

## Section 1. STATE CONSTITUTIONAL ENVIRONMENTAL RIGHTS

A number of states have experimented with constitutional environmental provisions,<sup>24</sup> with significant diversity in their approaches to the declaration of constitutional rights. Some are clear, some unspecific. Some appear to be enforceable by courts and some appear to be mere political posturing. For more on state constitutional provisions, see Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193 (1972).

But just because there is a constitutional right doesn't necessarily mean that one can do anything with it in a court of law. Is the constitutional provision self-enforcing, or does it depend on subsequent legislative action? The following state constitutional provision<sup>25</sup> sets up the following case considering whether state constitutional provisions are self-executing and enforceable.

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. Pa. Const. art. 1 §27 (1971).

**Commonwealth v. National Gettysburg Tower, Inc.**

Supreme Court of Pennsylvania, 1973  
454 Pa. 193, 311 A.2d 588

[In this case the Commonwealth of Pennsylvania, acting through and by its Attorney General, sought to enjoin the defendant from erecting a commercial tourism tower more than 300 feet tall that would loom over a portion of the Gettysburg battlefield, based on Article I §27, the state constitution's environmental amendment.<sup>26</sup>]

O'BRIEN J. (joined by POMEROY, J.)... The chancellor, after making detailed findings concerning the location and characteristics of the tower and the neighborhood of the park, concluded that the Commonwealth had failed to show by clear and convincing proof that the natural, scenic, historic or aesthetic values of the Gettysburg environment would be injured by the erection of the tower.... The chancellor first found to be without merit the defense interposed by appellees that Article 1, §27 of the Pennsylvania Constitution — upon which the Commonwealth relied

24. See, e.g., Cal. Const. art. 16 §14; Haw. Const. art. 11 §9; Ill. Const. art. 11 §1; La. Const. art. 9 §1; Minn. Const. art. 11 §14; Mont. Const. art. IX; N.M. Const. art. 20 §21; Pa. Const. art. 1 §27.

25. Contrast the Pennsylvania provision with the following:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. The general court [legislature] shall have the power to enact legislation necessary or expedient to protect such rights. Mass. Const. art. 49.

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. Mich. Const. art. IV §52.

26. The attorney who represented the Gettysburg developer in this case was the same attorney who had successfully argued trust principles against the development company in the *Florissant Fossil Beds* case.

for the authority of the Attorney General to bring this suit — was not self-executing and, therefore, legislative authority was required before the suit could be brought....

By familiar principles, the appellees, as the owners of the site, may use their property as they please, provided they do not interfere with their neighbors' reasonable enjoyment of their properties and subject to reasonable regulations for the public good imposed under the police power of the State, of which there are none here....

Similarly, there is no statute of the Pennsylvania Legislature, which would authorize the Governor and the Attorney General to initiate actions like the law suit in the instant case. Rather, authority for the Commonwealth's suit is allegedly based entirely upon Article 1, §27 of the State Constitution, ratified by the voters of Pennsylvania on May 18, 1971....

It is the Commonwealth's position that this amendment is self-executing; that the people have been given a right "to the preservation of the natural, scenic, historic and esthetic values of the environment," and "that no further legislation is necessary to vest these rights in the people."

The general principles of law involved in determining whether a particular provision of a constitution is self-executing....

A Constitution is primarily a declaration of principles of the fundamental law. Its provisions are usually only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws, yet it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing....

Cooley's Constitutional Limitations (8th ed.), Vol. 1 p. 165 says: "But although none of the provisions of a constitution are to be looked upon as immaterial or merely advisory, there are some which, from the nature of the case, are as incapable of compulsory enforcement as are directory provisions in general. The reason is that, while the purpose may be to establish rights or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced. In such cases, before the constitutional provision can be made effectual, supplemental legislation must be had; and the provision may be in its nature mandatory to the legislature to enact the needful legislation, though back of it there lies no authority to enforce the command. Sometimes the constitution in terms requires the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only a moral force: the legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted."

In *Davis v. Burke*, 179 U.S. 399, 403, the United States Supreme Court said: "Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject...or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution." *O'Neill v. White*, 22 A.2d at 26–27 (Pa. 1941).

