

ARTICLES

# WHY CONSTITUTIONAL ENVIRONMENTAL RIGHTS DON'T MATTER

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## SUMMARY

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As the federal government abandons climate action and environmental protection, advocates and scholars pin their hopes on state constitutional amendments to fill the void. The underlying idea is that state constitutions will change hearts and minds, leading to fast and meaningful action. Detractors argue that these constitutional rights are meaningless. This Article provides original data on the role of state constitutional environmental rights in the day-to-day work of civil servants. It argues that environmental rights amendments are only one small part of complex systems that influence beliefs and actions on the ground, and do not have a direct impact on natural resources managers. It also highlights mechanisms to strengthen constitutional environmental rights: other rights, specifically the public trust doctrine, do have significant influence; advocates may bolster the meaning of environmental rights through trainings, linking them to native cultural rights, and through litigation; and state natural resources agencies need to be adequately funded and staffed.

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As the federal government retreats from environmental and public health protection, advocates and scholars are turning their attention to state law and state constitutional law to fill the void.<sup>1</sup> The stakes are high; the security of water resources, ecosystems, economies, and

the well-being of millions of people depend on the presence and enforcement of environmental law. Yet, the pace of global warming leaves vanishingly little time to adjust course. Inaction has its costs. So too does time and investment in well-meaning changes to law that will not lead to action. Are state constitutions up to the task?

Over the past half-century, advocates of environmental rights have succeeded in passing constitutional amendments in six states.<sup>2</sup> Environmental rights are now expe-

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1. *E.g.*, Quinn Yeagain, *Decarbonizing Constitutions*, 41 *YALE L. & POL'Y REV.* 1 (2022) (arguing that state constitutions provide a unique mechanism for furthering climate goals in the absence of federal action).

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2. Following Profs. John Dernbach and Amber Polk's restrained approaches, I include these as Illinois, Hawaii, Pennsylvania, Massachusetts, New York, and Montana. *See, e.g.*, John Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis*, in *ENVIRONMENTAL LAW BEFORE THE COURTS* (2023); *see also* Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 *HASTINGS L.J.* 123, 127 (2023). *Cf.* Barry E. Hill, *Environmental Rights, Public Trust, and Public Nuisance: Addressing Climate Injustices Through State Climate Liability Litigation*, 50 *ELR* 11022 (Dec. 2020), <https://www.elr.info/articles/elr-articles/environmental-rights-public-trust-and-public-nuisance-addressing-climate> (discussing Rhode Island's environmental constitutional provisions). Other states have adopted environmental provisions without explicitly creating rights, and this list is much longer. *E.g.*, Barton H. Thompson Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 *MONT. L. REV.* 157, 158 (2003).

riencing a “political revival”<sup>3</sup> at multiple scales, with some recent wins through litigation in Hawaii<sup>4</sup> and Montana.<sup>5</sup> At the global scale, environmental rights are now part of fundamental human rights.<sup>6</sup> Concurrent with these efforts, legal scholars have produced significant works that consider how environmental rights have been and may be litigated,<sup>7</sup> especially with regard to climate change. But the life of law is not limited to courtrooms and litigants.<sup>8</sup> To

answer whether constitutional environmental rights matter, we need to look to how those rights function, or fail, outside of traditional legal contexts.<sup>9</sup>

This Article brings a qualitative empirical approach<sup>10</sup> to this issue,<sup>11</sup> providing original data from the experience of bureaucrats in environmental and natural resources agencies—agencies that have enforcement and/or permitting authority over water and resources management—in a sample of states that (1) already had a constitutional right to a healthy environment, (2) faced unique environmental challenges, and (3) had different wording or structure of their amendments from other states.<sup>12</sup> Agency attorneys from Pennsylvania and New York declined on behalf of their agencies to participate in the study.<sup>13</sup> However, current and former natural resources agency staff in Montana and Hawaii did participate.<sup>14</sup>

Natural resources managers, of course, are not the only players who matter to securing a healthy environ-

3. Polk, *supra* note 2, at 125. See JAMES MAY & ERIN DALY, GLOBAL JUDICIAL HANDBOOK ON ENVIRONMENTAL CONSTITUTIONALISM (3d ed., United Nations Environment Programme 2019); Brian Preston, *The Nature, Content and Realisation of the Right to a Clean, Healthy and Sustainable Environment*, 36 J. ENV'T L. 159-85 (2024); Craig Martin, *Drop in the Ocean: The Hidden Power of Rights-Based Climate Change Litigation*, 56 CASE W. RES. J. INT'L L. 151 (2024) (discussing international environmental rights); MAYA K. VAN ROSSUM, THE GREEN AMENDMENT (2022).

Scholars in the late 20th century tended to be more skeptical of constitutional environmental rights. See, e.g., Barton H. Thompson Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 871 (1996); J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245 (1999).

4. Press Release, Josh Green, Governor, Hawaii, Historic Agreement Settles Navahine Climate Litigation (June 20, 2024), <https://perma.cc/4FFK-ALZ8>.

5. Held v. Montana, 560 P.3d 1235, 1260-61 (Mont. 2024).

6. The United Nations General Assembly voted to recognize a “human right to a clean, healthy and sustainable environment.” G.A. Res. A/76/300 (July 28, 2022).

7. Polk, *supra* note 2, at 127; 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. 693 (1998); John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, 97 DICK. L. REV. 104 (1999); John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENV'T L. 463 (2015); John Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 WIDENER COMMW. L. REV. 147 (2021); James R. May & Erin Daly, *Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, It Can.)*, 39 UCLA J. ENV'T L. & POL'Y 39, 58 (2021); James R. May, *Subnational Climate Rights in America*, 26 U. PA. J. CONST. L. 26, 45-60 (2024) (discussing litigation under state constitutional environmental rights); Rebecca Bratspies, *Administering Environmental Justice: How New York's Environmental Rights Amendment Could Transform Business as Usual*, 41 PACE ENV'T L. REV. 100 (2024) (discussing the interpretation and implementation of New York's environmental rights amendment); Paul Rink, *Conceptualizing U.S. Strategic Climate Rights Litigation*, 49 HARV. ENV'T L. REV. 149 (2025); Sarah Everhart, *Green Amendments and Ham: How Green Amendment Jurisprudence Can Inform Maine's Right to Food*, 16 ME. L. REV. 203 (2024); Evan Bianchi et al., *The Private Litigation Impact of New York's Green Amendment*, 49 COLUM. J. ENV'T L. 357 (2024); Sam Bookman, *Defensive Environmental Constitutionalism: American Possibilities*, 26 U. PA. J. CONST. L. 1 (2024); Johanna Adashek, *Do It for the Kids: Protecting Future Generations From Climate Change Impacts and Future Pandemics in Maryland Using an Environmental Rights Amendment*, 45 PUB. LAND & RES. L. REV. 113 (2022); Andrea White, *Protecting Future Generations From Climate Change in the United States*, 49 ECOLOGY L.Q. 501 (2022); Melanie Hess, *Building Blocks of a Fundamental Right: A Thought Experiment on the Constitutional Right to a Livable Climate*, 1 NOTRE DAME J. EMERGING TECH. 525 (2020); Sarah Hyde, *Healthy Environment, Healthy Mind: Constitutionally Guaranteeing Children the Right to a Healthy Environment*, 10 CHI.-KENT J. ENV'T & ENERGY L. 1 (2020); Hill, *supra* note 2; Jacob Elkin, *Environmental Justice and Pennsylvania's Environmental Rights Amendment: Applying the Duty of Impartiality to Discriminatory Siting*, 11 COLUM. J. RACE & L. 195 (2021).

8. Bryant G. Garth, *James Willard Hurst as Entrepreneur for the Field of Law and Social Science*, 18 L. & HIST. REV. 37 (2000); Michaela Anang-Hadjicostandi et al., *Environmental Geography and Law: Towards a Synthesis*, 99 TULANE L. REV. 811 (2025); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 282-92 (Harvard Univ. Press 1994); Melissa K. Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135 (2000); Melissa K. Scanlan, *Protecting the Public Trust and Human Rights in the Great Lakes*, 2006 MICH. ST. L. REV. 1333 (2006);

Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View Into the Trustee's World*, 39 ECOLOGY L.Q. 123 (2012); Sonya Ziaya, *The Secret Lives of Environmental Rights*, 41 PACE ENV'T L. REV. 345 (2024).

As Sam Bookman puts it, constitutional environmentalism matters “beyond the world of rights and courts.” Sam Bookman, *Demystifying Environmental Constitutionalism*, 54 ENV'T L. 1, 6 (2024). Paul Rink similarly points to potential societal consequences of litigation under constitutional environmental rights in his discussion of “category 3” and “category 4” climate litigation. Rink, *supra* note 7, at 190-205 (2025) (discussing broader societal impacts beyond successes in the courtroom).

9. See Bryant Garth & Austin Sarat, *Studying How Law Matters: An Introduction*, in HOW DOES LAW MATTER 3-5 (Garth & Sarat eds. 1998) (discussing the relationship between law on the books and law in action as understood by generations of law and society scholars).

10. The methods and interview instruments for this project were reviewed and approved by the University of Baltimore Institutional Review Board on October 19, 2021.

11. The lack of empirical studies of how environmental rights work on the ground has been a concern for scholars in this area. See, e.g., James R. May, *The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes*, 42 CARDOZO L. REV. 983, 987 (2021) (“There is also sparse demonstrable evidence that legal recognition of a right to a healthy environment improves environmental outcomes, suggesting a need for further interrogation.”).

12. My gratitude to Profs. Katrina Kuh, Richard Wallsgrove, Sandra Zellmar, and John Dernbach for making initial introductions in state agencies.

13. Despite kind introductions from key gatekeepers, New York declined to participate because of pending litigation over its recently adopted amendment, and Pennsylvania similarly declined to participate. These early setbacks, though, are consistent with the practice of interdisciplinary research. See, e.g., Simon Halliday & Patrick Schmidt, *CONDUCTING LAW AND SOCIETY RESEARCH 5-7* (2009) (discussing the role of serendipity and bad luck in law and society scholarship).

14. HAW. CONST. art. XI, §9:

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. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

MONT. CONST. art. II, §3 (“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . . In enjoying these rights, all persons recognize corresponding responsibilities.”). MONT. CONST. art. IX, §1:

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

ment. Activists,<sup>15</sup> legislators, media, and corporations<sup>16</sup> play important roles—for better and for worse. But environmental protection necessarily depends on monitoring, limiting access and withdrawal (e.g., permitting), and enforcement.<sup>17</sup> In the 21st century, these tasks heavily depend on technocratic bureaucracy, which is why I center them in this investigation.

For the people tasked with protecting water and other natural resources, what meaning do constitutional environmental rights hold? How do such rights impact the day-to-day work of natural resources agency staff? Based on interviews combined with examination of agency documents and court cases, the Article argues that constitutional environmental rights amendments are only one small part of social-ecological systems that influence state natural resources managers' beliefs and actions.

These amendments are weak on their own, and are generally seen as unimportant by managers. Advocates can bolster the meaning of environmental rights through trainings, linking them to native cultural rights, and through litigation. But ultimately, the ability of natural resources managers to give effect to those rights depends on the capacity of the agency as well as political economic conditions, which are felt more keenly by natural resources managers than constitutional law.

Put differently, think of law as software. State agency budgets and staff are hardware. We have been stripping the copper for the past 40 years, making software updates questionably useful, without durable fixes to the hardware. For constitutional environmental rights to make a difference, state natural resources agencies need to be adequately funded and staffed.<sup>18</sup>

Why should legal scholars and practitioners care about what natural resources managers think or say about constitutional environmental rights? The responses of these managers reveal how state constitutional environmental rights work on the ground. Litigation is an expensive and uncertain endeavor.<sup>19</sup> If legal scholars, practitioners, and advocates want to understand whether constitutional envi-

ronmental rights are producing the changes they hope for, they need to look outside the courts.

This Article provides original data, based on interviews and triangulation with natural resources managers, in jurisdictions with a long-standing right to a healthy environment. Insights from participants suggest some ways to strengthen constitutional environmental rights that have not been raised in prior scholarship on environmental constitutionalism. And by taking a holistic approach to understanding how law functions among other influences on natural resources managers, it sheds light on the neglected but crucial relationship between law, budgets, and staffing—something that the United States is beginning to understand at the national level as cuts to federal agencies and executive orders stopping federal grants take effect.

The Article proceeds by first describing how my research approach and methods build on prior qualitative empirical work related to natural resources governance. It builds on the legal scholarship of environmental constitutional rights litigation, environmental governance scholarship in its political economy and information adoption branches, and law and society scholarship on administrative agencies. Part II provides an introduction to Hawaii and Montana, laying out the geographic and environmental context before providing some of the history of their constitutional amendments. Both jurisdictions have cultures and traditions closely connected to their ecosystems and geography, and both face challenges to resource and ecosystem protections. They differed in their approaches to developing and interpreting environmental amendments. Nonetheless, the courts of both jurisdictions took decades before they saw meaning in the constitutional rights at issue.

Part III synthesizes data from qualitative interviews with state water and aquatic resources managers in Hawaii and Montana, putting resource managers' views about constitutional rights to a healthy environment into the context of other influences on their jobs. Participants offered multiple non-law influences on their work, which fell into three categories: personal values and identity, political economy, and diminished agency capacity. There were some constitutional influences on the work of natural resources managers in Hawaii, but these were connected to the public trust doctrine and cultural Native Hawaiian rights, not the right to a healthy environment. Advocates of constitutional environmental rights may have greater success if they can replicate the institutions that support a strong constitutional public trust—mandated trainings and connection to broader social identities related to native rights. Even so, without adequate funding and staff, the laws on the books quickly lose meaning for those responsible for implementation. Part IV draws some conclusions.

## I. Framework and Methodology

This research is grounded in three fields—scholarship on constitutional environmental rights, environmental governance literature, and law and society studies of state bureaucrats. Legal scholarship on constitutional environmental rights offers extensive analyses of how courts should

15. Bookman, *supra* note 8. Rink, *supra* note 7, at 190-205.

16. Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communications (1977-2014)*, 12 ENV'T RSCH. LETTERS 084019 (2017); Geoffrey Supran & Naomi Oreskes, *Addendum to "Assessing ExxonMobil's Climate Change Communications (1977-2014)"*, 15 ENV'T RSCH. LETTERS 119401 (2020); Geoffrey Supran & Naomi Oreskes, *Reply to Comment on "Assessing ExxonMobil's Climate Change Communications (1977-2014)"*, 15 ENV'T RSCH. LETTERS 118002 (2020); Katrina F. Kuh, *Law and Climate Disinformation*, 56 ENV'T L. \_\_\_\_ (forthcoming 2026).

