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HB 82: Constitutional Amendment-Environmental Rights

Position: Favorable

January 7, 2021

Chairman Kumar P. Barve

Vice Chair Dana M. Stein

House Environment and Transportation Committee

Maryland House of Delegates

House Office Building

6 Bladen St., Annapolis, MD 21401

Dear Chairman Barve, Vice Chair Stein, and Members of the Committee;

I write this letter in support of HB 82, "Constitutional Amendment - Environmental Rights," not only as a Maryland resident for decades but also as an environmental attorney with more than 40 years of experience in the public and private sectors. Currently, I am an Adjunct Professor of Law at Vermont Law School, and a Visiting Scholar at the Environmental Law Institute, a Washington, D.C. think-tank in environmental law and policy. I also served as the Director of the Office of Environmental Justice at the U.S. Environmental Protection Agency from 1998-2007.

My comments in support of HB 82 are based in part on my Essay, "Environmental Justice For All Must Be A Human Right Enforceable in U.S. State Constitutions," in the book, [A BETTER PLANET: 40 Big Ideas for a Sustainable Planet](#), recently published by Yale University Press. For your review and consideration, I have enclosed the Essay

Let me state that, based upon my experience as an environmental lawyer and policy maker, I am an unabashed and unapologetic advocate for environmental justice for all communities; an advocate for a human right to a clean and healthy environment; and an advocate for environmental rights amendments.

With that being said, this letter is **not** about the instances of environmental injustice and climate injustice in Maryland that are many and varied. This letter is **not** about proposed legislation that would require the Maryland Department of the Environment to conduct a study that identifies and monitors air pollutants and pollutants in the water emitted by large poultry operations. This letter is **not** about proposed legislation that would require the Department of Health to lower Maryland's blood lead action levels since science has already proven that there is no safe level of lead exposure and that the effects of lead poisoning in children are irreversible. This letter is **not** about proposed legislation that would require Maryland's Department of the Environment, the Department of Health, and the Department of Natural Resources to establish the validity and veracity of data collected by community-led science-based projects, and would compel the development and implementation of policy for the use of that data by those departments. Those environmental and public health-related issues may in the future be

appropriately addressed by other speakers or in other letters of support to this House Environment and Transportation Committee.

To the contrary, this letter is solely about the need for leadership by this Committee to declare, through HB 82, that every Marylander, regardless of race, color, national origin or socioeconomic status, has the right to clean air, clean land, and clean water and a stable climate. In essence, this is the public policy goal to be achieved of environmental justice for all communities. With this language, HB 82 will begin to address, among other things, the substantial environmental and public health issues in black and brown, and/or poor communities overburdened by pollution and health hazards throughout the state.

Moreover, as a direct result of the leadership of this Committee, HB 82 will provide additional tools in the toolbox for Maryland's Commission on Environmental Justice and Sustainable Communities to be more successful. As you know, the Commission was created on January 1, 2001 by Executive Order¹ by then-Governor Parris N. Glendening, and was tasked with advising state agencies on environmental justice issues; assessing the adequacy of current state laws to ensure environmental justice; and developing criteria to determine which communities may be disproportionately exposed to environmental harms and risks. Effective October 1, 2003, the Commission was established by statute by the General Assembly (Chapter 460, Acts of 2003).² I submit that if the Commission has HB 82 as the fundamental law of the state to point to in providing such advice to state agencies, it would, most assuredly, be more effective.

