Making Environmental Wrongs Environmental Rights: A Constitutional Approach

By Wendy Kerner*

"Man did not weave the web of life; he is merely a strand in it. Whatever he does to the web, he does to himself." ~Chief Seattle

* The author would like to thank Kristen Barrett, Nate Bellinger, Justice Gregory Hobbs, Rachael Jaffe, Matthew Miller, Sarah Quigley, Maya K. van Rossum, Dean Annecoos Wiersema, and Claire Lillie Yerman for their valuable feedback and insight and Peter and Ella Thayer for their constant support.

I. INTRODUCTION

In 1854, Chief Seattle, chief of the Suquamish and Duwamish tribes, communicated this message to the U.S. government, a message that protecting the natural environment is critical to protecting the human race.[1] Chief Seattle understood what contemporary academics and scientists also recognize, that people are dependent on the environment and the services that ecosystems provide for their survival and well-being.[2] These services include goods such as fresh water and timber, regulatory mechanisms such as water filtration and crop pollination, and spiritual and intellectual inspiration.[3] Chief Seattle's precept is consistent with the modern-day principle that human rights are interdependent with and indivisible from environmental rights—including the right for all people to live in healthy environments.[4] Therefore, where governmental frameworks advance environmental protections, they foster human rights.[5] In order to promote human rights, an increasing number of nations around the world are constitutionalizing environmental rights.[6]

Over seventy countries explicitly recognize environmental rights in their constitutions.[7] The United States is not one of those countries. However, two U.S. states,[8] Pennsylvania and Montana, recognize in their state constitutions the right to a healthy environment as an inherent, indefeasible, and inalienable right.[9] Other states—such as New York,[10] Delaware, New Jersey, New Mexico, and Oregon—are showing leadership and foresight alongside Pennsylvania and Montana by

1. *See* Robin Paul Malloy, *Letters from the Longhouse: Law, Economics and Native American Values*, 1992 WIS. L. REV. 1569, 1628 (1992).

2. Kate A. Brauman et al., *The Nature and Value of Ecosystem Services: An Overview Highlighting Hydrologic Services*, 32 ANN. REV. ENV'T & RES. 67, 82 (2007).

3. *Id.* at 69.

4. *See* JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 2 (2014).

5. *See id.* at 3 (arguing that environmental constitutionalism is an important and contemporary tool for advancing both environmental protection and human rights).

6. *Id.* at 2.

7. *Id.* at 4, 11 (listing countries that have amended or implemented environmental rights provisions in their constitutions as recently as 2005 including Armenia, Bolivia, Ecuador, Egypt, France, Hungary, Jamaica, Kenya, and Nepal).

8. In November, 2021, New York became the third U.S. state to add a Green Amendment to its constitution. As the addition of the amendment only narrowly preceded the publication of this piece, its adoption is not discussed.

9. MAYA K. VAN ROSSUM, THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT 52-53 (2017).

10. *See supra* note 8.

pursuing similar environmental rights amendments.[11] What these proposed amendments have in common is that each one recognizes and protects for all people, including future generations, the inherent right to pure water, clean air, healthy environments, and a stable climate.[12] Such an amendment has been coined a "Green Amendment."[13]

Maya K. van Rossum, author of *The Green Amendment: Securing Our Right to a Healthy Environment*, has initiated a nationwide movement to insert carefully worded and strategically placed Green Amendments in every state constitution.[14] To qualify as a "Green Amendment," the provision must: 1) be placed in the bill of rights or declaration of rights section of a constitution; 2) recognize and protect individual rights of current and future generations; 3) ideally, recognize the fiduciary duty of the state to act as a trustee; 4) be self-executing, explicitly or implicitly, based on how the constitution is interpreted and how the language is applied in a state; and 5) elevate environmental rights to the status of other legally recognized and legally protected fundamental rights.[15] By adopting a Green Amendment, states explicitly recognize the environmental rights of all citizens and future generations, resulting in more robust constitutional protections.

