

State Constitutions and Environmental Bills of Rights

By Art English and John J. Carroll

The movement to add environmental bills of rights to state constitutions is important as one manifestation of a wider environmentalism that began to sweep the country in the 1970s, but also because it sheds interesting light on state constitutions and constitutional processes. The states proved to be more hospitable for this type of constitutional reform than the federal because state constitutional traditions diverge substantially from the national model. In particular, the argument is that the openness of state constitutional processes to their political environment facilitated the effort to place environmental rights, as well as a variety of other environmental provisions, in state constitutions.

The provisions to include environmental bills of rights in state constitutions have been crafted in innovative ways. These provisions typify how states amend constitutions, displaying first, uniformities in intent and meaning as new states adopted provisions borrowed from other states and adopted them and, second, increments of innovation as the basic idea was adapted to the needs of a unique state and its environment.

Each state that adopted a provision could claim, like all the others, a unique environmental character. Rhode Island is a coastal state with some of the most unspoiled beaches and best saltwater fishing in the nation and its environmental provisions reflect those characteristics. Pennsylvania is known for its woodlands, deer population and mountains, as well as its many colonial and Civil War historic places. Massachusetts has both freshwater resources and coastline fisheries, while Hawaii is perhaps the most

unique American state with eight main islands geographically located almost 2,500 miles from the continental United States. Even the central gateway to the Midwest, Illinois, has thousands of square miles of timberland, lakes and rivers. The state environmental bills of rights reflect each state's unique assets and concerns.

Six Environmental Bills of Rights

Illinois, 1970: Illinois' pioneering environmental rights provision was a product of the constitutional reform that was prevalent in the states during the 1970s. The article was part of a revised state constitution adopted in 1970 and is fairly typical of the kinds of environmental rights that were placed in state constitutions during this active period of environmental constitution making. The environmental bill of rights appears in the Illinois Constitution as a freestanding provision and is not part of the

Table A: Summary of Environmental Rights Provisions in Six States

State	Date	Section	Total words in provision	Mentions state public trust	Mentions future generations	Enforcement mechanism noted
Illinois.....	1970	Article XI	83	Yes	Yes	Self-Executing
Pennsylvania	1971	Article I Section 27 (in bill of rights)	61	Yes	Yes	Legislative
Montana	1972	Article II, Section 3 (in bill of rights)	60	Yes	Yes	Unclear—Subject to judicial interpretation
Massachusetts	1972	Article 97	191	Yes	No	Legislative
Hawaii.....	1978	Article XI, Section 9	57	Yes	Yes	Self-Executing
Rhode Island.....	1987	Article I, Section 17 (in bill of rights)	185	Yes	Yes	Legislative

Source: Art English and John J. Carroll.

document's bill of rights. The key language of the provision is found in Section 2 and states, "Each person has the right to a healthful environment."¹

Like most of the environmental provisions written into state constitutions during this period, Illinois' provision is short but reflects the unique traditions of state constitution making that drove the selected language. Section 1, for example, offers a uniquely state constitutional twist when it begins by observing that it is "the public policy of the state and the duty of each person to provide and maintain a healthful environment for the benefit of this and future generations." This section bears several of the earmarks of the distinctive state constitution making tradition. The language is a hortatory reminder to the people of Illinois that they bear a direct responsibility for the care of the environment themselves. It is a statement of public policy meant to guide, but not bind, the state legislature to a course of action. The article lays out the public trust doctrine giving the legislature the responsibility for protecting the environment for current and future generations.

Section 2 contains ideas later alluded to in the Montana and Hawaii documents that provide a person may enforce the right to a healthy environment against a governmental or private party, but that the right is subject to reasonable regulation the General Assembly may provide by law. Thus, while Article 1 appears to be completely self-executing, i.e. enforceable by the courts without legislative implementation, nonetheless, Article 2 grants the Illinois General Assembly power to implement the provision.

