terminology, Value Declarations are not "self-executing," but instead rely on legislative or administrative implementation. Government officials and others, however, often invoke Value Declarations in advocating for or defending particular actions,[14] and such Value Declarations may influence legislative and administrative decisions.

Institutional Specifications. Without directly dictating particular environmental actions, state constitutions also can influence environmental policy either by changing the rules by which governmental branches make environmental decisions or by creating new governmental organizations to manage specific environmental issues. In the first category, the constitution can modify legislative voting requirements or administrative procedures. In order to protect state lands of particular environmental importance, for example, several state constitutions require that the legislature approve any sale of protected tracts of land in multiple legislative sessions or by supermajority votes.[15] Constitutions also can modify the rules by which the courts review and enforce environmental laws. Rhode Island's constitution, for example, mandates that environmental regulations "be liberally construed."[16]

Constitutions also can take environmental issues away from the traditional branches of government and award the issues to new governmental organizations that are specially designed to ensure special expertise, to favor one or another interest group, or to provide a balanced perspective. For example, the California Constitution creates a Fish and Game Commission to manage fish and wildlife in the state.[17] In order to ensure a degree of independence from political influence, that constitution also requires that the five members of the commission be selected by the governor but confirmed by the Senate and serve six-year terms.[18]

Policy Directives. Constitutions also can protect the environment either by directing the government to adopt and implement particular policies or by restricting the actions that the government can take. These Policy Directives can bind all or selected branches of government and can set out the mandated policy in general or detailed terms. The Michigan Constitution, for example, provides broadly that the "legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction."[19] At a more detailed level, California's constitution requires the state, whenever it sells or transfers public lands, to reserve "in the people the absolute right to fish thereupon."[20]

Courts often have held that broad Policy Directives, such as the Michigan directive, do not give citizens the right to sue the state for failing to take particular actions either because the provisions are not "self-executing"[21] or because the constitution does not give private citizens a cause of action or standing to sue.[22] Although such Policy Directives might still play important political roles, directives that are not judicially enforced are effectively the same as Value Declarations.

Environmental Rights and Duties. Finally, some constitutions include Environmental Rights that assure citizens of particular protections. Again, the Environmental Rights can be either quite broad or relatively narrow and detailed. At the latter end of the spectrum, the Wisconsin Constitution provides that "the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor."[23] Colorado's constitution specifies that the "right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[24] At a much broader level, the Massachusetts Constitution sets out a public right to "clean air and water."[25] Constitutions can and often do couple such broad Environmental Rights with Policy Directives to the government.

Environmental Duties are the flip side of Environmental Rights. Any constitutional right implies a corresponding duty. If a constitution guarantees its citizens a right to clean air, there must be a duty in at least some individuals or entities not to pollute the air. Although constitutions can leave duties an implicit corollary to the listing of Environmental Rights, spelling out specific Environmental Duties makes clear who exactly is under a duty not to interfere with the right. The Illinois Constitution therefore states that "the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations."[26]

3. Enforcement

Policy Directives, Environmental Rights, and Environmental Duties raise the questions of who can enforce the provisions, in what courts, and in what circumstances. One option, which most constitutions have adopted, is to say nothing, leaving these questions to judicial resolution under the courts' standard rules of constitutional enforcement. There are risks, however, to this approach. Environmental litigation is relatively unique. In traditional constitutional litigation, plaintiffs seek to block governmental action that directly threatens to injure them. In environmental litigation, by contrast, plaintiffs who have not suffered a personal injury but are trying to vindicate a general environmental interest often seek to force the government to act. A nonprofit organization, for example, may try to use environmental provisions to force the government to protect an endangered species. Many states have not developed clear rules for dealing with such cases, and courts often have proven reticent to recognize private causes of action in such settings.

Policy Directives, Environmental Rights, and Environmental Duties therefore may wish to incorporate explicit provisions regarding judicial enforcement. The constitutions of Hawaii and Illinois explicitly authorize citizens to enforce their Environmental Rights in court against both governmental and private

defendants, subject to "reasonable limitations and regulation as provided by law."[27] And the New York Constitution provides that a violation of its Policy Directives "may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen."[28]

Such enforcement provisions can address a number of important issues, without getting bogged down in unnecessary detail. First, who can bring a lawsuit seeking to enforce the environmental provision? Potential plaintiffs include various governmental attorneys (e.g., state attorneys general and local city or county attorneys), other governmental officials holding special responsibilities for representing the public interest (e.g., state public advocates), and private organizations and individuals. Second, should courts employ any special standing rules? In particular, should courts insist on a showing of actual injury or damage to the plaintiff? Finally, should the constitution affirmatively encourage such lawsuits by authorizing courts to award attorneys' fees to prevailing plaintiffs? "Citizen suit provisions" in national environmental statutes, such as the Clean Air Act, have helped promote enforcement of these laws by providing for fee awards, and similar constitutional authority is likely to lead to more active litigation under environmental provisions.[29]