Furthermore, as a direct result of the leadership of this Committee, HB 82 will provide additional tools in the toolbox for Maryland's Attorney General's Office if the state decided to initiate climate liability litigation against Big Oil and gas companies as the State of Rhode Island did in the current case **Rhode Island v. Chevron et al.**³

On July 2, 2018, Rhode Island sued 21 oil and gas fossil fuel companies alleging various state-law tort claims. Among other things, Rhode Island is seeking to hold the 21 companies liable for causing climate change impacts that adversely affected the state's natural resources, as well as the rights of its inhabitants' access to and use of those natural resources in violation of the state's environmental rights amendment. The case is moving towards being heard by a jury of Rhode Island residents. I wrote about this case in a December 2020 article entitled, "Environmental Rights, Public Trust, and Public Nuisance: Addressing Climate Injustices Through State Climate Liability Litigation."⁴

In that article, I discussed why a state may want to consider having an environmental rights amendment and an updated public trust law that spell out clearly the government's environmental policy with respect to the atmosphere as a natural resource that needs to be protected by the state as trustee for all individuals and communities, including minority and/or low-income communities.

I pointed out that this was a significant legal issue in a climate change case that was recently decided in the state of Oregon. In 2011, two teenagers who live in Oregon, Olivia Chernaik and Kelsey Cascadia Rose Juliana, and their mothers filed a climate change complaint in the Circuit Court of Oregon, Lane County, against then-Governor John Kitzhaber and the state for failing to protect essential natural resources,

¹ Md. Executive Order No. 01.01.2001.01: Commission on Environmental Justice and Sustainable Communities Mar.9, 2001 (reprinted in 28-7 Md. Reg674 (Apr.6, 2001).

² Md. Environment Code. Ann. §1-701 (2014).

³ Complaint, **State of Rhode Island v. Chevron Corp.**, No. PC-2018-4716 (R.I. Super. Ct.)

⁴ Environmental Law Reporter, 50 ELR 11022 (December 2020).

including the atmosphere, as required under the public trust doctrine.⁵ The plaintiffs sought to compel the state government to create a viable climate recovery plan for reducing CO₂ emissions in order to protect the state's natural resources, and to protect young people from the impacts of climate change. In May 2015, the circuit court trial judge held that the state had no affirmative legal responsibility nor fiduciary obligation to preserve and protect the atmosphere from climate change for present and future generations because it was not a public trust resource. In sum, the trial court questioned "whether the atmosphere was a 'natural resource' at all." There was no enacted law or constitutional provision on this issue, which provided that Oregon has a fiduciary responsibility as trustee to protect the atmosphere from impairment.

In July 2015, the plaintiffs filed a notice of appeal with the Oregon Court of Appeals, and in January 2019, the appellate court finally ruled against the youth plaintiffs by stating that the public trust doctrine imposed no affirmative duty on the state, and declined to state whether the atmosphere is a public trust resource.⁶ The plaintiffs asked the Oregon Supreme Court to review and overturn the appellate court's decision. On October 22, 2020, the Oregon Supreme Court affirmed the appellate court's decision that the public trust doctrine does not impose a fiduciary obligation upon the state to preserve and protect the atmosphere.⁷

Imagine for a moment if Oregon had a robust and updated public trust law like the proposed HB 82 that not only spells out Maryland's public trust responsibilities regarding its natural resources, but also simple and straightforward language that states, "Every person has the fundamental and inalienable right to a healthful environment, including the right to clean air, water, and land, [and] a stable climate."

Arguably, the Oregon trial court may have been able to issue a different ruling on the state's affirmative duty to protect its natural resources, which includes the atmosphere, if the state had in place public trust legislation, as well as an environmental rights amendment similar to the proposed HB 82.

Furthermore, in asserting its leadership, the Committee should be aware that there is a trend moving towards the idea of fundamental environmental rights to clean air, clean land, and clean water in other states like New York and New Jersey via environmental rights amendments.

Additionally, I would like to bring to the Committee's attention that, on January 21, 2020, the U.S. Supreme Court denied the petition of former state and local government officials in the *City of Flint v. Guerin* matter. With that denial, the Supreme Court determined that the Flint, Michigan residents' civil suit against those former state and local government officials could proceed. The residents argued that they had a constitutional "right to bodily integrity." They argued that the government officials acted with deliberate indifference and thus violated their constitutional right to bodily integrity by knowingly contaminating their drinking water with lead and harmful bacteria, and then repeatedly lied about evidence of the contamination, causing the residents to unknowingly and involuntarily ingest poisonous substances over a period of months. The Supreme Court's denial of the petition was an enormous victory for the Flint residents, who were exposed to high levels of lead after the government officials changed the city's drinking water source in 2014.