17. E.g., Elinor Ostrom, GOVERNING THE COMMONS: EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990). Cf. Stefania Almazán-Casali et al., *Who Governs at What Price? Technocratic Dominance, Ways of Knowing, and Long-Term Resilience of Brazil's Water System*, 3 FRONTIERS WATER (2021) (noting the limits and counterproductive efforts related to technocratic approaches).

18. This is more critical now given the recent gutting of the federal grants and partners that states have relied on for decades to help fill in the gaps.

19. Even in states with a constitutional environmental right, it took decades before the right gained significance in litigation. See *infra* Sections I.B.2 and I.B.4, and see Franklin Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENV'T L.J. 123 (1990) (noting the lack of legal meaning to the amendment decades after it first passed).

interpret those rights. That scholarship largely ignores how rights work outside of litigation. In part, this may be because scholars have lacked original data to complete such studies. Environmental governance literature, meanwhile, gives insights on administrative agencies as actors within complex systems, but little attention to law and less to state constitutional law. Finally, interdisciplinary law and society scholarship on agencies and bureaucrats has used ethnographies and qualitative interviews with triangulation to gather important original data on how actors within agencies shape and are shaped by law and context.

The study presented here ties these three fields together. I rely on them to shape my methodology and form a framework for potential influences on natural resources managers. This Article adds to these fields, bringing them together and providing crucial original data on the place of constitutional environmental rights in the work of state natural resources managers.

Below, I discuss the three fields that form the basis for this study, and what my work adds to them. I then introduce the two case study sites, Hawaii and Montana, with background on formation and judicial interpretations of their constitutional environmental rights. I close this part with details of my qualitative methodology.

## A. Literature Review

This Article is in dialogue with literature from three fields: legal scholarship on the constitutional right to a healthy environment, environmental governance literature (especially two branches touching usable information and political economy), and law and society scholarship on state and federal agencies.

### 1. Legal Scholarship on the Constitutional Right to a Healthy Environment

Existing scholarship on constitutional environmental rights targets critiques and arguments in favor of constitutional environmental rights. The experience of a proposed amendment to the Maryland Constitution<sup>20</sup> provides a useful overview of typical arguments.

The arguments made to the Maryland Legislature's Judiciary Proceedings Committee about a proposed constitutional amendment creating a right to a healthy environment provide some organization to the voluminous literature on constitutional environmental rights, and are worth repeating here. Arguments against the amendment raised fears that a constitutional right to a healthy environment would lead to a flood of litigation, and that the right was too vague to be meaningful, or alternatively so vague that it would cede too much authority to the judiciary. Written testimony in support of the amendment argued that it was needed on principle to further intergenerational equity, to fulfill the state's obligation to justice,

and to protect against climate change or other threats to the environment.<sup>21</sup>

Addressing critiques, scholars interpret the scope of the right, arguing that the constitutional amendments meaningfully support or constrain government action.<sup>22</sup> John Dernbach's work has been notably influential, earning key citations in state court decisions interpreting environmental constitutional rights.<sup>23</sup> Elsewhere, scholars make the compelling case that constitutional environmental rights are matters of principle, connecting them to human rights, dignity, and justice; these works, too, focus on court interpretations of rights.<sup>24</sup> More recent literature turns toward theorizing, at least in part, how constitutional environmental rights may work outside of the litigation context.<sup>25</sup>

This literature is of great importance to the fields of environmental and natural resources law as well as to state constitutionalism. But these works focus on courts and litigation while missing the broader social context in which constitutional rights gain or lose meaning and are (or are not) incorporated into the work of state agencies. A story from Professor Dernbach's experience is telling.<sup>26</sup>

21. See Support SB783 BBP 2022 (2022), [https://mgaleg.maryland.gov/cmte\\_testimony/2022/jpr/9787\\_03092022\\_10120-40.pdf](https://mgaleg.maryland.gov/cmte_testimony/2022/jpr/9787_03092022_10120-40.pdf).

22. John C. Dernbach, *The Value of Constitutional Environmental Rights and Public Trusts*, 41 PACE ENV'T L. REV. 153 (2024) (arguing that the value added of constitutional rights, depending on interpretation, is to put constraints on government action, bolster support for pro-environment government action, and provide a basis for a private right-of-action); Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis*, *supra* note 2 (arguing that state environmental amendments have guided and constrained state action, including in Hawaii and Montana); John C. Dernbach et al., *Recognition of Environmental Rights for Pennsylvania Citizens*: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 70 RUTGERS L. REV. 803 (2018) (assessing how recent litigation had changed the meaning of Pennsylvania's amendment); Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, *supra* note 7; Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, *supra* note 7; May & Daly, *supra* note 7; May, *supra* note 7 (discussing litigation under state constitutional environmental rights); Bratspies, *supra* note 7 (discussing the interpretation and implementation of New York's environmental rights amendment); Polk, *supra* note 2, at 127 (discussing the potential legal effects of constitutional environmental rights); Bianchi et al., *supra* note 7 (interpreting New York's recent constitutional environmental amendment); James May, *The Intersection of Constitutional Law and Environmental Litigation*, Chapter 8, in ENVIRONMENTAL LITIGATION 360 (2009); Wendy Kerner, *Making Environmental Wrongs Environmental Rights: A Constitutional Approach*, 41 STAN. ENV'T L.J. 83 (2022); Amber Polk, *Environmental Rights Amendments as Constitutional (Not Environmental) Law*, WIS. L. REV. (forthcoming 2026) (arguing that environmental rights amendments are constitutional in nature and work best as negative rights).

23. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *Pennsylvania Env't Def. Found. v. Commonwealth (PEDF II)*, 161 A.3d 911, 916 (Pa. 2017).

24. E.g., May, *supra* note 11; Erin Daly & James May, *Bridging Constitutional Dignity and Environmental Rights Jurisprudence*, 7 J. HUM. RTS. & ENV'T 218 (2016); Erin Daly & James May, *Exploring Environmental Justice Through the Lens of Human Dignity*, 25 WIDENER L. REV. 177 (2019); Maya K. van Rossum & Kacy C. Manahan, *Constitutional Green Amendments: Making Environmental Justice a Reality*, 36 NAT. RES. & ENV'T 27 (2022) (connecting environmental constitutionalism to environmental justice); Adashek, *supra* note 7; White, *supra* note 7; Melanie Hess, *Building Blocks of a Fundamental Right: A Thought Experiment on the Constitutional Right to a Livable Climate*, 1 NOTRE DAME J. EMERGING TECH. 525 (2020); Hyde, *supra* note 7; Elkin, *supra* note 7.

25. Rink, *supra* note 7; Bookman, *supra* note 7; Ziaja, *supra* note 8.

26. This story is also related in part in Professor Dernbach's discussions with other environmental rights experts, transcribed and printed in Frank-

20. S.B. 783, 2022 Leg., 444th Sess. (Md. 2022).

His many articles on the right to a healthy environment in Pennsylvania have shifted how the highest court in the Commonwealth interprets that amendment, with downstream effects for state budgeting and legislation.

But as the story goes, those articles came out of his experience working for the Department of Environmental Resources. In the building, there were posters decorating the office with the words of the amendment on display. Seeing the words every day led him to take on the project of seeing them have legal meaning and meaning for the agency. Had the context in which young Dernbach worked been different, would the Commonwealth of Pennsylvania now have an enforceable constitutional environmental right?

This study adds to the substantial legal scholarship, recognizing the importance of litigation and courts to interpretations of state constitutional law, and contributes a new dimension, along with original data about how constitutional rights are interpreted on the ground.

## 2. Environmental Governance Literature

This Article also builds on two branches of environmental governance literature (political economy<sup>27</sup> and information adoption branches), connecting them to the ample legal scholarship on constitutional environmental rights. There is crossover between these sub-fields. Both recognize that there are multiple influences on natural resources management in agencies,<sup>28</sup> and that those influences may interact in complex ways with emergent properties.<sup>29</sup> For example, litigation may shift the process within agencies for obtaining permits or public input, though that may conflict with political preferences of the administration, which also influences agency action. Or a legacy of aging naval infrastructure may lead to fuel leaks into local water supply, causing a freshwater shortage, and more work for

water managers, but may also potentially create a window of opportunity to secure increased funding for the agency, as in the case with the Red Hill leak at Pearl Harbor.<sup>30</sup>

For environmental governance studies rooted in political economy, history and culture are tied to political economy, such that the meaning and value of law depends on more conditions than simply the text of the law or the fact of its existence.<sup>31</sup> “[I]nstitutions [including constitutional law] can only be understood . . . in the context of other institutional statements, and in the context of physical and material conditions and attributes of the community.”<sup>32</sup> For scholars following the approaches of Elinor Ostrom’s Social Ecological Systems Framework, Institutional Analysis and Development Framework, and related progeny,<sup>33</sup> governance of natural resources, especially common pool resources, is part of a complex system.<sup>34</sup>

According to these frameworks, the actions, norms, and rules of natural resources agencies relate to de facto law and de jure law, within polycentric and/or nested systems of governance.<sup>35</sup> They also relate to the characteristics of the ecosystem being governed, which can have a mutual relationship with culture, each influencing the conditions of the other.<sup>36</sup> Researchers in these traditions consider interactions among four main components in the complex relationship between an ecosystem and its social, economic, and political setting.<sup>37</sup> Environmental governance literature further has established that across agencies, there are differentials in power related to differences in mission, societal value placed on those missions, legalistic differences in the organic statutes forming those agencies, and

lin L. Kury et al., *The Constitutional Right to Save the Environment*, 52 ELR 10007, 10009 (Jan. 2022), <https://www.elr.info/articles/elr-articles/constitutional-right-save-environment>:

Basically, people using the amendment to challenge something that the government did hardly ever won under this test. As a young lawyer in the early 1980s at the Pennsylvania Department of Environmental Resources, I saw the ERA actually meant the *Payne v. Kassab* test. I remember looking at the text of §27 at the time and thinking, gosh, these are wonderful words; wouldn’t it be interesting if the courts treated these words like law?

27. The political economy I rely on here is institutionalist at root, concerned with how the “rules of the game”—whether informal or formal law, regulations, norms and customs—relate to the characteristics of their context, especially current and historical political and economic conditions.

28. See, e.g., Steven Rayner et al., *Weather Forecasts Are for Wimps: Why Water Resource Managers Do Not Use Climate Forecasts*, 69 CLIMATIC CHANGE 197, 199 (2005), <https://doi.org/10.1007/s10584-005-3148-z> (“[I]nformation in organizations and institutions of all kinds is not a well-behaved commodity that can be passed between parties like water poured from one bucket to another.”); Neil Adger et al., *The Political Economy of Cross-Scale Networks in Resource Co-Management*, 10 ECOLOGY & SOC’Y 9, 9-11 (2006) (illustrating multiple scales of human-environment interaction, including legal scales); Jessica Bolson & Kenneth Broad, *Early Adoption of Climate Information: Lessons Learned From South Florida Water Resource Management*, 5 WEATHER, CLIMATE & SOC’Y 266 (2013) (concluding that for water managers, agency culture, social networks, and policy windows enabled adoption of new information into agency practices).

29. Adger et al., *supra* note 28.

30. Patricia Yu, *The Impact of Red Hill Fuel Leaks on Water Quality: A Case Study of Pearl Harbor’s Contamination in O’ahu*, in SUSTAINING WATER QUALITY—FROM LOCAL CHALLENGES TO GLOBAL SOLUTIONS (Carmine Massarelli ed., 2024), <https://www.intechopen.com/online-first/1204665>.

31. Edella Schlager & Elinor Ostrom, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis*, 68 LAND ECON. 249 (1992); CARL BAUER, SIREN SONG: CHILEAN WATER LAW AS A MODEL FOR INTERNATIONAL REFORM (2004); ARUN AGRAWAL, ENVIRONMENTALITY: TECHNOLOGIES OF GOVERNMENT AND THE MAKING OF SUBJECTS (2020).

32. Edella Schlager & Michael Cox, *The IAD Framework and the SES Framework: An Introduction and Assessment of the Ostrom Workshop Frameworks, Chapter 6*, in THEORIES OF THE POLICY PROCESS 230 (Christopher Weible & Paul Sabatier eds., 2018) (paraphrasing Elinor Ostrom).

33. E.g., Micheal McGinnis & Elinor Ostrom, *Social-Ecological System Framework: Initial Changes and Continuing Challenges*, 19 ECOLOGY & SOC’Y 30 (2014) (establishing a framework for intercomparison across social ecological systems research, including government agencies as tier three subsystems); Daniel Cole et al., *The Utility of Combining the IAD and SES Frameworks*, 13 INT’L J. COMMONS 244 (2019), <https://doi.org/10.18352/ijc.864>; Craig A. Arnold et al., *The Social-Ecological Resilience of an Eastern Urban-Suburban Watershed: The Anacostia River Basin*, 51 IDAHO L. REV. 29 (2015) (describing one such progeny in their Institutional-Social-Ecological Dynamics approach).

34. E.g., James Wilson, *Scientific Uncertainty, Complex Systems and the Design of Common-Pool Institutions, Chapter 10*, in THE DRAMA OF THE COMMONS (Elinor Ostrom et al. eds., 2002) (discussing the role of complex systems within common pool resources research and governance).