4. Degree of Specificity

A final drafting question is the degree of specificity with which an environmental provision should be written. Both extremes present dangers. However, hyperlegislation, in which a constitution specifies environmental policy at a level of detail more traditionally associated with statutes, presents far greater problems. Hyperlegislation makes it difficult to adjust environmental policies to changing conditions and needs and to make midcourse adjustments to policies in light of experience. Hyperlegislation also clutters up a constitution and dilutes the importance of more fundamental constitutional provisions. To the degree that a constitution grows to resemble a statutory code, fewer citizens will be aware of the constitution's provisions, and the symbolic and educational value of the constitution will fade.

An example of counterproductive hyperlegislation is the appropriately named Marine Resources Protection Act, which constitutes Article X-B of the California Constitution. Approved by California voters in 1990 as a constitutional amendment, Article X-B bans the use of gill and trammel nets, which can entangle and thereby injure or kill sea-lions, porpoises, and other noncommercial marine life. Like statutes, the article sets out in exacting detail how the ban should be implemented, specifies enforcement procedures (including the exact penalties and fines to be imposed for violations), and even requires an annual report to the legislature. Any changes in the details of the article require a constitutional amendment, effectively freezing in place the current provisions.

Overly general provisions, by contrast, can be ineffective. Few people would disagree that states should protect their environments and carefully manage their natural resources. Constitutional provisions that merely mandate "healthy environments" and resource "conservation" thus contribute little to public policy. To be more than window dressing, constitutions must provide guidance on key policy questions regarding environmental trade-offs and uncertainty. The goal should be to provide useful guidance but at a broad level that governmental agencies and courts can apply in an evolving, flexible manner to each situation that arises.

Key Drafting Issues

1. Why Should State Constitutions Address Environmental and Natural Resource Issues?

A number of questions are relevant in choosing and drafting environmental provisions. The first and most important question is why a state constitution should include environmental provisions at all. One can readily imagine a constitution that does not include any environmental provisions whatsoever. The federal Constitution, as well as a handful of state constitutions, focus largely on shaping the process by which the government makes decisions and then trust that process to determine appropriate substantive policy. These constitutions generally authorize broad categories of governmental action, but include virtually no substantive directives. Even constitutions that include substantive mandates typically do not include provisions dealing with transportation policy, insurance, professional regulation, employment policy, and a host of other issues with which state governments regularly are engaged. Why then should a state constitution include environmental provisions?

Community Values. The state polity may wish to include environmental provisions in its constitution in order to recognize and stress the special importance of the environment to the polity. One of the original purposes of state constitutions was to define, highlight, and foster the identity and values of the state. Under such a "community values" rationale, environmental provisions serve an important constitutional function both by proclaiming the significance of environmental protection to the citizenry and by signaling to the government the importance of promoting the environment through legislation and administrative action. The environmental provisions constitute a dialogue, both among the state's citizens and between the citizens and their governmental officials, concerning the physical and symbolic value of environmental protection.

A community values rationale can justify Value Declarations that announce broadly supported environmental values and that leave the state government

with discretion in how to implement the values. But a community values rationale by itself cannot justify Policy Directives, Institutional Specifications, Environmental Rights, and Environmental Duties that modify, bypass, or constrain the legislative and administrative processes by which the state typically makes regulatory or social policy. To justify these politically more intrusive provisions, the framers of a constitution must find a rationale for changing or restricting the normal governmental decision-making process.

Process Imperfections. At least two rationales might justify such provisions. First, despite constitutional efforts to create effective governmental processes, the legislative or administrative processes may suffer from unavoidable imperfections that prevent the government from dealing efficaciously with some environmental issues. For example, legislators may underrepresent future generations, who do not vote and cannot help legislators get reelected.

Framers of a state constitution, however, must be cautious before constraining or bypassing governmental decision-making on process grounds. Legislative and administrative processes are inherently flawed to some degree, but we tolerate the relatively minor flaws because of our commitment to and valuation of democracy and pluralism. In deciding whether to "constitutionalize" a particular environmental issue, the question is whether there is something unique about the issue that makes the risks of the standard governmental processes greater than the benefits.

