Battlefield. The Commonwealth alleged that the proposed tower would spoil the area’s natural and historic environment and thereby would violate section 27 of the Pennsylvania Constitution’s Article I. Although the Commonwealth claimed that the provision was self-executing, the court disagreed. According to the court, section 27 was a general policy statement that served only to name the Commonwealth as the trustee of its own natural resources. Consequently, the court explained, supplemental legislation was necessary to define the values mentioned in the provision and to establish guidelines to regulate competing uses of private property. Without this supplemental legislation, the court refused to hear claims invoked under section 27 and dismissed the case on these grounds. The strong dissent argued that the majority opinion emasculated the constitutional amendment.

Ironically, the dissent in *Gettysburg* soon became the majority in *Payne v. Kassab*, which the Pennsylvania Supreme Court decided three years after *Gettysburg*. In *Payne*, the court held that section 27 was a self-executing provision. The *Payne* court did not explain why it diverged from the *Gettysburg* decision. Each Pennsylvania case after *Payne* followed it in declaring section 27 self-executing.

---

72 Id. at 590. Section 27 states that
1]he 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.

PA. CONST. Art. 1, § 27.
73 311 A.2d at 594.
74 Id. at 595.
75 Id.
76 Id. at 596 (Jones, J., dissenting) The dissent explained that the court had “been given the opportunity to affirm the mandate of the public empowering the Commonwealth to prevent environmental abuses; instead, the Court has chosen to emasculate a constitutional amendment by declaring it not to be self-executing.” Id.
78 See id. at 272.
79 Id. “No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the amendment does so by its own ipse dixit.” Id.
80 See id.
Like section 27 of the Pennsylvania Constitution, the environmental provision in Montana's constitution does not explicitly refer to an individual's right to enforce the duty to maintain a healthful environment. While Montana courts have not directly decided the issue of whether the provision is self-executing, the dissent in Montana Wilderness Ass'n v. Board of Health & Environmental Sciences acknowledged a party's standing to bring suit under this provision, although the court dismissed the claim for other reasons. In that case, the Montana Wilderness Association sought to enjoin a proposed subdivision development, asserting violations of section 3 and several state environmental statutes. The Supreme Court of Montana found the statutes inapplicable to the named defendant and dismissed the case without mentioning the constitutional claim. In subsequent cases the Supreme Court of Montana has allowed claims asserted under this provision without discussing the self-execution issue. Thus, in two states, Pennsylvania and Montana, where the constitutional provision does not clearly indicate whether it is meant to be self-executing, the courts have interpreted the provision as allowing individuals to assert claims.

The Massachusetts and Rhode Island constitutional provisions regarding the environment appear to fall within the last category—

---

82 MONT. CONST. art. II, § 3. The Montana provision declares that "[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities." Id.

83 559 P.2d 1157 (Mont. 1976).

84 Id. at 1168 (Haswell, J., dissenting).

85 Id. at 1158.

86 Id. at 1161.


88 Article 49 of the Massachusetts Constitution provides that "[t]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights.

MASS. CONST. amend. art. XLIX

89 Section 17 of the Rhode Island Constitution's Article I states that "[t]he people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values;
provisions granting citizens a right to a healthful environment but requiring enabling legislation to allow a person to bring suit. The Massachusetts provision specifically states that legislation is necessary to protect the rights named in Article 49, and declares that preservation of the environment for the people is a public purpose. Similarly, the Rhode Island provision places a duty on the legislature to provide for conservation and protection of the environment on behalf of the state's residents. No individual in either state has attempted to assert a private cause of action to enforce the right to a healthful environment using these provisions.

B. Intended Parties

A self-executing provision does not in and of itself give a party the right to raise a claim in state court. A state's constitutional provision can limit the class of potential parties. Four potential situations exist: private party vs. government, private party vs. private party, government vs. private party, government vs. government (for example, a conflict between two government agencies). Examining the text of each provision gives a preliminary indication of the parties whom the legislature intended to be the advocates for the rights that the provision grants. For instance, the environmental rights provisions in the Illinois and Hawaii constitutions specifically recognize suits by and against private parties. In Morford v. Lensey Corp., however, the Illinois Court of Appeals refused to apply that state's equivalent provision to a landlord/tenant dispute. The court denied the tenant's right to assert a constitutional claim when its common law claims were sufficient to remedy the alleged harm. By reasoning that the legislature only intended the provision

and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

R.1. CONST. art. 1, § 17.