35. Schlager & Cox, *supra* note 32.

36. McGinnis & Ostrom, *supra* note 33.

37. McGinnis & Ostrom, *supra* note 33; Schlager & Cox, *supra* note 32, at 234-35.

reputation.<sup>38</sup> These power differentials, in turn, influence agency outcomes.<sup>39</sup>

Information, whether legal or scientific, influences agencies.<sup>40</sup> The seminal study of climate information and water managers notes, “the use of information in organizations is inextricably bound up with creating collective meaning and identity as well as servicing implicit goals of organizational maintenance.”<sup>41</sup> In other words, there are multiple reasons bureaucrats adopt and use information, which ultimately are part of larger processes of meaning-making. The adoption and dissemination of technical and non-technical knowledge within organizations is not a linear process.<sup>42</sup>

The constitutional amendments at issue here live as text, but within legal, historical, and cultural contexts, in which the interpretation and force of those amendments can and do change.<sup>43</sup> Considering the legal and political economic context, as well as how new information is rejected or adopted by agencies, in questions to interview subjects, and triangulating answers to those questions,<sup>44</sup> the Article is able to get a deeper sense of how and whether constitutional environmental rights influence the work of state natural resources managers.

### 3. Law and Society Literature on Administrative Agencies

From the perspective of law and society, whether law “matters”—does it have the power to cause changes in society, is it merely reflective of society, or are law and society mutually constitutive?—is a foundational question, which depends in part on social science methodologies to derive empirics.<sup>45</sup> In this tradition, prior interdisciplinary research on administrative agencies uses qualitative interviews with civil servants to study how factors in agency culture and structural context, rather than law alone, lead to results.<sup>46</sup>

Anya Bernstein and Cristina Rodriguez concluded in their groundbreaking study of the social organizational dynamics of federal agencies that “relationships, structures, and practices” lead to agency accountability.<sup>47</sup> Alyse Bertenthal’s detailed and rigorous investigation of California civil servants and environmental justice found that narratives and agency culture drove how environmental enforcement decisions were made.<sup>48</sup> These researchers shed light on the importance of values held and encouraged by civil servants to give effect to law.

Melissa Scanlan’s impressive longitudinal study of water managers and the public trust doctrine in Wisconsin<sup>49</sup> relates directly to the methodology and framework of the study presented here. Scanlan conducted three sets of semi-structured qualitative interviews with water managers over two decades.<sup>50</sup> She was able to obtain data on how changes to state law affected the on-the-ground work of agencies, and was able to see how structural changes to budgets and staffing influenced the work of agencies over time.<sup>51</sup> Throughout Scanlan’s studies, she was careful to consider multiple scales of influence on agency staff, from personal values to staffing and law.<sup>52</sup> The study I present here builds on Scanlan’s research, relying on her interview instrument and tailoring it to the specific sites and law at issue in this Article.<sup>53</sup> In doing so, it connects to research on other natural resources law and society work, and connects that field to legal scholarship on constitutional environmental rights and environmental governance.

#### B. Site Selection

For this study, I conducted semi-structured interviews in Hawaii and Montana. Of the states with long-standing environmental rights amendments, I selected these two jurisdictions because their similarities and differences make them useful foils to consider the influence of environmental rights amendments. Both have identities and economies that are closely tied to their environment and

38. MARY DOUGLAS, *HOW INSTITUTIONS THINK* (1986); JEANNE N. CLARKE & DANIEL MCCOOL, *STAKING OUT THE TERRAIN: POWER AND PERFORMANCE AMONG NATURAL RESOURCES AGENCIES* (2d ed. 1996) (examining how agencies function within bureaucratic ecosystems).

39. DOUGLAS, *supra* note 38; CLARKE & MCCOOL, *supra* note 38.

40. Maria C. Lemos et al., *Narrowing the Climate Information Usability Gap*, 2 *NATURE CLIMATE CHANGE* 789 (2012) (reviewing the literature on usable climate information).

41. Rayner et al., *supra* note 28.

42. Rayner et al., *supra* note 28. See Lemos et al., *supra* note 40.

43. See Ziaja, *supra* note 8.

44. See John C. Cole & Diana M. Liverman, *Brazil’s Clean Development Mechanism Governance in the Context of Brazil’s Historical Environment—Development Discourses*, 2 *CARBON MGMT.* 145 (2010) (demonstrating how triangulation increases credibility).

45. E.g., *HOW DOES LAW MATTER?* (Bryant Garth and Austin Sarat eds., 1998) (providing an overview of approaches to the question of how law matters).

46. Anya Bernstein & Cristina Rodriguez, *The Accountable Bureaucrat*, 132 *YALE L.J.* 1600 (2023); Alyse Bertenthal, *Toxic Narratives, Toxic Communities, and Enforcement of Environmental (In)justice*, 99 *WASH. L. REV.* 1053 (2024); Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, *supra* note 8; Scanlan, *Protecting the Public Trust and Human Rights in the Great Lakes*, *supra* note 8; Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View Into the Trustee’s World*, *supra* note 8; Melissa K. Scanlan, *The Public Trust Doctrine: Regulatory Reform, Climate Disruption, and Unintended Consequences*, 49 *ECOLOGY L.Q.* 779 (2022).

47. Bernstein & Rodriguez, *supra* note 46.

48. Bertenthal, *supra* note 46.

49. Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, *supra* note 8; Scanlan, *Protecting the Public Trust and Human Rights in the Great Lakes*, *supra* note 8; Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View Into the Trustee’s World*, *supra* note 8; Scanlan, *The Public Trust Doctrine: Regulatory Reform, Climate Disruption, and Unintended Consequences*, *supra* note 46. Scanlan’s methodological approaches are very close to the qualitative approaches of Robert Ellickson, in his scholarship on fence line disagreements between neighboring cattle ranchers. See ELICKSON, *supra* note 8 (citing to yet other law-and-society studies regarding qualitative methodologies).

50. Scanlan, *The Public Trust Doctrine: Regulatory Reform, Climate Disruption, and Unintended Consequences*, *supra* note 46.

51. *Id.* (examining in part the effects of Act 21 in Wisconsin).

52. See Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, *supra* note 8; Scanlan, *Protecting the Public Trust and Human Rights in the Great Lakes*, *supra* note 8; Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View Into the Trustee’s World*, *supra* note 8; Scanlan, *The Public Trust Doctrine: Regulatory Reform, Climate Disruption, and Unintended Consequences*, *supra* note 46.

53. Professor Scanlan generously shared her materials while keeping information from her subjects omitted.

natural resources, but they have distinct political identities and histories.

I begin here by providing a brief introduction to the geography and environmental context of each jurisdiction. Climate change, a legacy of natural resources use and extraction, and population changes have left marks on both states—though in different ways. After providing environmental context, I present the constitutional amendments and their histories.<sup>54</sup> It is worth noting the distance and transformation from the values their drafters had hoped to embed in the language and their meaning and importance in the work lives of natural resources managers decades on.

The agencies fit the model of cross-scale linkages in natural resources management described by Neil Adger and others.<sup>55</sup> The agencies do not simply dictate how resource users may harvest or use water, fish, or forests. Instead, they are networked with and nested within multiple scales of institutions.<sup>56</sup> Some of this is familiar to lawyers and legal scholars. Local-level operational rules are set in the context of regulations and statutes that must be consistent with constitutional law.<sup>57</sup> Resource users, agencies, and state government are “nested” in much the same way.<sup>58</sup> But they are different in that the small-scale stakeholders (resource users, community groups, and activists) can influence larger-scale bureaucracies, like state natural resources agencies.<sup>59</sup> This kind of interconnected relationship between resource users and regional or national natural resources management is near universal.<sup>60</sup>

## 1. Hawaii

A warning came up consistently in my interviews in Hawaii. It went something like this: “Island is to planet, as Hawaii is to Earth. Mainlanders must learn from Hawaii to solve global environmental problems.” That metaphor is repeated in environmental literature as well. Hawaii is regarded by environmental anthropologists and ecological archeologists as a microcosm of human-ecosystem dynamics.<sup>61</sup>

The characteristics of the Hawaiian Islands’ landscape and history make it an ideal place to study how people and their environment influence one another. The islands of Hawaii are isolated from the mainland but contain within themselves a variety of local climates and biomes. Culturally, Hawaii has a rich Indigenous culture coupled

with waves of immigration, a legacy of colonial control, extractive agriculture, and tourism—all of which have had impacts on the Hawaiian environment, its people, and the myriad species that live there.

*Ola i ka wai.*<sup>62</sup> On the chain of volcanic islands, the water that supports life comes from two places: rain and aquifers. Rainfall in Hawaii is “spectacularly diverse”<sup>63</sup> while still being reliable, depending on where the mountains divide the land.<sup>64</sup> Windward portions of the islands receive an annual mean of 404 inches. Areas on the leeward side, where the mountains shelter the land from rainstorms, receive as little as eight inches annually.<sup>65</sup> That bifurcation creates Hawaii’s lush tropical forests, its sun-drenched beaches, and sustains much of its 250,000 unique species.<sup>66</sup>

The resilience of Hawaiian nature is under threat from the mundane (sunscreen and ungulates)<sup>67</sup> and extraordinary (leaking of millions of gallons of bunker fuel<sup>68</sup> and climate change).<sup>69</sup> A full three-quarters of all documented extinctions in the United States are attributed to the death of species from Hawaii.<sup>70</sup>

The state’s capacity to manage environmental crises and climate change is linked to the participation and treatment of Indigenous peoples of Hawaii. As Hawaii’s Department of Land and Natural Resources puts it, “For many native Hawaiians, the relationship with the land and native ecosystems is integral to their identity and sense of well-being.”<sup>71</sup> The U.S. Global Change Research Program’s National Climate Report notes that although Indigenous peoples of the Pacific face multiple climate threats, “trans-

54. Polk’s summaries of environmental rights case law provide greater depth. See, e.g., Polk, *supra* note 2, at 123.

55. Adger et al., *supra* note 28, at 911.

56. David Cash et al., *Scale and Cross-Scale Dynamics: Governance and Information in a Multilevel World*, 11 *ECOLOGY & SOC’Y* 8 (2006).

57. *Id.*

58. *Id.*

59. Adger et al., *supra* note 28, at 9.

60. Adger et al., *supra* note 28, at 9. These common characteristics suggest that lessons from this study may be broadly applicable, despite differences across American states.

61. Noa K. Lincoln et al., *Restoration of ‘Āina Malo’o on Hawai‘i Island: Expanding Biocultural Relationships*, 10 *SUSTAINABILITY* 3985 (2018); Kevin Chang et al., *Hawai‘i in Focus: Navigating Pathways in Global Biocultural Leadership*, 11 *SUSTAINABILITY* 283 (2019).

62. Water is life.

63. Thomas W. Giambelluca et al., *Online Rainfall Atlas of Hawai‘i*, *BULL. AM. METEOROLOGICAL SOC’Y* 94, 313-16 (2013).

64. *Id.*

65. *Id.*

66. Many of these, however, are aquatic species that do not depend on freshwater. There are approximately 140,100 native species on land, including freshwater species, and 6,500 marine species. *Issue 6: Conservation of Native Biodiversity*, in *HAWAII STATEWIDE ASSESSMENT OF FOREST CONDITIONS AND RESOURCE STRATEGY* 154 (2010), <https://dlnr.hawaii.gov/forestry/files/2013/09/SWARS-Issue-6.pdf>.

67. University of Hawai‘i at Mānoa, *Impacts of Nonnative Ungulates on Ecosystem Structure and Function in Hawaiian Forests*, <https://cms.ctahr.hawaii.edu/littonc/Research/Impact-of-Non-Native-Ungulates> (last visited Apr. 21, 2026); National Park Service, *New Research Finds Fencing Out Ungulates Protects ‘Ōhi‘a Forests*, [https://www.nps.gov/articles/000/20210812\\_article-fencing-protects-ohia.htm](https://www.nps.gov/articles/000/20210812_article-fencing-protects-ohia.htm) (last updated Aug. 13, 2021); see also Ryan L. Perroy et al., *Spatial Patterns in ‘Ōhi‘a Mortality Associated With Rapid ‘Ōhi‘a Death and Ungulate Presence*, 12 *FORESTS* 1035 (2021).

68. Grace Gibson, *Hawaii’s Red Hill Water Crisis Isn’t Over*, *GEO. ENV’T L. REV. BLOG* (Apr. 28, 2022).

69. *Issue 6: Conservation of Native Biodiversity*, *supra* note 66, at 160; U.S. Environmental Protection Agency (EPA), *What Climate Change Means for Hawaii* (2016) (EPA 430-F-16-013), <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-hi.pdf>.

70. *Issue 6: Conservation of Native Biodiversity*, *supra* note 66, at 160; U.S. EPA, *supra* note 69. See ROBERT J. CABIN, *RESTORING PARADISE: RETHINKING AND REBUILDING NATURE IN HAWAII* (2013) (describing the threats to biodiversity in Hawaii and approaches to rebuilding biodiversity and critical habitat).

71. *Issue 6: Conservation of Native Biodiversity*, *supra* note 66, at 155; see also D. Kapua‘ala Sproat, *Wai Through Kanawai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 *MARQ. L. REV.* 127 (2011); D. Kapua‘ala Sproat, *A Question of Wai: Seeking Justice Through Law for Hawai‘i’s Streams and Communities*, in *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* 199-219 (Noelani Goodyear-Kaopua et al. eds., 2014).

mission and protection of traditional knowledge and practices” are “vital for ongoing adaptation and survival.”<sup>72</sup>

Along similar lines, a study of adaptation planning practices of Hawaii and the U.S. Affiliated Pacific Islands found that they faced “unique challenges . . . that make effective local and regional climate assessments essential foundations for accelerated adaptation planning and implementation and for negotiations and global advocacy. Chief among them are widespread climate data scarcity, varied political classifications, spatial isolation, and the colonialism that burdens self-reliant populations and creates persistent funding inequities.”<sup>73</sup> The success of climate adaptation efforts depends on not just the physical environment, but the social, historical, and legal environment.