Green Amendments should be placed in each state's constitution. Such amendments play a key role in addressing the evolving concern over environmental rights. However, most U.S. states do not have a Green Amendment. This paper demonstrates that where state courts have failed to recognize environmental rights as fundamental, citizens are adversely and disproportionately impacted because current statutes and regulations do not effectively protect such rights. The paper presents the benefits of Green Amendments for all citizens and future generations if states implement such amendments in their constitutions.

State constitutions are critical mechanisms for protecting individual liberties, including environmental rights. The late Supreme Court Justice William J. Brennan discussed these governing documents' important role at length in his celebrated article *State Constitutions and the Protection of Individual Rights*.[16] There he recognized state constitutions as receptacles

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11. *Active States*, GREEN AMENDS. FOR THE GENERATIONS, https://forthegenerations.org/actnow/ (last visited Oct. 29, 2021).

12. *Id.*; *see, e.g.*, VAN ROSSUM, *supra* note 9, at 9.

13. VAN ROSSUM, *supra* note 9, at 12.

14. *Id.* at 240.

15. *Id.* at 232-34.

16. William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

for individual liberties, often providing greater protections than federal law.[17] He surmised that without state law "the full realization of our liberties cannot be guaranteed."[18] Justice Brennan also lauded New Jersey Supreme Court Justice Stewart G. Pollock for his leadership in confirming the role of the New Jersey Constitution in protecting its citizens.[19] Justice Pollock stressed the increasingly important role of constitutional protections at the state level, particularly where evolving public attitudes toward fundamental rights are concerned.[20]

There is an evolving public concern that environmental rights are not being recognized as fundamental. In many states, constitutions recognize civil and political rights as fundamental, such as the right to religious freedom and the right to free speech.[21] Fundamental rights are those that are "essential to individual liberty in our society."[22] The function of fundamental rights rooted in individual autonomy is to protect well-recognized human rights, such as the rights to life, health, and dignity.[23] An important aspect of constitutions is that they distribute power among governing bodies and may protect these rights when "other constraints on power have failed to prevent political overreach[]."[24] Clean air and pure water are essential to realize these human rights, yet current laws have failed to prevent political overreach and, consequently, do not protect these rights for all citizens and future generations.[25]

This paper argues that there should be a Green Amendment in each state constitution to advance environmental rights nationwide. The paper uses Colorado as a case study to demonstrate the environmental harms and injustices citizens suffer when a state fails to provide explicit environmental rights for all. Part II addresses the structural legal implications of a Green Amendment, including impacts it would have on state and local governments, citizens, and courts. Part III analyzes data and case law in Colorado that demonstrate how citizens and the environment suffer harms due to poor air quality despite state laws and regulations that are supposed to protect the public and the environment. The case law also exposes environmental injustices that occur under

17. *Id.*

18. *Id.*

19. Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 707 (1983).

20. *Id.* at 708, 720.

21. *See id.* at 710.

22. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1015 n.7 (Colo. 1982).

23. MAY & DALY, *supra* note 4, at 25.

24. *Id.* at 37.

25. *See infra* Parts III-IV.

current statutes and explains how a constitutional amendment would promote environmental equity. Part IV analyzes case law in Colorado using the same approach as Part III but focuses on water quality and supply issues and their impacts on communities. Part V examines case law in Pennsylvania and Montana, where Green Amendments have protected the environmental rights of citizens who were successful in challenging governmental decisions that would have otherwise caused adverse environmental effects. Part VI reviews citizens' previous attempts to place environmental rights amendments into the Colorado Constitution, explores the concerns of parties that opposed these initiatives, and addresses these concerns while arguing for a Green Amendment.