The Commonwealth makes two arguments in support of its contention that §27 of Article 1 is self-executing. We find neither of them persuasive.

First, the Commonwealth emphasizes that the provision in question is part of Article 1 and that no provision of Article 1 has ever been judicially declared to be nonself-executing. The Commonwealth places particular emphasis on the wording of §25 of Article 1. See *Erdman v. Mitchell*, 56 A. 327 (Pa. 1903). Section 25 of Article 1 reads as follows:

To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.

However, it should be noted that Article 1 is entitled “Declaration of Rights” and all of the first twenty-six sections of Article 1 which state those specific rights must be read as limiting the powers of government to interfere with the rights provided therein.

Section 25 of Article 1 should be read as summarizing the philosophy of the first twenty-four sections of Article 1, particularly when it declares that “...everything in this article is *excepted out of the general powers of government* and shall remain forever inviolate.” (Emphasis supplied.)

Unlike the first twenty-six sections of Article 1, §27, the one which concerns us in the instant case, does not merely contain a limitation on the powers of government. True, the first sentence of §27, which states: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment,” can be read as limiting the right of government to interfere with the people’s right to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” As such, the first part of §27, if read alone, could be read to be self-executing.

But the remaining provisions of §27, rather than limiting the powers of government, expand those powers. These provisions declare that the Commonwealth is the “trustee” of Pennsylvania’s “public natural resources” and they give the Commonwealth the power to act “to conserve and maintain them for the benefit of all people.” Insofar as the Commonwealth always had a recognized police power to regulate the use of land, and thus could establish standards for clean air and clean water consistent with the requirements

of public health, §27 is merely a general reaffirmation of past law. It must be recognized, however, that up until now, aesthetic or historical considerations by themselves have not been considered sufficient to constitute a basis for the Commonwealth’s exercise of its police power.

Now for the first time, at least insofar as the state constitution is concerned, the Commonwealth has been given power to act in areas of purely aesthetic or historic concern.

The Commonwealth has cited no example of a situation where a constitutional provision which expanded the powers of government to act against individuals was held to be self-executing.... It should be noted that §27 does not give the powers of a trustee of public natural resources to the *Governor* or to the *Attorney General* but to the *Commonwealth*.



FIGURE 22-3

A brochure showing the tower, which stood for 25 years before being dismantled in 2000 after a \$5 million federal eminent domain acquisition.

If we were to sustain the Commonwealth's position that the amendment was self-executing, a property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property. The fact that the owner contemplated a use similar to others that had not been enjoined would be no guarantee that the Commonwealth would not seek to enjoin his use. Since no executive department has been given authority to determine when to [sue] to protect the environment, there would be no way of obtaining, with respect to a particular use contemplated, an indication of what action the Commonwealth might take before the owner expended what could be significant sums of money for the purchase or the development of the property. We do not believe that the framers of the environmental protection amendment could have intended such an unjust result....

To summarize, we believe that the provisions of §27 of Article I of the Constitution merely state the general principle of law that the Commonwealth is trustee of Pennsylvania's public natural resources with power to protect the "natural, scenic, historic and esthetic values" of its environment. If the amendment was self-executing, action taken under it would pose serious problems of constitutionality, under both the equal protection clause and the due process clause of the Fourteenth Amendment. Accordingly, before the environmental protection amendment can be made effective, supplemental legislation will be required to define the values which the amendment seeks to protect and to establish procedures by which the use of private property can be fairly regulated to protect those values....

ROBERTS, J. (concurring). I agree that the order of the Commonwealth Court should be affirmed; however my reasons for affirmance are entirely different from those expressed in the opinion by Mr. Justice O'Brien. I believe that the Commonwealth, even prior to the recent adoption of Article I, Section 27 possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27. The express language of the constitutional amendment merely recites the "inherent and independent rights" of mankind relative to the environment which are "recognized and unalterably established" by Article I, Section 1 of the Pennsylvania Constitution.

Prior to the adoption of Article I, Section 27, it was clear that as sovereign "the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain...." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). The proposition has long been firmly established that

it is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted...that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened...that the crops and orchards on its hills should not be endangered.... 206 U.S. at 238.