⁵ *Chernaik v. Kitzhaber*, No. 16-1-09273 (Or. Cir. Ct. filed May 19, 2011).

⁶ On May 22, 2019, the Oregon Supreme Court granted the plaintiffs' request to review the Court of Appeals' January 2019 ruling. On November 13, 2019, the Oregon Supreme Court heard oral arguments.

⁷ *Chernaik v. Brown*, No. S066564 (Ore. Sup. Ct. filed October 22, 2020). Available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20201022_docket-S066564-_opinion.pdf

On July 29, 2020, the Michigan Supreme Court determined in *Mays v. Governor of Michigan* that knowingly subjecting the residents of Flint to contaminated drinking water violated their Substantive Due Process rights to bodily integrity, and observed that, “There is obviously no legitimate governmental objective in poisoning citizens.”⁸ Substantive Due Process derives from the Due Process Clause of the 14th Amendment which provides that “nor shall any State deprive any person of life, liberty, or property, without due process of law.” And, bodily integrity, has been defined to mean “an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate government objective.”⁹

Flint, unfortunately, has become the current poster child for environmental injustice in this country. While the U.S. Supreme Court's ruling and the Michigan Supreme Court's ruling should be applauded, it's worth noting that if Michigan had an environmental rights amendment – which provides a constitutional right to environmental protection – the Flint water crisis likely would never have happened in the first place.

If Michigan had an environmental rights amendment that explicitly protected citizens' rights to clean water like the proposed Maryland environmental rights amendment, it is likely that the state officials, in their policy decisions, would have been obligated to more carefully consider the right of the Flint residents to clean water, and would not have switched the water supply in 2014. Flint is, in many respects, a wake-up call to the legislative, executive, and judicial branches of the entire nation regarding citizens' access to clean drinking water.

As you know, environmental justice is an urgent problem in America. For example, a recent U.S. National Institutes of Health study entitled, “Race, Income, and Environmental Inequality in the U.S. States, 1990-2014,”¹⁰ concluded that black families are more likely to live in environmentally hazardous neighborhoods than white families, despite having equal or higher incomes. According to the researchers, blacks are so overburdened with toxic concentrations of pollution, the findings explain some of the significant health disparities that exist between blacks, whites, and Hispanics. The Trump administration, moreover, acknowledged this reality when the *American Journal of Public Health* published a study in April 2018 entitled, “Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status,” by EPA's National Center for Public Health of the Office of Research and Development concluding that “disparities in pollution exposure from PM [particulate matter] emissions were more pronounced for Black populations (regardless of wealth) than those living in poverty...Emission disparities resulting from structural racism exist on a national level and at the state and county levels in most instances.”¹¹

Finally, with respect to climate injustice, a January 2020 study entitled, “The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 U.S. Urban Areas,” published in the journal *Climate*, concluded that deadly urban heatwaves disproportionately affect minority neighborhoods because of a legacy, beginning in the 1930s, of racist housing policies.¹² Although redlining

⁸ *Mays v. Governor of Michigan*, 2020 WL 4360845 (July 29, 2020).

⁹ *Rogers v. Little Rock, Arkansas*, 152 F.3d 790, 797 (8th Cir. 1998), citing *Sacramento Co. v. Lewis*, 523 U.S. 833, 847, n.8 (1998).

¹⁰ Debra J. Salazar et al., “Race, Income, and Environmental Inequality in the U.S. States, 1990-2014.” *Social Science Quarterly* (February 25, 2019)

Available at: <https://onlinelibrary.wiley.com/doi/abs/10.1111/ssqu.12608>

¹¹ Ihab Mikati et al., “Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status,” *Am.J.Public Health* (April 2018).

