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Environmental Rights

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I. ENVIRONMENTAL RIGHTS

Daniel Kemmis

A. *The Montana Provisions*

The 1972 Montana Constitution contains two environmental provisions. The right to a clean and healthful environment is the first of the fundamental rights guaranteed by article II, section 3:

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . .[1]

Article IX is concerned exclusively with the environment and natural resources. The most important environmental guarantees of that article are contained in the three paragraphs of its first section:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) The legislature shall provide for the administration and enforcement of this duty.
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.[2]

These provisions of the 1972 constitution have no counterpart in the predecessor 1889 constitution or in the United States Constitution. As a result, Montana lawyers and judges approach the interpretation of the new provisions with no precedents to guide them in determining the meaning and consequences of these environmental guarantees. As with other newly created rights in state constitutions, the Montana environmental provisions will only acquire significance to the extent that Montana lawyers and judges give appropriate weight to their constitutional status.

That work began on a healthy tenor in 1976, when the Montana supreme court decided *Montana Wilderness Ass'n v. Board of Health*[3] (known in Montana and hereinafter referred to as *"Beaver Creek I"*). In a thoughtful opinion by Justice (now Chief Justice) Haswell, the court came as near as any court in the nation to giving a constitutional guarantee of environmental rights the respect and

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1. MONT. CONST. art. II, § 3.
2. MONT. CONST. art. IX, § 1.
3. Montana Wilderness Ass'n v. Board of Health and Environmental Sciences (33 St. Rep. 711 (1976). The decision was later withdrawn in Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, ___ Mont. ___, 559 P.2d 1157 (1976). Justice Haswell included the entire majority opinion in the first decision in his dissent to the second decision. Future citations will be to the dissent.

the weight which its constitutional status requires. The decision was withdrawn upon rehearing of the case,[4] and therefore it is not precedent for future Montana decisions. Because the second decision avoided the constitutional question,[5] the withdrawn opinion may still supply some indication of how the court will treat the environmental provisions in a future case in which a constitutional question is addressed. Apart from whatever value it has as a harbinger of future decisions, *Beaver Creek I* serves as an excellent example of how the constitutional guarantee of environmental rights should be applied and interpreted. It is primarily in that capacity that it will be cited in the following pages.

This article will discuss a number of issues which are likely to be litigated in connection with the environmental provisions in Montana's constitution. Those issues include standing, the question of whether the provisions are self-executing, and the standard to be applied under the provisions. Since most of these issues have been litigated in other states with constitutional guarantees of environmental rights, the decisions of other state courts will be a major focus of discussion. *Beaver Creek I* will also be discussed in connection with any of the issues addressed by that opinion. Because the issues likely to arise under a state constitutional guarantee of environmental rights are suggested in part by the cases and commentary which have urged the discovery of a federal constitutional guarantee, it is useful to begin with the federal history in this area.

B. *Environment and the Federal Constitution*

Although there is no explicit guarantee of environmental rights in the United States Constitution, several commentators have argued that such rights are implicitly guaranteed by that document.[6] Environmental rights are said either to be implied by the fifth and fourteenth amendments' protection of life,[7] or to be among the rights "retained by the people" and protected by the ninth amendment.[8] These arguments have not persuaded the federal courts. Several federal district courts have rejected the argument that environmental rights are protected by the due process clauses

4. Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, ___ Mont. ___, 559 P.2d 1157 (1976).

5. *Id.* at ___, 559 P.2d at 1160.

6. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L. J. 203 (1974); Pettigrew, *A Constitutional Right to Freedom from Ecocide*, 2 ENVT'L. L. 1 (1971); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

7. Klipsch, *supra* note 6, at 222-30.

8. Pettigrew, *supra* note 6, at 5-20.

of the fifth and fourteenth amendments,[9] and the Court of Appeals for the Fourth Circuit has done the same.[10] The ninth amendment argument has fared no better. The prevailing position was expressed by the District Court for the Southern District of Texas in *Tanner v. Armco Steel Corp.*:[11]

> The Ninth Amendment, through its "penumbra" or otherwise, embodies no legally assertable right to a healthful environment.[12]

To date it appears that only one federal court has discovered protection for the environment in the United States Constitution. In *Environmental Defense Fund v. Hoerner Waldorf*,[13] Montana citizens sought to enjoin the operation of a kraft paper mill near Missoula because its sulfur emissions allegedly threatened their health. The District Court for the District of Montana observed that health sustains life, which in turn is protected by the fifth and fourteenth amendments. From this the court inferred "that each of us is constitutionally protected in our natural and personal state of life and health."[14] The court implied that the ninth amendment also afforded protection to human health.[15] But neither of these constitutional claims could sustain an action against a private corporation where there was no state action underlying the alleged pollution.[16] Thus the conclusion that the Federal Constitution protects some environmental rights was only dictum, and even as dictum it has no support elsewhere in federal adjudication.