Fundamental Principles. A second rationale for more intrusive constitutional provisions is that the subject matter of the provisions is ethically too fundamental or principle driven to leave to democratic discretion, no matter how well governmental institutions reflect current majoritarian views. This rationale, of course, is a primary justification for including civil rights provisions in state constitutions: no matter what the views of the current electorate, the state should not be permitted to discriminate against individuals or groups based on immutable personal characteristics. The difficult constitutional question is what, if any, other policies fall into this category. The framers of a constitution must distinguish between strongly and widely held policy preferences that nonetheless should be open to political debate, on the one hand, and fundamental principles that should be enshrined in the constitution, on the other. Virtually everyone, for example, believes that drinking water should be safe from injurious pollutants, but is safe drinking water of the same fundamental character as freedom from invidious discrimination?

At least two questions seem central to determining whether a particular policy is sufficiently "fundamental" to justify enshrinement in a constitution. First, does support for the policy go beyond mere self-interest? Would citizens agree with the policy even if it did not personally benefit them? Second, is the

principle sufficiently important to a well-functioning, industrious, and equitable society to justify inclusion in the state constitution?

2. Will Courts Implement and Enforce Environmental Provisions?

Because the purpose of Value Declarations is merely to proclaim and stimulate discussion of common values, rather than to impose particular policies, they do not need active judicial enforcement to be effective. Rights Declarations, by contrast, anticipate that the public can call on courts to vindicate their rights. Both Policy Directives and Institutional Specifications also can require active judicial intervention to be effective. If the legislature fails to comply with a Policy Directive or the legislative or executive branches of government intrude into the jurisdiction of commissions or other special entities created by Institutional Specifications, courts may need to step in if the constitutional goals are to be achieved.

In choosing and framing environmental provisions, another key question is thus whether courts are adequately equipped and willing to enforce the provisions. Although courts may feel uncomfortable enforcing all types of environmental provision, Policy Directives and Rights Declarations can raise special concerns for courts. Most courts have declined to use general environmental policy provisions to force legislatures to protect the environment or to constrict the actions of private or governmental entities that threaten the environment. Although the courts have relied on various legal grounds to avoid involvement, the courts' reticence to act appears motivated by more fundamental concerns, only some of which can be avoided by constitutional drafters.

First, many Policy Directives and Rights Declarations provide only the broadest and vaguest of guidance. The Hawaii Constitution guarantees everyone a "right to a clean and healthful environment,"[30] while the Michigan Constitution provides that the "legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction."[31] Presented with only the most general of charges, courts have found it difficult to apply such provisions to the difficult and complex trade-offs involved in real cases.

Courts, of course, frequently engage in hard trade-offs in other fields, such as free speech and procedural due process, with little guidance from the constitutional language. A far greater consensus, however, exists on the framework to apply in addressing these other constitutional issues. The societal split on how to resolve environmental disputes, by contrast, is both wide and deep. In the case of long-standing constitutional provisions, courts can turn to decades of jurisprudence to help frame and resolve new cases. By contrast, modern environmental provisions ask courts to develop and apply a totally new framework in a complex field. Absent both precedent and an existing or emerging societal norm, courts often feel rudderless trying to decide how much of society's resources to devote to increasing the chances that an endangered species will

recover or to decreasing the chances that the most pollution-sensitive members of the population will suffer from asthmatic attacks.

Courts also must worry about the procedural complexity of applying and enforcing Policy Directives, Environmental Rights, and Environmental Duties in the environmental arena. Environmental law is a particularly technical field that often requires significant fact collection and scientific evaluation, as well as an active regulatory apparatus to monitor and pursue violations. Courts, however, generally do not have the expertise or comprehensive fact-finding ability of legislatures. Unlike legislatures, moreover, courts cannot create and fund expert administrative agencies to implement and enforce their policies.

The procedural problems that courts can encounter in trying to implement Policy Directives, Environmental Rights, and Environmental Duties should not be overstated. State and federal courts have dealt effectively with similar procedural problems in both a wide array of institutional litigation (involving school desegregation, prison reform, mental health care, and educational policy) and in multiplaintiff conflicts involving exposure to toxic substances. In drafting environmental provisions, nonetheless, framers of state constitutions must bear in mind the comparative limitations of courts in designing, implementing, and enforcing environmental policy.