Pennsylvania, 1971: The Pennsylvania environmental rights provision appears in the constitution's Declaration of Rights and was placed there in 1971 by a referendum that passed by a margin of 4-to-1. The referendum was part of a general awakening in Pennsylvania about matters of environmental concern, and was one of several steps taken during this period to tighten control on coal companies, steel companies and land developers.²

In its provision, Pennsylvania enumerates the components of what Illinois had summarily called a "healthful environment." Among the components are values we have since come to expect: clean air, pure water and preservation of natural areas. But the Pennsylvania provision contains some surprises reflecting its historic legacy as one the first 13 colonies. The inclusion of "scenic, historic and aesthetic values" takes the idea of an environmental bill of rights in a new direction and expands its scope. It

also indicates to constitution makers in other states that such a declaration can be sensitive to each state's unique heritage, including, but not limited to, its natural environment.

Like the Illinois document, the Pennsylvania Constitution contains a statement of policy in defining environmental values as a public trust of the state to preserve and articulate on behalf of the people, including "generations yet to come."³ The Pennsylvania language is unclear as to whether it was meant to follow the self-executing model, or whether it depended on the legislature to provide for its enforcement. This became a matter of contention in the courts.⁴

Montana, 1972: Montana is a particularly interesting case. The Montana provision emanated from a constitutional convention called by the people, which essentially replaced Montana's 1889 statehood constitution. The new constitution was adopted by a razor-thin majority of 116,415 to 113,883 in 1972. At 11,200 words, it was only half the size of the 1889 document. Among its more modern provisions were a right to bring suit against the state for injuries to person and property, a provision that the governor and lieutenant governor run as a team, and an amendatory veto for the governor.⁵ Short in length and not excessive in detail, the new Montana Constitution had a decidedly "model" state constitution look.⁶ The preamble of the 1972 Montana Constitution demonstrates a forceful commitment to environmental rights, intoning in almost spiritual language the natural wonders of the state:

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.⁷

The language of the preamble demonstrates that environmental protection was a very high value among those who wrote the state's constitution. One of the new constitution's most innovative provisions, however, was Article II, Section 3 of The Declaration of Rights, which enumerates the inalienable rights of a people "born free." In its enumeration of rights, pride of place is given to "the right to a clean and healthful environment," followed in the same sentence by such traditional items as "enjoying and defending lives and liberties," "protecting property," and "safety, health and happiness."

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While Article II seems to provide a self-executing right, Article IX of the Montana Constitution mandates the legislature to “provide for the administration and enforcement” of the “clean and healthful environment.” Article IX follows the Illinois example in declaring public policy, but also mandating “each person” as well as the state to protect the environment for present and future generations.⁸

Massachusetts, 1972: In 1972, Massachusetts voters placed into their constitution an environmental rights provision. The Massachusetts provision, Article 97, has its own space in the state document and was placed there in part to obtain a degree of certainty that takings by the state for environmental purposes would not otherwise be directed unless two-thirds of the Massachusetts General Court agreed. In this way, the commonwealth used its constitutional processes to address a specific issue in substantive detail. In its detail and the narrowness of the policy area addressed, Article 97 has some characteristics akin to positive law and illustrates a common state practice in which the constitution is used to raise higher hurdles for the passage of legislation than would otherwise be required.

The environmental rights section is similar to the provisions of the other states, but borrows heavily from Pennsylvania. The article protects “natural, scenic, historic and aesthetic qualities” as Pennsylvania had done the year before. Its innovative content is “freedom from excessive and unnecessary noise,” a protection that had not previously appeared in a state constitution. Article 97 also protects a right of conservation and utilization of agricultural, mineral and other resources, in a variant of the more common right to access provisions. The Massachusetts provision is interesting for its mix of positive and higher law elements, and its typically state characteristic of both borrowing language from other initiatives and offering new language at the same time.