See supra note 88 and accompanying text.

See supra note 89 and accompanying text.


See ILL. CONST. art. XI, §§ 1-2; HAW. CONST. art. XI, § 9.

See id.


Id. at 937; see also Fredman v. Clore, 301 N.E.2d 7, 10 (Ill. App. Ct. 1973).

Id.
to protect persons and the environment from threats of pollutants, the court limited the applicability of the provision in other types of private suits. 98

Some states' constitutional provisions regarding the environment do not explicitly authorize private suits. The Pennsylvania constitutional provision, for example, is ambiguous on the question of whether a private party can bring suit or be sued. 99 Nonetheless, the Pennsylvania state courts have allowed private suits based on the provision. 100 The Montana provision also does not specifically state whether parties can sue private citizens. 101 The provision, however, does mandate that all persons have corresponding duties to respect others' right to a healthful environment, thus indicating that individuals have an obligation to maintain a healthful environment. 102 Therefore private suits are likely to be allowed.

The New York courts have yet to interpret that state's constitutional provision on the environment to allow suits against private parties. Section 5 of the New York Constitution's Article 14 grants private citizens the right to enforce the environmental policy set forth in section 4, which places a duty to preserve and maintain the natural environment solely on the New York state government. 103 As a result, private parties suing under the auspices of section 5 have only asserted claims against government agencies or officials. 104

In the majority of states with these constitutional provisions, courts seem more willing to entertain suits by and more often against government agencies. 105 For example, Pennsylvania Supreme Court granted standing to the state's Game Commission to challenge the

98 Id.
99 See PA. CONST. art. 1, § 27.
101 MONT. CONST. art. II, § 3.
102 Id.
103 N.Y. CONST. art. XIV, §§ 4–5.
issuance of a solid waste permit for land adjacent to a waterfowl refuge. The court provided that when a legislature invests an agency with certain responsibilities within a specified area of interests, that agency has the implicit power to be a litigant in suits touching upon those interests. In this case, the Game Commission was the proper party to challenge a permit with potential adverse effects on a state wildlife refuge.

Despite their apparent preference for governmental litigants, courts have not given free rein to any government agent asserting an environmental right. For example, the Illinois Supreme Court refused to allow the United States Environmental Protection Agency (EPA) to prosecute cases before the state Pollution Control Board where the legislature had reserved that power for the State Attorney General.

Some jurisdictions, such as Illinois and Pennsylvania, have recognized a municipality's right to bring suit under these constitutional provisions on behalf of its citizens. In Pennsylvania, however, state courts were slow to interpret the commonwealth constitution's environmental rights provision as authorizing municipalities to be parties. In Snelling v. Department of Transportation, various parties, including the city of Allentown, brought suit under section 27 of the Pennsylvania Constitution to challenge plans for the construction of a shopping mall and the expansion of a main road. Allentown alleged that its citizens would suffer serious bodily harm due to increased traffic accidents. The court ruled that a city had no standing to assert the claims of individual property owners.

---

106 See Game Comm'n v. Dep't of Env'tl. Resources, 555 A.2d 812, 815 (Pa. 1989).
107 Id. at 816.
108 Id.
109 See generally Life of the Land, 623 P.2d 431; Bernhard, 568 P.2d 136; Payne, 361 A.2d 263; Pollution Control Bd., 473 N.E.2d 452; Reid, 377 N.Y.S.2d 380.
110 See, e.g., Fiedler v. Clark, 714 F.2d 77, 80 (9th Cir. 1983); People ex rel. Scott v. Briceland, 359 N.E.2d 149, 157 (Ill. 1977).
111 See Scott, 359 N.E.2d at 157 (court refused to construe Article XI broadly to permit legislature to diminish Attorney General's power in representing state in proceedings designed to enforce environmental policy).
114 Id. at 1300.
115 Id. at 1301.
116 Id. Some individual citizens asserted the same claims, but the court denied them relief because their claims were too speculative. Id. at 1302.
burg Associates v. Newlin Township, also involved a town's attempt to bring suit on behalf of its citizens. Newlin Township challenged before the Environmental Hearing Board the Department of Environmental Resources' (DER's) issuance of a sanitary landfill permit. The board had recognized the town's standing, concluding that in suing on behalf of its citizens, the town was fulfilling its municipal responsibilities to provide for their well-being. As in Snelling, however, the court refused to grant the town standing, on the grounds that there was no connection between the DER granting a landfill permit to a private company and the town carrying out its local governmental functions.