Available at: <https://pubmed.ncbi.nlm.nih.gov/29470121/>

¹² Jeremy S. Hoffman et al., “The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 U.S. Urban Areas,” *Climate* (January 2020).

was banned by the Fair Housing Act of 1968, the researchers found that those neighborhoods are still predominantly home to minority and lower-income communities who are disproportionately exposed to a variety of environmental hazards such as lead, poor water and air quality, overdevelopment, and limited shade. Thus, historical housing policies in the United States are directly responsible for the disproportionate exposure to current heat events in urban areas. This is important because the world has experienced 18 of the 19 warmest years on record since 2001.

In conclusion, if environmental justice is to be secured for all communities in Maryland, there must be a concerted effort to amend the state constitution to include an environmental rights amendment. Otherwise, environmentally overburdened communities like, for example, South Baltimore¹³ will continue to be exposed disproportionately to environmental harms and risks. As Pennsylvania, Rhode Island, Montana, Hawaii, Illinois, and Massachusetts have already demonstrated, environmental constitutionalism works. The leadership of the House Environment and Transportation Committee is unquestionably essential at this time.

Very truly yours,



Barry E. Hill

Enclosed: Article, "Environmental Justice for All Must Be a Human Right Enforceable in U.S. State Constitutions"

Available at:

https://www.researchgate.net/publication/338556690_The_Effects_of_Historical_Housing_Policies_on_Resident_Exposure_to_Intra-Urban_Heat_A_Study_of_108_US_Urban_Areas

¹³ See Nicole Fabricant, "The Environmental Justice Movement in South Baltimore," *New Politics* (Winter 2018)

Available at: https://newpol.org/issue_post/environmental-justice-movement-south-baltimore/

ESSAY TWENTY

Environmental Justice for All Must Be a Human Right Enforceable in U.S. State Constitutions

Barry E. Hill

IN 1969, the United States Congress articulated the nation's environmental policy in the National Environmental Policy Act, and the federal government steadily established, implemented, and enforced standards for the protection of human health and the environment through extensive legislation and regulations. In 1970, the U.S. Environmental Protection Agency (EPA) was established as the federal agency responsible for administering protective environmental laws and their implementing regulations related to enforcement, standard setting, monitoring, and research for the protection of human health and the environment. According to the EPA website, its primary purpose is to ensure that "all Americans are protected from significant risks to human health and the environment where they live, learn and work."¹

But this comprehensive regulatory framework has not adequately addressed the concerns of all communities because EPA has not enforced equally the federal laws protecting human health and the environment for all communities. Indeed, the unevenness of enforcement of protective environmental laws and policies across the nation raises a salient question about how best to ensure environmental justice, which EPA defines as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."² According to EPA, environmental justice, as a public policy issue, seeks to ensure that all Americans have clean water, clean land, and clean air where they live,

learn, and work. As the environmental activist and author of *The Green Amendment: Securing Our Right to a Healthy Environment* Maya van Rossum observes, when it comes to protecting human health and the environment, existing environmental laws have failed us. In response, van Rossum argues for “environmental constitutionalism,” which is centered on placing an environmental rights amendment in the bill of rights sections of our 50 state constitutions.³

WHY ENVIRONMENTAL JUSTICE REQUIRES A CONSTITUTIONAL RIGHT TO ENVIRONMENTAL PROTECTION

In many respects, Flint, Michigan, currently serves as the poster child for environmental injustice in the United States. This predominantly African-American city continues to struggle today with the decisions made by state and local government officials that resulted in dangerous levels of lead in the drinking water of tens of thousands of children.

