

PUBLIC NATURAL RESOURCES, COMMON PROPERTY, AND THE PUBLIC TRUST DOCTRINE

by John C. Dernbach

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SUMMARY

The public trust clause of Pennsylvania’s environmental rights amendment recognizes the commonwealth’s responsibility to “conserve and maintain” “public natural resources,” and states that these resources are “the common property of all the people,” including future generations. But what does it mean for these resources to be common property? This Article argues, first, that the term includes resources expressly recognized in well-developed common law as government-owned prior to the amendment, like state forest and park land, beds of navigable waters, and publicly dedicated land, as well as types of resources such as air, water, fish, and wildlife that no one categorically owned in a “title-based” sense. Second, it uses long-standing public trust law to explain the commonwealth’s constitutional duties to manage these resources as common property. These duties involve public availability of these resources, which includes but is not limited to their protection. This understanding of Pennsylvania’s public trust clause provides a basis for strengthened protection of public natural resources, and is central to the meaning of the public trust doctrine in other states and countries, focusing the government’s trust duties on those resources most essential for human survival and well-being.

Constitutional environmental rights, particularly the right to a clean and healthy environment, are gaining increasing national and international recognition, driven in no small measure by their potential for reducing the threat of climate disruption.¹ The right to a clean, healthy, and sustainable environment, and its application to climate change, were recognized in 2025 by the International Court of Justice² and the Inter-American

Court of Human Rights.³ Three years earlier, the United Nations General Assembly adopted a resolution recognizing that right as a human right.⁴

International decisions have been mirrored by major judicial decisions in some U.S. states.⁵ The Montana Supreme Court decided in 2024 that the state’s constitutional right to a “clean and healthful” environment includes a right to a “stable climate system,” and invalidated legislation that prohibited state consideration of greenhouse gas emissions in environmental impact reviews.⁶ The Hawaii Supreme Court has concluded that the state’s constitutional right to a “clean and healthful” environment “subsumes a right to a

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Editor’s Note: Professor Dernbach has engaged in extensive scholarship, advocacy, and litigation on the environmental rights amendment to Pennsylvania’s Constitution. The Pennsylvania Supreme Court cited his work in landmark 2013 and 2017 decisions that reinvigorated the amendment.

1. THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT (John H. Knox & Ramon Pejan eds., 2018); JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2014); DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT (2012); PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW (James R. May ed., 2011).
2. Obligations of States in Respect of Climate Change, Advisory Opinion, 2025 I.C.J. ___, ¶ 393 (July 23, 2025) (“[U]nder international law, the

human right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights.”).

3. Climate Emergency and Human Rights, Advisory Opinion OC-32/25, Inter-Am. Ct. H.R. (ser. A) No. 32, ¶ 11 (May 29, 2025) (holding unanimously that “[u]nder the right to a healthy environment, States must (i) protect nature and its components from the impacts of climate change, and (ii) establish a strategy to move towards sustainable development. . . .”).
4. G.A. Res. A/76/L.75, The Human Right to a Clean, Healthy, and Sustainable Environment (July 26, 2022).
5. See John C. Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis*, in ENVIRONMENTAL LAW BEFORE THE COURTS: A US-EU NARRATIVE 35 (Giovanni Antonelli et al. eds., Springer 2023) (reviewing and analyzing judicial decisions on environmental rights provisions of U.S. state constitutions).
6. Held v. State, 560 P.3d 1235 (Mont. 2024). The Montana Constitution provides in part: “All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment. . . .” MONT. CONST. art. II, §3.

life-sustaining climate system.”⁷ Much of the advocacy for “green amendments” to other state constitutions is driven by a quest for a legal mechanism to ensure a stable climate.⁸

While there is growing interest and activism at the state level in the United States on behalf of constitutionalizing environmental rights, most of this has been directed at the right to a clean environment, or words to that effect. Thus, the only constitutional environmental amendment adopted in the United States in recent decades was in New York in 2021, which recognizes that “[e]ach person shall have a right to clean air and water, and a healthful environment.”⁹ The public trust for natural resources, a legal doctrine with a much older and more widely used lineage, has received far less attention.

This is paradoxical. Various forms of the public trust doctrine exist in every single state.¹⁰ Perhaps the most widely recognized version of the public trust for natural resources exists in the extensive common law applicable to navigable waters, non-navigable tidal waters, and their bottomlands.¹¹ Another well-known form of the public trust is for land that is dedicated for public purposes.¹² Two state constitutions—Pennsylvania’s¹³ and Hawaii’s¹⁴—recognize a public trust for natural resources that is enforced by the courts.¹⁵ In both states, the constitutional public trust has recognized an expanded scope of protected natural resources and has strengthened protection of those resources.¹⁶

The constitutional public trust grows out of a long history of public trust law, particularly the common law, in Pennsylvania and every other state, and in the federal

courts. It is not a novel concept; indeed, it dates at least as far back as Roman law.¹⁷ Despite state-to-state differences, the public trust doctrine involves governmental responsibilities to the public, including future generations, for designated natural resources. The government, Prof. Joseph Sax wrote, has three basic responsibilities for public trust resources: (1) it must ensure that they “not only be used for a public purpose,” it must also hold them “available for use by the general public”; (2) it can sell these resources only in limited circumstances; and (3) it must maintain these resources “for particular types of uses,” either traditional uses of particular resources or those that are consistent with use of the particular resource in a “natural state.”¹⁸

These responsibilities, in turn, can be analyzed productively through the lens of a traditional private law trust structure, in which the public is the beneficiary, the government is the trustee, protected resources are the trust corpus, and the government’s specific responsibilities are the terms of the trust.¹⁹ In addition, the government’s public trust responsibilities are necessarily directed at both present and future generations.²⁰

The public trust clause of Pennsylvania’s environmental rights amendment, contained in Article I, §27 of the state constitution,²¹ fits directly into that structure. The clause recognizes the commonwealth as trustee for public natural resources, and requires the commonwealth to “conserve and maintain them for the benefit” of present and future generations.²² As the state supreme court has explained, the amendment “establishes a public trust, pursuant to which public natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries.”²³ By the terms of the trust, the commonwealth is required to “conserve and maintain” “pub-

7. In re Maui Elec. Co., Ltd., 506 P.3d 192, 202-03 n.15 (Haw. 2022). The court based its decision on Hawaii Constitution Article XI, §9, which provides in part: “Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.” The court based its decision on the legislature’s adoption of greenhouse gas reduction goals and other measures to reduce greenhouse gas emissions. 506 P.3d at 202-03. See also In re Application of Maui Elec. Co., 141 P.3d 1, 5 (Haw. 2017) (holding that Article XI, §9 includes the right to be protected “from the effect of greenhouse gas emissions”).

8. See, e.g., MAYA K. VAN ROSSUM, *THE GREEN AMENDMENT: THE PEOPLE’S FIGHT FOR A CLEAN, SAFE, AND HEALTHY ENVIRONMENT* 13 (2d ed. 2022) (explaining author’s Green Amendment mantra as “pure water, clean air, a stable climate, and a healthy environment”).

9. N.Y. CONST. art. I, §19.

10. *THE PUBLIC TRUST DOCTRINE IN FORTY-FIVE STATES* (Michael C. Blumm ed., 2014 ed.), <http://ssrn.com/abstract=2235329>; Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN STATE ENV’T L. REV. 1, 26-113 (2007); Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 93-197 (2010).

11. Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J. L. REFORM 907, 918-23 (2007). See also DAVID C. SLADE ET AL., *COASTAL STATES ORGANIZATION, INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES* (2d ed. 1997).

12. See, e.g., In re Borough of Downingtown, 161 A.3d 844 (Pa. 2017); Paepcke v. Public Bldg. Comm’n of Chi., 263 N.E.2d 11 (Ill. 1970); Chas. E. Knox Oil Co. v. McKee, 223 P. 880 (Okla. 1924).

13. PA. CONST. art. I, §27.

14. HAW. CONST. art. XI, §1.

15. John C. Dernbach, *The Value of Constitutional Environmental Rights and Public Trusts*, 41 PACE ENV’T L. REV. 153, 179-93 (2024).

16. *Id.*

17. J.B. Ruhl & Thomas McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. 117 (2020) (detailed exploration of Roman public trust doctrine and its application to current arguments for an atmospheric public trust by a Roman law scholar and a natural resources law scholar).

18. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970).

19. *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 6-7 (Michael C. Blumm, Mary Christina Wood & John C. Dernbach eds., 4th ed. 2025); John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 U. MICH. J. L. REFORM 77 (2020).

20. Mary Christina Wood, *Securing Ecology “Capable of Sustaining Human Life”: Invoking the Inherent and Inalienable Public Trust Rights of the People*, 26 U. PA. J. CONST. L. 1212, 1233-34 (2024).

21. Pennsylvania Constitution Article I, §27 provides in full:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The first sentence or clause recognizes the people’s right to a quality environment. The second and third sentences constitute its public trust clause, recognizing the people’s right as beneficiaries to have the commonwealth conserve and maintain public natural resources.

22. *Id.*

23. Pennsylvania Env’t Def. Found. v. Commonwealth (*PEDF II*), 161 A.3d 911, 931-32 (Pa. 2017) (citation omitted).

lic natural resources.”²⁴ “The plain meaning of the terms conserve and maintain,” the court has stated, “implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.”²⁵

The commonwealth must manage public natural resources “according to the plain language of Section 27, which imposes fiduciary duties consistent with Pennsylvania trust law.”²⁶ These duties, the court has held, require the commonwealth to conserve and maintain the public trust corpus—public natural resources—with prudence, loyalty, and impartiality.²⁷ These fiduciary obligations extend to “all agencies and entities of the Commonwealth government, both statewide and local.”²⁸ And the court has held that present and future generations are simultaneous beneficiaries of this public trust, which means that the commonwealth cannot “prioritize the needs of the living over those yet to be born.”²⁹ Article I, §27 is enforceable by the commonwealth as trustee³⁰ and by beneficiaries.³¹ All of this is designed to protect public natural resources.

Article I, §27 was nearly dormant for more than four decades after its adoption in 1971 because of a commonwealth court decision that substituted a three-part balancing test for the text of the amendment.³² That changed with a pair of landmark Pennsylvania Supreme Court decisions. In 2013, in *Robinson Township v. Commonwealth*, a plurality of the court used §27 to invalidate several parts of a state statute regulating shale gas development, and set out a detailed set of principles for implementing the text rather than the balancing test.³³ In 2017, in *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF II*), a majority of the court scrapped the balancing test and used §27 to invalidate legislation involving use of royalty money from oil and gas leasing on state forest land.³⁴

24. *Id.* at 932, 935 (citing *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013)).

25. *Id.*

26. *Id.* at 916.

27. *Id.* at 932-33 (explaining each of these duties). The commonwealth’s discretion in administering this public trust is limited by its terms and purposes, and by what is “necessary for the preservation of the trust.” *Id.* at 933 (quoting *In re Sparks’ Est.*, 196 A. 48, 57 (Pa. 1938)).

28. *Id.* at 931 n.23 (“Trustee obligations are not vested exclusively in any single branch of Pennsylvania’s government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality.”). The state legislature is among the trustees to which these obligations apply. *Id.* at 930-31.

29. *Pennsylvania Env’t Def. Found. v. Commonwealth* (*PEDF V*), 255 A.3d 289, 309-10 (Pa. 2021).

30. *PEDF II*, 161 A.3d at 931 n.23. See also John C. Dernbach & Robert B. McKinstry Jr., *Agency Statutory Authority and the Pennsylvania Environmental Rights Amendment*, 37 *Geo. Env’t L. Rev.* 1 (2024) (arguing that agencies can and should implement Article I, §27 as part of the exercise of their statutory authority).

31. See *infra* notes 167-70 and accompanying text.

32. See John C. Dernbach, *Natural Resources and the Public Estate*, in *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* §30.3[a] [1] (Ken Gormley & Joy G. McNally eds., Bisel Publishing 2d ed. 2020) (describing legal developments in that period).

33. 83 A.3d 901 (Pa. 2013). A fourth justice provided a majority of the seven-member court for a decision holding parts of the statute unconstitutional, but based his decision on substantive due process. *Id.* at 1000 (Baer, J., concurring).

34. 161 A.3d at 931. The Pennsylvania Environmental Defense Foundation has brought so many cases that the supreme court has created a numbering

In these and other subsequent decisions, the court has addressed these principles in significant decisions involving public spending (three),³⁵ regulation of oil and gas (two),³⁶ and greenhouse gas emissions (one).³⁷ These decisions have emphasized the amendment’s text, as well as the use of private trust law in interpreting the public trust.³⁸ All of this helps ensure that the public rights recognized by the amendment have the same constitutional protection as other rights recognized by the state constitution.³⁹

This Article addresses an important question of Pennsylvania’s constitutional public trust law that has received less attention. This question is also central to understanding the public trust doctrine and the role it plays, and can continue to play, in other states and countries to address pressing environmental challenges. The first sentence of the public trust clause of Pennsylvania’s amendment provides: “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come.”⁴⁰ This sentence has no analogue in Hawaii’s

system for them. *Pennsylvania Env’t Def. Found. v. Commonwealth* (*PEDF VI*), 279 A.3d 1194, 1198 n.4 (Pa. 2022) (explaining numbering system). To limit reader confusion, the text of this Article refers by name only to *PEDF II*. *Pennsylvania Env’t Def. Found. v. Commonwealth* (*PEDF I*), 108 A.3d 140 (Pa. Commw. Ct. 2015), was reversed in *PEDF II*. Other *PEDF* cases are discussed in the notes as appropriate.