Two years later, the Supreme Court of Pennsylvania found a town's arguments more persuasive, in Franklin Township v. Commonwealth of Pennsylvania. Like the town in Newlin, Franklin Township sought judicial review of a landfill permit. The court granted the town standing, reasoning that the town was a legal person with rights and responsibilities that included protecting the environment within its borders. Thus, in six years, the courts of Pennsylvania were persuaded that the interests of a town in protecting the health and welfare of its citizens were sufficient to garner standing under section 27.

In sum, state courts prefer to have governmental bodies advocate the individual's right to a healthful environment. While courts have not hesitated to limit standing even for governmental plaintiffs, these cases demonstrate that government agencies or officials, on behalf of citizens, bring the majority of suits.

C. Standing

After making the initial determination of whether a party qualifies to sue, a court next examines whether the asserted interest is sufficient to warrant standing. The United States Supreme Court has

---

118 Id. at 1016.
119 Id. at 1017.
120 Id. at 1017.
121 Id.
122 452 A.2d 718, 720 (Pa. 1982).
123 Id.
124 Id. at 720. The court found that the town's interest in preventing toxic wastes from permeating its land was both direct and substantial. Id. at 720–21.
125 See, e.g., Fiedler v. Clark, 714 F.2d 77, 80 (9th Cir. 1983); People ex rel. Scott v. Briceland, 359 N.E.2d 149, 157 (Ill. 1977).
held that plaintiffs must allege an "injury in fact," and that this interest must fall within the zone of interests that the statute or constitutional provision in question protects.\textsuperscript{127} State courts have differed in their interpretation of this standard. The Illinois legislature, for example, has directed the state's courts to interpret this standard broadly, exempting individuals suing under the Illinois constitutional provision on the environment from traditional standing criteria.\textsuperscript{128} These state courts nonetheless still require that the alleged injury be real and substantial; an alleged apprehension or fear of injury is insufficient.\textsuperscript{129}

Like the Illinois courts, the Hawaiian Supreme Court also interpreted the standing requirement under its state environmental provision broadly.\textsuperscript{130} In \textit{Life of the Land v. Land Use Commission},\textsuperscript{131} the court granted standing to an environmental organization that was challenging the reclassification of certain lands, even though no members of the organization were adjacent landowners.\textsuperscript{132} According to the court, if plaintiffs' based their claim on a constitutional right then they need only assert an "interest of justice" rather than a specific property interest, as a statutory or common law claim would normally require.\textsuperscript{133}

In contrast, Pennsylvania courts demand a more substantial injury, applying traditional standing criteria.\textsuperscript{134} The Pennsylvania courts explicitly have rejected the broader standards that Illinois and Hawaii use.\textsuperscript{135} For example, the commonwealth court in \textit{Community College of Delaware County v. Fox},\textsuperscript{136} the court refused to uphold the state Environmental Hearing Board's expansion of the

\begin{thebibliography}{136}
\bibitem{128} "Because the wrong here has reached crisis proportions and because it affects individuals in so fundamental a way, the Committee is of the view that the 'special injury' requirement for standing is particularly inappropriate and ought to be waived." Notes to ILL. CONST. art. II, § 2, (1970), ILL. REV. STAT.
\bibitem{129} See, e.g., Village of Hillside v. John Sexton Sand & Gravel Corp., 434 N.E.2d 382, 390 (Ill. App. Ct. 1982) (in action challenging process of transferring waste permits, parties had to assert adverse or unsafe effect from defendant's actions, not merely disagree with process); Parsons v. Walker, 328 N.E.2d 920, 924 (Ill. App. Ct. 1975) (in action seeking to enjoin state officials from constructing reservoir, parties had to assert more than fear of injury).
\bibitem{131} \textit{Id.} at 441.
\bibitem{133} See Fox, 342 A.2d at 474.
\bibitem{134} \textit{Id.}
\bibitem{135} \textit{Id.}
\bibitem{136} \textit{Id.}
\end{thebibliography}
class of litigants who could raise an environmental claim.\textsuperscript{137} For a party to have standing in Pennsylvania, the court stated, the party must have a direct interest in the subject of the particular litigation, and that interest must be immediate and substantial, having a discernable effect.\textsuperscript{138}