According to a 2016 report, EPA’s inspector general concluded that inadequate drinking water treatment exposed many of Flint’s residents to lead ingestion.⁴ The report recounts how the problem came about: Flint had formerly bought drinking water from Detroit Water and Sewerage but turned to the Flint River as its water source in 2014. “Treated water from Detroit Water and Sewerage included a corrosion-inhibiting additive, which lined pipes to minimize the level of lead leaching into drinking water,” the report said. Flint’s new water treatment process did not involve this addition. Soon after, residents, whose initial concerns had been either ignored or dismissed by state officials, began informing EPA of water color and odor issues.⁵ Lead was found in the water in February 2015, and in April, EPA determined that the new Flint water system was not using the additive that protected against lead leaching. Signs of lead contamination began to appear in the community, and in children’s blood lead levels. Flint once again began using water from Detroit Water and Sewerage in October 2015.

Representative Dan Kildee (D), who represents Flint, said: “Drinking water is a fundamental human right. It’s something that’s necessary to sustain human life, and so it’s hard to think of a more important priority for every level of government.”⁶

The United Nations would agree with Congressman Kildee’s statement. In 2010, the U.N. General Assembly declared, through a historic vote, that clean water was a fundamental human right. Resolution 64/292 states that the United Nations “recognizes the right to safe and clean drinking water and

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sanitation as a human right that is essential for the full enjoyment of life and all human rights.”⁷ The measure passed with a vote of 122 in favor to none against, with 41 abstentions. The U.S. representative was concerned, however, whether this human right was an enforceable right under international law.

The United States, consequently, abstained from voting in favor of the resolution.

Access to safe and clean drinking water and sanitation has been recognized as a critical link to human health throughout the passage of time.⁸ Marcus Vitruvius Pollio, a famous Roman architect and engineer, recognized this relationship as far back as the first century BC in his seminal work, *The Ten Books on Architecture*. He wrote that “water from clay pipes is much more wholesome than that which is conducted through lead pipes, because lead is found to be harmful for the reason that white lead is derived from it, and this is said to be harmful to the human system. . . . This we can exemplify from plumbers, since in them the natural colour of the body is replaced by a deep pallor. For when lead is smelted in casting, the fumes from it settle upon members, and day after day burn out and take away all the virtues of the blood from their limbs. Hence, water ought by no means to be conducted in lead pipes, if we want to have it wholesome.”⁹

Thus, more than 2,000 years ago, Vitruvius realized that lead was highly toxic, and therefore poisonous, because it interfered with some of the body’s basic functions. Without the benefit of modern medical technology, he was able to observe the adverse health effects of lead ingestion.

Lead can adversely affect the health of anyone, but children under age six face special hazards because their brains and nervous systems are still developing. The scientific community and public health professionals generally agree that, in low levels, lead can cause permanent harm to children, including injuries to the nervous system and kidneys, learning disabilities, attention deficit disorder, reduced intelligence, speech and behavior issues, muscle coordination problems, diminished muscle and bone growth, hearing damage, and many other issues.¹⁰ There is chelation therapy treatment for high blood levels of lead, but there is no medical cure.

In response to the Flint water crisis, federal and state class action civil lawsuits were filed against Michigan, the state’s governor, its Department of Health and Human Services, its Department of Environmental Quality, and others since, according to one complaint, the state government “made the final decision that created, increased and prolonged the hazards, threats and dangers that arose by replacing of safe drinking, washing and bathing water

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with a highly toxic alternative.”¹¹ The Michigan attorney general also filed criminal charges against some state and local government officials.

But all of these civil suits and criminal charges may not be enough to address the simple fact that access to safe and clean drinking water and sanitation is not a human right protected by the U.S. federal government. It is clearly not an expressed right in the U.S. Constitution and its Bill of Rights. According to the University of Virginia professor Jonathan Z. Cannon, the U.S. Constitution is “pre-ecological.”¹² Nor is there a Supreme Court decision declaring that it falls within a *penumbral right*—a right that could be derived from other rights explicitly protected in the Bill of Rights—as the Supreme Court has declared for the right to privacy or the right for same-sex couples to marry.