## 2. History of the Hawaiian Amendment

Despite being a relatively young state, Hawaii has deep experience with drafting constitutions,<sup>74</sup> with the most recent constitution drafted after the 1978 constitutional convention (or Con Con),<sup>75</sup> in which 34 amendments were proposed and later approved by voters.<sup>76</sup> The 1978 Con Con was massive in scale and diversity. Compared to prior constitutional conventions, the 1978 Con Con “was [demographically] younger, included more women, and more accurately reflected the islands’ racial and ethnic diversity.”<sup>77</sup> There were also fewer attorneys, legislators, and business delegates than prior conventions.<sup>78</sup> “[I]t was singularly lacking in familiar political figures and persons with well-established community status.”<sup>79</sup>

At the Con Con and after, environmental protection and management provisions were closely tied with Native Hawaiian rights<sup>80</sup> and “preserving Hawaii’s uniqueness.”<sup>81</sup>

The right to a “clean and healthful environment”<sup>82</sup> was not the sole constitutional amendment dealing with the environment. Other proposed amendments included the establishment of a new state agency to maintain water resources and new powers and duties for the state related to protecting agricultural lands, ocean resources, public land banking, and population growth management.<sup>83</sup> Within this package, Hawaiian political scientists Norman Meller and Richard Kosaki refer to the constitutional right as “some-what as a crowning point.”<sup>84</sup>

Decades after the Con Con, Hawaiian Supreme Court Justice Richard Pollock remarked at his confirmation hearing that the rights afforded to environmental protection and Native Hawaiian practices in the constitution were underutilized.<sup>85</sup> The right has been interpreted from the beginning as granting standing to plaintiffs alleging environmental harm.<sup>86</sup> However, as Amber Polk notes, it did not make noticeable differences in court cases for another 30 years,<sup>87</sup> after the Hawaii Supreme Court found the right to be a self-executing right of private action.<sup>88</sup> In the subsequent decade, the court unexpectedly expanded the right to include due process claims to intervene in administrative proceedings.<sup>89</sup> In litigation, Hawaii’s right to a clean and healthful environment is “melded with the . . . public trust doctrine.”<sup>90</sup>

72. Victoria W. Keener et al., *Chapter 27: Hawai‘i and U.S.-Affiliated Pacific Islands*, in *IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT* (2018), available at <https://essopnarchiv.oe.org/doi/full/10.1002/essoar.10500623.1>.
73. Victoria W. Keener et al., *Accelerating Climate Change Adaptive Capacity Through Regional Sustained Assessment and Evaluation in Hawaii and the U.S. Affiliated Pacific Islands*, 4 *FRONTIERS CLIMATE* 1, 2 (2022).
74. Richard H. Kosaki, *Constitutions and Constitutional Conventions of Hawaii*, 12 *HAW. J. HIST.* 120 (1978) (describing the eight constitutions of the kingdom and later territory and state of Hawaii from 1840 through 1968).
75. For fantastic histories of the 1978 Con Con, see Amy K. Trask, *A History of Revision: The Constitutional Convention Question in Hawai‘i, 1950-2008*, 31 *U. HAW. L. REV.* 291, 308-12 (2008); Norman Meller & Richard H. Kosaki, *Hawaii’s Constitutional Convention—1978*, 69 *NAT’L CIVIC REV.* 248, 271 (1980); Victor Fischer, *A New Constitutional Convention for Alaska? The Lessons of Hawaii 1978* (1980), [https://hawaii.concon.info/?page\\_id=128](https://hawaii.concon.info/?page_id=128) (the Alaskan report was based largely on interviews with Con Con participants shortly after the convention and is sufficiently well regarded that the Hawaiian government page on Hawaiian constitutional conventions links to the report).
76. Trask, *supra* note 75, at 312. As Amy Trask notes, after subsequent litigation, not all amendments were included in the constitution. See *id.*; see also *Kahalekai v. Doi*, 60 *Haw.* 324, 590 P.2d 543 (Haw. 1979).
77. Trask, *supra* note 75, at 309. For a breakdown of age and profession across delegates to the 1978 convention and prior conventions, see Fischer, *supra* note 75, at 12.
78. Trask, *supra* note 75, at 309; Meller & Kosaki, *supra* note 75, at 251.
79. Meller & Kosaki, *supra* note 75, at 250.
80. Fischer, *supra* note 75, at 27-29.
81. Meller & Kosaki, *supra* note 75, at 255. For more on the connection between Indigenous rights and environmental protection in Hawaii broadly, see D. Kapua‘ala Sproat, *An Indigenous People’s Right to Environmental Self-*

*Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35.2 *STAN. ENV’T L.J.* 156 (2016); D. Kapua‘ala Sproat & MJ Palau-McDonald, *The Duty to Aloha ‘Aina: Indigenous Values as a Legal Foundation for Hawai‘i’s Public Trust*, 57 *HARV. CIV. RTS.-CIV. LIBERTIES L. REV.* 525 (2022).

82. *HAW. CONST.* art. XI, §2.
83. Meller & Kosaki, *supra* note 75, at 256.
84. *Id.* None of the environmental amendments were among those that received the largest shares of no votes at the polls. *Id.* at 257 (“The proposals which received the largest negative tallies included the ‘Hawaiian-affairs package,’ the right to privacy, resignation of incumbents on running for another office, campaign financing, and the transfer of the administration of the property tax to the counties.”).
85. Todd W. Eddins, *Gifts From the Past for the Future: A Tribute to Justice Richard Pollack*, 43 *U. HAW. L. REV.* 636, 637 (2021).
86. *Kahana Sunset Owners Ass’n v. Maui Cnty. Council*, 948 P.2d 122, 124 (Haw. 1997).
87. Polk, *supra* note 2, at 148-50 (discussing *County of Haw. v. Ala Loop Homeowners*, 235 P.3d 1103 (Haw. 2010)).
88. *Ala Loop Homeowners*, 235 P.3d at 1129.
89. *In re Application Maui Elec. Co., Ltd.*, 408 P.3d 1 (Haw. 2017); *Matter of Gas Co.*, 465 P.3d 633 (Haw. 2020); *Matter of Haw. Elec. Light Co., Inc.*, 445 P.3d 673 (Haw. 2019). For a thorough discussion of these cases, see Polk, *supra* note 2, at 153-55.
90. Katrina F. Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 *ECOLOGY L.Q.* 731, 753 (2019) (citing *HAW. CONST.* art. XI, §1) (“For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i’s natural beauty and all natural resources.”). The public trust enjoys strong public awareness in Hawaii. Interview with HG (May 24, 2022) (on file with author): [W]e have very um, one there’s very strong awareness of the public trust doctrine, and two, we have a number of NGOs that are pretty aggressive at asserting you know and reminding government when it may be going askew a little bit, like “hey, whoa, what about what about the public trust here?” Earth Justice is one of those in particular, Sierra Club is another one. And there are a number of like Surf Rider, a number of different organizations that are pretty active on the, on the legislative and legal front, and they will y’know sue or file injunctions as needed if they feel like there isn’t adequate consideration of some of those public trust considerations[.]

In the 21st century, Hawaiian courts emphasized the self-enforcing nature of Article XI, §9.<sup>91</sup> It has been used to challenge permits from the Land Use Commission,<sup>92</sup> to intervene and introduce procedural environmental justice in the Hawaii Public Utilities Commission decision to approve a fossil fuel power purchase agreement,<sup>93</sup> and to challenge county approval of development projects.<sup>94</sup> Most recently, Article XI, §9 proved instrumental in litigation assisted by Our Children’s Trust and Earthjustice, which resulted in a historic settlement between the youth plaintiffs and the Hawaiian government to decarbonize the transportation sector.<sup>95</sup>

### 3. Montana

Nature is big in Montana—bison, bears, Yellowstone, the Rocky Mountains, and the Great Plains. The history of the right to a healthy environment in Montana suggests that nature was big for the delegates too, who spoke passionately about preserving Montana’s natural environment for future generations as a matter of identity. Many delegates spoke about Montana’s environment as something that set the state apart from others, as discussed below. Montana has long seen itself as the “last best place.”

But it faces serious ecological stressors: The state is “heating faster than the global average and the rate of warming is increasing.”<sup>96</sup> “[C]limate change is harming Montana’s environmental life support system now and with increasing severity for the foreseeable future.”<sup>97</sup> Wildfires, fueled by higher temperatures, along with changes to precipitation and snowmelt are adding stress to existing water supplies.<sup>98</sup> Water stress impacts humans and ecosystems in Montana.<sup>99</sup>

As the district court judge in *Held v. Montana* found, “[a]nthropogenic climate change is impacting, degrading, and depleting Montana’s environment and natural resources, including through increasing temperatures, changing precipitation patterns, increasing droughts and aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss.”<sup>100</sup> Over 80% of the original 146 glaciers at

Glacier National Park are now gone, and the remaining glaciers have lost 70% of their area.<sup>101</sup> She concluded that “[t]he science is clear that there are catastrophic harms to the natural environment of Montana . . . due to anthropogenic climate change.”<sup>102</sup>

### 4. History of the Montanan Amendment

In preparation for Montana’s 1972 Con Con, the state legislature formed a commission to help educate the Con Con delegates on state constitutions and the history of Montana’s Constitution.<sup>103</sup> Despite focusing on historical bills of rights, and noting that environmental concerns there had not yet been explicitly included in Montana’s bill of rights,<sup>104</sup> the commission included an entire chapter dedicated to environmental protection.<sup>105</sup> The chapter’s author traces an American tradition of environmental stewardship back to 19th-century transcendentalists and Native American cultures.<sup>106</sup> He concludes in a statement that presages the hopes and arguments of environmental advocates today: “Because a constitution provides a law higher and more fundamental than [sic] statutes and an expanding bulwark even a majority cannot overrun, it is not surprising that environmental issues should press for constitutional recognition.”<sup>107</sup>

We know significantly more about what was said at Montana’s Con Con than Hawaii’s, thanks to verbatim transcripts.<sup>108</sup> The Natural Resources Committee heard approximately 95 witnesses who made at least 165 appearances.<sup>109</sup> The committee’s recommendations were unanimous, except for the one dealing with “the environment, itself.”<sup>110</sup> Opening statements to the general body stressed that it was imperative that they pass a strong amendment to protect future generations.<sup>111</sup> Over the next two days, delegates proposed amendments and argued about appropriate adjectives and what the amendments could be.<sup>112</sup>

91. *Ala Loop Homeowners*, 235 P.3d at 1125.

92. *Id.* at 1129.

93. *In re Application Maui Elec. Co.*, 408 P.3d 1.

94. *Protect & Pres. Kahoma Ahupua’a Ass’n v. Maui Plan. Comm’n*, 489 P.3d 408 (Haw. 2021).

95. Press Release, Josh Green, Governor, Hawaii, Historic Agreement Settles Nawahine Climate Litigation (June 20, 2024), <https://perma.cc/4FFK-ALZ8>.

96. *Held v. State*, 560 P.3d 1235, 1243 (Mont. 2024); *see also Held v. State*, No. CDV-2020-307, at 142–43 (Mont. Dist. Ct. Aug. 14, 2023) (“Montana has already warmed significantly more than the global average . . . All parts of Montana have seen a long-term trend of increasing mean annual temperatures since 1950.”).

97. *Held*, 560 P.3d at 1248.

98. ALEXANDRA ADAMS ET AL., CLIMATE CHANGE AND HUMAN HEALTH IN MONTANA: A SPECIAL REPORT OF THE MONTANA CLIMATE ASSESSMENT XIX (2021), [https://www.emountainworks.com/docs/2021\\_C2H2inMT\\_final.pdf](https://www.emountainworks.com/docs/2021_C2H2inMT_final.pdf); *Held v. Montana*, No. CDV-2020-307, slip op. at 38–44 (Mont. 1st Dist. Ct.) (Aug. 14, 2023).

99. Jamie McEvoy et al., *Ecological Drought: Accounting for the Non-Human Impacts of Water Shortage in the Upper Missouri Headwaters Basin, Montana, USA*, 7 RESOURCES 14 (2018).

100. *Held v. State*, No. CDV-2020-307, at 140.

101. *Id.* at 154.

102. *Id.* at 193.

103. RICK APPLEGATE, BILL OF RIGHTS 35 (1971).

104. *Id.* at 249.

105. *Id.* at 248–85.

106. *Id.* at 249.

107. *Id.*

108. MONTANA CONSTITUTIONAL CONVENTION, MONTANA CONSTITUTIONAL CONVENTION PROCEEDINGS 1971–1972, VOLUME 4 (Mont. Leg. 1981), <https://scholarworks.umt.edu/montanaconstitution/41>.

109. *Id.* at 1203.

110. *Id.* at 1199.

111. *Id.* at 1199–1200.

112. *Id.* at 1202 (Chair kept track of how many times lawyers spoke, noting that “there’s a course given in law school on water law and I don’t think we need the whole course today.”). Of note, Charles Lindbergh, famed pilot and Nazi sympathizer, added to the contentiousness of the proposed environmental amendments. He spent time with the delegates during the convention, in which he would extoll the greatness of the natural beauty of Montana urged them to protect the environment, and cautioned against the public trust doctrine as a communist plot. *Id.* at 1215–16, 1224, 1284.

Reflections of delegates decades later recall that “[a]t one point, Lindbergh poked his nose into a hearing room to offer his wisdom to the chairwoman of an environmental committee. ‘She told him she was busy.’” Rich Ecker, *4 in Great Falls Helped Write Montana Constitution*, WASH. TIMES (Oct. 1, 2016), <https://www.washingtontimes.com/news/2016/oct/1/4-in-great-falls-helped-write-montana-constitution/>. Ironically, he lived out his later days and died in Hawaii, which as noted elsewhere in this Article, has

From the Con Con transcripts, it is abundantly clear that there were three main audiences for the right to a clean and healthy environment: future Montanans, the legislature, and most importantly the courts. Scholars have noted that in the first few decades of the right's existence, no one took much note; the constitution's "environmental provisions seemed headed for the same ignoble obscurity."<sup>113</sup>

The Montana Supreme Court took over 20 years before it began to listen.<sup>114</sup> In 1999, the court held in *Montana Environmental Information Center v. Department of Environmental Quality*<sup>115</sup> (MEIC) that the environmental rights amendment was subject to strict scrutiny.<sup>116</sup> Then, in 2001, in *Cape-France Enterprises v. Estate of Peed*,<sup>117</sup> the court suggested that the amendment could be applied to restrict private actions as well as those of the state,<sup>118</sup> although that theory proved unsuccessful in *Shammel v. Canyon*<sup>119</sup> and *Sunburst School District No. 2 v. Texaco, Inc.*<sup>120</sup> It took another 20 years after MEIC for the Montana Supreme Court to outline scrutiny analysis under Article II, §3 and Article IX, §1.<sup>121</sup> In *Park County Environmental Council v. Montana Department of Environmental Quality*, however, the court chose not to define "clean and healthful environment," contrary to the expectations of most of the delegates to the 1972 Con Con.<sup>122</sup>

In sum, the Montana Supreme Court established that the right to a clean and healthy environment was a fundamental right requiring strict scrutiny, but left open questions about the role of private suits against private individuals, and the meaning of key terms in the amendment. Most recently, the court ruled in favor of 16 youth plaintiffs in *Held v. Montana*, holding that the environmental rights amendment protects the right to a stable climate and that amendments to the Montana Environmental Policy Act (MEPA) restricting consideration of greenhouse gas emissions and climate impacts in environmental reviews were therefore unconstitutional.<sup>123</sup>

a particularly strong public trust doctrine. Seemingly, it did not impede his life or sense of freedom overmuch.

