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Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27

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I. Introduction	695
II. A Two-Part Amendment	700
A. Environmental Rights and Public Trust	700
B. <i>Gettysburg Tower</i> and <i>Payne</i>	704
III. Sustainable Development, Not Anti-Development . .	714
A. Origins of Anti-Development Perception	714
B. Amendment Embodies Conservation or Sustainable Development	716

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This Article has two parts. The second part, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II—Environmental Rights and Public Trust*, will appear in the 104th volume of the *Dickinson Law Review*, issue number one.

IV. Government Responsibilities as the Primary Basis for Citizen Rights	722
V. A More Constructive and Useful Judicial Role	724
A. Primary Responsibility in Legislative and Executive Branch	725
B. Judicial Role in Enforcing Amendment	727
1. Substantive Rules to Close Legislative or Adminis- trative Gaps	727
2. Principle-Reinforcing Rules to Support Legislative or Administrative Actions	731
VI. Conclusion	733

We shall not cease from exploration
 And the end of all our exploring
 Will be to arrive where we started
 And know the place for the first time.

—T.S. Eliot¹

I. Introduction

The public enthusiasm for environmental protection that swept the country in the early 1970s was premised on the view that ecological degradation is an unacceptable price for social and economic progress. To ensure protection, many argued, the environment should be recognized in state constitutions as well as the United States constitution. On May 18, 1971, Pennsylvania citizens overwhelmingly approved such a provision.² Article I, Section 27 of the Pennsylvania Constitution provides:

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.³

More than a quarter century later, the promise of Article I, Section 27 has been realized more by the enactment and implementation of legislation and regulations addressing specific problems

1. *Little Gidding*, in *FOUR QUARTETS* 59 (1943).

2. The vote was 1,021,342 in favor and 259,979 opposed. See Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123 (1990). Four other proposed constitutional amendments were included in the referendum. Two were adopted, but by much smaller margins, and two were defeated. See *id.* at 123-24 n.2. No candidate for statewide office that day received as many votes. See *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 596 n.1 (Pa. 1973) (Jones, C.J., dissenting).

3. PA. CONST. art. I, § 27. Two other environmental amendments had been adopted earlier. The first amendment authorized the state to create debt and issue bonds for \$70 million for land acquisition of state parks and other conservation, recreation, and historic preservation purposes. See *id.* art. VIII, § 15. The second amendment authorized the state to create debt and issue bonds for \$500 million for, among other things, "the conservation and reclamation of land and water resources of the Commonwealth, including the elimination of acid mine drainage, sewage, and other pollution from the streams of the Commonwealth . . ." *Id.* art. VIII, § 16.

than by the Amendment itself. Franklin Kury, the author and chief legislative sponsor of the Pennsylvania Amendment has conceded that it is "still largely untested as an environmental protection tool."⁴ As its early supporters feared, the Amendment seems to have more symbolic than substantive value, inscribed on plaques and quoted in speeches, but rarely used in decision making.

While the first major judicial decision was supportive of the Amendment, a subsequent decision greatly diminished its importance. In the first decision, *Commonwealth v. National Gettysburg Battlefield Tower*,⁵ the courts held that the Amendment created a self-executing public right, but that construction of an observation tower overlooking the Gettysburg Civil War battlefield would not violate that right.⁶ Shortly thereafter, in *Payne v. Kassab*,⁷ the commonwealth court developed a three-part test for applying the Amendment that utterly ignores the constitutional text,⁸ but which has been widely used ever since. The test is so weak that litigants using it to challenge environmentally damaging projects are almost always unsuccessful. Undercut but not overruled by *Payne*, the *Gettysburg Tower* decision has seen little use.

In another series of cases, however, the supreme court has used the Amendment to support decisions to uphold statutes or ordinances whose constitutionality or applicability is challenged on other grounds. In one of these cases, *United Artists' Theater Circuit, Inc. v. City of Philadelphia*,⁹ the supreme court used the Amendment to uphold the constitutionality of a historic preservation ordinance that was challenged by a landowner as a taking of private property without compensation in violation of the state constitution.¹⁰ Cases such as *United Artists'* suggest that environmental principles and values may only be capable of complete

4. Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution*, in 1 PENNSYLVANIA ENVIRONMENTAL LAW AND PRACTICE § 2-3, at 26 (Joel R. Burcat & Terry L. Bossert eds. 1998). As a former member of the Pennsylvania House of Representatives, Mr. Kury drafted and sponsored the amendment that became Article I, Section 27. *See id.* § 2-1 n.1.

5. 13 Adams County L.J. 45 (jurisdiction), 75 (opinion of the court), 135 (supplemental opinion of the court) (C.P. Adams County 1971), *aff'd*, 302 A.2d 886 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973).

6. *See id.*

7. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

8. *See id.* at 94.

9. 635 A.2d 612 (Pa. 1993).

10. *See id.* at 620.

protection if they are of equal legal status to the other values and principles identified in the constitution.¹¹

However tentatively, such cases recognize that Article I, Section 27 matters because it does something that statutes and regulations cannot do; it makes environmental and historic protection part of the constitutional purpose of state government. This two-part Article explains how the Amendment accomplishes that purpose and what it should mean for Pennsylvania, and suggests the value of similar inquiries under other state and national constitutions.

My starting point is that Article I, Section 27 is constitutional law, and is no less so than other provisions of the state constitution simply because it pertains to the environment. This Article suggests a framework for applying the Amendment in Pennsylvania, building on parts of the state's experience, criticizing other parts, and suggesting approaches that have not yet been tried. We should not be bound by the way that prior cases under Article I, Section 27 were litigated and judged if we see new ways of understanding and applying the Amendment.

The role of constitutional provisions in environmental protection is likely to continue to grow in importance. More than two-thirds of state constitutions contain provisions concerning natural resources and the environment, and all state constitutions written since 1959 have such provisions.¹² Nearly all national constitutions adopted or revised since 1972 have included a constitutional right to a decent environment.¹³ The United States Constitution contains no such provision, although proposals for such an amendment continue to surface.¹⁴

Pennsylvania's experience is particularly important in understanding such provisions because Article I, Section 27 is the most

11. These cases do not suggest that the Amendment's values are superior to those stated elsewhere in the constitution.

12. See Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 865, 871 (1996).

13. See Dinah Shelton, *Challenges to the Future of Civil and Political Rights*, 55 WASH. & LEE L. REV. 669, 682 (1998).

14. See WILLIAM H. ROGERS, ENVIRONMENTAL LAW § 1.5 (1994 & Supp. 1998) (summarizing proposals and suggested existing constitutional sources). But see J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245 (1999) (arguing that the U.S. Constitution should not contain an environmental amendment). Prof. Ruhl's argument, however, is not addressed to state amendments. See *id.* at 252 n.22.

prominent environmental amendment to a state constitution.¹⁵ The *Gettysburg Tower* case was recently described as “undoubtedly the best known of any state court opinion which has construed the meaning of a state environmental constitutional provision.”¹⁶ Indeed, the Pennsylvania Amendment has been recommended for consideration in other national constitutions.¹⁷ Pennsylvania’s Amendment also provides a rich source of experience for understanding such provisions.

Environmental amendments to state or national constitutions are attractive, however, only if they can be applied in a meaningful way.¹⁸ That, in turn, requires a coherent and practical framework for interpreting them. The Pennsylvania cases interpreting Article I, Section 27, unfortunately, do not provide that framework. These cases generally do not recognize the constitutional status of Article I, Section 27, only inconsistently recognize the Amendment as a source of government authority, and do not impose any meaningful restraint on government power.

As Part I of this Article explains, the Amendment has been less than fully effective for four basic reasons. First, it is treated as a single indivisible rule even though it contains two separate rules. Second, Article I, Section 27 has been understood as categorically anti-development, as potentially putting a halt to most if not all human activities. Third, much more attention has been given to the creation of citizen rights than to the governmental responsibilities on which those rights are primarily based. Finally, and perhaps most importantly, there has never been a generally accepted explanation for why Article I, Section 27 even matters given the predominant role of legislation and administrative regulation

15. See ROGERS, *supra* note 14, § 1.5 (describing Article I, Section 27 as the “best known” of state environmental amendments). The Amendment is discussed at length in numerous articles about environmental amendments to state constitutions. See, e.g., Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 141-47 (1997); Bruce Ledewitz, *The Challenge of, and Judicial Response to, Environmental Provisions in State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 33 (1991). Article I, Section 27 is also discussed in environmental law textbooks. See, e.g., ZYGMUNT J.B. PLATTER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1023-29 (2d ed. 1998).

16. Gallagher, *supra* note 15, at 141.

17. See, e.g., Elizabeth F. Brown, Comment, *In Defense of Environmental Rights in East European Constitutions*, 1993 U. CHI. L. SCH. ROUNDTABLE 191, 215 (suggesting East European countries adopt constitutional provision similar to Pennsylvania’s).

18. Shelton, *supra* note 13, at 683-84.

concerning environmental protection and natural resources conservation.

This part of the Article suggests an interpretative framework for understanding the Amendment that responds directly to these four reasons. That framework begins with the recognition that the Amendment creates two separate constitutional rules—one concerning the public's right to clean air, pure water, and the preservation of certain environmental values; and the other creating a public right in the conservation and maintenance of public natural resources.

Second, Article I, Section 27 gives the environment the same legal protection that other provisions of the state constitution give to individual property rights. The Amendment, when balanced by provisions protecting property rights, is thus not anti-development. Rather, it is directed toward environmentally sustainable development.

Third, Article I, Section 27 needs to be understood primarily on the basis of governmental responsibilities. While citizen rights are an essential part of the Amendment, such rights should be directed primarily at enforcement of the government's duties.

Finally, when legislation or administrative regulation provides as much protection as Article I, Section 27, or even more protection, there is no need for judicial enforcement of the Amendment. Where legal gaps exist, however, courts should enforce the substantive rules contained in the Amendment. Courts should also use Article I, Section 27 to support the application of other legal rules. These four premises create a framework for understanding the environmental rights and public trust parts of the Amendment, which will be discussed in detail in Part II of this Article.

This interpretative framework is new in the sense that it explains Article I, Section 27 in significantly different ways than we have understood it. Yet this framework is also based primarily on the text, legislative history, and purposes of the Amendment. It attempts to capture the original understanding of Article I, Section 27, informed by subsequent experience with the Amendment and with environmental protection. After nearly three decades, it is time to revisit Article I, Section 27 and know it—as if for the first time.