C. *Environment and State Constitutions*

As the likelihood of a federal constitutional guarantee of environmental rights has become more remote, commentators have directed more attention to state constitutional provisions.[17] Several state constitutions now contain environmental provisions.[18]

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9. Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305, 311 (N.D. Ohio 1974); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 537 (S.D. Tex. 1972); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1971).

10. Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

11. Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972).

12. *Id.* at 535. *Cf.* Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1971); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

13. Environmental Defense Fund v. Hoerner Waldorf, 1 E.R.C. 1640 (D. Mont. 1970).

14. *Id.* at 1641.

15. *Id.*

16. *Id.*

17. Comment, *A Constitutional Right to a Liveable Environment in Oregon*, 55 ORE. L. REV. 239 (1976); Tobin, *Some Observations on the Use of State Constitutions to Protect the Environment*, 3 ENVT'L AFF. 473 (1974); Fine, Matsakis and Spector, *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RTS - CIV. LIB. L. REV. 271 (1973); Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972).

18. FLA. CONST. art. II, § 7 (1968); ILL. CONST. art. XI (1970); MASS. CONST. art. XLIX (1972); MICH. CONST. art. IV, § 52 (1963); N.M. CONST. art. XX, § 21 (1971); N.Y. CONST.

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Whereas the protection of environmental rights by the Federal Constitution is at best conjectural, there is no doubt about the existence of environmental rights in these states. If it is possible in any way for people to recognize or create new rights, then clearly they may do so by proclaiming those rights in their constitutions. And if the concept of "fundamental rights" has any meaning, then the fact that people declare in their basic covenants that they have a right to a clean or habitable environment is evidence, not only of the right's existence, but of its fundamental nature as well.

Even within a constitution, the placement, wording, or history of particular provisions may indicate that some rights are intended to be more fundamental, and thus to have more "weight," than others. The same factors may signify that environmental rights have more weight or a different meaning in one state than in another. The following discussion of issues which arise under environmental guarantees will take account of the differences in wording, history, and placement of the various state provisions.

D. *Issues Arising Under Environmental Guarantees*

1. *Standing.*

Standing is a paramount problem in environmental litigation because the interest which people have in their environment has been recognized and vaguely delineated only recently. Standing to sue has traditionally been contingent on a showing of direct injury to the plaintiff's property or civil rights.[19] The United States Supreme Court has recently recognized that persons claiming injury to aesthetic or other environmental interests may now have standing,[20] but this is true only when the action is brought under the federal Administrative Procedure Act.[21] This limitation is important for two reasons. First, the Administrative Procedure Act would not apply to any action against private individuals. Therefore neither the federal doctrine of environmental standing nor any state doctrine patterned after it will allow a person to vindicate environmental interests against another private individual. Moreover, standing which rests on a statutory basis is subject to extinction by legislative action. While there may be little danger that the federal Adminis-

art. XIV, § 4 (1970); N.C. CONST. art XIV, § 5 (1972); PA. CONST. art. I, § 27 (1971); R.I. CONST. art. I, § 17 (1970); VA. CONST. art. XI (1971). (Dates refer to date of adoption of the environmental provisions.)

19. *See, e.g.*, State *ex. rel.* Mitchell v. District Court, 128 Mont. 325, 339, 275 P.2d 642, 649 (1954).

20. Sierra Club v. Morton, 405 U.S. 727, 734 (1972); United States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), 412 U.S. 669, 686 (1973).

21. 60 Stat. 237-44, 5 U.S.C. §§ 551-706 (1976).

trative Procedure Act will be amended in such a way that the federal doctrine of environmental standing would be undermined, the same assurance is not justified with respect to standing based on state statutes. Environmental standing may be shielded against legislative infringement by basing standing upon a constitutional guarantee of environmental rights.