113. Thompson, *supra* note 2, at 159.

114. *Id.* at 167-69; Polk, *supra* note 2, at 139.

115. *Montana Env't Info. Ctr. v. Department of Env't Quality (MEIC)*, 988 P.2d 1236, 1236 (Mont. 1999).

116. *Id.* See Polk, *supra* note 2, at 139-40 (discussing MEIC and how it reconciled Article II, §3's fundamental environmental rights with Article IX, §1); Thompson, *supra* note 2, at 170-71 (discussing the Montana Supreme Court's treatment of MONT. CONST. art. IX, §1); Cameron Carter & Kyle Karmen, *A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision*, 22 PUB. LAND & RES. L. REV. 97 (2001).

117. *Cape-France Enter. v. Estate of Peed*, 29 P.3d 1011 (Mont. 2001).

118. *Id.* at 1017.

119. *Shammel v. Canyon Res. Corp.*, 167 P.3d 886 (Mont. 2007).

120. *Sunburst Sch. Dist. No. 2 v. Texaco Inc.*, 165 P.3d 1079 (Mont. 2007). For brief overviews of *Shammel* and *Sunburst*, see Polk, *supra* note 2, at 142-43 (2023).

121. *Park Cnty. Env't Council v. Montana Dep't of Env't Quality*, 477 P.3d 288 (Mont. 2020) (holding 2011 amendments to the Montana Environmental Protection Act to be unconstitutional).

122. Nathan Bellinger & Roger Sullivan, *A Judicial Duty: Interpreting and Enforcing Montanans' Inalienable Right to a Clean and Healthful Environment*, 45 PUB. LAND & RES. L. REV. 1 (2022).

123. *Held v. State*, 560 P.3d 1235 (Mont. 2024).

## C. Methods

Along with the characteristics of the two sites, three bodies of scholarship guided my methodology for this study. To obtain and analyze useful data on what constitutional environmental rights mean on the ground, relying on judicial opinions that interpret constitutional amendments alone is part of the picture, but incomplete.<sup>124</sup> It also is not sufficient to simply survey natural resources managers for their opinions on the matter and take their word for it.<sup>125</sup> If we assume that state constitutional law exists outside of the courtroom, and that interviews absent context cannot give a holistic picture, how can we investigate what role that law plays in state agencies?

First, I limited my analysis to comparable agencies. I chose to focus on agencies and individuals with authority over water and aquatic resources—specifically the Montana Reserved Water Rights Compact Commission, the Montana Department of Natural Resources and Conservation, and the Hawaiian Commission on Water Resources Management as well as the Department of Aquatic Resources.<sup>126</sup> As Ostrom's frameworks make clear, the nature of the resource being governed is inputs in social-ecological systems that can affect governance choices and outcomes.

For example, freshwater and fish (aquatic resources) are renewable, though may have subtractable yields, whereas oil and gas resources are finite; this has implications for governing the frequency as well as quantity of extractions.<sup>127</sup> Focusing on water and aquatic resources reduces differences across the jurisdictions. There is also deep resources governance scholarship on water management and fisheries, especially in the context of common pool resources.<sup>128</sup> Concentrating on these resources allows for comparisons across that literature, and opens up possibilities for future scholarship in those fields.<sup>129</sup>

In both jurisdictions, I used the snowball sampling method to recruit participants for qualitative interviews. Starting with contacts in state natural resources agencies shared by environmental law professors in Hawaii and Montana, I then asked initial and subsequent participants to identify additional natural resources managers who would be willing to speak with me. Based on this sampling method, the interviews included individuals involved

124. Ziaya, *supra* note 8.

125. See *supra* Section I.A. Had participant responses been limited only to those from direct questions about constitutional rights, the answers would have been that constitutional rights do not influence natural resources managers at all, if they even are aware of their existence. By asking questions about context, culture, other influences, and the managers' own concerns, a bigger picture emerged with indications that the existence and constitutional status of rights do matter in the work lives of interviewees. Discussions also point to potential lessons for how to make constitutional rights matter.

126. In both Montana and Hawaii, interviewees frequently also had worked in land agencies, and brought their insights from other natural resources management contexts into their responses.

127. Schlager & Ostrom, *supra* note 31, at 249-62.

128. See, e.g., THE DRAMA OF THE COMMONS, *supra* note 34.

129. See, e.g., Shahana Bilalova et al., *Toward Sustainable Water Governance? Taking Stock of Paradigms, Practices, and Sustainability Outcomes*, 12 WILEY INTERDISC. REVS. WATER e1762 (2025) (providing a systemic review of 165 studies of water governance).

in management and permitting decisions (board members, staff scientists, agency attorneys, and current and former deputy directors). I conducted 11 interviews,<sup>130</sup> each of which lasted approximately 1-2 hours in length. I used triangulation of data sources as a means to enhance reliability, reduce bias, and add depth to the results.<sup>131</sup> Follow-up questions and materials were sent by e-mail after interviews.

In addition to conducting interviews, I reviewed agency websites, documents, and other material obtained from the agencies and interviewees. Access to agency staff for research purposes is “notoriously difficult.”<sup>132</sup> An interview-based qualitative approach with triangulation allows for “a depth of discussion and analysis not easily obtained with larger samples.”<sup>133</sup> By putting natural resources managers at the center of the analysis and allowing them the space to share their own views with their own words, this Article joins with other interdisciplinary legal scholars who view those actors and their discourses and values as forces that shape law and legal structure on the ground.<sup>134</sup>

All interviews were recorded via Zoom, with the permission of participants, transcribed verbatim, and coded and analyzed in MAXQDA. I used deductive and inductive approaches to coding.<sup>135</sup> I identified themes and codes from the existing scholarship on the right to a healthy environment (law, rights, constitution, case names, etc.). I then inductively developed a set of codes based on interview data, re-reading interviews to identify additional aspects of influence as offered by the interviewees themselves.

## II. Results

Roughly 50 years since the constitutional conventions in Montana and Hawaii, it is clear that green amendments

“don’t drive the bus.” Natural resources managers consistently described environmental rights amendments as unimportant to their work, duties, and identities. Multiple participants noted that in their experience the amendments were not used at all. Some did not know the environmental rights amendments existed. Instead, participants described their personal values and broader political economic and cultural conditions as more influential on their day-to-day work.

Some managers questioned whether trying to influence perspectives through constitutional rights was a good idea at all. Nonetheless, there was evidence that the amendments are used and useful, especially in disciplining agency clients. These themes and responses are discussed below, first with regard to direct questions about environmental rights amendments and then to indirect questions about law and other influences on natural resources managers.

### A. Responses to Direct Questions About the Place and Importance of Environmental Rights Amendment(s) in Natural Resources Management

Across interviews, it was striking how absent environmental rights amendments were for natural resources managers. In both jurisdictions, I asked questions about how state law and state constitutional law, in particular, influenced the day-to-day work and planning of natural resources managers. In discussions in both jurisdictions, interviewees did not raise environmental rights amendments in their responses without a direct prompt. They did, however, raise other state statutes and constitutional provisions. When answering direct prompts, interviewees from both Montana and Hawaii were skeptical of the worth of the environmental rights amendments, and suggested that these constitutional rights were largely unknown or not used by natural resources managers and attorneys.

#### 1. Ambivalence About the Constitutional Right to a Healthy Environment

Montanan participants noted that their environmental rights amendment was simply not used in the work of natural resources managers. Participants attributed similar negative views about constitutional environmental rights amendments when they were asked to speculate about what their colleagues might say as well. One supervisor put these views succinctly: “the clean and healthful provisions of the Montana constitution don’t cross anyone’s mind.”<sup>136</sup> This perspective was consistent throughout interviews in

130. One additional interview was conducted in New York but is not included in this study.

131. See, e.g., Jo Moran-Ellis et al., *Triangulation and Integration: Processes, Claims and Implications*, 6 QUALITATIVE RSCH. 45, 47-49 (2006).

132. Bertenthal, *supra* note 46, at 1068 n.73 (citing to Laura Nader, *Up the Anthropologist—Perspectives Gained From Studying Up*, in REINVENTING ANTHROPOLOGY 284, 296 (Dell Hymes ed., 1969) and Bernstein & Rodríguez, *supra* note 46, at 1680-82). Indeed, in my own experience on this project, access to staff was denied in several other jurisdictions.

133. Bertenthal, *supra* note 46, at 1068.

134. *Id.* (examining social and organizational dynamics of environmental enforcement decisions in California); Bernstein & Rodríguez, *supra* note 46 (examining how the social and organizational dynamics of federal agencies promote accountability); Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, *supra* note 8; Scanlan, *Protecting the Public Trust and Human Rights in the Great Lakes*, *supra* note 8; Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View Into the Trustee’s World*, *supra* note 8.

135. Although ideally an additional researcher would have participated in coding, that was not feasible in this case with existing funding. Solo coding, however, has been done to wonderful and rigorous effect in Tony Arnold et al., *Cross-Interdisciplinary Insights in Adaptive Governance and Resilience*, 22 ECOLOGY & SOC’Y 14 (2017), as well as Scanlan’s longitudinal study of perceptions of the public trust among water managers in Wisconsin, Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, *supra* note 8; Scanlan, *Protecting the Public Trust and Human Rights in the Great Lakes*, *supra* note 8; Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View Into the Trustee’s World*, *supra* note 8; and questioned in PAT BAZELEY & KRISTI JACKSON, *QUALITATIVE DATA ANALYSIS WITH NVIVO* (2d ed. 2013) (arguing that coding is a tool meant to assist analysis rather than replicability).

136. Interview with M1 (June 23, 2022) (on file with author):

But anyway, I mean, the, the whole point is that, like your big question, <laugh> is that the answer is no. I mean, whenever the agency is doing permitting or making decisions, it doesn’t, the, the clean and healthful provisions of the Montana constitution don’t cross anyone’s mind. <Laugh>, . . . it’s just really it’s not talked about.

Montana. State attorneys working for the Department of Natural Resources, who knew about the right to a healthy environment, doubted that non-attorney staff were aware the amendment existed.<sup>137</sup>

Participants shared their thoughts about why the amendment was so absent from the thoughts and discussions<sup>138</sup> of natural resources managers. In general, they suggested the reason<sup>139</sup> was a combination of agency culture and a perception that the environmental rights amendment was too vague and not actionable. Participants saw the mission of the agency as more important to their work protecting natural resources.<sup>140</sup> Protecting and managing water resources was seen as a clear directive that was part of their jobs, whereas the “clean health” language of the amendment was described as “seem[ing] so amorphous and vague [ . . . that i]t’s just kind of out there.”<sup>141</sup>

One Montanan participant offered that for the amendment to matter to agency staff, the legislature would have needed to direct them to create regulations regarding the right to a healthy environment. They drew a parallel to the Montana Water Use Act,<sup>142</sup> which lists the criteria the Department must consider when deciding whether to grant or deny an application for water rights.<sup>143</sup> The participant suggested that because the Water Use Act was so direct and detailed, and that was a directive from the legislature to the agency, that encompassed the entire world of salient law for the agency staff.<sup>144</sup> As they put it, “this

is all we’re gonna look at.”<sup>145</sup> This view runs in opposition to advocates of constitutional environmental rights, who expect that constitutional status would give the right more weight than statutory laws in states.

Responses from natural resources managers in Hawaii to direct questions about their environmental rights amendment were similarly doubtful about the relevance of the amendment to their work. Participants expressed a lack of familiarity with the amendment, and suggested that it was not “at the forefront”<sup>146</sup> and further that it was not used in staff communication, documents, or procedures as a basis for agency action or inaction.<sup>147</sup> As in Montana, participants were doubtful that others in their agency knew of the constitutional right to a healthy environment, with one participant expressing certainty that at least one natural resources manager in a supervisory role was not aware of the right’s existence.<sup>148</sup> For those participants who were aware of the environmental right’s existence, they were doubtful that the amendment was important to the work of the agency.<sup>149</sup>

Hawaiian participants raised normative concerns about whether it was appropriate for constitutional law to be used to influence perspectives or behavior. These participants argued that intrinsic motivation and values are more determinative to their work, and further, that was the proper way of things. One participant forcefully communicated that sentiment: “[The environmental rights amendment is] irrelevant to your motivation . . . . [Y]ou [should] recognize a duty to, for environmental protection you should as a bureaucrat, regardless of whether it’s in the constitution or not.”<sup>150</sup>

A slightly different take from another participant with a normative view that constitutional environmental rights should not be used to influence values, was that such

137. Interview with M2 (June 21, 2022) (on file with author) (“I’m not sure if practitioners like the [hydrologists and] biologists and whatnot are aware of the constitutional provisions.”).

138. Interview with M1, *supra* note 136.

139. David W. Cash et al., *Knowledge Systems for Sustainable Development*, 100 PROC. NAT’L ACADEM. SCI. 8086 (2003) (discussing the role of legitimacy, alongside credibility and salience in decisionmaking).

140. Interview with M2, *supra* note 137:

I guess my opinion would be it’s agency culture. Like, this is our job. We know our job is to manage water resources. That is a very important job. Clean health will just, is like, it seems so amorphous and vague that I just don’t think people see it as like an actionable, at least in the, you know, people that are on the front lines doing the, the work see it as kind of like a, a thing they need to really focus on when making decisions. It’s just kind of out there.

See Interview with M1, *supra* note 136.

141. Interview with M2, *supra* note 137. See Interview with M3 (June 27, 2022) (on file with author):

in sort of my advisory role as in-house counsel I never had an agency staff um, person come to me and say “do you think this might infringe the constitutional right to a clean and healthful environment?” because frankly, um, I think we viewed it as nice language without a lot of teeth.