The Lessons of Existing Environmental and Natural Resource Provisions

The myriad environmental and natural resource provisions contained in existing state constitutions provides one set of potential models for new constitutional provisions. Drafters of future constitutions also might find valuable models in the provisions of several international agreements, including the Stockholm Declaration of the United Nations Conference on the Human Environment (signed by the United States and scores of other countries in 1972 at the first major United Nations conferences on the environment),[32] the World Charter for Nature (adopted by the United Nations General Assembly in 1982 over the sole dissent of the United States),[33] and the Rio Declaration on Environment and Development (which the United States and dozens of other nations signed during the 1992 "Earth Summit" in Rio de Janeiro).[34]

General Environmental Policy Provisions

1. Current Provisions

The most common environmental provisions in state constitutions seek in broad terms to promote general environmental protection. While over a third of all

state constitutions now contain such provisions,[35] the provisions vary tremendously in their language and purpose. Georgia's Constitution, for example, contains merely an Authorization Provision, empowering the legislature to address environmental issues.[36] Four states go a step further and include Value Declarations announcing the importance of environmental protection.[37] Most of the state constitutions go further and at least purport to require environmental protection either through Policy Directives[38] or Environmental Rights and Duties.[39]

Most of these constitutional provisions refer broadly and vaguely to the need for or right to a "clean" or "healthful" environment or "scenic beauty."[40] A minority of the provisions refer to somewhat more specific environmental goals or mandates, such as clean air and water or noise abatement.[41] As discussed later, many of the provisions also provide for protection or conservation of wildlife and natural resources. None of the provisions, however, provide any guidance on what they mean by terms such as "clean" or "healthful."

Only a few constitutional provisions explicitly recognize and address the potential trade-offs between environmental protection and other societal goals. The New Mexico Constitution, for example, provides that the "legislature shall provide for control of pollution and control of despoilment of the air, water, and other natural resources of the state, consistent with the use and development of these resources for the maximum benefit of the people."[42] Louisiana's constitution mandates a "healthful" environment but only "insofar as possible and consistent with the health, safety, and welfare of the people."[43] In including this proviso, the delegates to Louisiana's 1974 Constitutional Convention intended "to strike a balance, or find a happy medium between the environmentalist on one side, and the agri-industrial interest on the other side" and hoped that they had found a policy statement that "strikes a balance, that is not extreme one way or the other."[44] Although the proviso is exceptionally vague on how this balance is to be struck, Louisiana courts have concluded that the proviso embodies a "rule of reasonableness" that "requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors."[45]

Most environmental provisions are silent regarding how courts should deal with such trade-offs. A few constitutions recognize other public policy goals, implicitly suggesting that there should be a trade-off without informing either the state or its courts of how to perform the trade-offs.[46] But most environmental provisions ignore the trade-offs entirely, leaving state decision makers with no guidance whatsoever.

As discussed, virtually all the constitutional provisions are similarly silent regarding enforcement options, presumably deferring questions of standing and causes of action to the judiciary. Of those constitutions that contain Policy Directives, only New York's constitution addresses enforcement, authorizing private citizens and nonprofit organizations to sue if the state supreme court

consents and the state attorney general has been notified.[47] Of the constitutions that create Environmental Rights, only Hawaii's and Illinois' constitutions explicitly authorize private citizens to enforce their rights in court, subject to "reasonable limitations" imposed by law.[48] The remaining constitutions are silent on whether and when private citizens can enforce their constitutionally vested environmental rights.

2. Judicial Reactions

Not surprisingly, state courts have held that Authorization Provisions and Value Declarations do not require either the state or private parties to take any particular action.[49] However, most state courts also have found ways to avoid taking any actions under Policy Directives, Environmental Rights, and Environmental Duties.

The legal grounds that courts have given for avoiding private enforcement efforts are legion. Where state constitutions are silent on enforcement, courts sometimes have concluded that there is no private or public cause of action.[50] Even when an environmental provision explicitly authorizes citizen enforcement, courts have dismissed lawsuits based on lack of standing or ripeness.[51]

One of the most common grounds for dismissing lawsuits has been that the provisions are not "self-executing."[52] If constitutional provisions are not self-executing, courts must wait for the legislature to pass implementing statutes. In deciding whether a constitutional provision is self-executing, courts not only look at the language and purpose of a provision but also ask whether the provision sets out a sufficient rule by which to decide cases without legislative guidance.[53] For the reasons discussed earlier, most courts have found that the general and vague language of environmental provisions provide inadequate guidance on how to resolve concrete disputes.