35. *PEDF II*, 161 A.3d 911; *Pennsylvania Env’t Def. Found. v. Commonwealth* (*PEDF V*), 255 A.3d 289 (Pa. 2021); *PEDF VI*, 279 A.3d 1194.

36. *Robinson Twp.*, 83 A.3d 901; *Marcellus Shale Coal. v. Department of Env’t Prot.*, 292 A.3d 921 (Pa. 2023).

37. *Shirley v. Pennsylvania Legis. Reference Bureau*, 318 A.3d 832 (Pa. 2024).

38. *PEDF VI*, 279 A.3d at 1202 (quoting *PEDF II*, 161 A.3d at 930). *PEDF II* is explained in more detail in Part II.B. Private trust law can and has been used in some cases to strengthen public trust law, not just in Pennsylvania, but also in Hawaii and other states. Dernbach, *supra* note 19, at 93-102.

But in other cases, courts have refused to use private trust principles when they would undermine public trusts. *Id.* at 103-07. See also *Yaw v. Delaware River Basin Comm’n*, 49 F.4th 302, 320-22 (3d Cir. 2022). In this case, plaintiff legislators and local governments challenged the Commission’s ban on hydraulic fracturing in the Pennsylvania part of the Delaware River watershed. As part of their argument for standing, they asserted that the ban interfered with their status as Article I, §27 trustees, because the ban’s reduction in revenues directly injured the trust corpus. The court rejected this argument, saying that it turns §27 “upside down.” *Id.* at 321. “The problem with this argument is that it ignores the explicit purpose of [§27] and mistakes the unique public trust it created for a run-of-the-mill financial trust in which the trustees have a duty to maximize profits.” *Id.* at 321-22.

Because the use of trust law principles in interpreting and applying public trusts requires an analysis of each principle being invoked, my article, “The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources,” set out a four-step test for considering when and how to use these principles when a question arises about the meaning of a particular public trust:

Step 1: What are the terms and purpose of the public trust?

Step 2: Do the terms and purpose of the public trust answer the question?

Step 3: If the terms and purpose of the public trust do not answer the question, what underlying principles of trust law can help provide an answer?

Step 4: Which principles would most fully effectuate the terms and purpose of the public trust?

Dernbach, *supra* note 19, at 124-44.

39. *PEDF II*, 161 A.3d at 916 (“In 1971, by a margin of nearly four to one, the people of Pennsylvania ratified a proposed amendment to the Pennsylvania Constitution’s Declaration of Rights, formally and forcefully recognizing their environmental rights as commensurate with their most sacred political and individual rights.”).

40. PA. CONST. art. I, §27.

Constitution.⁴¹ As noted above, Pennsylvania courts have addressed the intergenerational aspect of this sentence. But what does it mean for “public natural resources” to be “the common property of all the people”? Where does that fit into this trust structure?

The answer can be found not only in the text and legislative history of the environmental rights amendment, but also in public trust cases and commentary that have a long pedigree. Put differently, “public natural resources” and “common property” should be informed by Pennsylvania and national public trust jurisprudence that goes back more than two centuries. The concepts and terms used in these cases were well established in the public trust context when the amendment was adopted.

This Article answers the question by arguing, first, that the term “public natural resources” includes types of resources that were expressly recognized in well-developed common law as commonwealth- or government-owned prior to the amendment, like state forest and park land, the beds of navigable waters, and publicly dedicated land. It also includes those types of resources such as air, water, fish, and wildlife, that no one (including the commonwealth) categorically owned in that “title-based” sense.

Second, it explains that the commonwealth’s constitutional duties in managing public natural resources as “common property” transformed the public trust landscape in fundamental ways. The broad definition of common property extended the public trust to expressly encompass a broader range of resources than the navigable waterways and publicly dedicated lands to which the public trust has regularly been applied. In addition, it gave constitutional relevance to long-standing public trust law concerning common property to supplement and reinforce the responsibilities described above. Simply put, the commonwealth’s duties involve public availability of public natural resources, which includes but is not limited to their protection.

Because public natural resources are “the common property of all the people, including generations yet to come,” they cannot be private property. The commonwealth must ensure that they are used only for trust purposes, and that they are available to present and future generations. The commonwealth cannot transfer ownership or control of public natural resources to private parties in ways that compromise their public availability or the terms of the trust.

These rules all derive from well-established understandings of what common property means in the public trust context. And they embrace a set of governmental responsibilities that reinforce, and to some degree extend beyond, the meaning of preventing and remedying “degradation,

diminution, or depletion” of public natural resources. The constitutional public trust requires the government not only to protect these resources; it also requires the government to ensure their public availability. And both responsibilities apply to present and future generations.

This understanding of Pennsylvania’s public trust clause provides a basis for strengthened protection of public natural resources. It also gives full effect to all of the words of the public trust clause. And it answers arguments that “common property” limits the meaning of public natural resources to property that can be owned like other property.

The concept of common property, moreover, is central to the meaning of the public trust doctrine, not only in Pennsylvania but in other states and countries. It focuses the government’s trust duties on those natural resources most essential for human survival and well-being. It helps ensure that these resources can be used and enjoyed by all people in present and future generations, regardless of income or social status. And the concept of common property protects the availability of these resources for future generations because future availability requires their conservation and maintenance by the current generation.

All of these are needed in the years and decades ahead because of the many environmental challenges society faces, including climate change. These challenges require new applications of foundational principles. The concept of common property makes clear the role that the public trust doctrine, including its particular expression in Article I, §27, can play in helping to address these challenges.

The Article proceeds as follows. Part I explains the foundational role of the term “public natural resources” in understanding the Article I, §27 public trust, and how its legislative history as well as subsequent judicial decisions shed light on the meaning of that term. Part II explains the meaning of “common property” by analyzing the history of the term and major public trust cases interpreting it, as well its use in the text and legislative history of Article I, §27. Part II also shows how the history of common property applies to Pennsylvania’s constitutional public trust and explains the importance of common property. Part III concludes.

I. Public Natural Resources and the Public Trust

The term “public natural resources” includes types of resources that were expressly recognized in well-developed common law as commonwealth- or government-owned prior to the amendment, like state forest and park land, the beds of navigable waters, and publicly dedicated land. It also includes those types of resources such as air, water, fish, and wildlife, that no one (including the commonwealth) categorically owned⁴² in that “title-based” sense, and that

41. HAW. CONST. art. XI, §1:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

42. Here and elsewhere, I use “categorically owned” to refer to all of Pennsylvania’s air, or all of Pennsylvania’s water, fish, or wildlife, to distinguish this kind of ownership from ownership of, for example, specific fish or game animals that people have caught, trapped, or killed. The latter, of course, belongs to the individual who caught, trapped, or killed it. *See, e.g.*, PA.

are things in which “a sort of transient usufructuary possession only, can be had.”⁴³ The term was written broadly, so that courts would be free to identify additional public natural resources as the need arises. This understanding is reflected in both the legislative history of the amendment and in the case law.

The scope of the public trust for natural resources defines what resources a particular public trust protects. The scope varies from state to state, and from trust to trust in states that recognize more than one form of public trust for natural resources.⁴⁴ Many are limited to navigable waterways.⁴⁵ Others, like the constitutional public trusts in Pennsylvania⁴⁶ and Hawaii,⁴⁷ are broader, covering “public natural resources.” Because, in Pennsylvania, these public natural resources “are the common property of all the people, including generations yet to come,” it is necessary to start with an analysis of what “public natural resources” means.

The legislative history is a useful starting point. Article I, §27 was adopted as an amendment to the state constitution by a four-to-one vote in a public referendum in May 1971, pursuant to a constitutional requirement that such amendments be passed by both houses of the legislature in one session, then passed by both houses in the next legislative session, before being submitted to the voters and approved.⁴⁸ Two amendments to the definition of “natural resources” as the environmental rights amendment went through the legislative process are central to understanding its meaning.

CONST. STAT. ANN. §2304(a) (stating that the “carcass of game or wildlife lawfully killed or taken shall be the property of the person who inflicts a mortal wound which enables that person to take possession of the carcass”). The Pennsylvania statute, of course, essentially restates the rule articulated in the iconic case of *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

43. *Arnold v. Mundy*, 6 N.J.L. 1, 75 (N.J. 1821). This case, a central public trust case on the meaning of common property, is discussed in detail in Part II.A.

44. See *supra* note 10.

45. See, e.g., *White Bear Lake Restoration Ass’n ex rel. State v. Minnesota Dep’t of Nat. Res.*, 946 N.W.2d 373, 376 (Minn. 2020) (refusing to extend state common-law public trust doctrine beyond navigable waterways to a claim “that the Minnesota Department of Natural Resources failed as trustee to maintain the waters of a lake for public use by authorizing the pumping of aquifer water for other public uses in the state”); *Chernaik v. Brown*, 475 P.3d 68, 83-84 (Or. 2020) (refusing to extend state common-law public trust doctrine beyond “submerged and submersible lands underlying navigable waters and the navigable waters themselves” to “require the state to protect public trust resources from effects of greenhouse gas emissions and consequent climate change”).

46. PA. CONST. art. I, §27.

47. HAW. CONST. art. XI, §1.

48. See PA. CONST. art. XI, §1. Two versions of the legislative history for Article I, §27 are available. The first is JOHN C. DERNBACH & EDMUND J. SONNENBERG, *A LEGISLATIVE HISTORY OF ARTICLE 1, SECTION 27 OF THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, SHOWING SOURCE DOCUMENTS* (Widener Law School, Legal Studies Research Paper Series No. 14-18, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660. The second, which shows only material that is relevant to §27, and not the extraneous material that is often included in the pages of some of the source documents where both §27 as well as other matters are shown, is John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181 (2015). All of the bills, articles, speeches, and other information cited in this Article from the legislative history are available in both of these documents. Instead of citing to these legislative histories, this Article cites to the source documents themselves.

To begin with, as originally introduced, the first sentence of the public trust clause provided: “Pennsylvania’s natural resources, including the air, waters, fish, wildlife, and the public lands and property of the Commonwealth, are the common property of all the people, including generations yet to come.”⁴⁹ It thus declared “Pennsylvania’s natural resources” to be “common property of all the people.” The absence of the word “public” before “natural resources,” however, suggested that the amendment might convert private property containing natural resources into the people’s “common property.” The amendment’s drafters believed that such a result would likely violate the constitutional prohibition against the taking of private property for public use without just compensation.⁵⁰ The language was thus changed to “Pennsylvania’s *public* natural resources.”⁵¹

Second, the drafters used “public natural resources,” a relatively general term, without any examples, to assure the amendment’s adaptability to changing conditions over a long period. They sought neither to immediately change nor permanently freeze the boundary between public and private property. The original version of the environmental rights amendment, as shown above, included a list of protected resources: “air, waters, fish, wildlife, and the public lands and property of the Commonwealth.”⁵² There was no objection to this list of resources, but some worried that a future court might limit the list to those resources.⁵³

As a result, the legislature removed the illustrative list, leaving the term “public natural resources” in place.⁵⁴ In so doing, as the Pennsylvania Supreme Court explained in *PEDF II*, the legislature intended to “discourage courts from limiting the scope of natural resources covered.”⁵⁵ In this way, the drafters facilitated the further evolution of public trust law under Article I, §27 to resources not specifically identified on the initial list.

Prof. Robert Broughton addressed this point in an article about the amendment that was published before it was adopted.⁵⁶ Rep. Franklin Kury, the environmental rights amendment’s drafter and chief sponsor, inserted the article into the legislative record, making it part of the legislative history.⁵⁷ Broughton observed that neither public trust resources nor private property are legally fixed.⁵⁸ Previously

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

50. Broughton, *infra* note 56, at 425.

51. Compare H.B. 958 (Printer’s No. 1105) (original language), with H.B. 958, 168th Sess. (Pa. 1969) (Printer’s No. 2860) (amended language).

52. See H.B. 958, 168th Sess. (Pa. 1969) (Printer’s No. 1105); see also Broughton, *infra* note 56, at 424.

53. “The introducing word, ‘including,’ would not ordinarily be so interpreted, but a list always presents some danger that a court may sometime use the list to limit, rather than expand, a basic concept.” Broughton, *infra* note 56, at 425-26.

54. Compare H.B. 958, 153d Leg., 2d Sess. (Pa. 1969) (Printer’s No. 2860), with H.B. 958 (Printer’s No. 1105).

55. *PEDF II*, 161 A.3d 911, 931 (Pa. 2017).

56. Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. BAR ASS’N Q. 421 (1970), reprinted in 1970 Pa. Legis. Journal-House 2274 (Apr. 14, 1970).

57. 1970 Pa. Legis. Journal-House 2272-81 (Apr. 14, 1970).

58. Broughton, *supra* note 56, at 425-26. Cf. Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENV’T L. 473, 474 (1989) (explaining likely change in boundary between public and private rights in water in western

recognized forms of private property have disappeared, he said, and future public property rights, perhaps relating to ecological diversity, might someday be recognized.⁵⁹ Such public property rights for ecological diversity, now called biological diversity, could mean that ownership of particular lands, for example, might be divided between private and public owners.⁶⁰ The final language, Broughton observed, neither requires nor prohibits further changes in the boundary between public natural resources and private-property rights.⁶¹

Significantly, the original list contains two distinct categories of public natural resources. It includes property resources for which commonwealth ownership was long recognized prior to the adoption of the amendment—“the public lands and property of the Commonwealth.” It also includes resources that were not “owned” by anyone, such as air, water, fish, and wildlife. As Representative Kury explained:

The bill as we will vote on it today, affirms the trusteeship of the Commonwealth over resources owned by the Commonwealth and also affirms the trusteeship of the Commonwealth over resources like air, waters, fish and wildlife and also all those not owned by the Commonwealth but which, nevertheless, involve a public interest.⁶²

The Pennsylvania Supreme Court cited Kury’s statement with approval in *PEDF II*.⁶³

Kury’s explanation tracks the list of resources in the original language of the amendment—real property owned by the commonwealth and natural resources not owned by anyone, including not owned by the commonwealth.⁶⁴ An example of ownership is legal title to state forest and park lands. But taken categorically or as a whole, the four listed resources—air, water, fish, and wildlife—are outside the boundaries of traditional property law. They are thus resources that neither the state nor anyone else categorically owned. Traditionally, these and similar public natural resources were “theoretically

open to all comers” and “subject to diminution by anyone.”⁶⁵ These public natural resources are all theoretically open to anyone—to use air and water, and to hunt fish and game—although state regulation limits this to some extent. And they are clearly subject to diminution by anyone with the resources and willingness to pollute, damage, degrade, or exploit them.

Each of the four listed resources identified by Representative Kury also involve public concern. Air and water are vital for all life. Air quality is essential for public health and a stable climate, and both are needed for a functioning society and economy. Water quality is necessary for human health and flourishing aquatic ecosystems. Fish and wildlife provide food and recreational opportunities, and support a large part of the outdoor recreation economy.

It is also significant that, as Representative Kury stated, public natural resources also include “all those [other natural resources] not owned by the Commonwealth but which, nevertheless, involve a public interest.” In saying that, he echoed a point made in what is easily the most influential public trust case ever decided, *Illinois Central R.R. Co. v. Illinois*.⁶⁶ In that case, the U.S. Supreme Court indicated that the trust obligation applied to natural resources “in which the whole people are interested,” which it also called resources of “public concern.”⁶⁷

The environmental rights clause of Article I, §27 provides a helpful way of understanding what public interest or public concern means in the public trust context. This clause, which is separate from the public trust clause, provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”⁶⁸ This clause recognizes a public right to high-quality air and water, and to the preservation of certain values in the environment. The state supreme court has explained: “This clause places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.”⁶⁹

states caused by need to “retrieve some water from traditional water users to sustain streams and lakes as natural systems and to protect water quality”).

59. Broughton, *supra* note 56, at 425 (citation omitted).

60. See, e.g., Mary Christina Wood, *The Oregon Forest Trust: An Ecological Endowment for Posterity*, 101 OR. L. REV. 515, 593-607 (2023) (arguing that state of Oregon has public trust interest in private forest lands where such forests are integral to ecosystem function).

61. Broughton, *supra* note 56, at 426. Restrictions on the use of public natural resources do, of course, indirectly affect uses of private property.

62. 1970 Pa. Legis. Journal-House 2271-72 (Apr. 14, 1970) (statement by Rep. Kury).

63. *PEDF II*, 161 A.3d 911, 931 n.22 (Pa. 2017).

64. Because of the care and attention given in the legislative process to the scope of protected public trust resources, it is also significant that there is not a single indication in the legislative history that the term “common property” is limited to the type of natural resources that the commonwealth owned as public lands and property prior to §27’s adoption. Nor is there a scintilla of evidence that use of “Pennsylvania’s public natural resources” in the first sentence of the public trust clause was intended to limit those resources to resources that the commonwealth owns. It makes more sense to say that this language focuses the amendment on public natural resources in Pennsylvania, whether the commonwealth owned them or not when the amendment was adopted.

65. Erin Ryan, *Privatization, Public Commons, and the Takingsification of Environmental Law*, 171 U. PA. L. REV. 617, 627 (2023). See also Elinor Ostrom et al., *Revisiting the Commons: Local Lessons, Global Challenges*, 284 SCIENCE 278, 278 (1999) (explaining difficulties of exclusion as well as “exploitation by one user” that “reduces resource availability for others”).

66. 146 U.S. 387 (1892) (holding that states hold submerged lands under navigable waters in trust for certain public purposes and cannot alienate those lands except in conformance with those purposes and their fiduciary responsibilities).

67. *Id.* at 453.

68. PA. CONST. art. I, §27.

69. *PEDF II*, 161 A.3d 911, 933 (Pa. 2017).

While the public trust and environmental rights clauses use distinctly different language,⁷⁰ they also overlap.⁷¹ It is highly likely, for example, that public natural resources cannot be significantly impaired without also violating the environmental rights clause. This has significant consequences for protection of public natural resources, because each clause provides a separate cause of action.⁷² In addition, the environmental qualities and values protected by the environmental rights clause could be relevant in an appropriate public trust case to determine whether additional specific natural resources should be protected under the public trust clause.

Courts have used the public concern or public interest formulation to extend the historical scope of the common-law public trust doctrine when additional natural resources become more publicly important.⁷³ Under the Hawaii Constitution, “public natural resources” includes “land, water, air, minerals and energy sources” that implicate the public interest in some way.⁷⁴ The Hawaii Supreme Court has expanded this list of public natural resources protected under its constitutional public trust to include water runoff, native trees, and forest habitat,⁷⁵ and has suggested that the constitutional public trust may extend to endangered species.⁷⁶ Robert McKinstry and I have argued

that public natural resources under Article I, §27 include a stable climate.⁷⁷

The Pennsylvania Supreme Court and Commonwealth Court have issued opinions about the scope of public natural resources that reflect this understanding. In *Robinson Township*, a plurality of the supreme court explained the meaning of “public natural resources” as follows: “At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.”⁷⁸

Similarly, Pennsylvania courts have decided that public natural resources under Article I, §27 include resources that the state or local governments own in a conventional property sense, such as state parks and forests,⁷⁹ the oil and gas under these parks and forests,⁸⁰ and municipal parks.⁸¹ The courts have also decided that “public natural resources” includes other resources such as air,⁸² surface water,⁸³ and groundwater.⁸⁴ This list, it should be noted, does not exclude the possibility of mixed common and private ownership, particularly for real property. One example, as the list immediately above indicates, is groundwater under private property. Another possible example, also alluded to earlier, is specific biological diversity resources on private property.⁸⁵

70. John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27*, 103 DICK. L. REV. 97, 701-04 (1999) (explaining that the language of the two clauses differs in scope, public rights, and governmental responsibility). While the public trust clause is directed toward protection of public natural resources, the environmental rights clause may also apply to state action that significantly impairs the natural, scenic, historic, and esthetic values of purely private property. See, e.g., *United Artists’ Theater Cir., Inc. v. City of Philadelphia*, 635 A.2d 612 (Pa. 1991) (using environmental rights clause to help uphold city historic preservation ordinance against private theater owner’s claim that ordinance constituted an unconstitutional taking of property without compensation under Pennsylvania Constitution Article I, §10).

71. For a more detailed discussion of the environmental rights clause, and its relationship to the public trust clause in Pennsylvania, see John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 142-50 (1999).

A growing and vigorous literature exists on the relationship between environmental rights and public trust in the context of climate change. Compare, e.g., Erin Ryan, *Public Trust Principles and Environmental Rights: The Hidden Duality of Climate Rights Advocacy and the Atmospheric Trust*, 49 HARV. ENV’T L. REV. 225, 252-56 (2025) (explaining public trust principles as environmental rights), with Wood, *supra* note 20, at 1232-34 (explaining differences between the public trust principle and the right to a clean environment).

72. See, e.g., *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677 (Pa. Commw. Ct. 2018) (addressing claims that each of the two clauses of §27 had been violated).

73. See, e.g., *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 121 (N.J. 2005) (quoting *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984)) (“[W]e perceive the public trust doctrine not to be ‘fixed or static,’ but one to ‘be molded and extended to meet changing conditions and needs of the public it was created to benefit.’”); *Environmental L. Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr. 3d 393, 400 (Cal. Ct. App. 2018) (applying the public trust to groundwater).

74. HAW. CONST. art. XI, §1. They include, but are not limited to, the resources protected under traditional trust law—water resources and state lands. They also apply to marine waters and submerged lands. *Umberger v. Department of Land & Nat. Res.*, 403 P.3d 277, 298 (Haw. 2017).

75. *In re Maui Elec. Co., Ltd.*, 506 P.3d 192, 204-05 (Haw. 2022).

76. *Morimoto v. Board of Land & Nat. Res.*, 113 P.3d 172, 177 n.16, 184 (Haw. 2005).

77. Robert B. McKinstry Jr. & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 9 MICH. J. ENV’T & ADMIN. L. 50 (2018).

78. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 955 (Pa. 2013). For another description of public natural resources, see Dernbach, *supra* note 71, at 121-22.

79. *PEDF II*, 161 A.3d 911, 931 (Pa. 2017) (public natural resources include “the state forest and park lands leased for oil and gas exploration”).

80. *Id.* (public natural resources include “the oil and gas” under state forests and park lands).

81. *Payne v. Kassab*, 312 A.2d 86, 97 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263 (Pa. 1976) (deciding that plaintiffs had standing to enforce the public trust clause of Article I, §27 “as part of the public and as owners of property fronting” a local public park to “object to the appropriation of part of the [park] for highway purposes”).

82. *Commonwealth, Dep’t of Env’t Res. v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1209 & n.15 (Pa. 2019) (“The Commonwealth is committed to the conservation and maintenance of clean air by Art. I, §27 of the Pennsylvania Constitution” and identifying the commonwealth as a trustee under the amendment); *Air-Serv Grp., LLC v. Commonwealth*, 18 A.3d 448, 453-54 (Pa. Commw. Ct. 2011) (explaining that the atmosphere is a part of the public natural resources—common property of all the people—and not subject to private ownership).

83. *National Wood Preservers, Inc. v. Commonwealth, Dep’t of Env’t Res.*, 414 A.2d 37, 41 (Pa. 1980) (citing the entire amendment, including public trust clause, as supporting application of Clean Streams Law to surface water pollution). The pollution in question was first detected in Naylor’s Run. *Id.* at 39.

84. *Id.* at 41. An investigation of the pollution in Naylor’s Run led to the conclusion that the “major amount of” the polluted water “appears to be pooled under the surface of the property.” *Id.* at 40. See also *Adams Sanitation Co., Inc. v. Commonwealth, Dep’t of Env’t Prot.*, 715 A.2d 390, 394 (Pa. 1998) (citing the entire amendment as supporting application of Clean Streams Law to groundwater pollution). The case involved a landfill operator’s challenge to a DEP order requiring it to, among other things, submit and implement a groundwater pollution abatement plan. *Id.* at 392.

85. See *supra* notes 60-61 and accompanying text. Public natural resources could also, for example, include conservation easements owned by government entities on private land. In addition, New Jersey and Oregon courts have authorized public easements on private land under limited circumstances in

II. Common Property and the Public Trust

The meaning of “common property” in the public trust context is different from its meaning in other legal contexts, such as tenancy in common.⁸⁶ The term has repeatedly been used in the common-law public trust context to refer to resources that are held by the government for public purposes *and* that cannot be conveyed to private parties. The text, legislative history, and case law under Article I, §27 are consistent with that understanding. In particular, the text of the amendment, which affirms that public natural resources are the “common property” of present and future generations, greatly increased the recognized scope and protectiveness of Pennsylvania’s public trust.

Professor Broughton, whose article is part of the amendment’s legislative history, explained that the purpose of the public trust clause was to place “Pennsylvania among the jurisdictions which adhere to the public trust theory of public natural resource management.”⁸⁷ Prominent public trust cases decided prior to 1971 provide a critical foundation for the environmental rights amendment. These public trust cases repeatedly use common property as not only an expression of what particular resources are subject to the public trust, but also to enforce their status as public resources available to all.

Private parties cannot use common property in ways that interfere with public use by others. The government

must ensure their public availability and cannot use these resources for its own proprietary purposes. Common property thus serves important public values—ensuring that resources essential for public well-being are available to the people, protecting both private property and public or common property, and protecting public expectations that public natural resources will continue to be available, including to future generations.