142. MONT. CODE ANN. §85-1-101 to -907 (2023). For an accessible guide to the Montana Water Use Act, see Adam Sigler & Brad Bauer, *Water Rights in Montana: An Overview*, MONTGUIDES (Dec. 17, 2023), <https://apps.msuextension.org/montguide/guide.html?sku=MT201709AG>.

143. See Albert Stone, *Montana Water Rights—A New Opportunity*, 24 MONT. L. REV. 57 (1973) (discussing changes to Montanan water rights shortly after the ratification of the current Montanan Constitution).

144. Interview with M2, *supra* note 137:

[A]t least for the water right side, is that, you know, the, the Montana Water used to act and the Montana Code spells out the criteria that the agency has to consider when deciding whether to grant or deny an application for a water, right? And those are expanded on in the administrative rules. And, and so really the, the mindset is really like, this is what the legislatures told us to look at, and this is all we’re gonna look at. And the legislature has not told us to make a determination on whether granting this application would comply with the clean, healthful provision of the Constitution.

145. *Id.*

146. Interview with H1 (May 3, 2022) (on file with author):

I’m not sure, I’m not sure that I’m as aware of sort of like the right to a healthy environment . . . . Or you know, just sort of the healthful aspect of it that’s more broadly applied. Um, I think the use of that sort of in practical spaces is newer. And so, it’s not as, it’s not as, sort of at the forefront I think, of, of agencies and citizens and community members.

147. Interview with H2 (June 30, 2022) (on file with author) (“I’ve never seen a y’know a staff memo that referred to the right to a clean and healthful environment as being a reason for doing something.”).

148. *Id.* (“When [a law professor] emailed . . . about [the right to a healthy environment and natural resources management] she emailed back, ‘do we have a right to an environment in our state constitution?’”).

149. *Id.* (“And I think that from, when I, it was, it was not that I wasn’t aware that it existed, but say as planning director, or even as an activist, I was aware that it existed, but I didn’t think that it had a substantive content beyond creating a right to a uh, a private right of action.”).

150. *Id.*:

I would think, you know if you have people in these agencies who are doing their jobs, they, environmental protection is part of your job. And whether you have a constitutional provision for it or not, really does not make a lot of difference. Like we don’t have a state constitutional provision that says people have a right to a good education. But I think if you passed, I think it if you passed one, a teacher is motivated, you know you go into teaching, you should be motivated to give your students a good education, and you don’t need a constitutional provision to, that tells you . . . .

mandates would hamper constructive dialogue.<sup>151</sup> These sentiments were also expressed together, with one participant raising the importance of underlying individual and collectively held values in giving effect to environmental protection law.<sup>152</sup> Although these positions are all quite different from the assertion of Montanan counterparts that direction should come from the legislature and not the constitution, these responses, too, raise some doubts about environmental constitutional rights advocates' normative claims that constitutional rights should influence behavior and values.

## 2. Grudging Limited Utility of Environmental Rights Amendments

Nonetheless, some attorney participants did note that on occasion the environmental rights amendments could be useful, especially in litigation and as a means to discipline agency clients. "From an activist standpoint . . . it's an arrow in the quiver."<sup>153</sup> A counsel for a natural resource agency in Montana noted they sometimes use the environmental amendment's constitutional status in discussion with agency clients to stress the importance of MEPA and think of that status as "an incentive to do the procedures that are required under MEPA." "To the extent you've gotta do the procedure [under MEPA] I think it's a mandate [because of the constitution]."<sup>154</sup>

### B. So What Does Influence the Work of Natural Resources Managers, in Their Views?

On an individual level, participants highlighted their values and identities as influential to their decisionmaking. At an organizational level, or when speaking about what influenced the decisions of high-level directors, participants focused on political economy (chief among these, political power dynamics and budget concerns). They described all of these categories as being more important to their work than constitutional amendments.

151. Interview with H3 (May 4, 2022) (on file with author) ("There's a problem with, you know and I was thinking about, because this whole rights, what I've noticed about, when people argue on the basis of constitutional rights, one of the things that happens is they don't feel it necessary to convince you it's a good idea anymore.")

152. Interview with H4 (Aug. 11, 2022) (on file with author):

I don't think we need more legal protections or stronger constitutional language or even statutes, or even consequences for not filling that because no one likes to stick to them, but it's why, like why is it important and getting into people's minds and having them be part of it is really important right. Yeah, because it's not like they're you know again talking with some friends and then sort of we have some of the strongest environmental laws right in throughout a lot of our states, but it's the values tied to implementing those laws that will make them as good as they're meant to be.

153. Interview with H3, *supra* note 151.

154. Interview with M2, *supra* note 137.

## 1. Personal Values and Identity

One underlying theme in the interviews is that natural resources managers see their work as ideally aligned with their values, and they bring those values into their work, where possible. Unsurprisingly perhaps, participants universally expressed environmentalist identities and values,<sup>155</sup> as well as discussing their personal connections to place. Sometimes connection to place was discussed in pointed terms, especially where something was harming a resource the participant liked to use and formed part of their self-conception.<sup>156</sup>

A natural resources manager who was also a surfer, for example, might have a particularly strong opinion about sea walls. Or a manager who practiced traditional spear fishing and was teaching their child the same might have similarly strong views about aquatic management.<sup>157</sup> But for others, values and connection to the land and resources they were stewarding in their jobs were tied in with history and broader culture. For example, one natural resources manager in Hawaii spoke about their connection to place and Native Hawaiian culture influencing their approach to work, describing that context and their own identity as "all things that . . . I take with me when I go to work."<sup>158</sup> Participants also emphasized their hope to encourage widespread adoption of their values.<sup>159</sup>

Contrary to participants' views about environmental rights amendments, when discussing values, participants

155. *E.g.*, biased in favor of MEPA. Interview with M2, *supra* note 137:

It's always in the, I feel like, especially for folks who've been there a long time, it was always kind of in the back of their head, like, you know, we had this important job to do, like, you know, water's so important, this state, and, you know, we, you know, the, the, we had been charged with you know, being the caretaker of water resources.

156. Interview with H6, *supra* note 90 ("I do have a very strong opinion about these sea walls, because that's where I surf.")

157. Interview with H2, *supra* note 147.

158. Interview with H7 (July 15, 2022) (on file with author):

Water is, you know, it's the next crisis. It's what we will fight over in the future. And as an island state, we don't have the luxury of importing water from another, another country, another state. We don't have a Colorado River, we just have what we have here. And those resources are dependent on a healthy environment you know, a vibrant and healthy forest. So those are all things that I, that I take with me when I go into work. We're really connected to the resources we have here. You just walk outside and you can actually see the mountains, you've seen streams you see everything that's right in front of you. Local native Hawaiian culture is also very connected to, to place and nature. And even though I, you know, I'm not born and raised here, I have lived here for over 13 years, and that has definitely rubbed off on me. The connection that we have with, with, with place and understanding the value of our resources and our responsibility to be involved in the protection of those resources, because we rely on them every day and we don't, you know, have the ability to, to go elsewhere to find more water.

159. Interview with H4, *supra* note 152:

We can use those values of like, we live on an island and have limited resources so we have to take care of everybody to help inform us in an unknown climate future, right? Like what we talked about when we first came on, mid-century is not looking too good. So if we know it's there, what can we learn from those value sets where we lived without any imports. Right now we import almost everything into Hawaii. How do we shift back to that value set or honor that value set and build on it to make it make sense moving forward here in Hawaii?

portrayed them as concrete and formidable, with the ability to impact their decisions on the ground. Directors within natural resources agencies are able to tap into those values to make decisions, “. . . typically, your key decisions are on a policy level where your values do come into play . . . . The statutes will give you some guidance to how you’re supposed to make a decision but at the end of the day, you are making a values decision . . . .”<sup>160</sup> In this view, law provides the algorithm—e.g., what is on the checklist—but it is the individual beliefs and values that give meaning and soul to natural resources work.

## 2. Political Economy

Political economy is paramount to the work of natural resources managers.<sup>161</sup> Participants described the governance landscape as one where the law on the books did not match their lived reality. Instead, immediate political economic context interfered with agency legitimacy,<sup>162</sup> while longer-term effects of political economy left agencies with diminished capacity to handle mounting environmental and political challenges. By legitimacy, I mean the ability of natural resources managers to do their work without substantial political interference from the governor’s office or the legislature,<sup>163</sup> while also having their work seen as salient<sup>164</sup> to communities, legislatures, and the governor’s office.

In short, natural resources managers try to “stay out of political trouble” and avoid threats to their time and budget, while fighting for additional staff and resources. These influences dominate the day-to-day work of natural resources managers. Threats to both legitimacy and capacity are perceived as undermining the agency’s ability to do its work.

Because law is intimately connected with political economy,<sup>165</sup> it is worth a quick note about how natural resources managers saw statutes and constitutional law in connection with politics.<sup>166</sup> Both lawyers and non-lawyers in Hawaii reported a mismatch between law and action; they saw law as something that was supposed to be on their side, as a tool to help them fulfill their mandates, but poli-

tics overpowers law. One natural resources manager with a science background shared their experience that even though one might think that law has a direct relationship with what natural resources agencies do on the ground, they are mere words that in practice “get[ ] a lot of lip service” but do not, in the end, “drive[ ] the bus.”<sup>167</sup> An attorney in Hawaii reported a similar outlook, though more pointedly suggested that politics has a greater role than constitutional law in agency action.<sup>168</sup> Hawaiian participants noted that despite how the law on the books appeared in Hawaii, the political culture there was frequently transactional, and politics controlled enforcement.<sup>169</sup>

In Montana, natural resources managers likewise noted that the influence of law on the books was complicated by the influence of the governor and regulated resource users’ instrumental use of the governor’s office. All Montanan participants noted the substantial influence of the governor’s office—whether that influence was direct from the governor or through regulated users. Some influence was simply the normal influence of a hierarchy, with the political branches pressuring the agency to focus on a particular matter or to be more “efficient.” This was observed in both Republican and Democratic administrations.<sup>170</sup> Nonetheless, this kind of influence was still discussed in cautionary or negative ways by interviewees, as “pressures” causing “consternation.”<sup>171</sup> Similarly, other participants shared that

167. Interview with H5 (Aug. 25, 2022) (on file with author):

There’s these things [laws and doctrines] that are out there, right. That are supposed to backstop what we do and, and provide some, some justification or, or legal basis for moving things forward, even if people are not necessarily all supportive of it. But it gets a lot of lip service. I don’t think at the end of the day it really drives the bus, so to speak[.]

168. Interview with H8, (May 24, 2022) (on file with author):

[The environmental rights amendment and the public trust doctrine] were technically in the constitution but like many things in Hawai’i the law is—the great law is on the books . . . . And so very—if you look at the Hawai’i laws you’d be—you’d think things were wonderful and because there was a progressive environmental rights amendment right around statehood when there, when people were really interested in planning, they were interested in land use design, they were interested in doing good things. A lot of things got on the books . . . . But then the reality of politics in Hawai’i is that people wanted their deals. And so a lot of the, a lot of the laws were never followed through, there’s very little enforcement. And so think of these statutes as tools but only, they’re only forums for conversation, they’re not like I can walk in and it’s a lay down hand of poker or something. It’s not like I get to win because a matter of pure logic, y’know, this is a violation. Um, the world’s more complex than that . . . .

169. *Id.*

170. Interview with M2, *supra* note 137:

[T]here was a lot of just requirements to . . . run every kind of minutiae by the governor’s office for comment before sending things out. And I won’t give a specific example, but in general, with litigation that existed prior to the new administration, they took a very heavy hand with guiding the, the way the litigation went after they took over. And sometimes it was kind of like a reverse course.

171. *Id.*:

And so there were those external pressures in addition to the current governor who ran on, you know, fixing the department, the DNRC oh, know that because we were <laugh> DNRC was the kind of one of the problem agencies and cutting the red tape and all, all of that, which were, you know, kind of the soundbites. So there, there was that externally on the water right side. And then internally there’s a real big push to kind of clean house in the agency. And that really started with the new administration and, you know, trying to form

160. Interview with H2, *supra* note 147.

161. This is consistent with prior work on natural resources agencies and the role of politics. See JEANNE N. CLARKE & DANIEL MCCOOL, STAKING OUT THE TERRAIN: POWER AND PERFORMANCE AMONG NATURAL RESOURCES AGENCIES (2d ed. 1996) (in a study of seven federal agencies finding that mobilization of political support is a key determinant of agency success); Helen M. Ingram, *The Political Economy of Regional Water Institutions*, AM. J. AGRIC. ECON. 10 (1973) (arguing that the failures of regional water management organizations were “largely determined by restraints on political viability”).

162. See Cash et al., *supra* note 139.

163. This may seem odd from the usual principal-agent narrative about agencies. Brigham Daniel’s 2014 article about the power dynamics between agencies and legislatures offers significant insights on this matter. Brigham Daniels, *Agency as Principal*, 48 GA. L. REV. 335 (2014).

164. In this sense, legitimacy is a combination of salience and credibility. Cash et al., *supra* note 139.

165. See, e.g., Daniel W. Bromley, *Land and Water Problems: An Institutional Perspective*, 64 AM. J. AGRIC. ECON. 834 (1982) (discussing insights from John Commons on law and economics).

166. Court cases and litigation can have a different kind of influence and are discussed *infra*.

there is a danger to not agreeing with the governor, that they could “rake you over the coals.”<sup>172</sup>

Beyond the usual top-down political pressure,<sup>173</sup> natural resources managers in both Hawaii and Montana described political pressure from citizens. This is consistent with Adger and others’ insights about bottom-up cross-scale linkages in natural resources management.<sup>174</sup> The form that this mode of influence took, though, was different in each jurisdiction and rooted in the political culture of each place.

In Montana, participants noted that it was common for regulated resource users to threaten to go to the governor’s office to coerce the agency staff toward a particular action. This dynamic was universally seen by participants as troubling, but also simply a fact of working in Montana.<sup>175</sup> Participants related that these kinds of threats from the public and even within the agency were “not . . . uncommon.”<sup>176</sup> And they felt that the small population of the state likely added to the prevalence of the threat. The smaller the population, the more likely it is that an individual will know someone in a position of authority.