II. A Two-Part Amendment

A. *Environmental Rights and Public Trust*

A basic principle of legal reasoning is that each rule that might be applicable to a particular factual situation should be discussed separately.¹⁹ Separate discussion ensures a clear discussion of each rule and also ensures that differences in the text and purpose of each rule are honored. Article I, Section 27 has two separate parts; it creates a public right in a decent environment, and it creates a separate public right in the conservation and protection of "public natural resources."²⁰ The two parts differ in scope, in the type of public rights they create, and in the responsibilities they articulate for the state. Because these two parts contain separate legal rules, it is impossible to analyze the Amendment in a useful manner unless each part is discussed separately. However, Article I, Section 27 is almost always quoted in its entirety and analyzed as an undivided whole.²¹ The Amendment is thus more often understood as expressing a vague environmental sentiment than as expressing constitutional law.

The distinction is made evident by dividing the Amendment into these two parts, and numbering them as if they were separate paragraphs:

- (1) 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.
- (2) Pennsylvania's public natural resources are the common property of all the people, including generations yet to

19. See JOHN C. DERNBACH ET AL., *A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD* 108-13 (2d ed. 1994) (emphasizing the importance of discussing each issue and sub-issue separately).

20. PA. CONST. art. I, § 27; see also ROBERT E. WOODSIDE, *PENNSYLVANIA CONSTITUTIONAL LAW* 175 (1985) ("If the courts were to accept the clear language of the section as expressing two separate concepts, it would result in a more logical and orderly application of the section, and would permit a more accurate application of the principles of constitutional construction and of trusts."); Kury, *supra* note 2, at 143-47; Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. BAR ASS'N Q. 421, 425 (1970). Broughton's article is also printed in 1970 Pa. Legislative Journal-House 2272 (April 14, 1970).

21. Among the dozens of decided cases, the only obvious exceptions are *Commonwealth v. National Gettysburg Battlefield Tower, Inc.* and *Payne v. Kassab*. Even for these two, however, the courts' analysis does not always clearly distinguish the two parts. See *infra* Part II.B.

come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Constitutional interpretation, of course, begins with the text of the Amendment. Different but similar sounding words and phrases ordinarily signal different meanings, especially if they are contained in the same paragraph.²² If the drafters intended a particular word or phrase to have the same meaning throughout, they would have used the same word or phrase.²³ Because different words and phrases are used to articulate the scope, public rights, and governmental responsibilities of each part, it is only logical to conclude that the two parts of the Amendment are different and therefore should be separately analyzed.

The two parts of Article I, Section 27 are different in scope. The first part refers to four different "values of the environment," as well as "clean air" and "pure water." The second part, however, refers to the state's "public natural resources," and later identifies the state as the trustee for "these resources." The two sentences in the latter part are obviously related, one declaring the resources to be common public property, and the other requiring the state to conserve and maintain them. The public trust part of the Amendment makes no reference to environmental values, to air or water, or even to the environment. The first part, similarly, makes no reference to "public natural resources," or even "resources."

When the two parts overlap, they both apply.²⁴ To the extent that air and water have not been privately appropriated, they are subject to both environmental rights and the public trust doctrine. Natural, scenic, historic, and esthetic values of the environment that

22. See *WOODSIDE*, *supra* note 20, at 175.

23. See, e.g., *Novicki v. O'Mara*, 124 A. 672, 673 (Pa. 1924) ("A change in language in separate provisions of a statute is *prima facie* evidence of a change of intent."). The Pennsylvania Supreme Court routinely cites statutory construction rules when interpreting the state constitution. See *Cavanaugh v. Davis*, 440 A.2d 1380 (Pa. 1982). The practice is reasonable because constitutional amendments originate in the legislature. See PA. CONST. art XI, § 1.

24. See *WOODSIDE*, *supra* note 20, at 180. It is likely that all "public natural resources" contain at least some "natural, scenic, historic and esthetic values of the environment." At a minimum, it would seem obvious that "public natural resources" would have some "natural" values. As a result, there is likely no category of resources or values for which there is a public trust responsibility but no environmental right in the public under the first part of the Amendment. On the other hand, not all state property constitutes natural resources.

are on public lands are also subject to both parts of the Amendment.

The public rights contained in the two parts are also different. The Amendment's first part creates a right in the public to clean air, pure water, and the preservation of certain values. The second part of Article I, Section 27 articulates the public's property right to the state's public natural resources, and establishes a public right to have those resources conserved and maintained for the benefit of future generations.²⁵ These rights are different, and the difference is perhaps most evident when the scope of the two parts overlaps. Air and water are not simply to be conserved and maintained; the public has a right to these resources in "clean" and "pure" form. Similarly, the conservation and maintenance requirements for public natural resources are supplemented by an obligation to protect the public's right to preservation of the natural, scenic, historic, and esthetic values of the environment. As a result, Article I, Section 27 creates two public rights, not one.

Finally, the governmental responsibilities in both parts of the Amendment are also different. The public trust part of Article I, Section 27 expressly requires the state to "conserve and maintain" public resources "for the benefit of all the people." By contrast, the public rights contained in the first part carry no express corresponding governmental responsibility. To the extent that such a responsibility exists, it must be implied. Quite plainly, the articulation of those rights would be meaningless unless the government had some duty to protect them. But the nature of that duty is not specified.

These differences in public rights, scope, and governmental responsibility are reinforced by the legislative history of the Amendment. Legislative history is relevant in determining the meaning of a constitutional provision, even when the text is unambiguous.²⁶ In accordance with the state constitution, Article I, Section 27 was passed by both houses of the legislature in one session, then passed by both houses in the next legislative session, before being submitted to the voters for approval.²⁷ The textual

25. See, e.g., Broughton, *supra* note 20, at 422; Kury, *supra* note 2, at 124.

26. See *In re Determination of Priority of Comm'n Among Certain Judges of the Superior Court and Commonwealth Court*, 427 A.2d 153, 156-57 (Pa. 1981); *In re Martin's Estate*, 74 A.2d 120, 122 (Pa. 1950); *Zemprelli v. Thornburgh*, 407 A.2d 102, 109 (Pa. Commw. Ct. 1979).

27. See PA. CONST. art. XI, § 1.

changes made to the Amendment in the legislative process indicate that Article I, Section 27 was understood to have two separate parts. To begin with, the environmental rights part of the Amendment went through the process unchanged, while the public trust part of the Amendment was changed in four ways.²⁸ This difference in legislative attention suggests that the two parts were understood from the outset as having separate meanings.

This difference in meanings of the two parts is reinforced by two of the specific amendments that were adopted. In its original form, the public trust part of the Amendment declared that "Pennsylvania's natural resources" were the "common property of all the people."²⁹ The absence of "public" before "natural resources," however, suggested that the Amendment might convert private property containing natural resources into the people's "common property." The Amendment's drafters believed that such a result would likely violate the constitutional prohibition against the taking of private property for public use without just compensation.³⁰ The language was thus changed to "Pennsylvania's public natural resources."³¹ As a result, the state's public trust responsibilities under Article I, Section 27 are limited to public property or things that are subject to the public trust.³² In making this change, moreover, the legislature made no parallel change to the first part of the Amendment.

On the other hand, the "values of the environment" in the environmental rights part can occur on both public and private property, and there is nothing in the text to suggest otherwise. While both parts of Article I, Section 27 apply to public property, the environmental rights part of the Amendment also applies to private property. Values in this context are not property but

28. See H.B. 958, Printer's Nos. 1105, 1307, 2860, 168th Pa. Sess. (Pa. 1969) (original bill and two bills showing amendments); H.B. 31, Printers Nos. 32, 54, 169th Pa. Sess. (Pa. 1971) (second session bill, with no additional amendments). In addition to the two changes described *infra* in the text, the legislature deleted two parts of the public trust provisions. It removed a requirement that public trust resources be protected "in their natural state." Compare H.B. 958, Printer's No. 1105, with H.B. 958, Printer's No. 1307. It also removed a list of protected natural resources. Compare H.B. 958, Printer's No. 1307, with H.B. 958, Printer's No. 2860.

29. H.B. 958, Printer's No. 1105.

30. See Broughton, *supra* note 20, at 425.

31. Compare H.B. 958, Printer's No. 1105 (original language), with H.B. 958, Printer's No. 2860 (amended language).

32. See Broughton, *supra* note 20, at 424.

principles or qualities that are intrinsically valuable.³³ Private lands can, and often do, contain environmental features with significant natural, scenic, historic, and esthetic values.

A legislative change in the state's public trust responsibilities also suggests that the two parts were understood as having separate meanings. As originally introduced, the Amendment required the state, as trustee, to "preserve and maintain" public natural resources.³⁴ The Amendment's first sentence, of course, calls for the "preservation" of certain values. As originally introduced, these two parts of the Amendment might thus have been understood as having a similar meaning, or at least as being logically related. State officials, however, were concerned that use of the word "preserve" in the public trust part of the Amendment might be construed by courts to prevent the harvesting of renewable resources (e.g., logging on state forest land).³⁵ In response to that concern, the legislative committee considering the Amendment changed the phrase to "conserve and maintain."³⁶ This change is particularly significant because the same state officials also suggested that the word "preservation" in the Amendment's first sentence be changed to "conservation."³⁷ Of course, that suggestion was not accepted.³⁸ Such legislative history provides further evidence that the Amendment has two distinct parts. This history also reinforces a more fundamental point—the text matters.

B. Gettysburg Tower and Payne

Two early cases recognized a distinction between the environmental rights and public trust parts of the Amendment, although even these cases blended the two parts somewhat. Since that time, however, the distinction has generally been overlooked.

In the first case, *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,³⁹ the Attorney General sought an injunction to prevent the construction of a 307-foot observation tower on

33. See WOODSIDE, *supra* note 20, at 177 (citing two dictionaries). "These are 'values' in which the people are given a right, which the officials may not violate, but without perverting the terms they cannot be held as trust property by a trustee." *Id.*

34. H.B. 958, Printer's No. 1105.

35. See Broughton, *supra* note 20, at 424. The principal state official expressing this concern was Dr. Maurice K. Goddard, Secretary of the Department of Forests and Waters.

36. *Id.*; H.B. 958, Printer's No. 2860.