These cases demonstrate that state courts differ in their interpretation of what constitutes sufficient interest to assert standing. When the state legislature’s intent is unclear, state courts have tightened requirements for a party asserting a violation of the right to a healthful environment.

\section*{D. Defining the Right and its Boundaries}

Having an interest sufficient to support a claim is only the plaintiff’s first hurdle. The court next turns to whether the interest asserted requires protective intervention, usually in the form of an injunction.\textsuperscript{139} In determining whether a private party or government agency has infringed on an individual’s right to a healthful environment, the courts somehow must define “healthful” or “decent” or whatever term the state legislature has chosen to describe the right.\textsuperscript{140} Only Hawaii’s constitutional provision on the environment attempts to define “healthful” in its text.\textsuperscript{141} Section 9 of Article XI, directs Hawaii’s courts to interpret “healthful” using the standards set in federal and state environmental quality laws.\textsuperscript{142} The remaining states leave this determination with the courts.\textsuperscript{143} While some commentators criticize the judicial definition approach, believing the courts are usurping the legislature’s role,\textsuperscript{144} others have suggested

\begin{itemize}
  \item \textsuperscript{137} Id. at 474.
  \item \textsuperscript{138} “[T]he requirement of a 'substantial' interest simply means that the individual's interest must have substance—there must be some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269, 282 (Pa. 1975).
  \item \textsuperscript{139} See, e.g., City of Chicago v. Pollution Control Bd., 322 N.E.2d 11, 13 (Ill. 1975); Parsons v. Walker, 328 N.E.2d 920, 923 (Ill. App. Ct. 1975).
  \item \textsuperscript{140} See, e.g., Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), aff’d, 361 A.2d 263 (Pa. 1976) (court formulated three-part test to determine when right has been violated); State v. Bernhard, 568 P.2d 136, 138 (Mont. 1977) (court chose to balance competing interests to determine when right has been violated).
  \item \textsuperscript{141} See HAW. CONST. art. XI, § 9.
  \item \textsuperscript{142} See note 67 and accompanying text.
  \item \textsuperscript{143} See Bozung, supra note 70, at 160.
\end{itemize}
that "healthful" is equally as definable as "reasonable" or "fair"—adjectives commonly defined by the judiciary.\textsuperscript{145}

Courts' interpretations of the obligations set forth in the various state constitutional provisions regarding the environment essentially serve to define the boundaries of the right to a healthful environment.\textsuperscript{146} In the majority of these cases, the plaintiff must prove that the provision places a duty on the state government to maintain a healthful environment, and that the government has violated this duty.\textsuperscript{147}

For example, the constitutional provisions in Illinois\textsuperscript{148} and Rhode Island\textsuperscript{149} specifically place a duty on the state government to preserve and maintain a healthful environment. Hawaii's\textsuperscript{150} and Montana's\textsuperscript{151} provisions, on the other hand, do not contain the word "duty." Montana's provision, however, may establish an even broader standard, seemingly placing the obligation to respect each individual's right to a healthful environment on all persons, individuals and government actors alike.\textsuperscript{152} While not using the word "duty," the Massachusetts,\textsuperscript{153} New York,\textsuperscript{154} and Pennsylvania\textsuperscript{155} constitutions declare that conservation and protection of the environment is state public policy.

Courts apply a variety of methods to determine whether the government has violated its obligation to maintain a healthful environment. These methods range from a specific multi-part test to a simple balancing of interests with no further guidelines for future cases.\textsuperscript{156} In \textit{Payne v. Kassab},\textsuperscript{157} the Pennsylvania Commonwealth Court enun-

\textsuperscript{145} Bozung, \textit{supra} note 70 at 160; see also McLaren, \textit{supra} note 9, at 136. McLaren notes that courts have not hesitated to interpret ambiguous terms in other areas of the law such as tort and federal constitutional law. \textit{Id.}


\textsuperscript{148} \textit{See} ILL. CONST. art. XI, § 1.