Environmental provisions in state constitutions affect standing in several ways. The most direct approach is embodied in the Illinois Constitution, which explicitly gives all citizens standing to sue on behalf of the environment:

> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.[22]

A similar provision, when offered in the floor debate on article IX of the Montana Constitution, was defeated by a vote of 43-47.[23] The convention also rejected other proposals to authorize citizen suits,[24] including one limited to suits against the state.[25] This history makes it clear that article IX of the Montana Constitution does not directly authorize citizen suits. The transcript leaves no doubt that the same conclusion applies to article II, section 3.[26]

A constitution may also broaden environmental standing by the inclusion of a public trust concept in an environmental provision. For example, under the Pennsylvania Constitution:

> Pennsylvania's public natural resources are the common property of all 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.[27]

As beneficiaries of such a trust, all citizens would have standing to enforce it, which means that all citizens would have standing to sue for the conservation of natural resources. Although various delegate proposals urged adoption of a public trust concept in the Montana Constitution,[28] neither the Bill of Rights Committee nor the Natural Resources Committee recommended such a concept.[29] When a pro-

22. ILL. CONST. art. XI, § 2.
23. Proceedings of the Montana Constitutional Convention, 3843 (1972) [hereinafter cited as Proceedings].
24. *Id.* at 3830, 3866, 3918.
25. *Id.* at 3899.
26. *See* the exchange between Delegates Burkhardt and Dahood, Proceedings at 5046-50.
27. PA. CONST. art. I, § 27.
28. *Montana Constitutional Convention, Delegate Proposals No. 12*, 162 (1972).
29. Proceedings at 3703, 5043.

vision similar to that of the Pennsylvania Constitution was proposed on the convention floor during the debate on article IX, the proposal was defeated by a vote of 34-58.[30] It is clear that the Montana Constitution does not explicitly extend standing to citizens as beneficiaries of a public trust. And since what is explicitly rejected can hardly be adopted by implication, it cannot be argued that the constitution implies a public trust concept.[31]

A constitution may indirectly influence standing by requiring the legislature to provide remedies for the infringement of environmental rights. Under such a constitutional directive to provide remedies,[32] the Michigan Legislature passed the Michigan Environmental Protection Act,[33] which provides for citizen suits. Article IX, section 1(3) of the Montana Constitution directs the legislature to provide adequate remedies to prevent degradation of the environmental life support system or unreasonable depletion of natural resources. Legislation patterned on the Michigan model has been introduced in Montana,[34] arguably in fulfillment of the legislative duty imposed by article IX, section 1(3), but the legislation has not been enacted.

Despite the failure of the convention and the legislature to explicitly extend environmental standing to all citizens, the Montana constitutional provisions still may have a substantial impact on standing by redefining "injury" for particular individuals. By guaranteeing every Montanan the heretofore unrecognized "right to a clean and healthful environment,"[35] the Montana Constitution appears on its face to transform any infringement of that right into a legal injury. In fact, such a conclusion seems to be the minimum that is required by any reading of the constitution which recognizes the clearly fundamental nature of the environmental right. If the constitution is read in this way, any person whose own surroundings are rendered unclean or unhealthful has standing to seek a remedy.

There is reason to believe that the Montana supreme court will adopt this interpretation of the constitution. In fact, it has already done so in *Beaver Creek I*,[36] a decision which was later withdrawn

30. *Id.* at 3789.

31. While the constitution does not impose a public trust upon the Montana environment generally, REVISED CODES OF MONTANA, § 81-103 (1947) does impose a public trust on state lands. Article IX, section 1 of the Montana Constitution may make the protection of environmental quality on state lands a part of the state's duty as fiduciary of that trust.

32. MICH. CONST. art. IV, § 52.

33. MICH. COMP. LAWS ANN., §§ 691-1201 to 1207.

34. H.B. 1076, 43d Legis. (1974) failed to pass the House of Representatives. HOUSE J., 43d Legis. 467 (1974). S.B. 203, 44th Legis. (1975) passed the legislature but was vetoed by the governor. SENATE J., 44th Legis. 1607 (1975).