A. Common Property in Public Trust Law

The term “common property” appears frequently in public trust law. The concept underlying common property dates at least as far back as Roman law, and critical features of common property are represented in English history. This history provides context for a more detailed examination of the most prominent and relevant public trust cases, which sheds additional light on its meaning. In brief, common property is public property, not private property. It is open to all, and individual users cannot exclude others from it. The government must ensure the public availability of common property, and cannot use common property for its own benefit. When §27 uses the term “common property,” it draws on this understanding of its meaning, and applies it to all of Pennsylvania’s public natural resources.

Broadly speaking, common property is derived from the most widely cited and influential early expression of the scope of the public trust, the Institutes of Justinian, which concerns Roman law:

By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.⁸⁸

Two critical features of this formulation—that certain resources are “common to all,” and that no one can be excluded from them—are integral to the meaning of “common property.” Common property, in other words, is not just a noun or a descriptive term; it also has legal consequences.

Common property, to be sure, is not the only expression of this concept. Another is *res communes omnium*, often shortened to *res communes*, which is translated in the passage from Justinian quoted above as “things common to all”⁸⁹ or “[t]hings common to all; things that cannot be owned or appropriated, such as light, air, and the sea.”⁹⁰ Still another is *jus publicum*, which historically expressed

order to access public beaches. *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005); *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969).

86. See *Common Property*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 11th ed. 2019) (stating one definition of “common property” as “real property that is held by two or more persons with no right of survivorship”). For Pennsylvania uses of the term “common property” in that context (i.e., tenancy in common), see *Lund v. Heinrich*, 189 A.2d 581, 583 (Pa. 1963); *Beers v. Pusey*, 132 A.2d 346, 348 (Pa. 1957). A tenancy in common is a form of co-ownership in which each owner (tenant) has the right to use and enjoy the entire property, but “[e]ach tenant’s interest is alienable, inheritable, and devisable.” JOSEPH WILLIAM SINGER, PROPERTY §8.2.1 (5th ed. 2017).

This is readily distinguishable from the common property recognized in Article I, §27. Among other things, the ability of a tenant in common to convey their share of the property during their lifetime means that a tenant in common can benefit financially from the tenancy in common. Yet, the Pennsylvania Supreme Court has held that Article I, §27 does not create income entitlements to public trust beneficiaries. *PEDF V*, 255 A.3d 289, 310-14 (Pa. 2021). Not only is there no language in the amendment providing for such entitlements, it is impermissible to divert money from the trust for nontrust purposes. *Id.* A tenancy in common provides an income entitlement, either for the co-owners or their heirs or devisees.

87. Broughton, *supra* note 56, at 422, quoted in *PEDF II*, 161 A.3d 911, 942 (Pa. 2017) (Baer, J., concurring and dissenting).

Representative Kury and Professor Sax corresponded while the amendment was working its way through the Pennsylvania Legislature, and Professor Sax wrote a letter expressing “enthusiastic support” for the amendment. Letter from Rep. Franklin L. Kury to Professor Joseph L. Sax, University of Michigan Law School (Nov. 24, 1969) (on file with author) (sharing copy of H.B. 958 that had passed the state House of Representatives and requesting letter of support for amendment); Letter from Joseph L. Sax to Franklin L. Kury (Dec. 5, 1969) (on file with author) (expressing his “enthusiastic support” for H.B. 958). “As a lawyer whose professional work is devoted overwhelmingly to the legal problem of environmental quality I feel strongly that legal recognition of the public right to a decent environment, such as that proposed in H.B. 958, is a most desirable step forward.” *Id.* Many thanks to Scott W. Stern for sharing these letters, which he found in the Sax Papers at the University of Michigan, Box 4, ND to RI Folder.

88. J. INST. Proemium 2.1.1 (T. Sandars trans., 4th ed. 1867).

89. Ruhl & McGinn, *supra* note 17, at 121.

90. *Air-Serv Grp., LLC v. Commonwealth*, 18 A.3d 448, 453-54 (Pa. Commw. Ct. 2011); *Res Communes*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 11th ed. 2019); MERRIAM-WEBSTER DICTIONARY, *Res Communes*, <https://www.merriam-webster.com/dictionary/res%20communes> (last visited Nov. 17, 2025) (nearly identical definition of “res communes”). See also Gerald Torres, *Who Owns the Sky?*, 18 PACE ENV’T L. REV. 227 (2001). Prof. Gerald Torres writes:

the public right to navigation and fishing in the sea and inland waterways.⁹¹ The *Illinois Central* court referred to “the common right” of the people to have “common use” of navigable waters.⁹² Other courts refer to “common owner” or “common ownership” of public trust resources.⁹³ But Article I, §27 uses “common property,” and the Pennsylvania Supreme Court has made clear that its interpretation is to be guided by its text.⁹⁴ It is therefore necessary to focus this analysis on common property.

Common property and private-property law in England evolved over many centuries, and this complex history resists easy generalizations. Still, it is possible to discern the development of these two ideas in this history.⁹⁵ The Magna Carta (“Great Charter”) of 1215 is best known for King John’s promise that he and future sovereigns would govern according to the rule of law.⁹⁶ But it also contains the seeds of the public trust doctrine for waterways by requiring that all fish weirs on the Thames and Medway Rivers “and throughout all England” “be removed altogether,” “except upon the seashore.”⁹⁷ A weir is a rock or wooden structure, built partly or entirely across rivers, that is used to trap or channel fish. Unlike nearly all of the rest of the Magna Carta, which granted rights to Norman nobles, this part “gave rights to commoners who fished—for subsistence and commerce—and navigated—for travel and commerce.”⁹⁸

Several centuries later, perhaps as early as the 16th century, English common-law courts and treatise writers decided that the sovereign owned submerged and tidal lands and the waters that flowed over them.⁹⁹ The courts also decided that sovereign ownership extended to navigable waters, but that the beds of non-navigable waters could be privately owned.¹⁰⁰ In this way, public rights to use navigable waters were recognized.

The atmosphere has not, historically, been thought of as a natural resource that was subject to private ownership. . . . Because it could not be reduced to exclusive possession, it was generally categorized within that class of assets that were invested with a public character. To the extent that there was a property interest in the sky, it was as *res communes*.

Id. at 234-35.

91. Larry W. George, *Public Rights in West Virginia Watercourses: A Unique Legacy of Virginia Common Lands and the Jus Publicum of the English Crown*, 101 W. Va. L. Rev. 407, 415-17 (1998) (explaining English history of the term).
92. 146 U.S. 387, 459-60 (1892).
93. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896); *PEDF II*, 161 A.3d 911, 931 (Pa. 2017); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956 (Pa. 2013).
94. *PEDF VI*, 279 A.3d 1194, 1202 (Pa. 2022) (citing *PEDF II*, 161 A.3d 911, 930 (Pa. 2017)).
95. Erin Ryan, *A Short History of the Public Trust Doctrine and Its Intersection With Private Water Law*, 39 Va. ENV’T L.J. 135, 143-45 (2020).
96. *Id.* at 143-44. See generally DAN JONES, *MAGNA CARTA: THE BIRTH OF LIBERTY* (2016).
97. *MAGNA CARTA—1215: ENGLISH TRANSLATION* ch. 33 (2018) (using “kydell” to refer to fish weir). This translation is copyrighted by the Lillian Goldman Law Library, Yale Law School. *Id.* at 1 n.1.
98. Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 Vt. L. Rev. 1, 7 (2018).
99. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. Rev. 711, 727-29 (1986).
100. Ryan, *supra* note 95, at 145.

Public rights to use certain lands as a commons developed in a somewhat similar way, but these rights were lost on many common lands through the Enclosure Movement. Two years after the Magna Carta, in 1217, King Henry III added the Charter of the Forest to the Magna Carta.¹⁰¹ Essentially, the king restored the rights of commoners to use public commons—rights that William the Conqueror had undermined—by promising not to interfere with their “rights to graze animals, forage, plant crops, and collect lumber on open lands subject to Forest Law.”¹⁰²

This was no small thing; about one-third of English land was considered forested at the time.¹⁰³ The Forest Charter, by recognizing “public rights in common resources owned by the Crown,” provides another foundation for the public trust doctrine.¹⁰⁴ It also has had an enduring legacy.¹⁰⁵ Nor was the Forest Charter the only basis for the common use of land. “Before enclosure, common land was the most common form in England: land on which anybody could grow food, graze cattle, sleep, eat and revel.”¹⁰⁶

The history of the commons in medieval England and in the rest of Europe illustrates not only the value of public rights to use the commons as common property.¹⁰⁷ This history also illustrates the apparently ceaseless tug-of-war between public and private interests over the use of this common property, involving privatization, class distinction, and the considerable value of often-scarce resources.¹⁰⁸ These all came together in the Enclosure Movement, which resulted in more than half the land of England becoming private property.¹⁰⁹ Enclosure was accomplished over many centuries, first through informal and formal agreements, and then through acts of Parliament.¹¹⁰ Commoners, whose expectations about their continued ability to use this land

101. CHARTER OF THE FOREST (1217), translated in *MAGNA CARTA AND THE RULE OF LAW* app. H at 423 (Daniel Barstow Magraw et al. eds., American Bar Association 2014); Ryan, *supra* note 95, at 144.

102. Ryan, *supra* note 95, at 144. See also Paul Babie, *Magna Carta and the Forest Charter: Two Stories of Property*, 94 N.C. L. Rev. 1431, 1460 (2016) (“From the perspective of its contemporaries, the Forest Charter did not so much restore individual property rights to landowners as it restored common property rights to all inhabitants of the forests.”).

103. Daniel Magraw & Natalie Thomure, *Carta de Foresta: The Charter of the Forest Turns 800*, 47 ELR 10934, 10936 (Nov. 2017), <https://www.elr.info/articles/elf-articles/carta-de-foresta-charter-forest-turns-800> (explaining that the English understanding of covered forest land included not only woodlands but also “grasslands, farmland, waterways, even parts of towns”).

104. Blumm & Engel, *supra* note 98, at 8.

105. For a detailed history of the Forest Charter, including its subsequent impact, see Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, in *MAGNA CARTA AND THE RULE OF LAW*, *supra* note 101, at 311. “The Forest Charter shaped England’s constitution as well as its landscape, and it continues to confer benefits for both law and the biosphere today.” *Id.* at 312.

106. CHARLIE HARRIS, UNIVERSITY OF OXFORD & OXFORD CENTRE FOR GLOBAL HISTORY, *ENCLOSING THE ENGLISH COMMONS: PROPERTY, PRODUCTIVITY, AND THE MAKING OF MODERN CAPITALISM I* (2022), <https://globalcapitalism.history.ox.ac.uk/files/case26-enclosingtheenglishcommons.pdf>.

107. Joseph L. Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 U.C. DAVIS L. Rev. 185, 189 (1980) (“It was only natural that these places should be commonly available, since their common use was necessary for the maintenance of the feudal economy.”).

108. *Id.* at 189-91.

109. HARRIS, *supra* note 106, at 1. For a detailed account, see JAMES ALFRED YELLING, *COMMON FIELD AND ENCLOSURE IN ENGLAND 1450-1850* (1977).

110. HARRIS, *supra* note 106, at 1.

were frustrated by its conversion to private property, often used violence to resist.¹¹¹

To be sure, the natural resources subject to the commons—not only in medieval Europe but also at present anywhere in the world—are not necessarily subject to the same governing structure as those governing natural resources under the public trust doctrine. The commons is typically governed by a set of informal, community-based rules and principles that the community itself enforces.¹¹² The public trust, by contrast, is administered by the government.¹¹³ The commons also embraced (and in many places still embraces) a set of agricultural practices that are not ordinarily covered by the public trust doctrine.¹¹⁴ Still, it is not hard to see many of the roots of the public trust, including common property, in the history of the commons.

Four foundational public trust cases¹¹⁵ have roots in this history. These cases—all of which used and explained “common property”—were decided in the 19th century by the Pennsylvania and New Jersey Supreme Courts and the U.S. Supreme Court. The first three involve waterways, and the fourth concerns game animals.

In 1810, the Pennsylvania Supreme Court held in *Carson v. Blazer* that the Susquehanna River is navigable and that the state thus owned the bottomland of the river. As a result, the court decided, a private owner of land along the bank of the river—a riparian owner—lacked the exclusive right to fish immediately in front of his land.¹¹⁶ The case is a landmark in the early development of U.S. public trust law because it broke with English common law, which held that navigable rivers were limited to those in which the tides ebb and flow.¹¹⁷ On non-navigable rivers, riparian owners own the land under the river to its middle, and can thus exclude others from fishing and navigation over the river bottomland they own.¹¹⁸ The English navigability rule, which applied only to tidal waters, would have allowed riparian owners on most of the Delaware River as well as the Susquehanna River to exclude others from passage or fishing—essentially making these rivers their private property and precluding public uses of them.