\textsuperscript{149} \textit{See} R.I. CONST. art. I, § 17.

\textsuperscript{150} \textit{See} HAW. CONST. art. XI, § 9.

\textsuperscript{151} \textit{See} MONT. CONST. art. II, § 3.

\textsuperscript{152} \textit{Id. See also} Montana Dep't of Health and Envtl. Sciences v. Green, 739 P.2d 469, 473 (Mont. 1987) (Constitutional provision mandates that department protect public's right to healthful environment).

\textsuperscript{153} \textit{See} MASS. CONST. amend. art XLIX.

\textsuperscript{154} \textit{See} N.Y. CONST. art. XIV, § 4.

\textsuperscript{155} \textit{See} PA. CONST. art. I, § 27.


\textsuperscript{157} Payne, 312 A.2d at 94.
ciated a three-pronged test to apply in determining when a plaintiff is entitled to relief. According to the commonwealth court, courts should consider whether there was compliance with applicable statutes and regulations relevant to the protection of natural resources; whether the record demonstrates the defendant's reasonable efforts to keep the environmental damage to a minimum; and whether the harm resulting from the challenged decision or action clearly outweighs its benefits, and thus amounts to an abuse of discretion. This test places a heavy burden of proof on the plaintiff.

In applying the Payne test, because of the plaintiff's heavy burden, the majority of decisions have favored the defendant, who usually has been a government agency. For example, Pennsylvania courts have concluded that section 27 of the commonwealth's constitution does not shift the burden of investigating environmental harm to state agencies; these courts have concluded that the burden still rests with those applying for permits, provided the agencies fully satisfy their obligations under the Payne test. Similarly, the Pennsylvania courts have also presumed the constitutionality of environmental protection statutes, believing that the existence of the constitutional provision further supports their validity.

---

158 Id.
159 Id.
160 See McLaren, supra note 9, at 139. McLaren notes that while the plaintiff has the burden of proving the harm substantially outweighs the benefit, the state need only show compliance with all applicable statutes and regulations.
161 See, e.g., Borough of Moosic v. Pennsylvania Pub. Util. Comm'n, 429 A.2d 1237, 1240 (Pa. Commw. Ct. 1981) (action to enjoin transfer of Pennsylvania Gas & Water Company property to private developer dismissed when plaintiffs could not prove transfer would effect utility's ability to provide safe and efficient water service); Community College of Delaware County v. Fox, 342 A.2d 468, 479 (Pa. Commw. Ct. 1975) (adjacent landowners challenging issuance of sewage permit did not prevail where Department of Environmental Resources had followed all applicable statutes and actual construction of sewer lines would have negligible effect on water quality).
Illinois courts prefer to balance the competing interests involved in environmental claims in order to determine which party should prevail. Here too, the balancing tends to favor the defending party, because courts are reluctant to issue injunctions except in extraordinary circumstances. Like Pennsylvania, Illinois has chosen to give wide latitude to the presumptive validity of legislative and agency actions concerning the environment.

The New York and Montana courts have also applied a balancing test to claims brought under their environmental provisions. In two Montana cases involving motor vehicle wrecking facilities, the Montana Supreme Court held that the courts must balance property rights with the environmental rights of the public. Similarly, the New York Supreme Court has stated that giving proper consideration to environmental interests may necessitate imposing a "social cost" in other areas. While the court acknowledged that the environment's importance should not to be understated, the court also cautioned against ignoring the competing interests involved.

States differ on whether their constitutional right to a healthful environment places an obligation on state legislative agencies to adopt uniform, statewide environmental regulations. For example, in Village of Carpentersville v. Pollution Control Board, the Illinois Supreme Court held that a manufacturer constructing an incinerator pursuant to a state government order must comply with local

Environmental Resources' powers could not be justified under § 27 of Pennsylvania Constitution).

---


168 See Montana Dep't of Health and Envtl. Sciences v. Green, 739 P.2d 469, 473 (Mont. 1987) ("While it is true that he does have certain constitutional rights to acquire and possess real and personal property, these property rights must be balanced with the rights of the public which the Department is mandated to protect."); see also Bernhard, 568 P.2d at 138.