In Hawaii, interviews revealed two mechanisms for the public to wield influence via the political branches. There were stories of individual resource users trying to indirectly influence what natural resources agencies did, although through a less direct mechanism than resource users in Montana. For example, one natural resources manager related that citizens and regulated users who want to force the agency toward a particular outcome will lie in wait until the end of a public process—when representatives from the governor’s office or legislature are present—to participate, in an effort to “derail” the agency, making claims about

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a ton of working groups and you know, looking at different ways that we operate to try to find efficiencies in, in the work. And so that caused staff a lot of just, it’s a lot of consternation. There’s a lot of change, new leadership and things like that. And, you know, for better, for worse, state agency staff don’t like change <laugh>, and especially those that have been there a long time. And yeah, kind of the, both of those pressures going on the external and the internal, that’s just the start.

172. *Id.* (“[D]epending on who the governor is, they can rake you over the coals for doing something that is not consistent with what the governor wants,” and “[I]t was like different than I expected, but like still uncomfortable the level of kind of micromanaging that the governor’s office did with, with each agency, and especially the lawyers. So I didn’t really like that.”)

173. Cash et al., *supra* note 56.

174. Adger et al., *supra* note 28, at 9-11.

175. Interview with M2, *supra* note 137:

Like, if, if you’re not doing something that they [the resource users] want you to do, they’ll say, “I’m gonna call the governor’s office.” You’re like, “You gotta do what you gotta do. You, you have, you’ve got that.” . . . I think for the most part, in my experience anyway, is those, the people who say that are typically, they know the governor or know someone on the staff. So they kind of, it’s kind of a two-prong threat. They’re kind of like, I’m gonna call the governor ’cause I know him because her and so, you know, I think they typically, as I said, they’re kind of trying to get you to do what they want to do. If you’ve got a directive yeah, you just kind of do. And if the governor changes course, it’s gonna filter down to the [agency].

176. *Id.*:

It’s not, I guess, uncommon in Montana agencies [for resource users to try to influence decisions by threatening to go to the governor] because people, it’s, you know, a small state and people know people that folk, regardless of the hierarchy will tell, you know, their managers like, I’m gonna tell on you to the governor’s office.

illegitimate processes and raising those to the political branches.<sup>177</sup> More powerful regulated users directly lobby the state legislature. Of course, this too is not uncommon in law and policymaking, but it is a notable source of pressure for natural resources managers, some of whom found the process to be surprising.

In one story, natural resources managers at the Department of Aquatic Resources came up against political maneuvering of regulated resource users when they tried to limit harm to unique fish habitat in Molokini<sup>178</sup> by creating a program to prevent tourist and fishing boats from overcrowding the area.<sup>179</sup> In the end, after tourism lobbyists enlisted the aid of the legislature, the agency staff convinced the governor’s office to intervene. The agency staff had expected to create a formal set of rules and regulations addressing overcrowding at Molokini. Instead, that work became a cooperative voluntary program. The natural

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177. Interview with H5, *supra* note 167:

It gets ugly and messy because you, you get a lot of people who don’t participate all the time popping in and you know, or you have people who deliberately try to, to derail the effort. There’s a lot of that now. People have gotten really good at that. Right. So they, they don’t constructively engage until the very end. And then they come in and, and blow all kinds of smoke and mirror about how horrible this is and how they’ve never heard about it, and nobody’s ever talked to us about it, and this is terrible. And they try to derail it at the very end . . . with the final policy makers, you know, not having been involved in everything up to that point, that oftentimes works really well. Right. The governor and the, and the legislators and the, the policy board that we work with called the Land Board, you know, they’re, they’re political minded folks, and when they hear that kind of stuff, they’re like, oh, this freaking, you know, division of aquatic resource, you guys are not doing your job.

178. Marine life conservation district.

179. Interview with H5, *supra* note 167:

I want[ed] to deal with the crowding [of boats in Molokini] because of [their impacts on a protected ecosystem]. But in this case, you know, it’s been a learning process for me too because I, I, I tried to be a little bit more heavy handed and just say, this is, this is what it is. This is the mandates we operate under. This is the concern. This is what we’re gonna do . . . And I just got clobbered by the state legislature. The, the marine tour operators have an advocacy group called the Ocean Tourism Coalition. They have high paid lobbyists. And somehow or another, I don’t know how this all works, I’m sure there’s a lot of illegal stuff going on, but these people carry a lot of weight with our state legislators and it, you know, to the point where they’re hostile to us. Like, we were not able to really participate meaningfully in the legislative process. They’re hostile to our division. They kind of push us off as being like, you guys are just, you’re just, you know, picking on these, these, these good hardworking people that are generating jobs and, you know, tax revenue for the state kind of thing. And it’s just kind of odd . . . You know, I, it was real eyeopener to me. We got killed. They went out and they created legislation that limited our ability to, to manage their crowding or use of Molokini. Just complete. No reason why a state legislator should create something like, so one-sided for an industry that just basically gives away public resource in that way. And, and all the legislators follow suit because it was written in such a way where they all thought, “Oh yeah, no, that’s a good idea.” Even though we tried to present testimony and explain why that’s a problem and how that limits our ability to manage this area and how that’s gonna affect, there was no interest. Right. So that was a real eye-opener to me that when it came to dealing with these folks, we have to be a little bit more sensitive, walk a little lighter, and try and try to try to come up with compromises that we can agree to, and that whole story aside, they created this bill and it was proved like unanimously in the state legislature, both house and Senate, which is like in itself kind of odd. That doesn’t happen very often. And then we, we basically, I got a meeting with the governor and convinced him how bad that was, and he vetoed it.

resources manager I spoke with concluded that the political process, which they had not initially expected, led to an opportunity to collaborate directly with regulated users to develop a voluntary program.

Unique to Hawaiian political economy is the political power of Native Hawaiian cultural rights and Native Hawaiian claims to access or restrict access of others to natural resources. These have both legal and cultural backing that can influence the work of natural resources agencies. As one former resources manager put it, agencies are “very aware” of Native Hawaiian rights “because it complicates their ability to enforce” and it is “embedded in everyone’s . . . awareness.”<sup>180</sup>

*That assessment held across all discussions with Hawaiian natural resources managers.* Constraints on access to natural resources are fundamental to much of natural resources management. Competing claims to control access for traditional Native Hawaiian cultural practices have legal backing in the state constitution.<sup>181</sup> It is not surprising that natural resources agencies consider native rights so prominently.

To give a sense of what the political influence of Native Hawaiian rights claims look like in practice, permitting for the large telescope observatory at Mauna Kea provides a useful example. In the 1990s, several large telescopes were built on Hawaiian mountains. At the time, the projects were permitted “without a single person testifying against it, or, or even sending a letter or the organization that officially represents Hawaiian interests in the state bureaucracy, the Office of Hawaiian Affairs having any comment at all.”<sup>182</sup>

That changed in the 2000s, when after contested hearings, the Land Board voted to approve construction of a new telescope on Mauna Kea.<sup>183</sup> Protesters, claiming Native Hawaiian rights were being impacted, blocked the road to prevent construction. And the project remains “stymied”<sup>184</sup>

180. Interview with H1, *supra* note 146.

181. Sproat, *supra* note 81 (arguing for a restorative justice framework connecting Native Hawaiian rights in the constitution to sustainability and climate adaptation). The interplay between Native Hawaiian cultural rights and environmental protection was a subject of sensitivity, respect, and, at times, frustration by participants. *E.g.*, Interview with H9 (Sept. 9, 2022) (on file with author):

I think another unique thing about Hawaii that I’m sure you’ve talked to people about is the Native Hawaiian rights that a lot of the times there’s kind of a misunderstanding I think, of what that actually entails. And so people often just try to use that as an excuse for bad behavior. They say, well, it’s my right. I am, you know, I’m allowed to be able to fish. And I’s like, okay, well if you wanna be using historical practices, sure. But I mean, they didn’t really have spear guns back in that time . . . Coming up against that, especially as an outsider, you know, and I know that I am an outsider, then communicating that with people can sometimes come off as, you know, I’m a colonialist or something, so try not to I try not to be too offensive with that, you know, I try to take more of a position of a listener and, you know, rather than an enforcer.

182. Interview with H3, *supra* note 151.

183. *Id.*

184. *Id.*

The permit, the permit’s still out there, you know valid, but they’re never able to move the construction trucks up to the mountain. So that’s, that’s the biggest controversy that’s happened. The, and then, y’know permit was challenged in the state supreme court and the state supreme court said we had validly looked at all the factors.

despite state supreme court intervention. When asked why this telescope garnered so much attention when others had not, a participant shared their view that “a good part of it, and maybe half of it at least, is that became the issue of the Hawaiian sovereignty, Hawaiian independence movement. [ . . . And] a part of Hawaiian identity, that’s a big part of nationalism now, is a big part of Native Hawaiian identity.”<sup>185</sup> The change in Native Hawaiian political identity, in other words, was perceived as shifting the pressures on agencies and outcomes.

### 3. Legacy of Political Economy Left Agencies With Diminished Capacity

The ability of natural resources managers to give effect to environmental rights depends on the capacity of the agency. Agency capacity is eroded by chronic understaffing, high turnover, budget constraints, and political interference. Understaffing prevents agencies from accomplishing even the basic requirements of natural resources agencies—especially monitoring.<sup>186</sup> High turnover impedes knowledge retention within agencies. Budget constraints diminish the ability of agency staff to do their jobs by lack of needed equipment (e.g. boats for the Department of Aquatic Resources), inability to hire sufficient staff, or difficulty in recruiting new staff. Political interference, too, can lower morale and lead agency staff to leave, leading to understaffing or high turnover.

Participants with supervisory authority in the agency generally thought they needed 30% to 50% more staff to handle their current workloads and backlogs.<sup>187</sup> In both Hawaii and Montana, directors felt that additional positions were needed. In Hawaii, one director related that “[t]he work [ ] greatly exceeds the number of people [in the agency].”<sup>188</sup> In Montana, the problem of losing existing staff was more acute. One long-term natural resources manager noted:

They don’t, you know they don’t, uh they say the way it’s phrased is of course y’know, “the findings of fact were not clearly erroneous and the conclusions of law were not erred.” And so we’re approving the decision that they made, not necessarily that they would’ve made the same decision had they sat in our shoes but that, that’s fine, that is their role. But y’know the public, there were enough people that were, that had attached enough of their identity to this that they were willing to be arrested and as I said the government was not ready to make a mass sweep and, y’know I think it would’ve been they would’ve had to call out the national guard, there were at least a couple of thousand people. That would’ve been arrested. So that was, that was a major controversy of the last eight years.

185. Interview with H3, *supra* note 151.

186. Monitoring is key to anticipate and respond to disturbances big and small for natural resources. Interview with H9, *supra* note 181:

And it’s, yeah, it’s bare bones and we are doing the best we can, and we’ve actually even expanded the areas that we’re monitoring, but now we have a bit of a bottleneck because we’re doing all this monitoring, but then we have to enter the data. So that’s <laugh>, that’s gonna be the, that’s our struggle at the moment. We’re a couple years behind there . . . And then on top of that, because the enforcement officers are, are also bare bones. It’s just, it’s, it’s hard.

187. Participants noted that sufficient staff for monitoring and community outreach were the greatest need.

188. Interview with H2, *supra* note 147.

We had, I think five attorneys leave because the new governor was in place and everyone was kind of freaked out because he's, well, here's another anecdote he got, he won election to . . . And the day before the election, he body slammed a reporter because the reporter asked him a question. Yeah, that's him.<sup>189</sup>

Participants reported that they felt their agencies were underfunded in state budgets and that salaries were below what staff could earn in the private sector. In Montana, one supervisor noted:

I think there were like three or four straight legislative sessions as the legislature just said, you know, every agency needs to reduce by 5% their operating budget and whatever that means. You, you know, so people were getting laid off. You know, and, and so for example, I was talking with my boss probably last week, I think, and we were talking about like revamping our pay schedules. And we're still at 85% of market. And we've been that way for, well, since I've been with the NRC. And I think it's, it's basically, it's just because the legislature is just not, they're just kind of anti-government for the most part . . . I think it makes it really hard for people to stay with the agency and to recruit people . . .<sup>190</sup>

In Hawaii, supervisors noted similarly that they did not have enough funding or staff to adequately fulfill their mandate:

So CWRM [Commission on Water Resources Management] has the authority to manage and regulate freshwater resource[s] and statewide. So you would think that that would come with a huge budget and a lot of staff. It doesn't, unfortunately. The staffing right now at CWRM is about 20 people. We are all based on the islands of Oahu. So we don't have staff that are based on any of the neighbor islands, although we do have staff that travel to the neighbor islands quite frequently to do field investigations and collect data and things like that meet with communities. The budget for the water commission is under \$3 million a year.<sup>191</sup>

Another participant in Hawaii noted that, "as a whole though, the, the department (DNR), we get approximately 1% of the entire state budget. So the department itself is severely underfunded. And then the trickle down effect to all the different divisions, including forestry and wildlife and CWRM, you kind of see like where it's going."<sup>192</sup> At least one aquatic resources manager suggested

that they try to encourage community members to bring complaints to legislators, so that the department can be adequately funded.<sup>193</sup>

In the absence of state funds and adequate staffing, natural resources agencies look to grants and federal partnerships to help fill in the gaps. For example, one Hawaiian natural resources manager stated that in their role at the forestry division, "a lot of what I did was fundraising, finding grants to support the important work that we do because we don't have the state money to make it happen."<sup>194</sup> In Montana, a supervisor noted that "the vast majority of [agency] funding comes from the federal Department of Transportation" with whom agencies do a joint NEPA-MEPA analysis. CWRM likewise partners, or traditionally partnered, with federal agencies to manage stream gauges and as a source for grants to help collect basic monitoring data to protect and regulate water quantity and quality in streams.<sup>195</sup>

### III. Ways to Bolster Constitutional Environmental Rights

Not all constitutional rights are equal, and the institutions and activities around rights may shift the weight of rights. Data from this study suggest that constitutional environmental rights may gain meaning and importance to natural resources managers when they are connected to culture and/or given legal import through statute and strategic litigation. In Hawaii, connecting the constitutional public trust<sup>196</sup> in water to constitutionally protected cultural rights and Native Hawaiian legal traditions made that amendment more meaningful than other environmental provisions of the constitution. This connection is bolstered in Hawaii by mandated trainings on native legal traditions. In both Montana and Hawaii, the use of strategic litigation and connection to state statutes can adjust the priority of perceived duties related to constitutional amendments.