II. IMAGINE A GREEN AMENDMENT: STRUCTURAL LEGAL IMPLICATIONS

A Green Amendment in each state constitution would unequivocally elevate the rights to pure water, clean air, healthy environments, and a stable climate for all citizens to the level of a constitutional protection—protection from government actions that abridge these rights. Such protections would extend not only to current generations but also future generations and marginalized communities suffering environmental injustices. A Green Amendment would also require that the state government act as trustee of natural resources, thereby ensuring enhanced protections for air, water, and natural environments.[26]

Legal scholars have supported elevating environmental rights to the level of other fundamental rights and acknowledged the effects of such a paradigm shift.[27] They have endorsed "the legitimacy of constitutional environmental rights" by recognizing "that they are a natural outgrowth of canonical liberal constitutional philosophies, and thus have the same weight as other constitutional rights."[28] Consequently, the public is likely to respond with greater reverence to such environmental constitutional law than environmental statutory law, increasing the likelihood of compliance with constitutional directives.[29] Concurrently, environmental constitutionalism is not substitutive but integral; it will not replace but "support[] and scaffold[] existing . . . legal systems."[30] Green Amendments provide the means by which to incorporate effective

26. VAN ROSSUM, *supra* note 9, at 232-34.
27. *See* MAY & DALY, *supra* note 4, at 44.
28. *Id.*
29. *Id.* at 33.
30. *Id.* at 54.

environmental constitutionalism.

With Green Amendments, citizens will have greater protections from state actions. State and local governments must consider the constitutional implications of their actions or inactions when implementing policy and enacting laws and regulations. When these fundamental rights are at issue, citizens who suffer environmental harms and want to challenge governmental decisions that allegedly infringe on their environmental rights have increased protections available under the state constitution.

Constitutions do not grant powers to state and local governments but instead restrict their powers, limiting governmental overreach.[31] Legislators may not lawfully enact statutes that contravene the limits imposed by a constitutional provision.[32] Therefore, with Green Amendments, local and state governments are restricted from passing laws and regulations, approving permits, or failing to remediate actions that violate citizens' constitutional environmental rights. Even where a state statute explicitly allows preemption of local governments, the statute cannot preempt local laws or ordinances if it violates the constitutional rights enshrined in a bill of rights.[33] In other words, local and state governments are not preempted from enacting laws to protect citizens' environmental rights that are consistent with or go beyond the floor of protections guaranteed under the terms of a Green Amendment.[34]

With a Green Amendment, when the government allegedly infringes upon any citizen's rights to clean water, clean air, healthy environments, or a stable climate, citizens can root their claims in the explicit rights put forth in such a provision. In such circumstances, citizens will have the protections afforded to other fundamental rights and the courts must apply strict scrutiny to analyze the government's decisions and protect such rights.[35] The government has the burden of proof to show that infringing on a fundamental right is "necessary to promote a compelling state interest" and that it has used the least restrictive means for promoting that interest.[36] Any restriction must be narrowly tailored to serve that interest and necessary to the solution.[37]

If citizens attempt to protect their environmental rights under the

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31. *See, e.g.*, Colorado State Civ. Serv. Emps. Ass'n v. Love, 448 P.2d 624, 628 (Colo. 1968).

32. *See id.* at 629.

33. *See* Robinson Twp. v. Commonwealth, 83 A.3d 901, 974-75 (Pa. 2013).

34. *See id.* at 977.

35. *See* Obergefell v. Hodges, 576 U.S. 644, 675-76 (2015) (discussing strict scrutiny); Reed v. Town of Gilbert, 576 U.S. 155, 163-64 (2015) (discussing fundamental rights).

36. *See* Evans v. Romer, 882 P.2d 1335, 1341 (Colo. 1994).