169 Reid, 377 N.Y.S.2d at 388.

170 Id.

zoning laws. In response to village residents' complaints of noxious odors emanating from a manufacturing plant, the owner obtained a permit to construct a hazardous waste incinerator. The permit, however, required the manufacturer to construct the incinerator one hundred feet above ground, in violation of a local zoning ordinance. The village refused to grant the manufacturer's request for a variance. Bringing suit under section 1 of the Illinois Constitution's Article XI, the manufacturer claimed that the legislature intended the provision to mandate uniformity of environmental regulation; therefore if local laws conflicted, the statewide laws should prevail.

The court declared that while the intent behind section 1 is for the state General Assembly to play a leadership role in implementing a statewide plan for pollution control, the provision did not prohibit local governmental units from instituting zoning or environmental ordinances. Pennsylvania, however, has interpreted its constitutional provision to prohibit local governments from adopting zoning ordinances that would restrict or interfere with the operation of any state agency, including the Department of Environmental Resources. While parties must follow local zoning ordinances, state environmental regulations take precedence when state and local actions conflict. Thus, states even conflict as to the pervasiveness of the duties imposed by the constitutional mandate.

The majority of cases brought under these constitutional provisions have concerned claims against government agencies. In general, state courts hearing these claims have recognized that constitutional provisions granting individuals a right to a healthful environment do place obligations on a state government to preserve and maintain the environment. In determining whether the government has violated its duty, the courts balance the competing interests involved. This balancing more often reaches a result in the government's favor. So, despite the courts' interpreting these pro-

---

172 Id. at 366.
173 Id. at 362–63.
174 Id.
175 Id. at 363.
176 Id.
177 Id. The court concluded that the General Assembly does not have a duty to adopt uniform, statewide standards for environmental protection. Id. at 366. See also City of Chicago v. Pollution Control Bd., 322 N.E.2d 11, 14 (Ill. 1975); County of Cook v. John Sexton Contractors Co., 408 N.E.2d 236, 237–38 (Ill. App. Ct. 1980).
179 Id.
visions as expanding governmental duties to care for the environment, courts refrain from enforcing these obligations. Therefore, provisions granting individuals the right to a healthful environment do not provide the protection they supposedly guarantee.

V. ENCOURAGING THE FORMATION OF STATE CONSTITUTIONAL RIGHTS TO A HEALTHFUL ENVIRONMENT

Forming state constitutional rights to a healthful environment may serve as an innovative means of addressing society's emerging focus on preserving the environment for present and future generations. The establishment of a constitutional right is a necessary supplement to existing environmental legislation. Often, individuals must depend on government agencies, both federal and state, to seek out and punish those harming the environment. These agencies commonly are without sufficient staff or funding actively to pursue violators and enforce the applicable environmental regulations.

Ideally, the federal government should recognize a constitutional right to a healthful environment. In light of the Supreme Court's increasingly conservative stance toward expanding interpretation of individual rights, it appears highly unlikely that the federal judiciary will acknowledge a right to a healthful environment. Similarly, the possibility of passing a federal amendment to the Constitution is highly doubtful. In contrast, state courts and legislatures have actively expanded their protection of fundamental rights and liberties. As a result, concentrating on state initiatives may be more successful in the near future. Although environmental provisions can take one of four forms, those specifically granting an individual right to a healthful environment are the most beneficial because they can provide the greatest protection when courts respect legislative intent.

A. Provisions Granting the Right to a Healthful Environment Should be Self-executing

For a constitutional provision purporting to protect individuals' interest in a healthful environment to have any weight, it must

180 See supra notes 46–51 and accompanying text.
181 See supra notes 54–56 and accompanying text.
182 See supra notes 45–51 and accompanying text.
183 See supra notes 57–59 and accompanying text.
specifically grant individuals an assertable right and be self-executing. In the seven state provisions examined in this Comment, only three specifically refer to an individual’s right to enforcement without supplementing legislation. 184 The remaining states have allowed the courts to decide the self-execution question, and when a legislature’s intent is unclear, the courts have encountered difficulty in determining whether the provision should be self-executing. 185 Pennsylvania’s experience in Commonwealth v. National Gettysburg Battlefield, 186 serves as an example of a court’s difficulty. By adopting an amendment similar to the ones in Illinois, 187 Hawaii, 188 or New York, 189 Pennsylvania could have easily averted the waste of judicial resources spent on interpreting its constitutional provision. 190