Moreover, in spite of Congressman Kildee’s bold assertion, environmental justice is not a recognized human right in Michigan. There is no environmental rights amendment in the Michigan Constitution to help Michiganders defend their human right to safe and clean drinking water and sanitation.

HOW ENVIRONMENTAL CONSTITUTIONALISM WORKS

The residents of Flint are not alone in facing what should be viewed as environment-related human rights violations.

The residents of rural Franklin Forks (a small, low-income, white rural community in Susquehanna County, Pennsylvania) began to notice in 2013 that the water coming out of their private household wells had turned gray. Tests found dangerous levels of methane in the water—forcing many residents to buy bottled water to drink and leaving them at the mercy of WPX Energy (the natural gas company that was fracking in pursuit of gas in the area from the Marcellus Shale formation) for non-potable water for showers and washing clothes. But the citizens of Franklin Forks had leverage that the citizens of Flint did not have: Pennsylvania citizens benefited from the protections afforded by Article I, Section 27, of the Declaration of Rights in the Pennsylvania Constitution. Section 27 reads: “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 to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”¹³

Ultimately, WPX Energy provided water tanks for impacted residents of Franklin Forks, and the company was incentivized to take a greater level of

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precaution and avoid potential civil and criminal liability. Although a constitutional case did not end up being litigated, the company's recognition of Pennsylvania's constitutional environmental rights amendment undoubtedly shaped the dynamic.

In some Pennsylvania cases, the constitutional environmental rights provision has been front and center. In 2013, in the *Robinson Township v. Commonwealth of Pennsylvania* case, numerous municipalities were outraged by the speed and environmental impact of natural gas development of the nearby Marcellus Shale formation. The political subdivisions were concerned that the new state oil and gas law (Act 13) not only impacted the enforceable right to the environment for individual citizens, or "individual environmental right," that is found in the state constitution but also impacted their governmental duty to protect the environment. The environmental activist and author Maya van Rossum—as the "Delaware Riverkeeper" tasked with protecting the watershed—was one of the citizen plaintiffs in this lawsuit challenging the constitutionality of Act 13. The towns and the citizens successfully sued the state to overturn key portions of the state oil and gas law, which were found to be inconsistent with Pennsylvania's constitutionally protected individual environmental right.

In that case, the Pennsylvania Supreme Court succinctly declared: "The right to 'clean air' and 'pure water' sets plain conditions by which government must abide. We recognize that, as a practical matter, air and water quality have relative rather than absolute attributes. . . . Courts are equipped and obliged to weigh parties' competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by the other branches of government. The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality."¹⁴

The Pennsylvania Environmental Defense Foundation, an environmental advocacy organization, also sued the Commonwealth of Pennsylvania, challenging the constitutionality of laws that removed conservation restrictions on the use of revenue from oil and gas exploration on state forests and park lands. In 2017, in *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, the Pennsylvania Supreme Court held that the state government's responsibility as a trustee of the land was governed by the environmental rights amendment, and, therefore, the legislation that allowed the monies received to be used for activities beyond conservation and care for public natural resources was unconstitutional on its face.

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In this moment, the Pennsylvania Supreme Court vindicated the individual citizen's environmental rights amendment that had been added to the state constitution in 1971. For more than 45 years, this constitutional provision had played a relatively minor role in the state and local governments' environmental decision-making processes. But, as a result of the *Robinson Township* decision, lower courts and appellate courts throughout the Commonwealth must now be prepared to enforce the provision. In addition to determining whether proposed state and local government actions comply with state and federal environmental laws and regulations, Pennsylvania courts may also have to determine whether those entities have complied with the individual citizen's environmental rights amendment. Again, the Pennsylvania Supreme Court determined in *Robinson Township* that "courts are equipped and obliged to weigh parties' competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by the other branches of government."

This is environmental constitutionalism at work. Pennsylvania residents can now seek to ensure that their right to a clean, safe, and healthy environment is given the highest level of legal protection in the Commonwealth. An environmental rights amendment is an additional strategy that can be utilized to ensure environmental justice for all—not only by affected individuals and communities but also by state and local environmental regulatory agencies in their decision-making processes.