37. See Broughton, *supra* note 20, at 424 n.8.

38. See *id.*

39. 302 A.2d 886 (Pa. Commw. Ct. 1973).

private land just outside the Gettysburg National Military Park.⁴⁰ Although the National Park Service, which administers the park, evidently lacked the legal authority to block the tower, it had negotiated an agreement with the company to locate the tower slightly further from the battlefield and visitor center.⁴¹ The state claimed that the Amendment prohibited the construction of the tower because it would interfere with the experience of park visitors, even though it would provide many visitors with a better view of the battlefield than they could get from the ground.⁴²

The state's claim was based on the environmental rights part of the Amendment, not the public trust part.⁴³ Because the land on which the tower would be built was privately owned,⁴⁴ the Attorney General could not argue that this land was the common property of the people. Furthermore, because the park is owned and managed by the federal government, the Attorney General could not argue that it was part of the state's "public natural resources" under the public trust part of the Amendment. Rather, the state argued that the tower's visibility throughout the Gettysburg Battlefield would interfere with the public right to preservation of the natural, scenic, historic and esthetic values of that environment.⁴⁵ The public's right to the preservation of those values, the Attorney General claimed, imposed a substantive limitation on such private development.⁴⁶

The trial court held that the Amendment's first sentence is self-executing—that is, the people have a right to clean air, pure water, and the preservation of certain environmental values, regardless of whether the legislature has enacted supporting

40. *See id.* at 887.

41. *See id.* at 888-89 (summarizing agreement), 891 n.4 (citing trial court holding that tower was not subject to federal regulation because it was outside park); *see also* Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 598 n.3 (Pa. 1973) (Jones, C.J., dissenting) (quoting testimony of National Park Service director that the purpose of the agreement was to "minimize to the extent that we could, within the authorities available to us, the adverse impact of this tower on Gettysburg Park").

42. *See Gettysburg Battlefield*, 311 A.2d at 588-89.

43. *See Gettysburg Battlefield*, 302 A.2d at 892.

44. *See* Commonwealth v. National Gettysburg Battlefield Tower, Inc., 13 Adams County L.J. 75, 77 (C.P. Adams County 1971) ("The site is on privately owned wooded land to the rear of a motel-restaurant complex.").

45. *See id.* at 83-86.

46. *See id.* The purpose of the lawsuit, of course, was to prevent construction of the tower.

legislation.⁴⁷ The court also held, however, that the state had failed to prove that the proposed tower would violate these public rights.⁴⁸ Both the commonwealth court⁴⁹ and supreme court⁵⁰ affirmed these holdings. The case was tried and decided, in sum, on the premise that the first sentence of the Amendment prohibited interference with the values it identifies.

Because the Attorney General was seeking an injunction, and because the court believed those values to be somewhat subjective, the court of common pleas required the state to demonstrate irreparable harm to the natural, scenic, historic, and esthetic values of the Gettysburg environment by clear and convincing evidence.⁵¹ The trial court held that the state failed to meet that burden.⁵² The state's witnesses were eminent historians, architects, and theologians, as well as state and federal park administrators.⁵³ They testified that the tower would intrude on the pastoral serenity and reverence of the battlefield scene, and would interfere with an understanding of the human scale of the battle that a tourist can get only by walking through the battlefield itself.⁵⁴ The company's witnesses—the tower designer, a county commissioner, and an environmental education consultant—depicted the park experience in strikingly different terms.⁵⁵ The environmental education consultant testified that “most of the visitors to the Park stay only a short time, are not academicians and desire a rapid view of the

47. *See id.* at 79-80.

48. *See id.* at 82.

49. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886 (Pa. Commw. Ct. 1973).

50. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973).

51. *See Gettysburg Tower*, 13 Adams County L.J. at 136-37.

52. *See id.* at 86.

53. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 889 (Pa. Commw. Ct. 1973).

54. *See id.* at 889-90. Among the state's witnesses was historian Bruce Catton. The court noted that Mr. Catton believed that to fully experience the battle, it is

[N]ecessary for one to go on the field in person, to brood while there, to translate oneself into the 1860's [sic] and to feel the spirit and courage that animated the men who fought there. It is his opinion that the tower would jar a person so experiencing the battlefield back into the present day and so diminish the historic and cultural values.

Id. at 889-90. Several of the state's witnesses, however, acknowledged that the tower would have some educational value. *See id.* at 890.

55. *See id.* at 891.

site and a quick understanding of the battle."⁵⁶ The consultant also explained that the tower would help educate tourists about the battle and was not inconsistent with a variety of other commercial activities near the battlefield.⁵⁷

In denying the requested injunction, the common pleas court examined evidence of potential harm to every amenity identified in the Amendment's first sentence—clean air, pure water, and the natural, scenic, historic, and esthetic values of the environment.⁵⁸ The court first held that the tower would not irreparably damage the scenic and esthetic values of the area.⁵⁹ The court found that the tower, while conspicuous, would not "transform the scene of present-day Gettysburg."⁶⁰ Referring to evidence that sensitivity to such matters varies from person to person, the court stated that it would not enjoin "activities because they adversely affect the peculiar sentiments or feelings of some but not all."⁶¹ The tower's effect on natural values, the court held, had to be judged by its effect on those values as they currently existed.⁶² The court concluded "that the historic Gettysburg area has already been raped" by development.⁶³ Because of that development, the court was not convinced that the tower's construction would irreparably damage the area's natural values.⁶⁴

56. *Id.*

57. *See id.* These activities include "a junkyard, motels, restaurants, fast food establishments, souvenir stands, an amusement park, gasoline service stations, commercial museums and exhibits and a variety of advertising signs and billboards." *Id.* As I know from visiting the battlefield, a Kentucky Fried Chicken outlet is visible from the rock wall where Union troops stopped Colonel Pickett's famous charge. Witnesses also testified that the tower would economically benefit the community by attracting more tourists. *See id.*

58. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams County L.J. 75, 83-86 (C.P. Adams County 1971).

59. *See id.* at 84.

60. *Id.* The court added that towers in other areas, such as the Eiffel Tower in Paris, had not caused "notable damage to either scenic or aesthetic values." *Id.* & n.6.

61. *Id.* at 84.

62. *See id.*

63. *Gettysburg Tower*, 13 Adams County L.J. at 85. As the court explained:

A major highway bisects the fields of Pickett's Charge. A Stuckey's restaurant, a motel, and an ice cream parlor face the Peach Orchard. A souvenir stand flourishes near a government observation tower opposite the Eisenhower farm. These are but a few examples. The Federal government's only recourse in the past has been to purchase these sites as funds become available. Then, of course, new ventures start elsewhere in equally offensive locations.

Id.

64. *See id.* at 84-85. The court also held that the tower should be judged by any social, economic, or educational value it may have, and noted that even some of the state's

Finally, the state's claim that the tower would adversely affect the unique historic values of the park was fatally compromised by the agreement between the National Park Service and the defendants. The Park Service has legal responsibility to manage the military park "for the benefit of all the people of the United States,"⁶⁵ the court reasoned, suggesting that Park Service decisions on such matters were thus entitled to great deference. Because the Park Service evidently decided in signing the agreement that the proposed tower would not cause irreparable harm, the court of common pleas was unwilling to question that decision.⁶⁶

The common pleas court found that the proposed tower "will have no noticeable effect whatever on the air or water of the Gettysburg area," and "will not irreparably damage the natural, historic, scenic or esthetic values of the environment of the Gettysburg area."⁶⁷ By distinguishing between air and water, on one hand, and the four identified values, on the other, the trial court indicated that the tower would noticeably but not irreparably damage Gettysburg's natural, scenic, historic, and esthetic values. The commonwealth court and the supreme court affirmed the trial court's decision that the Amendment's first sentence did not prohibit construction of the tower.⁶⁸

The second case, which tested the state's public trust responsibility under Article I, Section 27, is *Payne v. Kassab*.⁶⁹ In *Payne*, private citizens and college students brought an original action in commonwealth court against the state, the city of Wilkes-Barre, and certain state and city officials to prevent the widening of a city

witnesses thought the tower would have educational value. *See id.* at 83-84. This point is perhaps more relevant to the tower's effect on historic values because the tower would help paying customers learn about the battle.

65. *Id.* at 85 (citing 16 U.S.C. §§ 1, 3 (1994 & Supp. III. 1997)).

66. *See id.* at 85-86 (criticizing the Park Service for taking a "two-sided approach" to the tower, signing the agreement but continuing to question its impact in other ways); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 14 Adams County L.J. 52 (C.P. Adams County 1972) (mem.) (refusing to reconsider its prior opinion and continuing to criticize the Park Service for the same reason); *see also* JAMES A. GLASS, *THE BEGINNINGS OF A NEW NATIONAL HISTORIC PRESERVATION PROGRAM, 1957 TO 1969* 62 (1990) (explaining this problem as a result of conflicting organizational and legal roles within the Park Service that were changed as a result of Gettysburg Tower).

67. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams County L.J. 75, 78 (C.P. Adams County 1971).

68. *See supra* notes 49-50.

69. 312 A.2d 86 (Pa. Commw. Ct. 1973).

street to a four-lane highway approximately two-thirds of a mile in length.⁷⁰ Among other things,⁷¹ the plaintiffs argued that the Amendment prevented the use of part of a public park for a street-widening project.⁷² The street passed through one side of River Common, which the state legislature had dedicated as a public common in the first half of the nineteenth century.⁷³ River Common was 21.7 acres in size and consisted mostly of a park and open space area with “numerous walkways and grass lawns abutted by many trees and plants.”⁷⁴ The proposed street widening project would slice .59 acres from the park along the project’s length, slightly less than three percent of River Common’s total acreage.⁷⁵ The project would eliminate some large trees that eventually would be replaced, and would also require the relocation of a walkway.⁷⁶

The *Payne* facts are thus quite different from those in *Gettysburg Tower*, which involved the use of private land and a claim that the use would infringe on the public’s right to protection of certain values. The River Common project affected both parts of the Amendment, although it concerned primarily the state’s public trust responsibilities. The subject of the suit was city-owned land that was being converted from park to road purposes, and the court focused most of its attention on the diversion of 0.59 acres from public commons to public road. There is little doubt, the commonwealth court found, that this land constitutes part of the state’s public natural resources.⁷⁷ The public trust nature of this

70. *See id.* at 90. The street varied in width from three to four lanes, or thirty feet to forty-six feet, along the length of the project. *See id.* at 90-91.

71. The plaintiffs also claimed that use of River Common for the street widening project violated public trust law concerning the proper use of land that has been legislatively dedicated as a commons and violated state transportation laws. *See id.* at 94-95.

72. *See id.* at 93-94.

73. *See id.* at 89-91.

74. *Payne*, 312 A.2d at 91. River Common also included the Luzerne County Courthouse, *see id.* at 88 & n.1, and part of River Street. *See id.* at 91.

75. *See Payne v. Kassab*, 361 A.2d 263, 269 n.11 (Pa. 1976).