Even where courts have agreed to hear private enforcement actions and concluded that the constitutional provisions are self-executing, the courts typically have been very deferential to the legislature and executive branches. Although the Michigan Supreme Court has held that the state's constitution requires the legislature to provide environmental protection, the court also has concluded that the legislature "is not . . . under a duty to make specific inclusion of environmental protection provisions in every piece of relevant legislation."[54] So long as the legislature has paid some attention to the environment, Michigan courts do not appear eager to determine the exact level and type of protection constitutionally required. Despite entertaining multiple enforcement actions, the New York and Pennsylvania courts also have never used their states' environmental provisions to constrain state or private actions alleged to be harmful to the environment.[55]

The courts' historic reticence to actively wield the broad environmental provisions found in many state constitutions is understandable. As discussed, the

environmental provisions typically fail to provide the courts with even the most fundamental policy guidance—for example, how the adequacy of environmental protection should be judged, how policy trade-offs should be addressed, and how scientific uncertainties should be resolved. Given that environmental law is still very much in its infancy, courts are inclined to defer to legislative and administrative judgments. Although courts have mechanisms for evaluating complex scientific issues and creating new administrative structures, courts also are reluctant to become the ultimate arbiter of environmental policy. Courts might be willing to undertake the risk and burden of "constitutionalizing" the environment if current levels of environmental protection were clearly deficient, but the existence of multiple national and state statutes and the varied regulatory activities of national and state environmental agencies normally undercut any sense of urgency.

These concerns have not stopped all courts from using the constitutional provisions to achieve greater environmental protection. Louisiana courts have taken a more active stance while avoiding the concerns just discussed by focusing on the process by which the state makes environmental decisions rather than on the substance of those decisions. The Louisiana courts in essence have converted the state's Policy Directive into a process requirement. In a lawsuit challenging the approval of a proposed hazardous waste facility by the Louisiana Environmental Control Commission, for example, the Louisiana Supreme Court held that the Commission must "make basic findings supported by evidence and ultimate findings . . . and it must articulate a rational connection between the facts found and the order issued."[56]

The Montana Supreme Court treats Environmental Rights and Environmental Duties in the Montana Constitution much like other, more traditional constitutional rights.[57] For the first quarter century after voter approval of the 1972 Montana Constitution, the Montana courts, like courts in most other states, found legal reasons to avoid employing the environmental provisions. In 1999, however, the Montana Supreme Court held that state legislation exempting specified mining operations from state laws prohibiting degradation in water quality was unconstitutional.[58] Finding that a "clean and healthful environment" is a "fundamental" right under the Montana Constitution,[59] the court concluded that "any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective."[60] Two years later, the court held that the constitution's environmental "guarantees" also directly constrain private actions that threaten a clean and healthful environment. In a contract dispute between two private parties, the court concluded that it would be unlawful to drill a well on private property "in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks."[61]

The Montana Supreme Court's decisions, unfortunately, may open the door to an array of other, more troubling cases. Future cases, for example, may challenge the constitutionality of existing environmental quality standards, forcing the courts to determine the appropriate standard for pollutants with no safety threshold. Other cases may challenge the state's failure to address some environmental issues at all, presenting the courts with the daunting task of designing and implementing a regulatory system from scratch. In one recent lawsuit, a number of asbestos victims sought damages from the state for failing to regulate asbestos.[62] With some basis in existing constitutional case law, plaintiffs claimed that, by not ensuring them a "clean and healthful environment," the state committed a constitutional tort entitling them to damages for their asbestos injuries.

3. Future Directions

Given the importance of environmental protection to the citizens of most states, Value Declarations that articulate the public's interest in a healthful environment are easily justified. The justification for including Policy Directives, Environmental Rights, or Environmental Duties in state constitutions, however, is open to more question. Some proponents have argued that, absent such provisions, legislatures are likely to slight the public's interest in environmental protection in the face of strong business opposition. Empirical studies of environmental policy-making in the United States, however, provide no basis for concluding that biases in the legislative process are significant enough to justify having courts rather than the legislature make general environmental policy. Rather than being "captured" by industry, most legislatures appear to be responsive to both the need for environmental protection and public calls for environmental regulation.[63]

Proponents of stronger environmental provisions also have argued that a "healthful environment" is a fundamental right that should not be open to democratic derogation. No consensus currently exists, however, on how to address the trade-offs and scientific uncertainty involved in environmental policy-making. Given that trade-offs between the environment and other important policy goals will continue to evade any simple solution, legislatures rather than courts may be the better institutions to grapple with the issues at the current moment.

No matter what form general environmental provisions take, the provisions should furnish greater guidance on the principal issues underlying environmental disputes—trade-offs and scientific uncertainty. References to "clean" and "healthful" environments sound good; they provide effective sound bites. But they do not supply any of the branches of government with useful information for addressing concrete policy matters. As a result, all legislators and regulators can claim that they are acting in compliance with the constitution, and courts feel rudderless undertaking meaningful judicial review.