That result, the court explained, is not acceptable, and particularly so because the river’s bottomlands were never granted to riparian owners in the first place.¹¹⁹ The court

thus held the Susquehanna River to be navigable, which means that the state owns the bottomland of the river, and that the river is open to all for fishing, commerce, navigation, and other reasonable uses.¹²⁰ Justice Hugh Henry Brackenridge explained the river’s public trust status by describing it as “a common property,” and not one for “exclusive enjoyment.”¹²¹ A long line of subsequent Pennsylvania cases has confirmed this holding that navigable waterways are open for public use and applied it to other waterways.¹²²

In 1821, in *Arnold v. Mundy*,¹²³ the New Jersey Supreme Court provided a more detailed explanation of common property in the public trust context. In this case, Benajah Mundy and others harvested oysters in a part of the Raritan River that was adjacent to land that Robert Arnold owned. Arnold had planted oysters there and had staked off that part of the river. Mundy prevailed in the ensuing litigation. The court ruled that the river is navigable and therefore the oyster bed cannot be Arnold’s private property.

In so doing, it explained that the Raritan River is the “common property” of the people. Most property, Chief Justice Andrew Kirkpatrick said, is “divided among the individuals of the nation,” and is private property.¹²⁴ The rest, public property, consists of property that is “reserved for the necessity of the state” and is “used for the public benefit,” while the remaining public property “is called *common property*.”¹²⁵ Common property, the court explained, is “common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use.”¹²⁶ The court added that common property, “according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts.”¹²⁷

The court then stated the government’s trust responsibility for these resources:

But inasmuch as the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected,

111. Connor B. McDermott, *Monopolizers of the Soil: The Commons as a Source of Public Trust Responsibilities*, 61 NAT. RES. J. 125 (2021).

112. See MARY CHRISTINA WOOD, NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 161-63 (2014). A considerable body of empirical data shows when these informal systems have worked well, resulting in sustainable use of common property resources over time, and when they have not. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

113. WOOD, *supra* note 112, at 161-63.

114. *Id.* at 163-64.

115. THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW, *supra* note 19, at 67-78, 258-64 (excerpting the first three of these as general “foundation cases” and the fourth as foundational for the public trust in wildlife).

116. 2 Binn. 475, 494-95 (Pa. 1810).

117. *Id.* at 484.

118. *Id.*

119. *Id.* at 484-85.

120. Thus, for example, “every man may of common right fish with lawful nets in a navigable river; that the proprietors of the land on each side have not the exclusive right of fishery therein, but that the fishery is common and public.” *Id.* at 485.

121. *Id.* at 494. The court stated that navigable rivers “belong to the common wealth,” *id.* at 475, and are “common by law to all the citizens of the commonwealth.” *Id.* at 482. The court also refers to “the common right of fishing.” *Id.* at 488.

122. See *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 719-22 (Pa. Super. Ct. 1999). See also *Commonwealth, Dep’t of Env’t Prot. v. Espy*, 4 Pa. D. & C. 5th 225, 2007 WL 5433334 (Pa. Com. Pl. Huntingdon 2007) (holding that Little Juniata River is a navigable waterway).

123. 6 N.J.L. 1 (N.J. 1821).

124. *Id.* at 71.

125. *Id.*

126. *Id.*

127. *Id.*

and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people.¹²⁸

Chief Justice Kirkpatrick explained that the king of England, under the English common law, could not “intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation.”¹²⁹ Rather, the king’s grantee, the Duke of York, was required to exercise royal authority over “common property of which the rivers, bays, ports, and coasts of the sea were part . . . for the public benefit, and not as the proprietor of the soil, and for his own private use.”¹³⁰ Neither could the king, in making grants of property in the American colonies, “grant what is called the common property as to convert it into private property.”¹³¹

This part of the English common law became applicable in the United States after independence.¹³² Thus, this limitation of the power of the king also applies to the state legislature:

The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.¹³³

In 1842, the U.S. Supreme Court reached the same result in *Martin v. Waddell’s Lessee*,¹³⁴ a factually similar case that may have been an effort in federal court to overturn *Arnold*. Claiming ownership of 100 acres of submerged lands in the Raritan River, William C.H. Waddell’s lessee filed suit in federal court seeking to eject Merrit Martin and others from harvesting oysters there. The Supreme Court rejected the claim by Waddell’s lessee, reasoning that land under navigable waters is not private property, and that the state held this land in trust for the benefit of the public.¹³⁵ The Court described *Arnold* in some detail, including its analysis of common property, and applied the same reasoning as in that decision.¹³⁶ It described English common law on the “use of fisheries and rivers, as common property,” to be “peculiarly applicable to” European settlers in the United States.¹³⁷ *Martin* is also the first public trust case in which trust language was used.¹³⁸

128. *Id.*

129. *Id.* at 72.

130. *Id.* at 77.

131. *Id.*

132. *Id.* at 78.

133. *Id.*

134. 41 U.S. 367 (1842).

135. *Id.* at 417-18.

136. “A majority of the court seem to have adopted the doctrine of *Arnold v. Mundy* . . .” *Id.* at 419 (Thompson, J., dissenting).

137. *Id.* at 382.

138. THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW, *supra* note 19, at 67. In a later case, *Den ex dem. Russell v. Ass’n of Jersey Co.*, 56 U.S. 426 (1853), the Supreme Court applied the holding in *Martin* to land reclaimed from under the tidewaters of the Hudson River, and now occupied as building lots. This land, the Court held, belongs to the

Finally, in its 1896 decision in *Geer v. Connecticut*,¹³⁹ the U.S. Supreme Court determined that game animals were common property held in trust by the state for the benefit of the public. In a part of the decision that was later overruled,¹⁴⁰ the Court also held that a statute prohibiting out-of-state shipment of wildlife did not violate the Commerce Clause of the U.S. Constitution. The first part of the opinion was not overruled, however, and continues to be used.¹⁴¹ Its explanation of the state’s public trust responsibility for game animals as common property reflects many of the same elements as the waterways cases described above:

While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.¹⁴²

This brief survey of the use of “common property” in public trust cases is illustrative and not exhaustive. But it demonstrates that the term “common property” had been widely used in prominent public trust cases long before §27 was even drafted. The only public trust textbook used in law schools repeatedly uses “common property” to describe public trust resources.¹⁴³

state and not to those now occupying the land for building lots. *Id.* at 432-33. The Court analyzed this case as a straightforward application of *Martin*, explaining that ownership of the submerged land was the critical issue in that case, not whether it was submerged and not whether there was a right to fish that particular area. *Id.* Pennsylvania follows the same rule. *Delaware Ave., LLC v. Department of Conservation & Nat. Res.*, 997 A.2d 1231 (Pa. Commw. Ct. 2010) (holding that four acres of previously submerged land in the Delaware River that were filled with dredged material are owned by the commonwealth, not the riparian owner).

139. 161 U.S. 519 (1896).

140. *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (holding that an Oklahoma statute prohibiting the shipping of Oklahoma minnows out of state violated the Commerce Clause).

141. Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1462-65 n.204 (explaining that 48 states claim ownership of wildlife).

142. *Geer*, 161 U.S. at 529. This public trust responsibility, the Court held, provided the necessary authority for the statute being challenged. *Id.*

143. *See, e.g.*, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW, *supra* note 19, at 19, 74, 75, 261, 356, 597, 620, 642. These references exclude excerpted cases and constitutional provisions, which contain many more uses of the term.

Courts in public trust cases decided after 1971 have also employed the term “common property.” Many of these cite one of the cases described above. *See, e.g.*, *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1426 (10th Cir. 1986) (“It is well settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised ‘as a trust for the benefit of the people.’”) (citing *Geer*, 161 U.S. 519); *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 360-62, 364 (N.J. 1984) (describing *Arnold* in detail and describing the area seaward of the mean high tide line, to which the public has access for swimming and bathing, as “common property”).

B. Text

The first sentence of §27's public trust clause grows out of this history. It states: "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come."¹⁴⁴ That principle became constitutionally recognized as a public right to which all government action was constitutionally subject on May 18, 1971, the date that §27 was enacted.¹⁴⁵ This sentence effectuated constitutional protection of the natural resources for which the commonwealth government has clear legal public trust responsibility. It means that the people as common owners and beneficiaries can sue the commonwealth to carry out its responsibilities under this trust—responsibilities that the court has made clear in recent decisions.

Since the Pennsylvania Supreme Court's 2013 *Robinson Township* decision,¹⁴⁶ when Pennsylvania courts began focusing on the amendment's text, it has become clear that this sentence also defines the meaning of that responsibility in ways that the courts did not previously recognize in applying the amendment. These include, for example, the responsibility to protect present and future generations at the same time. These more recent decisions did not invent new law; they simply applied the constitution's text.

As explained above, the public trust concept, as well as common property, have been recognized in law for a long time. Justinian explained that "the air, running water, the sea, and consequently the shores of the sea" are common to all, and therefore common property. The court in *Arnold* stated that "the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can be had," such as "the air, the running water, the sea, the fish, and the wild beasts."¹⁴⁷ When the Pennsylvania Supreme Court held in 1810 that navigable waterways are "common property" of the people, it grounded its decision on the fact that riparian owners had never been granted submerged lands under navigable waterways; these lands were common property from the earliest days of the colonies.¹⁴⁸ The U.S. Supreme Court reached essentially the same result in *Martin*.¹⁴⁹ In *Geer*, the Court recognized a public trust in game animals as common property.¹⁵⁰ Pennsylvania's long-standing common law for publicly dedicated lands, such as municipal parks, was similar to that for common property: the municipality holds these lands in trust "in favor of the community," and "has neither power nor authority to sell and convey the same for private purposes."¹⁵¹

144. PA. CONST. art. I, §27.

145. Jt. Res. 3, Pub. L. No. 769 (1971).

146. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

147. *Arnold v. Mundy*, 6 N.J.L. 1, 75 (N.J. 1821).

148. *Carson v. Blazer*, 2 Binn. 475, at 484-85, 494-95 (Pa. 1810); *Warren Sand & Gravel Co. v. Commonwealth, Dep't of Env't Res.*, 341 A.2d 556, 560 (Pa. Commw. Ct. 1975).

149. *Martin v. Waddell's Lessee*, 41 U.S. 367, 417-18 (1842).

150. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

151. *Board of Trs. of Phila. Museums v. Trustees of Univ. of Pa.*, 96 A. 123 (1915).

An inchoate public trust evolved along with the case law, based on the government's growing practice of conservation, including for air, water, fish, and wildlife. The agency now known as the Pennsylvania Fish and Boat Commission was created by statute in 1866 in response to water pollution and reduced American shad runs in the Susquehanna River.¹⁵² Pennsylvania's first state park, at Valley Forge, was approved in 1893.¹⁵³ The Pennsylvania Game Commission was authorized by the legislature in 1895 to conserve and protect wildlife.¹⁵⁴ Pennsylvania's state forest conservation programs were comparatively well advanced in the early 20th century, guided in no small part by a rationale of stream preservation.¹⁵⁵ The state began regulating water pollution in 1905 with the adoption of the Purity of Waters Act, which limited sewage disposal in Pennsylvania waterways.¹⁵⁶ Pennsylvania's statewide Air Pollution Control Act was signed into law in 1959.¹⁵⁷

These laws were strengthened over time. The lands in the state park and forest system grew. Public concern about the effectiveness of conservation and environmental protection efforts also grew. It was no accident that the amendment was adopted less than one year after the first Earth Day, April 22, 1970, which represented a kind of high watermark of public concern for the environment. Article I, §27 codified in constitutional form both case law and growing recognition of the commonwealth's public trust responsibilities for common property.

The first sentence of the public trust clause recognized all natural resource lands and other property owned by any commonwealth entity, including municipal parks, as the common property of all the people, with its attendant public trust consequences.¹⁵⁸ It also confirmed that public natural resources not categorically owned by anyone in the traditional sense, including but not limited to air, waters, fish, and wildlife, are the common property of all the people, including future generations.¹⁵⁹ Significantly, these "unowned" resources are essentially the same as the types of common property resources identified in *Arnold*—"the air, the running water, the sea, the fish, and the wild

152. 1866 Pa. Laws 370; *PFBC Celebrates 150th Anniversary*, PA. FISH & BOAT COMM'N (Mar. 18, 2016), <https://www.pa.gov/agencies/fishandboat/newsroom/pfbc-celebrates-150th-anniversary->.

153. *History of Pennsylvania State Parks*, COMM. OF PA., <https://www.pa.gov/agencies/dcnr/recreation/where-to-go/state-parks/history> (last visited Dec. 3, 2025).

154. *Who We Are*, PA. GAME COMM'N, <https://www.pa.gov/agencies/pgc/about-us/about-the-pgc> (last visited Dec. 3, 2025).

155. KIMBERLY K. SMITH, *THE CONSERVATION CONSTITUTION: THE CONSERVATION MOVEMENT AND CONSTITUTIONAL CHANGE, 1870-1930*, at 93 (Univ. of Kansas Press 2019).