76. *See Payne*, 312 A.2d at 92. Despite all of these changes, the court made findings indicating that the project would not adversely affect the scenic, natural, historic, and esthetic values of the common. *See id.* at 92-93. Specifically, the court found that “the project will not significantly alter the River Common.” *Id.* at 93.

77. Although the land is owned by the city of Wilkes-Barre, the city is a subdivision of the state. In addition, the land was dedicated as a commons by the state legislature. The city has a public trust responsibility under Article I, Section 27 for such land. Under Article I, Section 27, the state also has a trust responsibility for such lands. In affirming the commonwealth court, the supreme court said there is “no doubt that the property here

case under Article I, Section 27 is reinforced by the plaintiffs' parallel claim that use of the commons for the street-widening project would violate the common law of public trust for land that has been dedicated as a commons.

In response to plaintiffs' claims that the text of Article I, Section 27 imposed a limitation on the project, a defendant, the Pennsylvania Department of Transportation, had filed briefs proposing that a three-part test be used in lieu of the constitutional text.⁷⁸ Conveniently, the test required nothing more of the agency than its existing statutes.⁷⁹ The commonwealth court adopted that test as a "realistic and not merely legalistic" means of deciding whether the Amendment has been violated. The court stated:

The court's role must be to test the decision under review by a threefold standard: (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?⁸⁰

The court then applied that test to the street-widening project at issue.⁸¹ The court first analyzed whether the state had complied with the applicable state transportation statute, which prohibited highway construction through public parks or historical sites unless there is no feasible and prudent alternative to the use of such land, and unless the facility is planned and constructed to minimize the harm to the park or historical site.⁸² This statute, which was based on a comparable federal statute, was one of the most stringent environmental statutes then in effect.⁸³ The court

involved is public property, a 'public Common', [sic] and that it is possessed of certain natural, scenic, historic and esthetic values." *Payne*, 361 A.2d at 272.

78. See Kury, *supra* note 2, at 127-28.

79. See *Payne*, 361 A.2d at 273 n.23.

80. *Payne*, 312 A.2d at 94.

81. See *id.* at 94-96.

82. See *id.* at 94-95.

83. See Department of Transportation Act of 1966 § 4(f), 49 U.S.C. § 1653(f) (codified as amended at 49 U.S.C. § 303 (1994)). The Supreme Court had earlier held that the "feasible and prudent alternative" language prohibited the federal government from constructing a highway through a public park unless no other alternative was feasible and prudent. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971)

concluded that the state followed this requirement as well as various procedural requirements in that act.⁸⁴ In addition, the court found that the planting of new trees to replace trees that were cut down for the project, relandscaping of the affected area, and preservation of historic features all demonstrated a reasonable effort to minimize the project's adverse consequences.⁸⁵ Finally, the court balanced the improvement in traffic movement that the project would bring against the loss of roughly three percent of the park's land area, and decided that the benefits of the project outweighed its costs.⁸⁶

In affirming the commonwealth court's decision, the supreme court recognized the plaintiffs' claim as being anchored primarily in the public trust part of the Amendment.⁸⁷ The court's opinion refers to the "trusteeship of the State,"⁸⁸ the "trust established by Art. I, § 27,"⁸⁹ and the state's "duties as trustee under the constitutional article."⁹⁰ Indeed, the supreme court expressly distinguished *Gettysburg Tower* by stating that the "property here is public property," not private property.⁹¹ "There can be no question," the court stated, "that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them."⁹² The court then explained that the safeguards provided by the state transportation statute "vouchsafe that a breach of the trust" established by the Amendment "will not occur" if state agencies comply with those safeguards.⁹³ Because the statute "was complied with, we have no hesitation in deciding that the appellee Commonwealth of Pennsylvania has not failed in its duties as trustee" under Article I, Section 27.⁹⁴ Compliance with the legislation, in sum, greatly reduced the project's impact on public natural resources. As a result, the state

84. See *Payne*, 312 A.2d at 94-95.

85. See *id.* at 95.

86. See *id.* at 96.

87. See *Payne v. Kassab*, 361 A.2d 263, 272-73 (Pa. 1976).

88. *Id.* at 273.

89. *Id.*

90. *Id.*

91. *Id.* at 272.

92. *Payne*, 361 A.2d at 272.

93. *Id.* at 273.

94. *Id.*

had not violated its constitutional duty to conserve and maintain those resources. Rather than apply the commonwealth court's three-prong test, the supreme court merely observed in a footnote that the commonwealth court had used it to determine compliance with the Amendment.⁹⁵

The *Payne* test applies only to the public trust part of the Amendment. The commonwealth court's test is explicitly anchored in the public trust part of Article I, Section 27, as evidenced by the reference in the first prong to "public natural resources." The *Payne* test contains no reference to the public right to clean air, pure water, or preservation of the natural, scenic, historic, or esthetic values of the environment. The supreme court in *Payne* distinguished, and did not overrule, *Gettysburg Tower*.

Unfortunately, the *Payne* test has not been limited to the public trust part of the Amendment. With little or no judicial analysis or explanation, the *Payne* test has become an all-purpose test for applying Article I, Section 27.⁹⁶ In using the *Payne* test, the courts rarely distinguish between public and private resources, between values and resources, or between the public trust and the right to a decent environment. Some cases decided under the *Payne* test do not even involve public natural resources; rather, they concern natural, scenic, historic, and esthetic values.⁹⁷ Indeed, the Amendment's text tends to be less important to lawyers and judges than the text of the *Payne* test.

The paramount role of the *Payne* test in analyzing both parts of the Amendment can be explained in two ways. First, it can be said that the court did not explicitly limit its analysis to the public trust part of the Amendment, and that the test thus applies to both parts of the Amendment.⁹⁸ A street widening project that involves the cutting of mature trees and the loss of public park land

95. See *id.* at 272 n.23.

96. See Kury, *supra* note 2, at 132-41 (discussing cases applying the *Payne* test).

97. See, e.g., *Del-AWARE, Unlimited, Inc. v. Commonwealth, Dep't of Env'tl. Resources*, 508 A.2d 348 (Pa. Commw. Ct. 1986) (esthetic impacts of a proposed pumping station on a state park and surrounding historic district); *Pennsylvania Env'tl. Mgt. Servs., Inc. v. Commonwealth, Dep't of Env'tl. Resources*, 503 A.2d 477, 479-80 (Pa. Commw. Ct. 1986) (holding that the visibility of a proposed landfill to a nearby inn and residences as well as an interstate highway is appropriately considered as part of aesthetic and scenic values, and that agricultural value of land on which landfill would be located is appropriately considered part of natural values).

98. The plaintiffs appear to have separately alleged violations of each part of the Amendment. See *Payne*, 361 A.2d at 272-73.

arguably involves both the right to preservation of environmental values and the conservation of public natural resources.

The case is best understood, however, as involving a failure by the courts to discuss and rule separately on each of the Amendment's two parts. The commonwealth court made detailed findings indicating that the environmental rights protected by the Amendment would not be interfered with, although it did not rule on that issue.⁹⁹ The court also focused on the transfer of 0.59 acres of park for street widening, which appears to implicate the public trust part of the Amendment more than the environmental rights part.¹⁰⁰ The public trust issue, of course, predominated in the courts' analysis.

The second reason the commonwealth court's *Payne* test has come to be seen as an all-purpose test for the Amendment lies in the way that it logically undercuts *Gettysburg Tower*. The state as owner and trustee is in a stronger position to control the use of public natural resources than the state as regulator of uses on private property. When the state is doing the work itself, it should more likely achieve the desired result than when it attempts to get that result by compelling others. In addition, state regulation of private property is subject to a variety of constitutional limitations, particularly the takings and due process clauses.¹⁰¹

By depriving the public trust part of the Amendment of any substantive content, however, the *Payne* test reverses this analysis. The state's responsibility for publicly owned resources—the resources over which it has greatest control—is not to conserve them or preserve their values, but rather to manage their degradation under the *Payne* test. The *Payne* test allows environmental degradation to occur if the state has made a reasonable effort to minimize the environmental incursion, and if a project's benefits outweigh its environmental costs.¹⁰² Meanwhile, under *Gettysburg*

99. See *supra* note 76.

100. The loss of 0.59 acres to street widening is not necessarily inconsistent with the preservation of certain values in the environment. It is possible, for example, to plant the remaining area with more or healthier trees. The environmental rights part of the Amendment, after all, focuses on values in the environment, not the resources on which those values are based. Because the public trust part of the Amendment is based on public natural resources, however, it is more obviously implicated by the loss of park land for the street-widening project.

101. See U.S. CONST. amends. V, XIV; PA. CONST. art. 1 §§ 1, 9, 10.

102. Of course, reducing the rate and magnitude of environmental degradation is still a significant accomplishment. Many state entities have used the *Payne* test in various ways.

Tower, the Attorney General has the right to challenge private activities that interfere with clean air, pure water, and the preservation of certain values. The most powerful judicial expression of support for Article I, Section 27, in other words, has come in a case in which the state's legal responsibility is normally more limited.

As a result, the ability of the state and perhaps citizens to vindicate environmental rights under *Gettysburg Tower* is compromised. If the claim is based on public natural resources, it is subject to the *Payne* test. If the claim is not based on public natural resources, it may still be subject to the *Payne* test because the commonwealth court has applied that test to the values identified in the first part of the Amendment. Even if an environmental rights claim not based on public natural resources could be separated from the *Payne* test, it would confront a logical dilemma. Why should the public have a right to preservation of natural, scenic, historic, and esthetic values that derive from private land when the public does not appear to have that right if those values are on public property? Because there is no defensible answer to that question, the *Payne* case undermines the authority of *Gettysburg Tower* even though it does not overrule it. Obviously, the two parts of the amendment need to be harmonized. But that cannot properly be accomplished unless the two parts of the amendment are analyzed and understood separately.

III. Sustainable Development, Not Anti-Development

A. *Origins of Anti-Development Perception*

The factual situations underlying *Gettysburg Tower* and *Payne*, as well as the claims made by the plaintiffs, helped convince Pennsylvania courts that the Amendment is categorically anti-development. In retrospect, these cases may not have been the best cases to educate the courts about the value of Article I, Section 27. When new laws are passed, citizen litigants and the

See Kury, *supra* note 4, § 2-2.3 (explaining the use of the *Payne* test by the governor, the Pennsylvania Department of Environmental Protection, the Pennsylvania Department of Transportation, the Public Utility Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Game Commission, the Pennsylvania Historical and Museum Commission, and municipalities). Article I, Section 27 requires, however, that public natural resources be conserved and maintained for the benefit of all people, including those in future generations. Future generations are unlikely to regard a degraded environment as one that has been conserved and maintained simply because it might have been degraded more.

government often bring easier cases first. If successful, they often use their prior victories to provide a foundation for winning more difficult cases. Here, by contrast, courts were confronted from the outset with two cases that pushed the extreme boundaries of the Amendment. Two months after the voters approved Article I, Section 27, the state in *Gettysburg Tower* challenged a private landowner's unregulated use of its own land.¹⁰³ Then, citizens and others in *Payne* used the Amendment to challenge the diversion of three percent of a public commons for a road-widening project whose effects were already subject to significant environmental regulation. Instead of educating the courts about how the Amendment makes sense, these cases frightened the courts into thinking that the Amendment could stop all development.