Without specific language, provisions granting the individual right to a healthful environment are often mistaken for policy statements. 191 Courts are reluctant to enforce environmental policy provisions where the legislature has not enacted any corresponding statutes. Therefore, policy statements do not grant an assertable “right,” and the individual gains no additional protection than environmental legislation provides. 192 Furthermore, to recognize an individual right and then require enabling legislation to enforce it, essentially subverts the intent behind the provision 193—the legislature’s possible inaction would nullify the right. 194 The Massachusetts 195 and Rhode Island 196 provisions provide an example. Though these provisions specifically recognize an individual’s right to a healthful environment, the courts have not interpreted them to be self-executing. Therefore, the supposed “right” is actually meaningless.

185 See supra notes 71–76 and accompanying text.
189 See N.Y. Const. art. XIV, § 9.
190 See supra notes 71–76 and accompanying text.
192 McLaren, supra note 9, at 133. Policy statements in the form of a directive create “a legislative imperative, but unless the legislature chooses to enact an implementing law, no environmental right is created.” Id.
194 McLaren, supra note 9, at 135.
195 See Mass. Const. amend. art. XLIX.
196 See R.I. Const. art. I, § 17.
B. Intended Parties Should Encompass Both Private and Public Entities

Individuals should be able to assert the right to a healthful environment against both private parties and the state government. If the legislature or courts enact standing requirements that are too stringent, it has the same effect of defeating the purpose of the provision. In recognizing a fundamental right, the legislature acknowledges the importance of that right. To limit the class of plaintiffs that can enforce the right would diminish the impact of recognizing the right at all. For example, the Illinois legislature intended to broaden standing requirements so as to not discourage citizens from bringing suit. The Illinois courts, however, have continued to apply a high standard to weigh a party's asserted interest, thus discouraging private citizens from filing claims. Despite the legislative intent that these rights be asserted by and for the individual, the courts consistently have limited the class of potential litigants, preferring governmental bodies as parties. Cases by or against government agencies or officials comprise the majority suits. This occurs even in states whose constitutional provisions authorize suits against private parties. Moreover, in cases against a private party, the plaintiff is often contesting a government agency action which benefitted that party. Therefore, the courts' preference for governmental plaintiffs, and the indication from past cases that it is commonly a government agency's action in dispute, essentially reaffirm the mistaken belief that the government is the only intended advocate and protector of the environment. Violating an individual's right to a healthful environment has the same effect whether the violator is a private citizen or a government agency. Determining whether the plaintiff has asserted a sufficient interest and whether another party violated that interest, appears no more difficult a task in private suits than in suits against the government.

197 Barnard, supra note 193, at 529-30.
198 See supra note 128 and accompanying text.
199 See supra note 129 and accompanying text.
201 See supra notes 104-06.
204 Compare Fox, 342 A.2d 468 with Borough of Moosic, 429 A.2d 1237.
Allowing claims by and against private parties would effectuate the legislature’s intent behind the right. Some believe that as a consequence, courts would be inundated with cases. Courts have repeatedly stated, however, that legislatures are responsible for balancing the interests of society. Therefore, in passing such a provision on behalf of the individual, the legislature in question must have taken the potential increase of cases into account and concluded that the importance of recognizing the individual’s right to a healthful environment outweighs any inconvenience to the courts. Also, many of these provisions allow legislatures to implement reasonable limitations on the exercise of this right. For example, the Illinois legislature has enacted “exhaustive requirements” that only allow court claims after the plaintiff has utilized administrative procedures. Provided that these requirements are not so burdensome as to discourage plaintiffs from asserting claims, they would effectuate the legislature’s intent and not overburden the courts.