156. Jan Jarrett, *Pennsylvania's History With Water Pollution Policy*, PENNFUTURE (June 27, 2017), <https://www.pennfuture.org/Blog-Item-Pennsylvanias-History-with-Water-Pollution-Policy>.

157. 1959 Pa. Laws 2119.

158. In 1959, Pennsylvania codified the common-law public trust for dedicated lands by adopting the Donated or Dedicated Property Act, 53 Pa. Stat. §§3381-3386, which requires "all lands or buildings" donated to a municipality "for use as a public facility or dedicated for public use" to be held by the municipality "as trustee, for the benefit of the public." *Id.* §3382.

159. 1970 Pa. Legis. Journal-House 2271-72 (Apr. 14, 1970) (statement by Rep. Kury).

beasts.”¹⁶⁰ This state constitutional assertion of common property for public natural resources is consistent with the ability of states under our federal system to define and reshape property law.¹⁶¹

That has had several consequences. To begin with, “all the people, including generations yet to come,” are the owners of this property. The Pennsylvania Supreme Court has repeatedly explained the meaning of “common property” in these terms. The *Robinson Township* plurality explained that “[t]his environmental public trust was created by the people of Pennsylvania, as the common owners of the Commonwealth’s public natural resources”¹⁶² In a later case, the majority explained that the first sentence of the public trust clause of Article I, §27 recognizes “the common ownership by the people, including future generations, of Pennsylvania’s public natural resources.”¹⁶³ This common ownership, the court stated, applies to public natural resources, including the list of resources in the original version of the amendment—air, water, fish, and wildlife, as well as the public lands and property of the commonwealth.¹⁶⁴

In addition, because the second sentence of the public trust clause recognizes the commonwealth as trustee for these resources, it follows that the people, as common owners, are beneficiaries of this public trust. Under traditional private trust law, which is to be used to interpret §27, the people, including future generations, are the equitable or beneficial owners of the trust corpus, and the state as trustee is the legal owner.¹⁶⁵ As a result, the commonwealth does not “own” these resources outright, even public natural resource lands that, according to their deeds, are held in fee simple absolute. Rather, public natural resources are held in trust, subject to the equitable or beneficial interest of the people, including future generations, as beneficiaries.

Legal ownership of these public natural resources as a trustee, however, has important consequences for the protection of these resources. Then-Justice William H. Rehnquist’s dissent in a 1979 decision noted that although states do not “own” wild animals “in any conventional sense of the word,” this does not mean that “the concept expressed by the ‘ownership’ doctrine is obsolete.” Rather, he wrote, the Court recognizes that “ownership language . . . is simply a shorthand way of describing a State’s substantial interest in preserving and regulating . . . fish and game.”¹⁶⁶ In Pennsylvania, however, the

commonwealth has more than a “substantial interest” in such public natural resources; it also has a constitutional public trust responsibility.

Moreover, as beneficiaries, the people have the right to sue commonwealth trustees for failure to carry out their §27 fiduciary duties. The ability of beneficiaries to sue to enforce Pennsylvania’s common-law public trust was unclear prior to §27’s adoption.¹⁶⁷ The courts recognized the public’s right to sue under §27 shortly after its adoption. In its 1973 decision in *Payne v. Kassab*, the commonwealth court decided that the local citizen plaintiffs had standing to enforce the public trust clause of Article I, §27 to protect the land and natural features of a public park.¹⁶⁸ On appeal, the supreme court affirmed the standing of the plaintiffs to bring an action to enforce the constitutional public trust without any further legislative action.¹⁶⁹ In 2017, in *PEDF II*, the supreme court reaffirmed its earlier holding in *Payne* by stating that “the Commonwealth’s obligations as trustee ‘create a right in the people to seek to enforce the obligations.’”¹⁷⁰

The commonwealth court’s *Payne* decision, unfortunately, also included the three-part balancing test referred to earlier.¹⁷¹ That meant the near dormancy of the environmental rights amendment for more than 40 years.¹⁷² When the Pennsylvania Supreme Court resurrected its text, it recognized the meaning of the public trust clause, including the explicit statement in its first sentence that public natural resources are the common property of present and future generations. In *PEDF II*, the supreme court rejected the *Payne* test, explaining that it is “unrelated to the text of Section 27 and the trust principles animating it, [and] strips the constitutional provision of its meaning.”¹⁷³ Instead, the court in this and a subsequent

160. *Arnold v. Mundy*, 6 N.J.L. 1, 71 (N.J. 1821).

161. See Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 *YALE L.J.* 72, 74-75 (2005) (explaining ability of states to modify property law, subject to federal constitutional restrictions).

162. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956 (Pa. 2013).

163. *PEDF II*, 161 A.3d 911, 931 (Pa. 2017).

164. *Id.* In a later case, the court held that the commonwealth cannot, “as trustee of the constitutional trust created for the conservation and maintenance of the public natural resources that are owned by ‘all of the people,’ . . . divert for its own use revenue generated from the trust and its administration.” *PEDF V*, 255 A.3d 289, 313 (Pa. 2021).

165. See *infra* note 200 and accompanying text.

166. *Hughes v. Oklahoma*, 441 U.S. 322, 341-42 (1979) (Rehnquist, J., dissenting). For a detailed explanation, see Dale Goble, *Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 *ENV’T L.* 807 (2005).

167. Broughton, *supra* note 56, at 423 n.5.

168. 312 A.2d 86, 97 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263 (Pa. 1976).

169. *Payne*, 361 A.2d at 272-73 & n.21. In *Robinson Township*, the supreme court explained that §27 is self-executing, and that a long-established rule of constitutional construction is that “prohibitive and restrictive provisions . . . may be enforced by the courts independently of any legislative action.” 83 A.3d 901, 974 (Pa. 2013) (citing *Commonwealth ex rel. Logan v. Hiltner*, 161 A. 323, 325 (Pa. 1932)).

170. *PEDF II*, 161 A.3d 911, 937 (Pa. 2017) (quoting *Robinson Twp.*, 83 A.3d at 974). The court not only presented concurring analyses from earlier cases, but pointed to additional support in the amendment’s legislative history that demonstrated the General Assembly’s intent that the amendment “immediately create rights to prevent the government (state, local, or an authority) from taking positive action which unduly harms environmental quality.” *Id.* at 938 (citing Broughton, *supra* note 56, at 438).

171. The test, which was intended to be used instead of the text of §27, is as follows:

The court’s role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Payne, 312 A.2d at 94.

172. John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 *DUQ. L. REV.* 335 (2015) (describing all cases decided under the *Payne* test, and showing that environmental advocates rarely prevailed).

173. *PEDF II*, 161 A.3d at 930.

case said that “the proper standard of judicial review lies in the text of Article I, §27 itself as well as the underlying principles of Pennsylvania private trust law in effect at the time of its enactment.”¹⁷⁴

PEDF II involved the lawfulness of legislation that authorized the use of royalty money received from oil and gas drilling on state forest and park land in any way the state saw fit. Because of the shale gas (hydrofracturing or fracking) boom, royalty and other revenues were nearly \$1 billion in total between 2008 and 2015,¹⁷⁵ compared to vastly lower sums from conventional oil and gas in earlier years. The supreme court held that royalties received from oil and gas leasing on these state lands must be used for conservation and maintenance of public natural resources because both these lands, and the oil and gas contained in them, constitute public natural resources.¹⁷⁶ As a result, they are subject to the public’s right to have them conserved and maintained for the benefit of future generations.

When these public natural resources are converted to cash through the leasing process, the court held, the resulting cash is subject to the same public trust stricture.¹⁷⁷ The state cannot, the supreme court held, lease public natural resources for cash, and then spend the resulting royalty receipts however it prefers. But the court remanded to the commonwealth court the question of whether bonus, rental, and other nonroyalty receipts from oil and gas leasing on public lands are subject to the same restriction.¹⁷⁸

On remand, the commonwealth court held that the state could spend one-third of the nonroyalty income from oil and gas leasing on state forest land for purposes other than conserving and maintaining public natural resources—that is, it could spend this money any way it saw fit.¹⁷⁹ Under this decision, this money would almost certainly be spent for the present generation of beneficiaries. The court used a 1947 trust statute to support its conclusion, reasoning that the constitutional public trust is like other trusts, which allow one-third of the income from the trust to be distributed to life beneficiaries while the rest of the income remains in the trust corpus, to be distributed later to remaindermen.¹⁸⁰

In 2021, the Pennsylvania Supreme Court reversed, holding that the text of the environmental rights amendment does not allow the diversion of public trust money in this way.¹⁸¹ The court explained that the public trust clause contains no express language creating income entitlements; there was thus no textual basis for the commonwealth court’s decision.¹⁸² The supreme court also held that the “cross-generational” nature of the trust—both present

and future generations are beneficiaries—means that the commonwealth cannot lawfully spend trust money for the present generation only. The court stated:

Far from setting up any kind of conflict between these beneficiaries regarding profiting from trust assets, the express inclusion of generations yet to come in “all of the people” establishes that current and future Pennsylvanians stand on equal footing and have identical interests in the environmental values broadly protected by the [amendment].¹⁸³

While the phrase “conserve and maintain” implies an intergenerational responsibility, the fact that both present and future generations are owners of this common property makes the intergenerational responsibility explicit. The court explained:

The explicit inclusion as simultaneous beneficiaries of the future generations of Pennsylvanians creates a cross-generational dimension and reminds the Commonwealth that it may not succumb to “the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office.”¹⁸⁴

The explicit cross-generational nature of common ownership of public natural resources, and thus beneficiaries of the public trust, enshrines intergenerational equity into the constitution.¹⁸⁵

Finally, the constitutional assertion of public natural resources as the people’s common property, as well as the public trust consequences that accompany that assertion, grow out of a public referendum approving Article I, §27 by an overwhelming vote. Courts interpreting and applying the amendment are simply following the constitution. Courts in other states without such constitutional provisions have tended to refrain from extending their common-law public trust doctrine to natural resources other than the navigable waterways to which they are traditionally limited.¹⁸⁶ In Pennsylvania, the constitution has already done that through a democratic process. That said, there has been one clear case of judicial activism in the history of §27. It is the invention of the now-defunct *Payne v. Kassab* test, which was explicitly designed to replace the constitutional text.¹⁸⁷

174. *PEDF VI*, 279 A.3d 1194, 1202 (Pa. 2022) (quoting *PEDF II*, 161 A.3d at 930).

175. *PEDF II*, 161 A.3d at 925.

176. *Id.* at 931.

177. *Id.* at 935 (holding that royalties “are part of the corpus of the trust and the Commonwealth must manage them pursuant to its duties as trustee”).

178. *Id.* at 936.

179. *PEDF III*, 214 A.3d 748 (Pa. Commw. Ct. 2019).

180. *Id.* at 773-74.

181. *PEDF V*, 255 A.3d 289, 293 (Pa. 2021).

182. *Id.* at 310-14.

183. *Id.* at 310.

184. *Id.* (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 959 n.46 (Pa. 2013)).

185. A rich literature on this subject is summarized in Edith Brown Weiss, *Intergenerational Equity*, MAX PLANCK ENCYCLOPEDIA PUB. INT’L L., <https://opil.ouplaw.com/display/10.1093/law/epil/9780199231690/law-9780199231690-e1421?prd=MPIL> (last updated Apr. 2021).

186. See *supra* note 45. See also Sax, *supra* note 107, at 185.

187. 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263 (Pa. 1976) (explaining the test as a “realistic and not merely legalistic” means of deciding whether the amendment had been violated).

C. Legislative History

Unlike “public natural resources,” which emerged from two changes during the legislative process, the term “common property” went through the legislative process unchanged. Indeed, the entire common property sentence went through the process unchanged. Still, the amendments to the term “public natural resources” shed considerable light on its meaning. First, and perhaps most obviously, the term “common property” does not mean private property. Otherwise, there would have been no need to change “natural resources” to “public natural resources.” This point is underscored by the words following “common property”—“of all the people, including generations yet to come.”

Second, “common property” is not limited to the type of property that the state owned like other property prior to §27’s enactment. If the legislature had meant that, it would have limited the original list of natural resources—“air, waters, fish, wildlife, and the public lands and property of the Commonwealth”—to “the public lands and property of the Commonwealth.” The first sentence of the public trust clause might thus have been written as follows: “Pennsylvania’s public natural resource lands and property are the common property of all the people, including generations yet to come.”¹⁸⁸ Language like this would plainly have generally excluded “air, waters, fish, [and] wildlife” from the constitutional public trust.