Parklands and historical sites, as "natural resources," are subject to the same considerations.<sup>27</sup>

Moreover, "it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them...." *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Since natural and historic resources are the common property of the citizens of a state, see *McCready v. Virginia*, 94 U.S. 391 (1876), the Commonwealth can

27. See *Snyder v. Bd. Park Comm'rs*, 181 N.E. 483, 484 (Ohio 1932): "[W]e...are of the opinion that, to the extent to which a given area possesses elements or features which supply a human need and contribute to the health, welfare, and benefit of a community, and are essential for the well being of such a community and the proper enjoyment of its property devoted to park and recreational purposes, the same constitute natural resources."

— and always could — proceed as *parens patriae* acting on behalf of the citizens and in the interests of the community,<sup>28</sup> or as trustee of the state's public resources.<sup>29</sup>

However, in my view, the Commonwealth, on this record, has failed to establish its entitlement to the equitable relief it seeks, either on common law or constitutional (prior or subsequent to Section 27) theories.... Moreover, I entertain serious reservations as to the propriety of granting the requested relief in this case in the absence of appropriate and articulated substantive and procedural standards.

MANDERINO, J., joins in this opinion. NIX, J., concurs in the result.

JONES, J., dissenting.... This Court has been given the opportunity to affirm the mandate of the public empowering the Commonwealth to prevent environmental abuses; instead, the Court has chosen to emasculate a constitutional amendment by declaring it not to be self-executing. I am compelled to dissent....

If the amendment was intended only to espouse a policy undisposed to enforcement without supplementing legislation, it would surely have taken a different form. But the amendment is not addressed to the General Assembly. It does not require the legislative creation of remedial measures. Instead, the amendment creates a public trust. The “natural, scenic, historic and aesthetic values of the environment” are the trust res, the Commonwealth, through its executive branch, is the trustee; the *people of this Commonwealth* are the trust beneficiaries. The amendment thus installs the common law public trust doctrine *as a constitutional right to environmental protection* susceptible to enforcement by an action in equity.

Each of the equivalent [environmental protection] amendments [in Illinois, Massachusetts, New York, and Virginia] purports to establish a policy of environmental protection, but either omits the mode of enforcement or explicitly delegates the responsibility for implementation to the legislative branch. The Pennsylvania amendment defines enumerated rights within the scope of existing remedies. It imposes a fiduciary duty upon the Commonwealth to protect the people's “rights to clean air, pure water and to the preservation of the natural, scenic, historical and aesthetic values of the environment.” That the language of the amendment is subject to judicial interpretation does not mean that the enactment must remain an *ineffectual constitutional platitude* until such time as the legislature acts.

Because I believe Article 1 §7 is self-executing, I believe that our inquiry should have focused upon the ultimate issue of fact: does the proposed tower violate the rights of the people of the Commonwealth as secured by this amendment?...

The facts indicate that the proposed tower is a metal structure rising 310 feet above the ground. It is shaped like an hourglass; about 90 feet in diameter at the bottom, 30 feet in the middle and 70 feet at the top. The top level will include an observation deck, elevator housings, facilities for warning approaching aircraft and an illuminated American flag. The proposed site of the tower is an area around which the third day of the battle of Gettysburg was fought. It is located immediately south of the Gettysburg National Cemetery.

The Commonwealth presented compelling evidence that the proposed observation tower at Gettysburg would desecrate the natural, scenic, aesthetic and historic values of the Gettysburg environment. The director of the National Park Service, George Hartzog, appeared as a witness for the Commonwealth....

28. See *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. 401 (1867).

29. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).



I described it as a monstrosity. I advised Mr. Ottenstein that between all of the mistakes which I felt the federal government had made here, and all of the mistakes I felt the commercial interests had made here, nevertheless Gettysburg remained a very sacred symbol to the more than 200,000,000 people across the United States, and that an intrusion of this immensity would, in our judgment, be an absolute monstrosity in this kind of environment and I was very much opposed to it.

Mr. Hartzog offered eloquent testimony on the question of the tower's impact upon the Gettysburg environment....

Q. Would it, in your opinion, be possible to measure the damage that would occur to this historic site if that tower were erected?