In Hawaii, interviewees regularly discussed the importance of the state's constitutional public trust doctrine (Article XI, §7) to their work. When doing so, they frequently discussed the doctrine as embodying elements of

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who are sort of flagrantly violating the rules and then nothing is happening, everybody kind of figures that out and then, then more people do it.

193. Interview with H9, *supra* note 181:

I often also will tell people in the community if they have concerns, you know, we are stretched super thin, we don't have a lot of resources, and if there are things that people want us to focus on, talking to the legislators is actually a really good way to do that because they can then put pressure and resources into our division so we can get the resources that way. But it's hard for us to do it without sort of top down.

194. *Id.*

195. Interview with H4, *supra* note 152.

196. 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 (2025) (suggesting a deep connection between public trust principles and environmental rights). *Cf.* Alyse Bertenthal & Sayd Randle, *The Half-Life of Legal Victory: Climate Rhetoric and the Co-optation of Reform*, ECOLOGY L.Q. (forthcoming 2027) (exposing how adoption of pro-environmental public trust rhetoric is used to undermine environmental goals).

189. Interview with M2, *supra* note 137.

190. *Id.*

191. Interview with H4, *supra* note 152.

192. Interview with H7, *supra* note 158. Aquatic resources managers in Hawaii reported similar frustrations. Interview with H9, *supra* note 181:

It has been a concern for a very long time that there's just not, not enough enforcement, not enough money. And, and everybody knows it, you know, and so that's why there's bad behavior. And I mean, of course it's not everybody, but when there are the people

Native Hawaiian legal culture and/or as necessary to give effect to constitutionally protected Native Hawaiian cultural rights.

For example, one Hawaiian water manager, when asked about how and whether constitutional amendments are discussed by natural resources agency staff, replied that the public trust doctrine has particular importance for CWRM; those rights are “talked about by staff” and is something that is “ingrained” in their reasoning and decisionmaking.<sup>197</sup> In making allocation decisions for water, water managers are required to consider four public trust purposes in their analysis; among these are traditional and customary rights.<sup>198</sup>

Beyond embedding cultural rights within public trust analyses, Hawaiian interviewees noted a deeper historical connection between the constitutional public trust and Native Hawaiian culture. Another Hawaiian water manager, after discussing the importance of the constitutional public trust doctrine to work at CWRM, went on to relate with pride how the public trust was based in Native Hawaiian Kingdom law and religious beliefs, such that state natural resources managers today were acting out the caretaker duties to honor and protect *kino lau*, the “earthly manifestation” of Kāne, “the god of fresh water.”<sup>199</sup>

197. Interview with H7, *supra* note 158:

They're very much talked about by staff. It's something we always have to consider in any decision we make is how does this relate to our duty to uphold the public trust as well as weighing, you know, reasonable and beneficial uses. So those are things that are kind of ingrained in our logic and thinking anytime a permit comes up for review anytime we're asked to provide comments on like a, an environmental assessment or, or anything really is, those are kind of the, the cornerstones of how we think within the agency. The example I'll give is whenever we issue a water use permit, there's like a checklist of an analysis we have to go through . . . So it's, it's really interesting and, and I'm not involved in, in this analysis, it's typically done by the groundwater folks for . . . anytime someone wants a water use permit, but they basically have to consider water availability, reasonable and beneficial use which has a whole other subset of things to consider interference with other existing legal uses, public interest state and county general plans on land use designations and policies interference with Hawaiian homeland rights traditional and customary practices.

198. *Id.*:

[T]hat's a huge issue for us. When we think about how we allocate and regulate water use, we have to consider these four public trust purposes in that analysis. And one of those is traditional and customary rights you know, Hawaiian homelands, reservations, things like that. So a lot of the disputes that we get involved with relate to restoration of streams. It's not just surface water, it's groundwater too.

199. Interview with H4, *supra* note 152:

. . . [S]o the water code and this concept of water being a public trust is really based in a foundation of a Native Hawaiian, a Native Hawaiian foundation and worldview of water as a resource. So in traditional Hawaiian perspective, one of our paramount gods was Kāne, and he was the god of fresh water, god of life. Water is life, right, I mean the, everyone says it. But it is and was and continues to be, right, the perspective of Native Hawaiians here in Hawaii. So as something with such, and, and all of the water, and all of its elements and forms are what we call *kino lau*, earthly manifestations of that god, here. So protecting and honoring that god in order for that god to provide for people, was a critical piece. AKA stewarding, or caring for something that gives you life, right? That relationship existed in a traditional perspective. Fast forward today, even prior to us being overthrown and, by the United States, the Hawaiian king, the Kingdom of Hawai'i had its own set of laws, and those laws were based on this traditional perspective of water

This heartfelt connection between duty in state public service and law was unusual in interviews, except for when participants raised the public trust doctrine in Hawaii. When participants did raise the public trust, they related it back to Native Hawaiian traditions and worldviews, and spoke about it with reverence. If advocates hope to influence “hearts and minds” through state constitutional law, the public trust doctrine in Hawaii and its connection to native culture may be a promising foundation, though difficult, if not impossible, to reproduce elsewhere.

Part of what might explain the prevalence of responses like those above is that by statute, Hawaii requires agency staff to attend trainings on native cultural rights, and their connection to Kingdom law and the Hawaiian Constitution. Agency board members and commissioners are required by statute to go through a training offered through the University of Hawaii, Manoa, and the Office of Hawaiian Affairs on traditional customary practices.<sup>200</sup> Natural resources directors note that while compliance is mixed, the trainings are open to additional staff, and attendance has changed understanding of the public trust doctrine and native cultural rights.<sup>201</sup> Staff are encouraged to go to the trainings and can do so during their work day without taking vacation time.<sup>202</sup>

The importance of constitutional provisions to natural resources managers can also be brought to fore by court decisions that directly involve a natural resources agency. Litigation can become a kind of political pressure that forces natural resources managers to change practices and

resource management, right, and this relationship with water. And this concept of public trust, that no one owns water, actually originates from Kingdom law.

Interview with H2, *supra* note 147:

So, based on that perspective, traditional perspective, based on the laws and the frameworks that water is not owned by anyone and that it's held in trust for the benefit of all, that then leads us to the Water Commission and its implementation. And so one of the quote unquote “models” or what people talk about is for the Water Commission is “*ke kahawai pono*.” So *kahu* is like a shepherd or steward, *wai* is water, and *pono* is like this concept of balance or, you know, being in equilibrium, right, like, equity, surely. So like always striving, a steward of water that's striving to seek balance, right? That's the concept of the Water Commission, or at least what we should be doing in our work here in Hawai'i.

200. H.B. 207 (Act 169), 28th Leg., Reg. Sess. (Haw. 2015) (seeking to expand the scope to department heads and administrators plus county councils and planning departments).

201. Interview with H4, *supra* note 152:

I think, you've seen more informed boards and commissions having now has to be required to go through that training and that legal priming. In their decision-making to ask the questions like okay well are we ensuring that we are meeting our Constitution obligations to discuss some practice and, in every decision, they are supposed to consider it right, and so whether you're the Board of Agriculture, whether you're the Land Use Commission, whether you're the County Planning Commission at the municipal level, those are all required to go through this training. To go through this training, I mean they cite all the boards and commissions but yeah that law was passed and so, while this is they've developed these primers to help support that training and people have access to it, the training that training itself has helped to elevate kind of the discourse around these rates and how those can be implemented into decision making of these bodies.

202. Interview with H7, *supra* note 158.

priorities. Court cases alter the significance of environmental rights amendments for natural resources managers.<sup>203</sup>

Attorneys at natural resources agencies in both Hawaii and Montana related that state court decisions interpreting constitutional provisions drive interpretations within the agencies. One attorney in Montana presented a trickle-down theory of how courts drive agency actions, in which attorneys for the agencies learn about litigation results and then use that information to help non-attorney staff conduct environmental assessments.<sup>204</sup> Participants in Hawaii described the relationship between court interpretations and agency actions in a tighter way, at least for bureaucrats with authority to make decisions, because “it’s primarily the court interpretations that drive how this has played out in real life on the ground.”<sup>205</sup>

Court cases can be catalysts for understanding constitutional provisions in new and different ways as well. For example, that the Hawaii Supreme Court interpreted the right to a healthy environment to be self-enforcing in *Ala Loop Homeowners*<sup>206</sup> caught natural resources managers by surprise. One former agency attorney shared that because no one had thought that the environmental rights amendment was self-enforcing, no one invoked it until *Ala Loop Homeowners*, after which attorneys began to use the right.<sup>207</sup> Pursuing legal strategies to shift agency behavior is not without risk.<sup>208</sup> But it remains one way that advocates of a right to a healthy environment can shift how agencies prioritize and think of those amendments.

203. This result is hardly surprising. The belief that litigation can effect sweeping and sudden changes in the interpretation of law and subsequent societal consequences underlies centuries of litigation, and the very existence of some legal advocates, whether Earthjustice or the Pacific Legal Foundation. Nonetheless, the idea that courts are the prime movers in societal shifts has had its critics over the years.

204. Interview with M2, *supra* note 137:

[The] supreme court said the vacate provision is required under the Montana constitution to [sic] provisions of clean and healthful environment. So that’s, you know, and I don’t think that’s a practical, there’s not a practical ramification for practitioners. I think it primarily affects the lawyers who are litigating that provision. But I think it trickles down, if not specifically. It’s basically it’s gonna trickle down to the practitioners, those who are doing EAs and EISs.

205. Interview with H2, *supra* note 147:

You can’t really separate from how the courts see it and how you see it as a board member or a person in my position that’s making decisions on, managerial level decisions, because it’s, I would say it’s primarily the court interpretations that drive how this has played out in real life on the ground.

206. *County of Haw. v. Ala Loop Homeowners*, 235 P.3d 1103 (Haw. 2010).

207. Interview with H3, *supra* note 151:

The healthy environment provision, which again was not observed at all, no one ever thought it was self-enforcing. And so it was never invoked, even people doing environmental laws sort of looked at it going well let’s see if [no] statutory enforcement provisions, no—the court’s not gonna take it seriously. Out of the blue, the current chief justice, Mark Brechenwald, in a case involving a charter school, and some zoning questions, and had nothing to do overtly with environmental questions directly, opined, albeit in dicta, that the right to a healthy environment is self-enforcing under the constitution. Everybody went “What? Where’d that come from?” But that was the decision, and so the—everybody who was shocked by that has now started to use it.

208. Rink, *supra* note 7, at 205-12 (discussing risks of climate litigation).

## IV. Conclusion

Advocates and adversaries of creating constitutional rights to a healthy environment tend toward some familiar tropes. Those opposing constitutional environmental rights tend to argue that doing so will create a flood of litigation,<sup>209</sup> and, in staggering contradiction, that the amendments are meaningless and wasted effort. Proponents of creating new constitutional environmental rights, however, are not immune to making unsupported claims, even if with good intent. Scholars have posited that constitutional environmental rights are needed to “change hearts and minds.”<sup>210</sup> The research presented in this Article casts doubt on that claim, suggesting that at least for natural resources managers, state constitutional environmental rights amendments do not seem to matter much.

In all, participants’ responses suggest that constitutional environmental rights are not among the most felt influences on their work governing natural resources. In both Hawaii and Montana, attorneys and non-attorneys offered a dim view of constitutional rights to a healthy environment. They did not think it played a significant role in their work. They questioned whether other staff even knew of the constitutional right’s existence. And they wondered whether law was the morally right way to influence values. Instead, interviews suggested that intrinsic personal values and identity mattered to the work lives of natural resources managers. And throughout responses from both jurisdictions, it was evident that immediate political economic context as well as the legacy of prior political economic conditions (e.g., low budgets and poor staffing) play a significant role in the work lives of natural resources managers.

But constitutional environmental rights nonetheless do factor into the work of natural resources managers. First, they factor in because the constitutional status of the rights can raise the profile of other related statutes, as in the case of MEPA in Montana. Supervisors in agencies use this to encourage supervisees to take environmental laws seriously. Second, and relatedly, litigation under constitutional rights can discipline agencies and get staff to change their approaches to natural resources management and processes. While this might seem like an attractive avenue for advocates, it should be noted that interviewees did not independently offer “litigation” or “courts” as something that “drives the bus.”

There are some lessons to be learned for advocates if they wish to bolster environmental constitutional rights, from interviewees’ reflections on how law affects their work. In Hawaii in particular, the constitutional public trust plays a significant role in the work of natural resources managers. The managers saw the public trust as connected to Native Hawaiian legal traditions and culture, which gave it mean-

209. This has not been the case in any of the jurisdictions with an existing right to a healthy environment over the past several decades. See Polk, *supra* note 2, at 127.

210. See, e.g., MAYA VAN ROSSUM, *THE GREEN AMENDMENT* 257-59 (2022) (arguing that through court interpretations of constitutions amendments change social beliefs and behavior).

ing and importance to managers. And crucially, Hawaii offers trainings to civil servants in partnership with the University of Hawaii to better understand the connections between Hawaiian constitutional rights and Native Hawaiian law and culture. The Hawaiian experience with the public trust suggests that trainings and connections to important cultural rights might strengthen the perceived importance of other constitutional environmental rights.

The bottom line, however, is that budget is king in the world of natural resources governance. And behind budgets are politics. If there are not enough staff or equipment to monitor resources, field questions, or fill out permits, it is very hard to give effect to environmental and natural resources laws.

As Abraham Maslow's saying goes, when you're a hammer, every problem looks like a nail. For lawyers and advocates, every problem may seem like it has a solution in new laws. Seeing the world in this way neglects the economic and cultural conditions necessary to make law matter in the first place. The United States is beginning to learn this at scale as federal agencies and grants are being cut with deliberate carelessness. The supposition among advocates is that environmental governance will fall to the states. But as seen even in the modest research here, changes to constitutional law may not influence on-the-ground results if there are not adequate funds and people to make law matter.