35. MONT. CONST. art. II, § 3.

36. Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, ___ Mont. ___, 559 P.2d 1157 (1976) (Haswell, J., dissenting).

for reasons unrelated to standing.[37] In that case an action for injunction and declaratory judgment against a proposed subdivision was brought by the Montana Wilderness Association and the Gallatin Sportsmen's Association. Because it was clear that members of these associations used the area in question, the standing issue was essentially whether such non-proprietary users had standing to sue in defense of the area's environment. The plaintiffs alleged that the Department of Health and Environmental Sciences had filed an inadequate environmental impact statement under the Montana Environmental Policy Act.[38] Noting that this was a case of first impression on standing under MEPA, the court reviewed standing requirements in Montana case law and found three criteria to be controlling:

> (1) The complaining party must clearly allege past, present or threatened injury to a property or civil right.
> (2) The alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.
> (3) The issue must represent a "case" or "controversy" as is within the judicial cognizance of the state sovereignty.[39]

The question, then, was whether an alleged injury to the plaintiffs' environment satisfied these criteria. The court acknowledged that under *Sierra Club*[40] and *S.C.R.A.P.*[41] a person whose aesthetic or recreational interests were injured by federal agency action had standing to sue in federal court. But the Montana supreme court did not find these cases dispositive of the standing question in Montana, because of their statutory basis:

> *Sierra Club* and *SCRAP* underscore the fact that in the federal courts environmental standing has developed in the statutory context of the federal Administrative Procedure Act.[42]

Instead of relying upon the federal development of standing under a statutory umbrella, the Montana court found standing justified by the Montana Constitution:

> First, the complaint alleges a threatened injury to a civil right of the Associations' members, that is, the "inalienable . . . right to a

37. Montana Wilderness Ass'n. v. Board of Health and Environmental Sciences, ___ Mont. ___, 559 P.2d 1157 (1976).

38. REVISED CODES OF MONTANA, § 69-6504 (1947).

39. Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, ___ Mont. ___, ___, 559 P.2d 1157, 1165 (1976)(Haswell J., dissenting).

40. Sierra Club v. Morton, 405 U.S. 727 (1972).

41. United States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), 412 U.S. 669 (1973).

42. Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, ___ Mont. ___, ___, 559 P.2d 1157, 1165 (1976) (Haswell, J., dissenting).

Montana Law Review, Vol. 39 [1978], Iss. 2, Art. 2

> clean and healthful environment," Article II, Section 3, 1972 Montana Constitution. This constitutional provision, enacted in recognition of the fact that Montana citizens' right to a clean and healthful environment is on a parity with more traditional inalienable rights, certainly places the issue of unlawful environmental degradation within the judicial cognizance.[43]

As noted above,[44] this decision basing standing on the constitution is not the law in Montana, but there is no precedent to prevent its adoption in future decision. Two of the supporters of the first decision are still on the bench,[45] while only one of the second decision's majority is still a member of the court.[46] The question of whether the Montana Constitution broadens standing in environmental cases clearly remains open.

2. *Are the Montana Provisions Self-Executing?*

If a court finds that a plaintiff has standing under an environmental rights provision, it may still face another threshold question: is the environmental provision self-executing, or does it require legislative action to make it effective? This question has been the subject of considerable controversy[47] following the Pennsylvania supreme court's decision in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*[48] The narrow holding of that decision was that construction of an observation tower near the Gettysburg Battlefield could not be enjoined under the environmental protection provision of the Pennsylvania Constitution.[49] The court's opinion, supported by a plurality of the justices, based its holding on a finding that the environmental provision was not self-executing.[50]

The intermediate level Commonwealth Court of Pennsylvania has refused to consider the *Gettysburg* conclusion on self-execution to be the law in Pennsylvania, because that conclusion, unlike the narrow holding of the case, was not endorsed by a majority of the

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43. *Id.* at 1167.

44. *See* pp. 224-25 *supra.*

45. Justices Haswell and Daly.

46. Justice Harrison.

47. Tobin, *supra* note 17, at 481; Fox, *Environmental Protection - A Constitutional Limitation on the Land Use Control Powers of Pennsylvania Municipalities,* 36 U. PITT. L. REV. 255, 258-66 (1974); Lantz, *An Analysis of Pennsylvania's New Environmental Rights Amendment and the Gettysburg Tower Case,* 78 DICK. L. REV. 331, 333-47 (1973); Pearson and Hutton, *Land Use in Pennsylvania: Any Change Since the Environmental Rights Amendment?,* 14 DUQUESNE L. REV. 165, 186-94 (1976).

48. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588 (1973).