But that is not how the legislature proceeded, or how Article I, §27 reads. Put differently, “common property” intentionally and necessarily includes public natural resources that are not traditional public trust lands and property. These include, but are not limited to, “air, waters, fish, [and] wildlife.” Since passage of Article I, §27, the General Assembly has adopted fish and game statutes that specifically claim public ownership of these resources.¹⁸⁹

The commonwealth court confirmed both of these meanings in *Air-Serv Group, LLC v. Commonwealth*,¹⁹⁰ a tax case. Air-Serv Group (ASG) “owns, installs, maintains, and services coin operated air vending machines,” which are used primarily to inflate automobile tires at gas stations and convenience stores.¹⁹¹ ASG challenged a Department of Revenue decision that the use of these vending machines

was subject to a state sales tax because they were used to sell air. The parties stipulated that these vending machines pump atmospheric air through a compressor that inflates tires.¹⁹² The Department argued that it was authorized to tax ASG’s vending machines because this pressurized air “is not the equivalent of atmospheric air.”¹⁹³

The commonwealth court rejected this argument based on state sales tax law because “air taken from the atmosphere is taxable only when it has been changed, separated, processed and/or bottled and then sold commercially.”¹⁹⁴ Here, the vending machines were used to sell air they had simply taken from the atmosphere and compressed.¹⁹⁵ The company cannot be taxed for selling such air, the court decided.¹⁹⁶ The court also rejected this argument based on public trust law. Because the “atmosphere is not subject to ownership by any private individual, group, or entity,”¹⁹⁷ the court decided, ASG cannot be taxed for selling what it does not own. The air is *res communes*,¹⁹⁸ the court held, explaining that this conclusion is consistent with Article I, §27 because public natural resources such as air are “the common property of all the people, including generations yet to come.”¹⁹⁹

From all of this, two conclusions are unmistakable: common property is not private property, and it includes resources like air that the state did not own prior to adoption of the amendment, but for which it now has a constitutional trust responsibility.

D. Common Property and Article I, §27

The history of common property recounted in Part II.A informs the meaning of Article I, §27, and particularly common property as it is used in the amendment. It makes clear that common property includes specific types of public natural resources for which the commonwealth does not have formal title. It also shows that the government’s interest in common property is best understood as a legal trustee whether or not it has formal title to public natural resources, and that the public’s legal interest is best understood as that of beneficiary. That is what it means for these resources to be “the common property of all the people, including generations yet to come.” In addition, these cases emphasize the importance of holding common property resources open for public use and enjoyment, and limiting

188. If it had done that, the second sentence of the public trust clause would likely read something like this: “As trustee of these lands and this property, the Commonwealth shall conserve and maintain them for the benefit of all the people” (substituting “these lands and this property” for “these resources”).

189. See 30 PA. CONS. STAT. ANN. §2506(a), (b) (1980) (stating that the “proprietary ownership, jurisdiction, and control of fish, living free in nature, are vested in this Commonwealth,” and identifying Pennsylvania Fish and Boat Commission as state agency “authorized to regulate, control, manage and perpetuate fish”). Before Article I, §27 was adopted, the superior court held that while “the state has power to preserve and control” fish for “the enjoyment of all citizens,” the state did not own the fish. *Commonwealth v. Agway, Inc.*, 232 A.2d 69, 71 (Pa. Super. Ct. 1967).

See also 34 PA. CONS. STAT. ANN. §103(a) (provision of 1986 Game Code vesting “ownership, jurisdiction over and control of game or wildlife” in Pennsylvania Game Commission); *Pennsylvania Game Comm’n v. Marich*, 666 A.2d 253 (Pa. 1995) (assuming that sea ducks whose hunting is regulated by the Game Commission are covered by Article I, §27).

190. 18 A.3d 448 (Pa. Commw. Ct. 2011).

191. *Id.* at 449.

192. *Id.* at 452.

193. *Id.*

194. *Id.* at 453.

195. *Id.* at 452-53 (accepting as fact that “air compressors do not change the chemical composition of air or the mixture of the air that is pumped through the device but merely compress the air to a selected number of pounds per square inch”).

196. *Id.* at 453. The court also distinguished *Commonwealth v. Air Products & Chemicals, Inc.*, 380 A.2d 741 (Pa. 1977), in which the supreme court held that a company was legally responsible for paying a sales tax when it used an industrial process to convert atmospheric air into its constituent gases, thus creating a taxable manufactured product. Here, by contrast, there was no such transformation. *Air-Serv Grp.*, 18 A.3d at 453.

197. *Air-Serv Grp.*, 18 A.3d at 454.

198. *Id.* at 453-54 (quoting *Res Communes*, BLACK’S LAW DICTIONARY (9th ed. 2009)).

199. *Id.* at 454.

the ability of private parties to use or restrict the use of these resources in ways that adversely affect constitutional public rights.

This history also provides a way of understanding common property that harmonizes public trust law with private trust law. Because common property in Article I, §27 is expressed in terms of a trust relationship between the commonwealth as trustee and “the people” as beneficiaries, common property can only be understood in terms of trust law. Pennsylvania’s long-standing private trust law, which as explained earlier is to be used to interpret the public trust clause, recognizes two kinds of ownership in trust property. The trustee is the legal owner, and is legally responsible for managing the trust for the benefit of the beneficiaries. The beneficiaries are the equitable owners, and have a legal right to enjoy the benefits of the trust.²⁰⁰ In that sense, public natural resources are the common property of all people, including future generations, and they are common owners of that property, with the right to benefit from the public trust.

In these common property cases, the public’s interest is expressed in terms of the right to use navigable waterways for fishing, navigation, and other purposes. As the court stated in *Arnold*, common property is “common to all the citizens, who take of them and use them, each according to his necessities.”²⁰¹ For some public natural resources, such as air, water, fish, and wildlife, the government’s interest is not expressed in terms of absolute or fee simple ownership. Because title to such common property cannot “be vested in all the people,” the law “has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit.”²⁰²

Prof. Gerald Torres explains it this way:

The principle of *res communes* was expressed in the English common law and in 19th century American law as *jus publicum*. The historic limitation of the reach of the public trust moderated to the extent that public property such as natural resources are owned by the state for the people. How does the state own it? Is it always and everywhere the same as ordinary private fee simple ownership? The lesson of the public trust doctrine is that such properties are held by the state for the people and are limited by those interests that are clearly public. In addition, to the extent that the state ownership is of *res communes*, that ownership is incomplete ownership. The beneficial interest in any *res communes* is held by the people in common. The state does not *own* a river or the sky like it owns the furniture in the state house. The power of the government to divest the

people of their common interest is limited by the interests of the people.²⁰³

This trust relationship for common property between the government and the people has other legal consequences under Article I, §27. To begin with, because public natural resources cannot be private property, private parties cannot permanently appropriate these resources as their own property in ways that exclude or limit others in their use or enjoyment of these resources. This was, in fact, the key holding in all three of the navigable waterways cases. Significantly, in each of them, private parties tried to prevent others from accessing parts of waterways that they claimed as their own property, thus impairing their public availability. In so doing, they invoked what may be the most fundamental property right, the right to exclude.²⁰⁴ And they lost because these resources were not their exclusive property in the first place.

In addition, because public natural resources are common property, the government must manage these resources according to the terms of the constitutional public trust and its fiduciary duties to ensure not only protection but also their continued public availability. The commonwealth cannot act in ways that substantially impair public access to public natural resources, and must protect against private actions that would significantly intrude against their public availability, now and in the future. It also means that the commonwealth may not allow some persons to use these resources in ways that violate the terms of the trust or compromise the ability of these resources to be used by others, including future generations.

The common property cases make this evolving governmental trust responsibility quite clear. It is one thing to say, as the *Carson* court did, that navigable waterways must be open to all.²⁰⁵ It is quite another to also say, as the *Arnold* court did, that the government must ensure that these waterways are open to all.²⁰⁶ And in *Geer*, the Supreme Court traced that same evolution for game animals. The “fundamental principles upon which the common property in game rest have undergone no change,” the Court explained. What has changed is “recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised . . . as a trust for the benefit of the people . . .”²⁰⁷ Section 27 is consistent with this evolving understanding. It confirms the commonwealth’s public trust responsibility to conserve and maintain public natural resources, including but not

200. See *In re The John Wilde & Josephine A. Wilde Income Only Protector Tr.*, 303 A.3d 902, 908 (Pa. Commw. Ct. 2023) (citations omitted) (explaining trustee as legal owner and beneficiary as equitable owner). This is basic trust law. RESTATEMENT (FOURTH) OF PROPERTY §1.3 cmt. a (Am. L. Inst. 2025). See also *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) (explaining distinction between legal and equitable interest in public trust context for submerged lands).

201. *Arnold v. Mundy*, 6 N.J.L. 1, 71 (N.J. 1821).

202. *Id.*

203. Torres, *supra* note 90, at 242. See also Wood, *supra* note 20, at 1233 (explaining that the public trust doctrine “establishes public property rights, so it provides a direct check against the privatization and monopolization that has caused so many resources to be treated as commodities for the singular benefit of profiteers”).

204. Rose, *supra* note 99, at 711 (citing Blackstone’s *Commentaries* and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (the right to exclude is the most valuable element of property)).

205. *Carson v. Blazer*, 2 Binn. 475, 494 (Pa. 1810).

206. See *supra* notes 128–33 and accompanying text.

207. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

limited to air, water, fish and wildlife, as common property for all the people, including future generations.²⁰⁸

As a consequence, the commonwealth cannot use public natural resources for its own purposes, use them for non-trust purposes, or convey them to private parties so as to divest the people of their “common right” to these resources.²⁰⁹ The commonwealth, as the *Arnold* court explained, may not act as a proprietor of public natural resources, using them for its own benefit.²¹⁰

None of these resolve the myriad specific conflicts that can and do exist between and among people and commonwealth entities over protection and availability of public natural resources. But they do provide a structure and legal guardrails for addressing them. Supreme court decisions have made clear the commonwealth’s obligations to conserve and maintain public natural resources, not only for the present generation, but also for future generations.²¹¹ These obligations mean that the commonwealth must “prevent and remedy the degradation, diminution, or depletion of our public natural resources.”²¹²

Conservation, one of the commonwealth’s core constitutional duties, refers to a set of practices that combine the use of land and resources with environmental protection: “Genuine conservation can occur only when humans intentionally use resources at less than maximum sustainable rates or forego the use of some resources altogether.”²¹³ “The conservation of natural resources is the key to the future,” wrote Gifford Pinchot, who was a Pennsylvania governor as well as the first director of the U.S. Forest Service.²¹⁴ “The very existence of our nation, and of all the rest, depends on conserving the resources which are the foundations of its life.”²¹⁵ The *Robinson Township* plurality

referred to the realization of both protection *and* use as sustainable development.²¹⁶

E. Public Values Served by Common Property

These rules for the governance of common property serve important public purposes. They provide a basis for ensuring that resources essential to human life and well-being are effectively protected. They help ensure that these resources are available to all, regardless of social, political, or economic status. They help protect public expectations in the continued use and enjoyment of these resources over many generations. And they give appropriate and meaningful protection to both private property and public property.

Common property provides a legal foundation for protecting resources essential to human life and well-being. It involves public rights to use waterways for navigation, fishing, shellfish harvesting, and other purposes, and public rights to game animals—which were and continue to be necessary not only for commerce but also for food. As suggested above, these should also include resources necessary for protection of the qualities and values expressed in the environmental rights clause of Article I, §27—“clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment.”²¹⁷ “[T]he logic animating the trust,” Prof. Mary Christina Wood has written, “is that citizens would never give their government power to impair resources crucial to their survival and welfare, so they implicitly reserve unto themselves common property rights to these vital resources.”²¹⁸

This is even more true in Pennsylvania because the environmental rights amendment is explicitly set out in Article I of the constitution, the state’s Declaration of Rights. Article I, §1 affirms that all citizens “have certain inherent and inalienable rights.”²¹⁹ As the supreme court has explained, these rights include those in the environmental rights amendment.²²⁰ Article I, §25, moreover, states that

208. The obligation to engage in active management for this purpose also avoids the potential for multiple users who, without self-regulation or government regulation, destroy or severely damage common property. See Garret Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). See also BURNS H. WESTON & DAVID BOLLIER, *GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS* 240-41 (2013). But there is considerable evidence that informal self-regulation actually works. See OSTROM, *supra* note 112.

209. See *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

210. *Arnold v. Mundy*, 6 N.J.L. 1, 77 (N.J. 1821). See also *Geer*, 161 U.S. at 529: [T]he power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

State v. Rodman, 59 N.W. 1098, 1099 (Minn. 1894):

We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative, and for the benefit, of all its people in common.

As part of the legislative history for Article I, §27, Professor Broughton made the same point—that the commonwealth must act as a trustee of these resources, and not as a proprietor. Broughton, *supra* note 56, at 423. The supreme court has frequently cited Broughton on this point. See, e.g., *PEDF II*, 161 A.3d 911, 932 (Pa. 2017).

211. See *supra* notes 22-31 and accompanying text.

212. *PEDF II*, 161 A.3d at 932, 935 (citing *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013)).

213. FRED VAN DYKE & RACHEL L. LAMB, *CONSERVATION BIOLOGY: FOUNDATIONS, CONCEPTS, APPLICATIONS* 3 (3d ed. 2020).

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

215. *Id.*

216. The plurality stated:

Of course, the trust’s express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather, as with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.