Much like in Pennsylvania, two landmark state supreme court decisions have paved the way for a broader understanding of environmental rights in Montana. In 1972, the state constitution was amended with Article II, Section 3, which reads: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthy environment."¹⁵ In 1999, in *Montana Environmental Information Center v. Department of Environmental Quality*, the Montana Supreme Court recognized a challenge to a state law by Montanan environmental activists. In accordance with an exemption in state environmental law, the Department of Environmental Quality had declined to perform a review of mining activities near the Blackfoot and Landers Fork Rivers, leading to a dangerous build-up of arsenic levels in the water. The Montana Supreme Court determined that the state law violated the environmental rights amendment providing for a clean and healthy environment, and decided in favor of the activists. The Montana Supreme Court stated: "Our constitution does not require that dead fish float on the surface of our

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state's rivers and streams before its farsighted environmental protections can be invoked.¹⁶ Two years later, the Montana Supreme Court extended this logic to include limitations on private actors by ruling, in *Cape-France Enterprises v. In re Estate of Peed*, that a private landowner could not drill a well on their own land if it would cause significant pollution of uncontaminated aquifers and risk serious public health issues.¹⁷

These Pennsylvania and Montana cases indicate that the inclusion of an environmental rights amendment in the state constitution allows the judiciary to protect the environment and human health from harms caused by the state government or private individuals.

BROADENING ENFORCEMENT

Perhaps Pennsylvania and Montana can serve as models for environmental constitutionalism across the United States. In 2018, the New Jersey legislature began considering concurrent resolutions (ACR85 and SCR134) that would embed an environmental rights amendment in the state constitution—based on Article I, Section 27, of the Pennsylvania Constitution. The proposed amendment states:

- (a) Every person has a right to a clean and healthy environment, including pure water, clean air, and ecologically healthy habitats, and to the preservation of the natural, scenic, historic, and esthetic qualities of the environment. The State shall not infringe upon these rights, by action or inaction.
- (b) The State's public natural resources, among them its waters, air, flora, fauna, climate, and public lands, are the common property of all the people, including both present and future generations. The State shall serve as trustee of these resources, and shall conserve and maintain them for the benefit of all people.
- (c) This paragraph and the rights stated herein are: (1) self-executing, and (2) shall be in addition to any rights conferred by the public trust doctrine or common law.¹⁸

To become a law, a New Jersey constitutional amendment needs either approval by three-fifths of the Senate and Assembly or majorities in both chambers in two consecutive years followed by a citizen referendum in which New Jersey residents must approve the amendment by a majority vote. The intensely democratic process through which most states enact constitutional

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amendments gives a constitutional right a certain democratic legitimacy, which gives it strength that is distinct from a private right-of-action or legislative provision.

Several other states are also serving as “laboratories of democracy”¹⁹ with regard to constitutional environmental rights. Hawaii, Illinois, Massachusetts, New York, and Rhode Island all have constitutional provisions for a right to a clean, safe, and healthy environment.²⁰ The environmental rights set forth in these state constitutions function as enforceable human rights, in stark contrast to the lack of any enforceable environmental right in a state such as Michigan that I discussed above.

LESSONS LEARNED

In sum, there must be a concerted effort to amend state constitutions to include the environmental rights of individual citizens if environmental justice is to be secured for all communities. Otherwise, environmentally overburdened communities like Flint and Franklin Forks will continue to be exposed disproportionately to environmental harms and risks.

Achieving environmental justice for all communities should not be based on the race or the socioeconomic status of the residents of any community, and those factors should not dictate the environmental risks that any American faces. Securing environmental justice for all should not be conditional. Every American is entitled to clean land, clean air, and clean water to improve their lives, protect their families, and strengthen their communities. Arguably, the best way to protect and enforce the human right to a clean, safe, and healthy environment is through the addition of an enforceable individual citizen’s environmental rights amendment to the bill of rights section of every state constitution. As cases in Pennsylvania, Montana, and elsewhere have demonstrated, environmental constitutionalism works.