49. PA. CONST. art. I, § 27.

50. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 205, 311 A.2d 588, 592 (1973).

higher court.[51] Commentators have criticized the *Gettysburg* decision as an overly restrictive interpretation of the Pennsylvania environmental rights provision.[52] For a number of reasons, the *Gettysburg* decision does not appear to be an appropriate guide for the interpretation of the Montana provisions.

One of the Pennsylvania supreme court's arguments against that state's provision being self-executing was the fact that the provision expressed general policy but did not provide a judicially manageable standard for review.[53] The history of the Montana provisions should preclude that argument's acceptance by the Montana courts. The version of article IX, section 1 originally proposed by the Natural Resources Committee contained no adjectives describing the kind of environment to be maintained.[54] Delegate Brazier supported that proposal in floor debate, explaining that the addition of adjectives would enable the courts to interpret the provisions, with the result that the interpretations would not be subject to legislative control.[55] The convention clearly rejected that approach and chose to encourage judicial interpretation when it amended the committee proposal by adding the adjectives "clean and healthful" to "environment."[56] The same words were contained in the environmental rights guarantee which was subsequently added to article II, section 3.[57] This history makes it clear that the convention intended the Montana provisions to be subject to judicial interpretation. They therefore cannot be considered non-self-executing for lack of a judicial standard.

The Pennsylvania supreme court also distinguished constitutional provisions which limit governmental activity from those which expand state power or place an affirmative duty on the legislature.[58] The court argued that only provisions in the first category are self-executing.[59] Under this approach, article IX, section 1 of the Montana Constitution would not be self-executing, because it imposes an affirmative duty on the legislature. Clearly that duty itself is not self-executing, neither is it enforceable, as the convention was

51. Payne v. Kassab, 11 Pa. Commw. 14, 28, 312 A.2d 86, 94 (1973), *aff'd*, 14 Pa. Commw. 491, 323 A.2d 407 (1974).

52. Pearson and Hutton, *supra* note 44, at 188-91; Lantz, *supra* note 44, at 338-47.

53. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 198-99, 311 A.2d 588, 591 (1973). *Cf.* COOLEY, CONSTITUTIONAL LIMITATIONS 165 (8th ed. 1927); Davis v. Burke, 179 U.S. 399, 403 (1900).

54. Proceedings at 3701.

55. *Id.* at 3771, 3814.

56. *Id.* at 3857.

57. *Id.* at 5054.

58. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 200, 311 A.2d 588, 592 (1973).

59. *Id. Cf.* COOLEY, *supra* note 50, at 165.

frequently reminded.[60] But the other portions of article IX, section 1 do not lose their capacity for self-execution merely by the addition of the legislative duty:

> A constitutional provision does not lose its self-executing quality merely because it provides that the legislature shall by appropriate legislation provide for carrying it into effect.[61]

In *Beaver Creek I*,[62] the Montana supreme court acknowledged that article IX, section 1 by its terms required legislative action.[63] But the court intimated that if the legislature failed to fulfill its duty under article IX, section 1(2), the court could still enforce the remainder of that section.[64]

If the court followed this reasoning in a future decision, it could enforce the article IX, section 1(1) duty of the "state and each person" to "maintain and improve a clean and healthful environment",[65] even in the absence of legislative action.[66]

Even if the court held article IX not to be self-executing in any sense, the article III, section 2 guarantee of environmental rights is clearly self-executing. The "clean and healthful" language provides a basis for judicial review; the provision undeniably operates as a limitation upon governmental activity, and there is no affirmative duty imposed upon the legislature. These factors satisfy all the criteria of a self-executing provision.[67] The history of the provision supports the same conclusion.[68]

3. *Judicial Standards.*

Courts must develop standards for deciding what constitutes

60. *Proceedings*, at 3859, 3861-62. *Cf.* COOLEY, *supra* note 50, at 165: "Sometimes the constitution in terms requires the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only moral force: the legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted."

61. COOLEY, *supra* note 50, at 170.

62. Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, ___ Mont. ___, ___ 559 P.2d 1157 (1976) (Haswell, J., dissenting).

63. *Id.* at ___, 559 P.2d at 1168.

64. *Id.*

65. MONT. CONST. art. IX, § 1(1).

66. In *Davis v. Burke*, 179 U.S. 399 (1900), the United States Supreme Court recognized that a provision which imposes an affirmative duty might still have some effect apart from that duty, and suggested that the remainder might be self-executing. The Court said "In other words, it is self-executing only so far as it is susceptible of execution." 179 U.S. at 403. *Cf.* COOLEY, *supra* note 50, at 169.