C. Standing Requirements Should not be Unduly Strict

Courts’ interpretations of what constitutes a sufficient interest to warrant standing differ between states. Hawaii espouses a broad interpretation, allowing claims in the interest of justice rather than applying a high threshold standard and thus giving the greatest deference to the legislative intent underlying these constitutional provisions. Pennsylvania, however, has not expanded on traditional standing criteria, instead demanding a demonstrated substantial interest before consenting to hear a claim based on the commonwealth’s constitutional provision. Perhaps most problematic is the intrastate conflict in Illinois. While the Illinois legislature specifically has stated its desire to loosen standing requirements under its constitutional provision regarding the environment, the state courts have not followed this directive. The Illinois courts are intentionally limiting the number of cases they hear under these provisions, contrary to the intent of their state’s legislature. Accordingly, the right to a healthful environment becomes less and less powerful, until it no longer serves to supplement existing environmental legislation by providing additional protection for the individual.

206 See, e.g., HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2.
208 See supra notes 130–33 and accompanying text.
209 See supra notes 134–38 and accompanying text.
210 See supra notes 128–29 and accompanying text.
D. Defining the Right and its Boundaries

The strength of these constitutional provisions granting the individual a right to a healthful environment depends primarily on how the courts define "healthful", or whatever term the legislature has chosen. States may choose to adopt Hawaii's approach by defining the terminology within the provision itself.211 The legislature creating the provision may formulate a definition, or refer to the standards set by current environmental laws. If, however, the state prefers to leave the term ambiguous, then the courts assume the duty of defining the right.212 Critics of this approach believe that courts have the potential to usurp the legislature’s role.213 Again, because the legislative branch is responsible for balancing the interests of society, then it must be assumed that the state government considered this factor.214

Essentially, the courts' decisions in cases brought under these provisions serve to define the boundaries of the right to a healthful environment. The courts appear to agree universally that these provisions do place an obligation on state governments to consider the environmental effects of their decisions,215 although states differ in their interpretation of the extent of this duty.216 Some states also place obligations on private parties.217 The different approaches taken by state courts to define these obligations—and consequently to define the right itself—serve to limit the strength of the right. For example, the balancing approaches of Illinois and Montana acknowledge the competing interests involved in environmental cases but do not necessarily give sufficient weight to the environmental interest. Similarly, Pennsylvania's three-pronged test weighs heavily in the government's favor. In every case brought under section 27 of the Pennsylvania constitution in which the government was a party, the court found in the government's favor, except for the one case that limited the environmental regulatory power of the executive branch.218 In the few cases finding for the plaintiff, the plaintiff usually has been a government agency or official.219 Thus, the effect

211 HAW. CONST. art. XI, § 9. For the text of this provision, see supra note 63.
212 See Bozung, supra note 70, at 160.
214 See supra notes 143-45 and accompanying text.
215 See supra notes 146-55 and accompanying text.
216 See supra notes 171-79 and accompanying text.
217 See, e.g., ILL. CONST. art. XI, §§ 1-2; MONT. CONST. art. II, § 3.
of these cases is to define the individual's right to a healthful environment very narrowly, giving overwhelming deference to legislative actions and essentially diminishing the substance of the right.

VI. CONCLUSION

The strength of a constitutional provision recognizing an individual's right to a healthful environment depends primarily on the way courts dispose of the claims asserted under it. First, for the right to have any meaning, it should be self-executing. If the language of the provision lacks clarity, courts should interpret it to allow claims by individuals. This supports the intent of the legislature to protect the individual's right to a healthful environment.

Furthermore, in hearing these claims, courts should refrain from limiting the class of potential litigants and imposing strict standing requirements. These actions subvert the intent of the provision and diminish its effectiveness. In addition, the difficulty the courts have had in defining "healthful environment" serves to reduce the provision's usefulness in protecting the environment. The ambiguity of the term, and the courts' reluctance to further define it, essentially reaffirm the status quo. The heavy burden placed on the plaintiff makes it difficult for plaintiffs to prevail.

Whether the few cases to date finding for the individual make the creation of a constitutional right to a healthful environment a worthwhile endeavor is questionable. If, however, the state legislatures and courts give more substance to this constitutional right, it could become a powerful tool in the struggle to preserve and maintain a healthful environment.

(state prevailed on claims asserted against it); Chicago v. Pollution Control Bd., 322 N.E.2d 11, 15 (Ill. 1975) (Pollution Control Board prevailed on charges against city).