NOTES

This essay draws on and builds on the author’s body of other scholarship on environmental justice and the importance of state constitutions, including “Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where Do We Go from Here?,” *Environmental Law Reporter* 49, no. 4 (April 2019): 10362–84.

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2. “Toolkit for Assessing Potential Allegations of Environmental Injustice,” United States Environmental Protection Agency, accessed March 8, 2019, <https://www.epa.gov/sites/production/files/2015-04/documents/toolkitek.pdf>.

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3. Maya van Rossum, *The Green Amendment: Securing Our Right to a Healthy Environment* (Austin, TX: Disruption Books, 2017).
4. "Management Alert: Drinking Water Contamination in Flint, Michigan, Demonstrates a Need to Clarify EPA Authority to Issue Emergency Orders to Protect the Public," U.S. Environmental Protection Agency Office of Inspector General, October 20, 2016, https://www.epa.gov/sites/production/files/2016-10/documents/_epaoig_20161020-17-p-0004.pdf.
5. For a comprehensive discussion of the important grassroots community organizing role played by Flint residents, see Derrick Z. Jackson, "Environmental Justice? Unjust Coverage of the Flint Water Crisis," Harvard Kennedy School, Shorenstein Center on Media, Politics and Public Policy (2017), <https://shorensteincenter.org/environmental-justice-unjust-coverage-of-the-flint-water-crisis/>.
6. "Louisiana Town Is Like Thousands That Are Vulnerable to Contaminated Water, with No Fix in Sight," CNN Wires, November 28, 2018, <https://edition.cnn.com/2018/11/28/health/enterprise-louisiana-water/index.html>.
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8. Barry E. Hill, Steve Wolfson, and Nicholas Targ, "Human Rights and the Environment: A Synopsis and Some Predictions," *Georgetown International Environmental Law Review* 16, no. 3 (2004): 359-402.
9. Vitruvius, *The Ten Books on Architecture*, trans. Morris Hicky Morgan (Cambridge, MA: Harvard University Press, 1914), 246-47, http://academics.triton.edu/faculty/fheitzman/Vitruvius__the_Ten_Books_on_Architecture.pdf.
10. Barry E. Hill, *Environmental Justice: Legal Theory and Practice* (Washington, DC: Environmental Law Institute, 2009), 435; Agency for Toxic Substances & Disease Registry, "Lead Toxicity: What Are Possible Health Effects from Lead Exposure?" Environmental Health and Medicine Education: Case Studies in Environmental Medicine, 2017, <https://www.atsdr.cdc.gov/csem/csem.asp?csem=34&po=10>.
11. Mays et al. v. Snyder et al., No. 15-14002 (E.D. Mich. 2015).
12. Jonathan Z. Cannon, *Environment in the Balance: The Green Movement and the Supreme Court* (Cambridge, MA: Harvard University Press), 29.
13. Pennsylvania Constitution, art. I, sec. 27.
14. Robinson Township v. Commonwealth of Pennsylvania, 83 A.3d 901 (Pa. 2013).
15. Montana Constitution, art. II, sec. 3.
16. Montana Environmental Information Center v. Department of Environmental Quality, 988 P.2d 1236 (Mont. 2012).
17. Cape-France Enters. v. In re Estate of Peed, 2001 MT 139.
18. New Jersey Office of Legislative Services, "Bills 2018-2019: SCR134," accessed February 18, 2019, <https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=SCR134>.
19. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).
20. Hawaii Constitution, art. XI, sec. 9; Illinois Constitution, art. XI, sec. 1 & 2; Massachusetts Constitution, amend. art. XLIX; New York Constitution, art. XIV, sec. 4 & 5; and Rhode Island Constitution, art. I, sec. 17.

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