Hawaii, 1978: Hawaii’s Article XI represents that state’s constitutional orientation to environmental protection. The article was one of 32 provisions drafted by the 1978 constitutional convention, the second comprehensive updating of the state’s document since statehood in 1958. Borrowing on the successful ratification strategy used to approve 22 out of 23 provisions from the 1968 constitutional convention, all 32 provisions drafted in 1978 were submitted separately to the people and all 32 were approved.⁹

Article 11 approaches the protection of the environment in a comprehensive manner, sub-

dividing environmental protection into several headings, which include broad public trustee categories of conservation and management of natural resources along with marine and water resources, nuclear energy, public land banking and agricultural lands.¹⁰ A separate section in Article XI devoted to environmental rights states that not only does each person have the right to “a clean and healthful environment,” but also that any person has the right to enforce those protections against any public or private entity subject to reasonable limitations as provided by law. As in Montana, people in Hawaii have a private right to bring suit pertinent to the self-executing language of this section.

Rhode Island, 1987: The Rhode Island provision is found in the constitution’s Declaration of Rights and Privileges, and was inserted by constitutional amendment in 1987. Rhode Island’s environmental bill of right provision illustrates that each state that has opted for an environmental provision in its constitution has a unique constitutional tradition. The Rhode Island article is very detailed, encompassing an access right for swimmers and gatherers of seaweed, as well as imposing responsibility on the state to protect the natural environment by regulation and planning. The state as a trustee and steward of the environment for the people is clearly written into this provision, which relies on its execution by the state “to adopt all means necessary and proper by law to protect the natural environment. ...” The provision is quite unique in granting access to the “rights of fishery and the privileges of the shore,” relying on the entitlements of the King Charles Charter that preceded the Rhode Island Constitution of 1842 and the common usages of the state. Rhode Island’s bill of rights reference in the state constitution may be of 20th century origin, but its protections are rooted in hundreds of years of fishing and shore rights for its people.

Discussion

The active yet limited process invoked by environmentalists during the last third of the 20th century provides insight into one of the unique processes of political change in the United States—enlarging the rights of people by placing them in the state’s constitution. In selecting state constitutional change as the mode of enlarging power in a state political system, individuals and groups must work within a state’s constitutional tradition and political culture. That tradition and culture invariably are intertwined

with a state's previous constitutions, particular political and historical traditions, and geopolitical developments. In selecting state constitutions as their target for environmental rights, supporters of a healthier environment hoped to establish a center of constitutional power in their respective documents that they could draw upon to repel assaults by those who would use raw political power in the states to provide unbridled development, hasty easements and takings that would despoil natural environments and endanger the health of the state's citizenry. The relative ease of the amendment process in the states, compared to fighting entrenched political interests at the federal level, offered supporters a way to write their values in the state's fundamental document.

This analysis demonstrates how environmentalists of the 1970s wrote these provisions in the frame of a higher law rather than positive or statutory law tradition. Their aim was to establish the protection of the environment not just in terms of concrete and immediate issues in the physical environment, but also on a larger community scale protecting the health and well-being of both present and future generations. While they hoped constitutional values would translate into a basis of higher political power, environmental advocates had other purposes in mind, too.

In the six states studied, it appears the framers of these amendments believed that even if the language in most cases would not support unilateral private action against serial environmental abusers, they would remind lawmakers, judges, political activists and the attentive public that the right to a clean and healthy environment is one of the most fundamental rights to which people are entitled. While these reminders might be considered merely hortatory, they also provide policy guidance to legislators, executives and courts who are encouraged to provide reasonable regulation and implementation by law in light of their public trust to take good care of the environment for future generations.

The environmental rights movement moved within the contours of the state constitutional traditions. Its legacy tells a good deal about why state constitutions were and are still important in the protection of the broader human values that are written into some of our national founding documents. The argument that the dignity of people cannot be separated from their place of habitat and that habitat must be healthy is a simple but powerful idea. That some states chose to write them into constitutions and not just into statutes

is no accident—the provisions were intended to provide authoritative advice and counsel to political decision-makers. We maintain that state constitutions are still an excellent place in which to articulate fundamental rights.