A brief review of *Gettysburg Tower* and *Payne* demonstrates the devastating effect of the claims made on behalf of the Amendment against these two proposals. After the trial court denied the state's requested injunction in *Gettysburg Tower*, the state appealed, arguing that "some injury to the values entitled to preservation by Article I, Section 27" was sufficient to justify an injunction, not "great injury."¹⁰⁴ In rejecting that view, the commonwealth court stated that the government's claim was impractical:

It is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment. If the standard of injury to historic values is to be that expressed by the Commonwealth's witnesses as an "intrusion" or "distraction", [sic] it becomes difficult to imagine any activity in the vicinity of Gettysburg which would not unconstitutionally harm its historic values.¹⁰⁵

The *Payne* case built on and elaborated this concern by addressing the effect of Article I, Section 27 on conventional development. The commonwealth court in *Payne* began its analysis by citing its own conclusion in *Gettysburg Tower* that the government's claim about the Amendment would bring all development to a halt, even though the *Gettysburg Tower* court rejected that claim about the Amendment.¹⁰⁶ "Likewise," the *Payne* court

103. See *supra* Part II.B.

104. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 895 (Pa. Commw. Ct. 1973).

105. *Id.* at 895.

106. See *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

said, "it becomes difficult to imagine any activity in the vicinity of River Street that would not offend the interpretation of Article I, Section 27 which the plaintiffs urge upon us."¹⁰⁷ The court continued:

We hold that Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources *rather than no development*.¹⁰⁸

The court then stated its three-part test for determining compliance with the Amendment.¹⁰⁹ Concern over the Amendment's anti-development potential was also expressed in subsequent cases.¹¹⁰

B. The Amendment Embodies Conservation or Sustainable Development

An analysis of the Amendment, rather than the claims made by litigants about the Amendment, demonstrates that the anti-development characterization is erroneous. Article I, Section 27 is not anti-development; it supports what was then called conservation and what we now call sustainable development. "The conservation of natural resources is the key to the future," wrote Gifford Pinchot, who had been a Pennsylvania governor as well as the first

107. *Id.*

108. *Id.* (emphasis added). The court added that "[j]udicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic." *Id.*

109. *See id.* at 94-96.

110. In one, the Department of Environmental Resources and private citizens challenged the Public Utility Commission's approval of a right-of-way for an electric transmission line, arguing that the Commission was constitutionally obliged to prohibit the transmission line "if it will have any effect on the interests enumerated in Article I, Section 27." *Commonwealth, Dep't of Env'tl. Resources v. Commonwealth, Pub. Util. Comm'n*, 335 A.2d 860, 864 (Pa. Commw. Ct. 1975). The court rejected "the absolute interpretation urged upon us here" as potentially limiting all development, and held that the applicant was only required to show compliance with the *Payne* test, and only if someone challenging the application showed that the interests protected by Article I, Section 27 would be adversely affected. *See id.* at 864-65. Similar reasoning was employed in *Commonwealth, Dep't of Env'tl. Resources v. Commonwealth, Dep't of Transp.*, 335 A.2d 860, 864 (Pa. Commw. Ct. 1975) (challenging the location of electronic transmission lines); and *Bucks County Bd. of Comm'rs v. Commonwealth, Pub. Util. Comm'n*, 313 A.2d 185, 191-92 (Pa. Commw. Ct. 1973) (challenging a petroleum pipeline).

director of the United States Forest Service.¹¹¹ “The very existence of our nation, and of all the rest, depends on conserving the resources which are the foundations of its life.”¹¹² Similarly but more broadly, sustainable development has been defined as “socially responsible economic development” that protects “the resource base and the environment for the benefit of future generations.”¹¹³ The nations of the world endorsed sustainable development at the 1992 United Nations Conference on Environment and Development as a response to growing global poverty and environmental degradation.¹¹⁴ Its basic premise is that human activity should and can be planned and conducted not only to “coexist with healthy ecosystems but actually [to] enhance them.”¹¹⁵

The text, legislative history, constitutional status, and referendum approval of the Amendment all support the conclusion that Article I, Section 27 furthers conservation or sustainable development—and is emphatically not anti-development. The public trust part of the Amendment obliges the state to conserve and maintain public natural resources for the benefit of all people. This part of Article I, Section 27 provides a classic expression of conservation because it expressly links natural resources protection to human use and enjoyment of resources. Similarly, the environmental rights part of the Amendment gives the people the right to the preservation of certain values in the environment without giving them the right to the preservation of specific features on which those values are based. Thus, people can make use of the environment so long as they preserve its values. The rights to clean air and pure water

111. GIFFORD PINCHOT, *BREAKING NEW GROUND* 324 (1947).

112. *Id.*; see also generally SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959); JOHN F. REIGER, *AMERICAN SPORTSMEN AND THE ORIGINS OF CONSERVATION* (rev. ed. 1986).

113. United Nations Conference on Environment and Development, Agenda 21, ¶ 8.7, U.N. Doc. A/CONF.151/26 (1992) [hereinafter Agenda 21].

114. See generally John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1 (1998) (explaining the concept of sustainable development, particularly at the national level). The concept of sustainable development is contained in two texts that the world's nations endorsed at the conference—Agenda 21, a blueprint for sustainable development, and the Rio Declaration on Environment and Development, a set of principles to guide national and international efforts toward sustainable development. See *id.* at 21-23.

115. J. Baird Callicott, *The Wilderness Idea Revisited: The Sustainable Development Alternative*, in *ECOLOGICAL PROSPECTS: SCIENTIFIC, RELIGIOUS AND AESTHETIC PERSPECTIVES* 37, 38 (Christopher Key Chapple ed. 1994).

are arguably the most extreme parts of the Amendment. But more than three decades of pollution control laws has shown that economic development is compatible with, and even requires, cleaner air and purer water.¹¹⁶ Moreover, constitutional provisions are rarely interpreted in absolute terms.

The legislative history also demonstrates an intent to allow human use of renewable resources. As originally drafted, for example, the state's public trust duty was to "preserve and maintain" protected resources "in their natural state."¹¹⁷ However, the legislature modified this duty. It deleted "in their natural state," so that the state was only obligated to "preserve and maintain" public trust resources.¹¹⁸ Then, as already noted, it changed "preserve" to "conserve."¹¹⁹

Article I, Section 27 also fosters sustainable development by giving constitutional parity to environmental protection and development. An important principle of constitutional interpretation is that the provisions of the constitution should be read so as to give effect to each.¹²⁰ The state's constitution is "an integrated whole," and courts thus are to give effect "to all of its provisions whenever possible."¹²¹ When an environmental provision is written into the constitution, all constitutional decision making concerning other provisions must be reconciled with the Amendment whenever possible. That creates an obligation by the state to ensure that consideration and protection of constitutional values concerning the environment are made part of all state decision making. Thus, individual constitutional provisions do not trump other constitutional provisions; they are to be harmonized if possible.¹²² By protecting private property, for example, the due

116. See REPORT OF THE PENNSYLVANIA 21ST CENTURY ENVIRONMENT COMMISSION 42 (1998) [hereinafter REPORT OF THE 21ST CENTURY COMMISSION] (indicating that the control of point source discharges of water pollutants "has significantly improved water quality but not necessarily overall aquatic ecosystem quality"); see also *id.* at 51-52 (noting improvements in air quality over past quarter century and future challenges).

117. H.B. 958, Printer's No. 1105, 168th Pa. Sess. (Pa. 1969).

118. *Id.*, Printer's No. 1307.

119. See *supra* notes 34-38 and accompanying text.

120. See, e.g., *Cavanaugh v. Davis*, 440 A.2d 1380, 1381-82 (Pa. 1982).

121. *Id.* at 1381.

122. The constitution thus fosters integrated decision making, which is an essential element of sustainable development. In part, integrated decision-making is the simultaneous and coherent consideration of economic, environmental, and social factors in making a particular decision. See Agenda 21, *supra* note 113, ¶ 8.4 ("The primary need is to integrate environmental and developmental decision-making processes."); see also WORLD COM-

process and takings provisions of the state constitution¹²³ reward human efforts to use and develop such property. Because these provisions give constitutional status to property rights, the constitution had a bias in favor of conventional development before the amendment was adopted.¹²⁴ Article I, Section 27 does not trump property rights provisions. Indeed, the Amendment's history demonstrates a concerted effort to ensure that its text could not be used for that purpose. Because Article I, Section 27 is placed in the state constitution, however, it obliges the state and other decision makers to reconcile environmental protection and property rights. Thus, Article I, Section 27 moves the state constitution from an orientation toward conventional development at the environment's expense to one of environmentally sustainable development.¹²⁵

The referendum approval process for Article I, Section 27 also supports this conclusion. One basic principle of constitutional interpretation is that constitutional amendments should be read to reflect the views of the ratifying voters.¹²⁶ The people who voted

MISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 62 (1987) [hereinafter OUR COMMON FUTURE] ("The common theme throughout this strategy for sustainable development is the need to integrate economic and ecological considerations in decision making.")

In this respect, sustainable development is not a new issue but a broader and more comprehensive way of analyzing and acting on all issues. Just as environmental problems cannot be separated from economic and social issues, social and economic goals cannot be considered separately from the environment. Integrated decision-making also means that the various decisions affecting particular social, environmental, and economic goals should actually further those goals.

123. See PA. CONST. art. 1 §§ 1, 9, 10.

124. See Thompson, *supra* note 12, at 905.

125. This middle approach is essential in Pennsylvania. Virtually every square inch of land in the state has been logged, farmed, mined, paved, or built upon over the past several centuries. The state's waters have been fished, dredged, dammed, and used for waste disposal in the same period. Indeed, the Amendment was broadly intended to ensure that future development would not continue the environmental destructiveness that has occurred historically. See FRANKLIN L. KURY, NATURAL RESOURCES AND THE PUBLIC ESTATE: A BIOGRAPHY OF ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION 1-4 (1985). As indicated by some of the cases decided under Article I, Section 27, in fact, past development requires restoration of the environment, not just prevention of future incursions. See, e.g., *Commonwealth v. Barnes & Tucker Co.*, 371 A.2d 461 (Pa. 1977), *appeal dismissed sub non.*, *Barnes & Tucker Co. v. Pennsylvania*, 434 U.S. 807 (1977); *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308 (Pa. 1973). On the other hand, the enormous economic productivity and social well-being of the state depend upon the ability of individuals and corporations to lawfully pursue their own ends.