Robinson Twp., 83 A.3d at 958 (citations omitted). The term “sustainable development” was first used in 1980, when the International Union for Conservation of Nature and Natural Resources (IUCN) published a conservation strategy for living resources that explained conservation and development, taken together, as sustainable development. IUCN, *WORLD CONSERVATION STRATEGY: LIVING RESOURCE CONSERVATION FOR SUSTAINABLE DEVELOPMENT* (1980).

217. PA. CONST. art. I, §27.

218. Wood, *supra* note 60, at 579. For a more extended discussion of the public trust as representing the reserved inalienable rights of the people, see *id.* at 579-83.

219. PA. CONST. art. I, §1.

220. “The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution—vis-à-vis the government created by the people—are inherent in man’s nature and preserved rather than created by the Pennsylvania Constitution.” *PEDF V*, 255 A.3d 289, 313 (Pa. 2021) (quoting *Robinson Twp.*, 83 A.3d at 948). See also *Arnold v. Mundy*, 6 N.J.L. 1, 74 (N.J. 1821), explaining that the state “cannot, consistently with the

all provisions of Article I are “excepted out of the general powers of government and shall forever remain inviolate.”²²¹ The constitutional status of this limitation underscores the importance of protecting these vital resources.

Constitutional protection of common property helps ensure that these resources are available, as Article I, §27 says, to “all the people, including generations yet to come.” Availability and protection are mutually reinforcing principles. Availability of public natural resources to future generations requires protection (in the form of conservation and maintenance) by the current generation. The private trust principle of impartiality, endorsed by the supreme court for use in applying Article I, §27, requires the commonwealth to manage “the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust.”²²² This principle applies not only to protection of public natural resources; it also applies to availability.

A plurality of the supreme court has applied the principle of impartiality to conservation and maintenance of public natural resources. In *Robinson Township*, the Pennsylvania Supreme Court held several provisions of recently adopted shale gas legislation to be unconstitutional.²²³ A plurality of the court, which based their decision on Article I, §27, stated that two of these provisions violated the duty of impartiality. In both, the plurality did not address whether the legislature intended for disparate effects to occur; instead, the plurality said that these provisions were unlawful because they had different effects on different groups of beneficiaries.

One provision required local governments to approve unconventional (i.e., shale) gas permits in all zoning districts, including residential zoning districts.²²⁴ Under that provision, the court reasoned, “some properties and communities will carry much heavier environmental and habitability burdens than others.”²²⁵ The plurality reasoned that this result is inconsistent with the express constitutional obligation that the trustee act for the benefit of “*all the people*.”²²⁶

The second legislative provision allowed, but did not require, the Department of Environmental Protection (DEP) to consider comments by municipalities on applications for well permits, and it specifically prohibited municipalities from appealing DEP well permit decisions even though permit applicants were allowed to appeal.²²⁷ This provision “marginalizes” participation by municipalities, the plurality found. Such “inequitable treatment of

trust beneficiaries is irreconcilable with the trustee duty of impartiality.”²²⁸ What is true for protection is also true for availability, particularly because these public natural resources are the common property of all people.

Moreover, while the public may use these resources for fishing, hunting, navigation, commerce, drinking water, and the like, no one—now or in the future—can appropriate them in ways that permanently constrain their public availability. Indeed, the public trust doctrine in the United States developed as a way of preventing the privatization and monopoly control of natural resources essential for public well-being.²²⁹ The common property cases involving navigable waterways discussed above all involve judicial rejection of efforts by private parties to control access to, and thus the public availability of, common property.

A 2025 commonwealth court decision involving a 348-acre public park in South Philadelphia illustrates the distinction between protection and public use.²³⁰ In this case, neighboring residents challenged the city’s plan to convert 40 acres of this park, now comprising “forests, heritage trees, meadows, and wetlands used for hiking, picnicking and birdwatching,” into athletic fields, basketball courts, and parking lots.²³¹ They objected on two grounds.

First, they argued, the “athletic fields will be gated and used for sports tournaments,” and will therefore “no longer be available for public use.” Second, they claimed that the destruction and conversion of the natural area in the park is inconsistent with the purpose for which the park was dedicated—“a public parkland.”²³² As a result, they argued, the city’s plan would violate the Pennsylvania statute involving publicly dedicated property as well as §27.²³³

The court remanded the matter to a lower court for an evidentiary hearing. In so doing, it held that local officials making decisions about the future use of dedicated park property must read this statute “through the lens of the Environmental Rights Amendment.”²³⁴ However this case is ultimately decided, it illustrates that limitations on public use as well as environmental degradation can be the basis for claimed violations of the §27 public trust.

In addition, common property provides meaningful and appropriate protection to both public and private property. It recognizes the separate integrity of each, even though there may be overlap and ambiguity at the boundaries. As explained above, the common property clause was amended during the legislative process to prevent the conversion of private natural resources into public natural resources. Yet, the clause also makes clear public natural resources—whether owned by the commonwealth in the real property sense or not—are now common property.

principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.” The court added: “It would be a grievance which never could be long borne by a free people.” *Id.*

221. PA. CONST. art. I, §25.

222. *PEDF II*, 161 A.3d 911, 932 (Pa. 2017).

223. *Robinson Twp.*, 83 A.3d 901.

224. 58 PA. CONS. STAT. §3304 (2012) (held unconstitutional in *Robinson Twp.*, 83 A.3d at 973-74).

225. *Robinson Twp.*, 83 A.3d at 980.

226. *Id.* (emphasis added).

227. 58 PA. CONS. STAT. §3215(d) (2012) (held unconstitutional in *Robinson Twp.*, 83 A.3d at 973-74, 984-85).

228. *Robinson Twp.*, 83 A.3d at 984 (citing *In re Est. of Hamill*, 410 A.2d 770, 773 (Pa. 1980); 20 PA. CONS. STAT. §7773).

229. Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENV’T AFFS. L. REV. 1 (2017).

230. *In re FDR Park*, 344 A.3d 461 (Pa. Commw. Ct. 2025).

231. *Id.* at 465, 468.

232. *Id.* at 473-74.

233. *Id.* at 466. See also *supra* note 158 (briefly explaining Pennsylvania statute on dedicated property).

234. *FDR Park*, 344 A.3d at 475.

More broadly, the constitutional status of the public trust (and environmental rights) under Article I, §27 provides a counterweight to claims that environmental actions by commonwealth entities constitute a taking of private property without compensation.²³⁵ Because “the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible.”²³⁶ This means, the commonwealth court has stated, that a municipality adopting a zoning ordinance is “bound by the Environmental Rights Amendment and by all of the [other] rights protected in Article I of the Pennsylvania Constitution,” which includes protection against an uncompensated taking of private property.²³⁷

Critically, this is not the same thing as generalized balancing of the environmental and economic aspects of an action. It is a rule of constitutional law, and it means that both property rights and environmental rights (including public trust rights) must be weighed as equal when they are both properly invoked and at issue. This rule of constitutional law is only invoked when there are competing constitutionally protected property and environmental rights. It cannot properly be invoked when there are constitutionally protected environmental rights but economic interests that do not rise to the level of a plausible unconstitutional taking.

The use of constitutionally protected environmental rights as a counterweight to the assertion of property rights is important when one considers what happens when there is no constitutional public trust for natural resources. Public natural resources, as explained earlier, are vulnerable to exploitation by private parties for their own interests. Prof. Erin Ryan explains in detail the chronic and perhaps deepening of privatization of the public commons at the federal level through the use of legal instruments that provide private rights in the public’s natural resources.²³⁸ To counter that, she proposes modifying “regulatory takings jurisprudence to better account for the balance of public and private rights in natural resource commons.”²³⁹ For public natural resources in Pennsylvania, by contrast, common property is already a constitutional counterweight.

Finally, the concept of common property protects reasonable public expectations in the continued availability of public natural resources as provided by the constitution. The public trust clause of Article I, §27 emphasizes the need for multigenerational continuity by stating that common property is to be available to both present and future generations. As noted earlier, the state supreme court has

held that present and future generations are “simultaneous beneficiaries” of the constitutional public trust.²⁴⁰ Just as “respect for reasonable expectations” is essential for private property, so it is or should be for common property.²⁴¹ The chief purpose of the public trust doctrine, Professor Sax wrote, is to prevent “the destabilizing disappointment of expectations held in common but without formal recognition such as title.”²⁴²

The *Robinson Township* plurality used a somewhat similar rationale for invalidating legislation based on Article I, §27.²⁴³ In addition to the legislative provisions described above, the challenged legislation substituted statewide rules for determining the location of shale gas facilities such as wells and compressor stations for local zoning rules that historically had determined their location.

The plurality decided that this statute violated §27 because existing local environmental regulation “created reasonable expectations in the resident citizenry”²⁴⁴ and that the state’s police power “does not encompass such authority as to fundamentally disrupt those expectations respecting the environment.”²⁴⁵ The new statute “alters existing expectations of communities and property owners and substantially diminishes natural and esthetic values of the local environment.”²⁴⁶ It “effectively disposed of the regulatory structures upon which citizens and communities made significant financial and quality of life decisions, and has sanctioned a direct and harmful degradation of the environmental quality of life in these communities and zoning districts.”²⁴⁷

The present and growing impact of climate change on public natural resources²⁴⁸ is perhaps the most important example of “destabilizing disappointment” of public expectations. These impacts include increased air pollution, greater water pollution, the loss of trout in many waterways, growing forest mortality, more flooding, and sea-level rise in the Delaware River estuary.²⁴⁹ Writing long before climate change became prominent, Sax’s words are prescient. “[O]ne of the most basic and persistent concerns of the legal system,” he stated, is a commitment to “evolutionary rather than revolutionary change, for the rate of change and the capacity it provides for transition are precisely what separate continuity and adaptation from crisis and collapse.”²⁵⁰ The speed and scale at which the climate is changing will be increasingly destabilizing, and require governments as trustees to protect present and future generations as beneficiaries.²⁵¹

235. PA. CONST. art. I, §10.

236. *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008); *Cavanaugh v. Davis*, 440 A.2d 1380, 1382 (Pa. 1982). This maxim helped justify the *Robinson Township* plurality’s decision to sharply criticize the three-part balancing test in *Payne* as inconsistent with the text of Article I, §27. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 946 (Pa. 2013). See also *Sprague v. Casey*, 550 A.2d 184, 191 (Pa. 1988) (citations omitted) (explaining that, under “established principles of constitutional construction,” the language of two constitutional provisions “must be read together” when they pertain “to the same subject matter”).

237. *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677 (Pa. Commw. Ct. 2018). See also PA. CONST. art. I, §10 (“nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured”).

238. Ryan, *supra* note 65, at 646-83.

239. *Id.* at 619, 718-50.

240. *PEDF V*, 255 A.3d 289, 309-10 (Pa. 2021).

241. Sax, *supra* note 107, at 186-87.

242. *Id.* at 188.

243. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

244. *Id.* at 977.

245. *Id.* at 978.

246. *Id.*

247. *Id.* at 980.

248. *McKinstry & Dernbach*, *supra* note 77, at 63-68. See also PENNSYLVANIA DEP, PENNSYLVANIA CLIMATE IMPACTS ASSESSMENT (2024), available at <https://www.pa.gov/agencies/dep/residents/climate-change/impacts>.

249. *McKinstry & Dernbach*, *supra* note 77, at 65-66.

250. Sax, *supra* note 107, at 188.

251. *McKinstry & Dernbach*, *supra* note 77, at 63-72.

III. Conclusion

This Article uses Pennsylvania's constitutional public trust as a lens for examining broader questions about the role of common property in any public trust. It argues that public natural resources, and thus common property in Pennsylvania, mean that the commonwealth has a constitutional public trust responsible for public natural resources ranging from natural resource lands to air, water, fish, and wildlife. It also explains the commonwealth's constitutional duties in managing "common property"—responsibilities regarding public availability that supplement and reinforce the commonwealth's responsibility for conserving and maintaining public natural resources.

More generally, common property in the Pennsylvania amendment can only be understood if one understands this clause in terms of its place in overall public trust law, in Pennsylvania and elsewhere, and not as a legal novelty. The

supreme court has made clear that the public trust clause is to be interpreted based on both its text, which states that public natural resources are the common property of present and future generations, and private trust law. If Pennsylvania environmental lawyers and decisionmakers need to learn private trust law, so too should they learn public trust law.

Finally, the meaning of this term in Pennsylvania law helps unpack the core meaning of the public trust doctrine in other states and countries. Some natural resources are so important to public well-being that they must be managed by government as a trustee, acting on behalf of present and future generations as simultaneous beneficiaries. The public trust doctrine is thus an important legal tool in protecting reasonable public expectations about the continuing quality and availability of these resources, and enabling us to better face the serious environmental challenges, including climate change, with which we are confronted.²⁵²

252. FRANKLIN L. KURY, *THE CONSTITUTIONAL QUESTION TO SAVE THE PLANET: THE PEOPLE'S RIGHT TO A HEALTHY ENVIRONMENT* (Env't L. Inst. 2021) (telling story of adoption of Article I, §27 and advocating that the federal government adopt a similar amendment).