67. COOLEY, *supra* note 50, at 165-72.

68. During the convention floor debate on article II, section 4 (the individual dignity section), the Chairman of the Bill of Rights Committee, Delegate Dahood, mentioned that constitutions are presumed to be self-executing, particularly within their bills of rights. Delegate Robinson asked if this would apply to the environmental rights language in article II, section 3. Dahood replied that the section 3 environmental right would be self-executing for anyone who was directly injured. Proceedings at 5067-68.

an abridgement of a constitutionally protected environmental right. It is precisely in the formation of such standards that the "weight" of rights is determined. Dworkin argues that the weight of a right is its capacity to withstand competition from considerations of social policy.[69] In the area of environmental litigation, the competing considerations of social policy are likely to involve concepts like economic progress, or administrative cost or convenience. The degree to which courts balance such considerations against environmental rights determines the weight of those rights. But a court is not at liberty to assign weight to rights at random. In particular, a right which acquires constitutional status should be assigned a weight commensurate with that status.[70]

In his opinion in *Beaver Creek I*,[71] Justice Haswell recognized that the constitutional status of a right makes it more "fundamental" than it would be without such status. Referring to an argument that a fundamental right may not be created by statute but must be "derived from the fundamental law,"[72] Haswell wrote:

> We concur and find an inalienable, or fundamental, right was created in our fundamental law, Article II, Section 3, 1972 Montana Constitution.[73]

Justice Haswell also observed that this provision was "enacted in recognition of the fact that Montana citizens' right to a clean and healthful environment is on a parity with more traditional inalienable rights . . . ."[74]

The Pennsylvania Commonwealth Court also recognized the parity between an environmental right and other more established rights in the Pennsylvania Constitution:

> We find no more reason to hold that Section 27 needs legislative definition than that the peoples' freedoms of religion and speech should wait upon the pleasure of the General Assembly.[75]

Yet in fashioning a standard of judicial review under the environmental rights provision, the same court abandoned the concept of parity between the environmental right and other fundamental rights. The court chose a standard which balances environmental

69. R. DWORKIN, TAKING RIGHTS SERIOUSLY 92 (1977).

70. *Id.* at 133.

71. Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, ___ Mont. ___, ___ 559 P.2d 1157 (1976) (Haswell, J., dissenting).

72. *Id.* at ___, 559 P.2d at 1168.

73. *Id.*

74. *Id.* at ___. 559 P.2d at 1167.

75. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commw. 231, 243, 302 A.2d 886, 892 (1973), *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973).

rights against policy considerations of economic growth and development.[76] This standard requires a court to ask three questions concerning any alleged infringement of an environmental right:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's 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?[77]

It is inconceivable that the courts of Pennsylvania or of any other state would ever review a governmental infringement of free speech or any other established fundamental right by asking whether the government had made ". . . a reasonable effort to reduce the . . . incursion to a minimum,"[78] or whether the

> harm which will result from the challenged decision or action so clearly outweigh[s] the benefits to be derived therefrom that to proceed further would be an abuse of discretion.[79]

We would be shocked if a court upheld an infringement of free speech because some economic gain outweighed an individual's partial loss of liberty. Yet fundamental rights like the right of free speech have the "power to withstand such competition,"[80] not because that power inheres in the rights themselves, but because courts have consistently refused to balance these rights against considerations of social policy. The right to a clean environment could some day seem as naturally inviolable as the right of free speech, but only if judges pay as much respect to the constitutional status of the new right as their predecessors paid to the older right when it was new.

One argument against applying a non-balancing standard to environmental rights is that the application of a stricter test might halt all changes in land use. In *Payne v. Kassab*,[81] the Pennsylvania Commonwealth Court rejected a standard which would find unconstitutional any activity which would amount to an "intrusion" upon

76. Payne v. Kassab, 11 Pa. Commw. 14, 29, 312 A.2d 86, 94 (1973), *aff'd*, 14 Pa. Commw. 491, 323 A.2d 407 (1974).
77. *Id.*
78. *Id.*
79. *Id.*
80. R. DWORKIN, *supra* note 69, at 92.
81. Payne v. Kassab, 11 Pa. Commw. 14, 312 A.2d 86 (1973), *aff'd*, 14 Pa. Commw. 491, 323 A.2d 407 (1974).

or "distraction" from historic or aesthetic values.[82] Implying that the application of such a standard would halt all economic development,[83] the court chose a balancing standard instead.[84] If the "intrusion or distraction" test would bar all land use changes, it probably demands more than human society is capable of, and therefore could not have been within the contemplation of the framers. But rejection of such an historically strict standard does not leave balancing as the only alternative. A brief consideration of a non-balancing standard under the Montana provisions should make this clear.