126. When faced with different interpretations of the same provision, courts are to favor a natural reading that avoids contradictions and difficulties in implementation, completely

for Article I, Section 27 surely did not expect their vote to result in major reversals in their standard of living. Otherwise, they would have voted against it. Nor, one must believe, did they think their vote was meaningless. If they did, they would not have bothered to vote at all. The voters sought instead a reconciliation of social and economic development with environmental and natural resources protection. They wanted continuing social and economic opportunities, in sum, but they also wanted to see environmental progress.

The Amendment's focus on values and resources indicates some kind of governmental and perhaps even private obligation to consider and protect resources and values holistically. Statutes and regulations may protect some resources and values but not others, or may not provide sufficient protection. More basically, the constitution focuses on what we need to protect, not the statutory or regulatory means that are used to provide that protection. Thus, while the state may improve the effectiveness of particular regulatory programs, or the private sector may improve the efficiency with which energy or materials are used, the Amendment asks a fundamental question about such efforts: are they resulting in protection of the resources and values identified in Article I, Section 27? All too often, for example, improvements in efficiency or effectiveness are offset by a greater level of polluting activity, meaning that these improvements in technique are not preventing deterioration of environmental quality.¹²⁷ Indeed, a major strength of Article I, Section 27 is that it forces us to focus on the health of the environment itself. Because environmental conditions are never static or unchanging, moreover, the only sure way to support the environment is to protect and even restore it.

Sustainable development seems more possible now than it did three decades ago. Environmental laws adopted in the past several decades provide evidence that environment and development goals are necessarily related. In the 1970s, Congress enacted legislation

conforms to the intent of the framers, and reflects the views of the ratifying voter. *See, e.g., Zemprelli v. Daniels*, 436 A.2d 1165, 1170-71 (Pa. 1981).

127. Perhaps the most well-known example is automobile pollution. The improvements in emissions controls on newer vehicles are substantially offset by increases in vehicle miles traveled and number of automobiles. *See* ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 763 (2d ed. 1996).

to control air pollution,¹²⁸ water pollution,¹²⁹ coal mining,¹³⁰ and other environmental problems.¹³¹ The conservation laws of earlier decades have also improved our forests, reduced soil erosion, and helped to protect our water supplies. Reductions in environmental contamination have contributed to human health and better quality of life, and have occurred along with growing prosperity.¹³²

Article I, Section 27 forces us to go further, and to imagine and work for a Pennsylvania in which there is clean air and pure water; a Pennsylvania where we preserve the natural, scenic, historic, and esthetic values of the environment, and a state that conserves and maintains public natural resources for the benefit of present and future generations.¹³³ While Article I, Section 27

128. See Clean Air Act Amendments of 1970, codified as amended at 42 U.S.C. §§ 7401-7671q (1994).

129. See Federal Water Pollution Control Act of 1972, codified as amended at 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997).

130. See Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1994 & Supp. III 1997).

131. See, e.g., Resource Conservation and Recovery Act of 1976, codified as amended at 42 U.S.C. §§ 6901-6992k (1994).

132. A "prosperous economy, a healthy citizenry and a better environment are directly linked to each other. To make progress in any one area, Pennsylvania must strive for simultaneous excellence in all." REPORT OF THE 21ST CENTURY COMMISSION, *supra* note 116, at 12. Indeed, in his second inaugural address, Governor Tom Ridge specifically linked environmental protection to job creation. See Governor Thomas J. Ridge, *1999 Inaugural Address*, reprinted in ENVIRONMENTAL PROTECTION UPDATE, Jan. 22, 1999, at 28.

133. Cf. Eric T. Freyfogle, *Illinois Life: An Environmental Testament*, 1997 U. ILL. L. REV. 1081, 1082 ("One aim of environmentalism is . . . to stimulate our communal imagination, to encourage us to consider what the land might look like if it really were healthy, and how we and our descendants might better flourish if we inhabited such a land.").

Both the Amendment and sustainable development seek to foster intergenerational equity. The most commonly used definition of sustainable development specifically includes this idea; present development must not compromise "the ability of future generations to meet their own needs." OUR COMMON FUTURE, *supra* note 122, at 43. The gist of that responsibility is to ensure that future generations inherit an environment that is of at least equal quality to the present environment. Intergenerational equity is based on the moral obligation of each generation "to future generations to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present generation." EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 37 (1989). Intergenerational equity also captures the politically accepted norm that each generation should enjoy a better life than the previous one.

The text of Article I, Section 27 expressly and implicitly incorporates the principle of intergenerational equity. The public trust part of the Amendment declares "Pennsylvania's public natural resources" to be "the common property of all the people, including generations yet to come." Similarly, the environmental rights part of the amendment

does not, and cannot, state the specific details for realizing that vision in particular parts of Pennsylvania in particular times, it creates a constitutional framework for achieving and maintaining such a vision.¹³⁴

IV. Government Responsibilities as the Primary Basis for Citizen Rights

Much of the early enthusiasm for the Amendment was based on the idea that it would enhance citizen access to judicial relief on environmental matters. Franklin Kury, the chief legislative sponsor of the Amendment, wrote that his hope in offering the Amendment was "that the declaration of environmental rights would be used by the courts on a case-by-case basis to develop a body of environmental rights law comparable to that developed by courts interpreting the Bill of Rights to the United States Constitution."¹³⁵ Because citizens could challenge environmental incursions in court, he explained, those who adversely affect the environment would have to modify their behavior.¹³⁶

This explanation contains two important truths. One is that the ability of citizens to bring judicial actions is a necessary element of any effective system for environmental protection. The other is that citizen claims under the Amendment must correspond to the obligations of the government and perhaps others. If citizens have a right to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment, then the government and perhaps others surely have an obligation not to interfere with those rights. If citizens have a right to the conservation and maintenance of public natural resources, then that right also defines the government's responsibilities for those resources.

Nearly three decades later, however, only one part of this equation is operative. Citizens have the ability to raise Article I, Section 27 claims under a great variety of circumstances, but a constitutionally-based understanding of the government's responsi-

provides a public right in the "preservation" of certain environmental values, a word that is meaningless if it refers only to the present generation.

134. Article I, Section 27 does not, however, speak to many of the national and international issues that sustainable development addresses. These include, but are not limited to, consumption of materials and energy, and financial assistance to developing countries. See, e.g., Dernbach, *supra* note 114, at 42-50.

135. Kury, *supra* note 2, at 124.

136. See *id.* at 124.

bilities under Article I, Section 27 has been lost. The *Gettysburg Tower* case upheld the Attorney General's authority to protect environmental rights under the Amendment. Because the case was brought against a private landowner, though, and because the Attorney General does not have any general legal duty to bring cases protecting environmental rights, the case contains no express statement of the government's responsibilities for environmental rights.

While the *Payne* test suggests that the state has some responsibilities under the public trust part of the Amendment, the language of the test also suggests that these responsibilities exist only on a project-by-project basis. The test contains no statement of the government's overall responsibilities for public natural resources. Nor, under the *Payne* test, are citizens ordinarily able to make meaningful claims that the government should do anything that it is not already doing. Plaintiffs in court, and appellants challenging the issuance of pollution control permits, have almost never successfully used the *Payne* test to stop or change a project.¹³⁷ They have not been able to use the test, for example, to prevent a stream relocation project to remedy existing hazardous conditions,¹³⁸ to prevent the construction of pumping stations and other facilities to divert water from a stream to supply water for cooling a nuclear generating station,¹³⁹ or to overturn permits approved by the state Department of Environmental Resources.¹⁴⁰ In sum, while the Amendment provides citizens a basis for requesting judicial relief, it has not been used to impose meaningful responsibilities on government.

The Amendment has not worked like other provisions in the Bill of Rights, or the corresponding Declaration of Rights in the

137. See Kury, *supra* note 4, § 2-2.1 (citing more than a dozen projects for which Article I, Section 27 challenges were unsuccessful). *But see id.* § 2-2.3.4 (citing a Public Utility Commission denial of an application to construct a natural gas pipeline because applicant failed to demonstrate compliance with *Payne* test).

138. See *In re Condemnation for Legislative Route 58818*, 375 A.2d 1364 (Pa. Commw. Ct. 1977).

139. See *Del-AWARE Unlimited, Inc. v. Pennsylvania Pub. Util. Comm'n*, 513 A.2d 593 (Pa. Commw. Ct. 1986); *Del-AWARE Unlimited, Inc. v. Commonwealth, Dep't of Env'tl. Resources*, 508 A.2d 348 (Pa. Commw. Ct. 1986).

140. *Smartwood v. Commonwealth, Dep't of Env'tl. Resources*, 424 A.2d 993 (Pa. Commw. Ct. 1981) (sewage facilities plan approval). The Department of Environmental Resources was divided and renamed the Department of Environmental Protection by the Conservation and Natural Resources Act, PA. STAT. ANN. tit. 71, §§ 1340.101-.1103 (West Supp. 1998-99).

Pennsylvania Constitution,¹⁴¹ because it is unlike those provisions. The second and third sentences in the Amendment establish an affirmative governmental trusteeship for public natural resources for which there is no parallel in the United States Bill of Rights or the Pennsylvania Declaration of Rights. All other provisions of the Bill of Rights and Declaration of Rights are “negative rights;” they simply prevent the state from acting in certain ways.¹⁴² In addition, all of the other amendments in the Bill of Rights and Declaration of Rights are directed toward protection of individuals or their property. The two parts of the Amendment, taken together, are broader because they encompass individuals, private property, and the outdoor environment. This, coupled with the express or implied government responsibilities in the Amendment, suggests that the government has a much larger role in implementing this Amendment than other provisions of the Declaration of Rights.

As the text of Article I, Section 27 indicates, the government’s constitutional responsibilities are twofold. First, the state is obliged to conserve and to maintain public natural resources. Second, by providing a public right to clean air, pure water, and the preservation of certain environmental values, Article I, Section 27 also implies that the state has a duty not to interfere with that right. These responsibilities are the same from project to project, though their effect on individual projects will obviously vary depending on the projects themselves.