In comparing the national constitutional tradition with the state traditions, it becomes clear why environmentalists worked within the state tradition. As noted, the federal tradition is one in which a constitutional amendment is exceedingly rare because of the difficulties in the adoption process and in building a national consensus. Within the states, constitution-making processes vary considerably, but in general the states have developed more sensitive and diverse mechanisms for democratic control than exists at the national level. States are regular users of their constitutional revision processes, whether it is a legislative proposal and popular referendum, citizen initiative or even a constitutional convention.

After the Bill of Rights, amendments at the federal level have dealt with procedures such as the voting age, prohibition, or vice presidential succession. Federal amendments have responded to political crises that were percolating up from the states such as the popular election of senators or the right to vote for women. Federal provisions are also usually self-executing or if they are not, as in the case of the civil war amendments, they may have enforcement clauses. Had there been a federal environmental rights amendment it would have had to have gone through all of these stages: relative consensus in the states, extraordinary majority by proposal and ratification, most likely an enforcement clause, and certainly judicial interpretation.

Environmentalists approached the state constitutional revision process differently. Their first intent was to place protection of the environment in the state constitution's bill of rights to clothe it with inalienability. The Hawaii provision, for example, says each person has the right to a clean and healthful environment. The second and most important intent was to write language that would allow environmental protection to be the right of any person should they so choose to be its champion in the courts. Thus, the Illinois provision states, "Each person may enforce this right against any party, governmental or private."

An additional distinction between the federal and state constitutional models is that the state provisions reflect the particular circumstances and interests that were unique to the state; in this sense, they reflect the variety of regional concerns. In

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Pennsylvania, the framers were concerned about leaving not only the environment, but also historic sites in good stead for future generations. In Rhode Island, access to the shoreline for swimming and fishing were important values, and in Massachusetts, where land is often at a premium, those who wrote the constitutional provision wanted to avoid having land taken for environmental purposes used for other ends unless extraordinary majorities of the General Court would agree.

While the state provisions are short and do not have excessive detail—fitting more into a higher law framework associated with the more modern constitutions of the latter part of the 20th century and the very early documents—they are not like the much more crisis-driven amendments the federal constitution has seen. It is fair to say the incremental amendment process that characterizes bill of rights provisions in the state constitutions illustrates the point that states have exercised considerable imagination as they have faced new problems and absorbed the wisdom generated by new social movements.

Notes

¹The complete texts of the six state provisions are included in the Appendix.

²Franklin L. Kury, “Pennsylvania’s Environmental Bill of Rights 25 Years Old,” available at <http://www.dep.state.pa.us/dep/Rachel-Carson/Kury.htm>.

³See Appendix.

⁴John C. Dernbach, “Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part 1—An Interpretative Framework for Article 1, Section 27,” 103 *Dick. L. Rev.* 693 (1999); Marcy Smorey-Giger, “The Effect of the Environmental Rights Amendment: How Article 1, Section 27 of the Pennsylvania Constitution Has Impacted Environmental Law in Pennsylvania,” *Juris: The Duquesne University School of Law News Magazine*, 35, 1 (2001) available at <http://www.Juris.Duq.edu/winter2001/effect.htm>. See *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973); and *Payne v. Kassab* 312 A.2d 86 (Pa. Commw. Ct. 1973).

⁵*The Book of the States*: 1972.

⁶See *Model State Constitution*, 6th eds. 1968. New York, NY: National Municipal League.

⁷A copy of the Montana State Constitution’s bill of rights as ratified in 1972 can be found at <http://www.harbornet.com/rights/Montana.txt>.

⁸See appendix for the entire article. The entire Montana Constitution can be viewed at <http://www.mcvedfund.org/constitution.htm> which is the home page of the Montana Voters Education Fund.

⁹Albert L. Sturm, “State Constitutions and Constitutional Revision: 1978–79 and the 1970s.” *The Book of the States*. (Lexington Kentucky: The Council of State Governments) p. 11.

¹⁰Provision found in appendix. Entire Hawaii State Constitution can be viewed at <http://www.hawaii.gov/Irb/> which is the home page of the Hawaii Legislative Reference Bureau.

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