Under such a standard, any impairment of the cleanliness or healthfulness of a person's environment would be an infringement of his rights. Courts would have to decide what they mean by cleanlines and healthfulness, and what quality and quantity of proof they would require to establish an infringement of those factors. This would be a difficult task, but the history of tort law demonstrates clearly that the judicial system is equipped for the task.[85] The challenge increases if "clean and healthful" also implies that aesthetic values must be protected. In *State v. Bernhard*,[86] the Montana supreme court held that the "clean and healthful" language in article II, section 3 could sustain an exercise of the police power to preserve aesthetic values.[87] If "clean and healthful" implies "aesthetic" in that context, it is difficult to discern why it would not also imply that aesthetic values are among those protected by the constitution. Under the standard proposed here, then, any impairment of the aesthetic value of a person's environment would be an infringement of her constitutionally protected right.

This is not the same as the "intrusion or distraction" test rejected by the Pennsylvania court.[88] Some people may consider that any human alteration of a natural setting constitutes aesthetic impairment, but a court would be no more constrained to adopt that standard than it is to make the most scrupulous person's standard of care the norm in tort law. The point here is not to propose a definition of aesthetic impairment, or of an impairment of cleanliness and healthfulness, but simply to suggest that courts are capa-

82. *Id.* at ___, 312 A.2d at 94.

83. *Id.*

84. *Id.*

85. *See, e.g.*, the development of a definition of nuisance: Iverson v. Dilno, 44 Mont. 270, 274, 119 P. 719, 721 (1911); Cavanaugh v. Corbin Copper Co., 55 Mont. 173, 178, 174 P. 184, 185 (1918); Fagan v. Silver, 57 Mont. 427, 430, 188 P. 900, 901 (1920).

86. State v. Bernhard, ___ Mont. ___, 568 P.2d 136 (1977).

87. *Id.* at ___, 568 P.2d at 138.

88. Payne v. Kassab, 11 Pa. Commw. 14, 29, 312 A.2d 86, 94 (1973), *aff'd*, 14 Pa. Commw. 491, 323 A.2d 407 (1974).

ble of devising such definitions[89] and that the task of defining these terms is not at all the same as the "task of weighing conflicting environmental and social concerns . . ."[90] which the balancing standard imposes. Under the balancing test, a proven impairment of environmental values would be constitutionally permissible if broadly defined benefits outweighed the harm to the individual. Under the test proposed here, once a court decided upon a definition of environmental values, any impairment of those values would constitute an invasion of protected rights. Under this standard, a clean and healthful environment could endure, as free speech and other fundamental rights have endured, from one generation to another.

E. *Conclusion*

The federal courts have not recognized a constitutionally protected environmental right. As a result, environmental guarantees in state constitutions will probably receive more attention than most courts traditionally have paid to state constitutional rights. Among the problems which state courts will face in interpreting environmental provisions are issues of standing, standards of review, and the question of whether or not environmental guarantees are self-executing. How courts handle these and other issues will depend upon how responsive they are to the constitutional status of these new rights. The Montana supreme court can look to a withdrawn opinion which still exists in the form of a dissent[91] for guidance in the task of taking Montana's environmental right seriously.

89. "Courts, which have attacked with gusto such indistinct concepts as due process, equal protection, unreasonable search and seizure, and cruel and unusual punishment, will surely not hesitate before such comparatively certain measures as clean air, pure water and natural, scenic, historic and esthetic values. The most uncertain of these, esthetic values, has been the subject of instant judicial recognition in the fields of planning and zoning." Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commw. 231, 243-44, 302 A.2d 886, 892 (1973), *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973).

90. Payne v. Kassab, 11 Pa. Commw. 14, 29, 312 A.2d 86, 94 (1973), *aff'd*, 14 Pa. Commw. 491, 323 A.2d 407 (1974).

91. Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, ___ Mont. ___, ___, 559 P.2d 1157, 1161-77 (1976) (Haswell, J., dissenting).