Remarkably, these responsibilities have been generally ignored. They are absent from the three-prong *Payne* test. Although a governmental duty not to interfere with the preservation of certain values can be inferred from *Gettysburg Tower*, no court has yet held that this duty exists. Nor have the courts recognized explicitly the state’s public trust responsibility for public natural resources. Yet these responsibilities provide the foundation for any allegation by citizens that their rights under the Amendment have been violated.

V. A More Constructive and Useful Judicial Role

The tendencies to treat Article I, Section 27 as an indivisible whole, to perceive it as anti-development, and to ignore the

141. See PA. CONST. art. I (Declaration of Rights), which includes Section 27.

142. See WOODSIDE, *supra* note 20, at 177-78.

government's responsibilities have led to a relatively minor role for the Amendment. Perhaps more important than these tendencies, however, is an understanding that the legislative and executive branches are more competent to address environmental matters than the courts. While there is much truth in that understanding, there still remains a substantial role for the courts.

A. *Primary Responsibility in Legislative and Executive Branches*

Almost three decades after Article I, Section 27 was adopted in 1971, legislation and administrative regulation, rather than the Amendment, carry out the greatest share of the state's environmental work. The number, complexity, and stringency of environmental statutes and regulations is much greater now than when the Amendment was first adopted.¹⁴³ The Amendment was adopted at the beginning of the modern environmental era in Pennsylvania as well as the United States. At the federal level, a significant number of major statutes were adopted, beginning in 1969.¹⁴⁴ Many of these statutes required states to adopt or upgrade legislation in order to continue operating their own environmental regulatory programs.¹⁴⁵ Thus, many Pennsylvania problems that might have been addressed through lawsuits under Article I, Section 27 were instead addressed by legislation as well as the development and implementation of administrative regulations. The existence of an alternative institutional means of addressing these problems, in turn, weakened the claim that the courts were necessary to vindicate public rights.

The language and subject matter of the Amendment also provide a basis for believing that the legislative and executive branches are better suited to make many decisions on these issues than the courts. The scientific and technical complexity of environmental problems, the existence of competing policies, and the economic and social consequences of environmental protection put resolution of most environmental matters outside the expertise

143. For a useful summary and explanation of most of those laws, see PENNSYLVANIA ENVIRONMENTAL LAW AND PRACTICE, *supra* note 4.

144. See J. William Futrell, *The History of Environmental Law*, in ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY § 1.2(I) (Celia Campbell-Mohn et al. eds., 1993); see also text accompanying notes 128-131.

145. See, e.g., John C. Dernbach, *Pennsylvania's Implementation of the Surface Mining Control and Reclamation Act: An Assessment of How "Cooperative Federalism" Can Make State Regulatory Programs More Effective*, 19 U. MICH. J.L. REF. 903 (1986).

and ordinary role of judges. In lawsuits under Article I, Section 27 that do not involve review of decisions made by administrative agencies, courts must decide these questions on their own. Performing that task in a competent manner can be daunting. In the absence of legislation or regulations, courts are often reluctant to make the difficult technical and policy calls that environmental decision-making requires.

The gap between many current development practices and the vision of sustainable development contained in Article I, Section 27 reinforces the need for legislation and regulations because it suggests the need for a coherent strategy for implementing the Amendment. The judiciary is not well positioned to provide or implement such a strategy. The other two branches are, however, particularly if they can work together. Significantly, it is well recognized that implementation of the sustainable development framework requires a concerted strategy, perhaps especially in the executive branch, but also with significant legislative support and participation.¹⁴⁶ This means that effective implementation of the Amendment will depend, in the final analysis, on a meaningful and continuing commitment by both the executive and legislative branches. Not only do they need to create and implement a coherent strategy, they must also fill in the details and authorize appropriate institutions to take necessary actions.

Finally, and perhaps most basically, the Amendment lacks the specificity necessary to precisely delineate appropriate behavior in the variety of contexts to which it will inevitably be applied. While it provides boundaries for that behavior, and contains some basic principles, legislative and administrative decisions will be needed to foster sustainable development in Pennsylvania.

These reasons lead to a basic question about the relevance of Article I, Section 27. The short answer is that it continues to be relevant, even essential, though perhaps not for the same reasons as originally envisioned. This answer is based on two mutually-reinforcing ways of interpreting the Amendment, and on judicial enforcement of these interpretations.

146. See Dernbach, *supra* note 114, at 69-72.

B. *Judicial Role in Enforcing Amendment*

1. *Substantive Rules to Close Legislative or Administrative Gaps*—Article I, Section 27 is most obviously applied through substantive rules protecting environmental rights and the public trust. Understood in this way, the Amendment prevents the legislative and executive branches, and perhaps private citizens, from undermining public rights to public natural resources or a clean environment. This substantive approach provided the basic rationale for the Amendment. Article I, Section 27 was intended to ensure that the government protects natural resources and the environment, rather than encourage or support their degradation.¹⁴⁷ Because the ordinary political process had often failed to protect these rights, a constitutional rule was required to correct the process.¹⁴⁸ Substantive constitutional rules invalidate legislation, regulations, administrative agency actions, and other actions that are inconsistent with these rules. Such rules thus prevent the political process from adversely affecting environmental rights and the public trust, and may even encourage their protection. When statutes do protect the environment, substantive constitutional rules can also effectively prevent their repeal; the Amendment was intended in part to prevent backsliding.¹⁴⁹

The public trust part of the Amendment lends itself most obviously to this interpretation because the text says that the state has a duty to conserve and protect public natural resources. It is difficult to think of a more obvious way to enforce the public trust part of the Amendment than as a substantive duty.

The public trust part of the Amendment is also like a great many other amendments to the federal and state constitutions that specify the way in which governmental machinery should operate.¹⁵⁰ In a basic sense, this part of Article I, Section 27 is simply

147. See KURY, *NATURAL RESOURCES AND THE PUBLIC ESTATE*, *supra* note 125, at 1-2. Between the end of the Civil War and the mid 1960s, "the Pennsylvania legislature was dominated by the iron, steel, coal, and railroad interests," which ensured that laws limiting environmental exploitation were limited in scope or inapplicable to those interests. *Id.*

148. See Thompson, *supra* note 12, at 880-81, 884-87.

149. See KURY, *NATURAL RESOURCES AND THE PUBLIC ESTATE*, *supra* note 125, at 4 ("[A]ny student of history knows that political tides rise and fall. What one legislature passes, another may repeal or amend.")

150. See Ruhl, *supra* note 14, at 256-57; see also, e.g., PA. CONST. arts. II (basic rules concerning operations of legislature), III (basic rules for passage of legislation), IV (basic rules concerning operation of executive branch), V (basic rules concerning operation and

a rule for the management of certain public property. A substantive interpretation is thus neither novel or remarkable. Because a substantive interpretation would prevent the state from authorizing or allowing private appropriation or degradation of public natural resources, moreover, such an interpretation would be consistent with the Amendment's original purpose. Finally, and perhaps most importantly, the public trust part of the Amendment builds on pre-existing common law public trust rules that impose substantive duties on the government for its management of certain resources.¹⁵¹ Given the explicit recognition of this common law background in the development of the Amendment, the public trust part of the Amendment necessarily imposes substantive limitations on the use of public natural resources.

The environmental rights part of the Amendment also imposes a substantive limitation, as the *Gettysburg Tower* case indicates. The text states that the public has a right to clean air, pure water, and the preservation of certain values. What more basic way is there to protect these public rights than to prohibit substantial interference with them? This part of the Amendment, moreover, is similar to the Bill of Rights of the United States Constitution and the Pennsylvania Declaration of Rights in several important respects. Because this part of the Amendment and the Declaration of Rights create individual rights, and because these rights necessarily limit the ability of the government and perhaps others to infringe on them, it is logical and appropriate to treat the first sentence of the Amendment as imposing substantive limitations. Just like the public trust part of the Amendment, moreover, the environmental rights part was intended to prevent government from encouraging and supporting pollution and other damage to environmental values. Application of the first sentence as a substantive limit is thus consistent with, and even necessary to accomplish, the Amendment's purposes.

Substantive application of both parts of the Amendment is also similar to the manner in which common law rules now operate in environmental cases. Before environmental statutes became widespread, the common law provided a means of redress for citizens who were adversely affected by pollution. Although greater use of legislation and regulation over the past several

administration of courts).

151. See, e.g., Broughton, *supra* note 20, at 422-23.

decades has reduced the need for common law actions, common law rules still provide a minimum level of protection for the public. When there is no legislation, or when it is being inadequately enforced, public nuisance and other common law actions are available for public use.¹⁵² Similarly, although an explosion in environmental legislation and administrative regulations has weakened the claim that Article I, Section 27 is necessary to address imbalances in the political process,¹⁵³ gaps still exist. These include the absence of effective legislation for suburban sprawl and protection of biodiversity.¹⁵⁴ There is no reason why the constitution should play less of a substantive gap-filling role than the common law. Substantive enforcement of Article I, Section 27 is thus most appropriate when legislation and regulation is not protecting the public.

This approach to constitutional interpretation would fundamentally alter the way in which Article I, Section 27 is currently understood, and would make the Amendment's interpretation more consistent with that of other provisions in the constitution. It would make the constitution's text the test for the adequacy of legislation. If a statute provided the protection required by Article I, Section 27, then the statute and any action taken under it would presumably pass constitutional muster.

At present, however, many statutes administered by the Department of Environmental Protection and the Department of Conservation and Natural Resources specifically include a statement that they are intended to implement Article I, Section 27.¹⁵⁵

152. See PLATER ET AL., *supra* note 15, at 157-58.

153. Judicial deference to administrative decision making and the technical nature of many environmental decisions contribute to the weakening of that claim.

154. See generally REPORT OF 21ST CENTURY COMMISSION, *supra* note 116 (identifying these and other environmental problems requiring new or modified legislation). Subsidies, tax laws, and similar legislation may even be environmentally destructive, although they are much less visible to the public than regulatory statutes. See, e.g., *id.* at 16 (identifying expenditures on "water and sewer infrastructure and on roads" as significant contributors to sprawl).