A. Well, I don't think that you can measure these things in a normal system of values that we articulate in terms of dollars and cents. You measure them more in terms of matters of integrity and understanding and inspiration and involvement. And from this standpoint, I think a monstrous intrusion such as this tower is, into the historical, pastoral scene of the battlefield park and Eisenhower National Site and the National Cemetery and the place where Lincoln spoke, is just destructive of the integrity of its historical value.

Q. And you are saying you can't put a price tag on those values?

A. No, you can't. There is one Yorktown and there is one Gettysburg....

I would enjoin the construction of this tower by the authority of Article 1 §27 of the Pennsylvania Constitution. I dissent!!

EAGEN, J., joins in this opinion.

#### COMMENTARY & QUESTIONS

**1. A split decision on constitutional enforcement?** As you count the votes on the different merits of this case, how many justices of the state supreme court were of the opinion that the tower did not amount to a violation of law? Clearly the tower won. How many of them, on the other hand, actually held that the constitutional provision was not self-executing? It appears that only the first two justices were convinced that §27 needed further legislative action. This reading of the court is supported by the fact that, like a number of other state high courts, the Pennsylvania Supreme Court subsequently held that §27 of the state constitution is self-executing. *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976).

**2. The state constitution and the public trust.** Note how the constitutional provision here was intertwined with the public trust doctrine, especially in Justice Roberts's concurrence. How many of the justices appeared to accept that public trust principles were at least theoretically applicable to the private lands surrounding the battlefield? Did §27 add anything to preexisting trust law?

**3. Commercialization, and a parade of horrors.** In hindsight, could you have litigated this case differently so as to have achieved a different result? One way might have been to remind the state supreme court that its decision could well spawn a rash of other towers surrounding the Gettysburg battlefield. If the image of the arrival of a thicket of towers and other tourist attractions (shooting galleries, water slides, cemetery-view ferris wheel rides?) would move the court, could it not draw the line here, enjoining the first tower?

One of the classic problems of public parklands is the way they attract the crassest commercialization to their boundaries — Estes Park at the gateway to the Rockies; West Yellowstone, Montana; and Pigeon Forge at the gateway to the Smokies National Park, with its Dinosaurland, Waterslides, Spaceship rides, Ripley's Believe-It-Or-Not, the Tourist Gardens of Christ, and the only hula dance-porpoise show in the Appalachians. Can the public trust doctrine extend to the surroundings of parklands to protect park resources from the depredations of the tourist marketplace carnival? How about public nuisance? How about legislation? See (as usual) Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 74 Mich. L. Rev. 239–245 (1976). See also Chapter 24.

**4. The tower came down.** In 2002, the Gettysburg Tower was condemned by the National Park Service and dynamited — in the presence of Secretary of Interior Bruce Babbitt with the accompaniment of a musket volley from a hundred uniformed Union and Confederate soldiers — as the inaugural event in a master plan to restore the battlefield to historical conditions. Aesthetics were not the only reason the tower was loathed by the preservation community. In exchange for an agreement that had provided vehicle access to the privately owned tower, the National Park Service was supposed to receive 5% of the tower's profits to support battlefield maintenance and preservation. Despite ticket sales of more than \$300,000 per year, however, the tower's owners insisted they had never made a profit. They sought and received approximately \$5 million in just compensation for the tower.

**5. State statutory environmental rights: the Michigan Environmental Protection Act.** The Michigan Environmental Protection Act (MEPA), Mich. Comp. Laws Ann. §§324.1701 et seq. (1970), is a rather unusual approach to environmental regulation. Drafted by Professor Sax, MEPA's central element is the creation of a cause of action whereby any person can file an injunction suit alleging that a challenged private or governmental action will "pollute, impair or destroy" natural resources or the public trust in those resources. If the court finds the facts to be so, the burden switches to the defendant to rebut the claim of resource harm or to prove an affirmative defense. The statute provides a defense if there is no "prudent and feasible alternative" to the action consistent "with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction." This statute has spawned a number of similar statutes in other states, and a complex caselaw. Materials on MEPA are available on the coursebook Web site.

*This noblest patrimony ever yet inherited by any people must be husbanded and preserved with care in such manner that future generations shall not reproach us for having squandered what was justly theirs.*

— The Whig Almanac, 1943

*The resources of the earth do not exist just to be spent for the comfort, pleasure, or convenience of the generation or two who first learn how to spend them.*

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