155. See Dam Safety and Encroachment Act, PA. STAT. ANN. tit. 32, § 693.2(3) (West 1997); Wild Resource Conservation Act, PA. STAT. ANN. tit. 32, § 5302(1) (West 1997); Environmental Education Act, PA. STAT. ANN. tit. 35, § 7522(1) (West Supp. 1998-99); Hazardous Sites Cleanup Act, PA. STAT. ANN. tit. 35, § 6020.301(16) (West 1993); Land Recycling and Environmental Remediation Standards Act, PA. STAT. ANN. tit. 35, § 6026.102(4) (West Supp. 1998-99); Pennsylvania Safe Drinking Water Act, PA. STAT. ANN. tit. 35, § 721.2(b) (West 1993); Solid Waste Management Act, PA. STAT. ANN. tit. 35, § 6018.102(10) (West 1993); Pennsylvania Municipal Waste Planning, Recycling and Waste Reduction Act, PA. STAT. ANN. tit. 53, § 4000.102(b)(13) (West 1997); Oil and Gas Act, PA.

Other statutes, by contrast, do not. Pennsylvania courts have been more willing to uphold an agency decision that furthers Article I, Section 27 when such a finding is contained in the legislation.¹⁵⁶ In one case, in fact, the commonwealth court may have suggested legislative balancing satisfies the *Payne* test when the statutes at issue state an intent to implement Article I, Section 27.¹⁵⁷ Ostensibly, the courts are willing to reach these conclusions because the Amendment was considered in the drafting of some statutes but not in the drafting of others. But there is no evidence to support this conclusion; no categorical difference between the first and second group of statutes exists except for the statement of intent.

The protection of public values and resources under the Amendment, moreover, depends not on the legislature's intent but on the legislation's effect. The Clean Streams Law¹⁵⁸ and the Air

STAT. ANN. tit. 58, § 601.102(4) (West 1996); Pennsylvania Appalachian Trial Act, PA. STAT. ANN. tit. 64, § 802 (West Supp. 1998-99); Conservation and Natural Resources Act, PA. STAT. ANN. tit. 71, § 1340.101(a)(1) (West Supp. 1998-99).

156. *See, e.g., Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1365-66 (Pa. 1986).

157. *See National Solid Wastes Management Ass'n v. Casey*, 600 A.2d 260, 264-65 (Pa. Commw. Ct. 1991). In this case, the governor issued an executive order imposing categorical substantive and procedural limits on municipal waste landfill and resource recovery facility operations. *See id.* at 261. The court held that the executive order constituted legislation, and that the governor lacked the authority under Article I, Section 27 to issue the executive order on his own. *See id.* at 265. Under the state constitution, legislation must be passed by both houses and either signed by the governor or passed by a two-thirds majority over his veto. *See* PA. CONST. art. II, § 1; art. IV, § 15. The executive order was not adopted in that manner, and it was not adopted through the rulemaking process of an administrative agency possessing properly delegated statutory authority. The court also held that the provisions of the executive order conflicted with existing legislation. *See Waste Management*, 600 A.2d at 265.

The court's holding that Article I, Section 27 does not provide the governor with power to exercise legislative authority is unobjectionable. However, the court then added, in dicta: "The balancing of environmental and societal concerns, which the Commonwealth argues is mandated by Article I, Section 27, was achieved through the legislative process which enacted Acts 97 and 101 [the two basic municipal waste regulatory statutes] and which promulgated the applicable regulations." *Id.*

This statement should not be taken at face value because it was not necessary to decide the case, because the statement was made in the context of a discussion of legislative authority, and because the court did not even attempt to explain how this legislation automatically met the *Payne* test. Moreover, the statement stands the constitution on its head because it makes legislation the defining measure of what the constitution means. Because the Pennsylvania constitution provides the standard against which legislation should be judged, legislation does not define what Article I, Section 27 means.

158. The Clean Streams Law, PA. STAT. ANN. tit. 35, § 691.4 (West 1993) (purposes do not include implementation of Article I, Section 27).

Pollution Control Act,¹⁵⁹ for example, contain no statement of intent to implement Article I, Section 27, even though the Amendment gives the public a specific right to clean air and pure water, and even though these are the two main Pennsylvania statutes that protect those rights.¹⁶⁰ To argue that these statutes do not further the purposes of the Amendment to a substantial degree would be absurd.¹⁶¹

This is not to say that lawsuits under Article I, Section 27 should provide a basis for second-guessing administrative decisions on highly technical matters. Rather, it suggests that Article I, Section 27 should be available to prevent the state from allowing or encouraging unmistakable environmental degradation, which should in turn prompt the adoption of legislation in areas where none now exists. In addition, the use of Article I, Section 27 as a substantive limitation on legislation would further the Amendment's purposes by preventing the legislature from encouraging or allowing environmental damage.

2. *Principle-Reinforcing Rules to Support Legislative or Administrative Actions*—Article I, Section 27 is also principle reinforcing. The substantive application of constitutional provisions necessarily reinforces the principles stated in those provisions, but there are other ways in which constitutional provisions are principle-reinforcing. Even when their substantive provisions are not being directly applied, they can help support or limit the application of other legal rules, provide a starting point for understanding how particular problems should be addressed, and provide a basis for determining how well the state is protecting the

159. Air Pollution Control Act, PA. STAT. ANN. tit. 35, §4002 (West 1993) (statement of policy does not refer to Amendment).

160. As a practical matter, the use or nonuse of Article I, Section 27 in environmental statutes is less a matter of government policy than of the preferences of the drafters.

161. In fact, the Pennsylvania Supreme Court has held several times that the Amendment supports the interpretation and applicability of these two statutes. *See, e.g.*, Commonwealth, Dep't of Env'tl. Resources v. Locust Point Quarries, Inc., 396 A.2d 1205, 1209 (Pa. 1979) (air quality); Commonwealth, Dep't of Env'tl. Resources v. Bethlehem Steel Corp., 367 A.2d 222, 226 n.10 (Pa. 1976) (air quality); Commonwealth v. Harmar Coal Co., 306 A.2d 308, 317 (Pa. 1973) (water quality).

Nor are legislative statements of intent necessary to implement the Amendment. The environmental rights part of the Amendment is self-executing against private parties and the government; the public trust part of the Amendment is also self-executing. These concepts are developed in part II of this Article, which is forthcoming in Volume 104, issue one of the *Dickinson Law Review*.

environment. In these and other ways, the Amendment helps foster a direct dialogue between the public and all parts of government about the best means of protecting and supporting the principles it states.¹⁶² The repeated use and application of these principles over time, in fact, deepens public and governmental understanding of their meaning.¹⁶³

This principle-reinforcing approach does not appear to be the primary approach that the drafters of Article I, Section 27 had in mind, but it is attractive for several reasons. To begin with, constitutional provisions represent an enduring commitment to the values and principles they contain.¹⁶⁴ The constitutional requirement that proposed amendments pass both houses twice and then be approved in a public referendum¹⁶⁵ make it more difficult to amend the constitution than to adopt legislation.¹⁶⁶ The time and deliberation required for constitutional amendments suggest that Article I, Section 27 represents fundamental principles rather than mere policy preferences.¹⁶⁷

The need for principle-reinforcing interpretations has become more evident since the Amendment was adopted. Nearly three decades later, it is increasingly obvious that environmental protection is not a passing fad. If anything, it appears that efforts to protect environmental values and public natural resources will need to intensify.¹⁶⁸ The number and complexity of statutes and regulations have generated claims of overregulation and have sometimes made it difficult for both the public and lawyers to

162. See Thompson, *supra* note 12, at 880-881, 902-03. The values at issue are not necessarily those of the community itself, but rather those that the community has placed in the constitution. See Robert A. Shapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 451-456 (1998).

163. The equal protection clause of the Fourteenth Amendment to the United States constitution is an excellent example.

164. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1143-46 (1995).

165. See *supra* note 27 and accompanying text.

166. Legislation that has passed both houses, however, must first be presented to the Governor for approval. See PA. CONST. art. IV, § 15. There is no such requirement for constitutional amendments. See *id.* art. XI, § 1.

167. Thompson, *supra* note 12, at 882-84.

168. See generally REPORT OF 21ST CENTURY COMMISSION, *supra* note 116 (identifying land use, natural resources conservation, and human health as major challenges in environmental protection).

understand what is at stake.¹⁶⁹ The Amendment provides a directional compass over this complex landscape.

More basically, the Amendment states in effect that development and environmental protection should be made compatible, and obliges courts, other governmental decision-makers, and citizens to think about how to make development sustainable. How can the state protect property rights and simultaneously preserve the natural, scenic, historic, and esthetic values of the environment? How can the state use public resources and still conserve them for the benefit of future generations? Whatever limitations the courts may have in second-guessing policy decisions by the legislature and technical decisions by administrative agencies, they are uniquely qualified to recognize and safeguard important principles and values.¹⁷⁰ The distance between many current development practices and the practices required by the Amendment reinforces the role of an interpretative model that keeps the Amendment's principles in front of decision makers.

VI. Conclusion

This Article suggests a different framework for understanding and interpreting Article I, Section 27. First, and perhaps most basically, the text of the Amendment matters. The text contains two separate parts—environmental rights, which concerns actions on public and private property; and public trust, which applies only to publicly owned natural resources. Second, Article I, Section 27 requires the state to reconcile environmental protection and development goals, not to “balance” the environment away to foster economic development or use the environment to trump development. Third, the Amendment imposes limits on the ability

169. In 1995, for example, the Department of Environmental Resources began a regulatory basics initiative the object of which was to repeal any regulations that were more stringent than federal requirements unless they had a compelling justification. See Department of Environmental Protection, Proposed Amendments to Chapter 16 (Water Quality Toxics Management Strategy, 28 Pa. Bull. 4289, 4289 (Aug. 29, 1998)). The initiative suggested that federal law provided the primary source of state environmental values, except to the extent that DEP identified important values on a regulation-by-regulation basis. Although recourse to the Amendment would surely not answer each question of regulatory detail, the principles and values it contains would have provided a more useful starting point. See Executive Order 1996-1, 26 Pa. Bull. 856 (March 2, 1996), codified at 4 PA. CODE Ch. 1 (applying basic principles of regulatory basics initiative to all agencies).

170. See Schapiro, *supra* note 162, at 417 (citing ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 24-26 (1962)).

of the state to adversely affect the environment, and those limits need to be understood and recognized. Those limits, in turn, define what rights citizens have to judicial relief. Finally, even though the scope and detail of environmental legislation is much greater now than in 1971, Article I, Section 27 may still be applied where gaps exist. The Amendment can also be used to support the exercise of government authority for environmental protection.¹⁷¹

It is almost three decades since the beginning of the modern environmental era, when Article I, Section 27 was adopted. We have a much better understanding now of what we can achieve and of the daunting challenges that lie ahead. We are more likely to face those challenges successfully if we take Article I, Section 27 seriously, as constitutional law. That is, after all, the insight with which we started.

171. The second and final part of this Article will develop this framework in greater detail for each of the Amendment's major parts.