37. *See id.* at 1350.

authority of Green Amendments, courts should not redirect them to the ballot box as they have when citizens have asserted such rights without constitutional support.[38] It is not the duty of the political branches to enforce these fundamental rights. Instead, under Green Amendments, courts must apply a deferential standard of review as to the constitutionality of the actions at issue. And, in states where environmental rights have been explicitly elevated to the status of other constitutional rights, courts have applied rigorous standards.[39]

Because these environmental rights differ conceptually from traditional fundamental rights, some are concerned that courts are not capable of handling the complexities of environmental constitutional rights.[40] Whereas constitutional claims around traditional rights often involve a distinct assertion that a specific party is injured and clear evidence supporting the injury, environmental rights challenges can be broad and indiscrete; the injuries may be widespread and the evidence obscure, making it difficult for courts to determine a remedy.[41] These complications magnify the typical issues involved in constitutional adjudication, like the substance of the constitutional text, costs, fairness, and political pressure.[42] Nevertheless, members of the judiciary are proving that they are equipped to scrutinize environmental constitutional jurisprudence. Not only are courts around the globe vindicating environmental rights,[43] but in the two states in the U.S. that have Green Amendments,[44] Pennsylvania and Montana, the judiciary has effectively interpreted and applied environmental rights provisions.[45]

Where Green Amendments are implemented, they will not only elevate environmental rights but also ensure that they are more enduring. Environmental rights placed in constitutions are more immutable than environmental protections in statutes. As compared to amending constitutions, the process for amending statutes is less complex and

38. *See, e.g.*, Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).

39. *Robinson Twp.*, 83 A.3d at 934 (discussing the application of a deferential standard of review for duly-enacted legislation); *see* Montana Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1245-46 (Mont. 1999) (applying strict scrutiny when the application of a rule implicates a fundamental right).

40. *See* MAY & DALY, *supra* note 4, at 88 (acknowledging that because environmental rights injuries can be so wide-ranging, it can be challenging to identify the core of an environmental right violation and to define a particular remedy).

41. *Id.*

42. *Id.*

43. *Id.*

44. *See supra* note 8.

45. *See infra* Part V.

changes may occur with a shift in political winds. For example, in Colorado, for a bill to become law, each house merely needs a majority vote.[46] Amending the Colorado Constitution, by contrast, is a more laborious process.[47] The legislature may propose a referendum or citizens may propose an initiative by gathering the required signatures on a petition.[48] After a rigorous approval process, an initiative or referendum will get placed on the ballot and will pass only with a supermajority vote.[49]

A Green Amendment is also more protective because it is strategically placed. The provision is intentionally placed in the bill of rights section of a state's constitution so it becomes self-executing and need not depend on any legislative action to be applied.[50] The legislature does not need to define the scope of the right in a statute for the courts to interpret the right; the articulation of the right in the constitution makes it operational.[51]

The scope of protections afforded by Green Amendments is broad. The amendments secure environmental rights for current and future generations. Under the current legal system, future generations are not being meaningfully considered; despite laws and regulations aimed to promote intergenerational equity, "the present generation has already shown itself capable of inflicting significant and quite likely irreversible environmental harm."[52] However, constitutions have the capacity to protect these generations because constitutional provisions are inherently "intergenerational compacts" ensuring rights to our "[p]osterity."[53] Green Amendments align with these constitutional intergenerational compacts by explicitly protecting environmental rights for future generations. Because the current legal paradigm does not effectively protect future generations from environmental harms, environmental rights must be enumerated in state constitutions to provide for more robust enforcement when these rights are violated.

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46. COLO. CONST. art. V, § 22.

47. *Id.* § 1, cls. 2-3 (discussing how initiative and referendum petitions require signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election, as well as the intention to make it even more difficult to amend the constitution).

48. *Id.*

49. COLO. REV. STAT. §§ 1-40-101 to -116 (2021); COLO. CONST. art. V, § 1.

50. Medina v. People, 387 P.2d 733, 736 (Colo. 1963).

51. *Id.*

52. MAY & DALY, *supra* note 4, at 47-48

53. *Id.*; *See also* RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE 141-42 (2009) (recognizing the framers of the U.S. Constitution sought to secure the protections of liberty for future generations and such protections should include environmental rights); U.S. CONST. pmbl.

Additionally, the scope of a Green Amendment encompasses marginalized communities and helps promote environmental justice. Constitutionalism is rooted in the idea of protecting minorities.[54] Environmental rights provisions serve to protect these underrepresented citizens from majoritarian policies that cause discriminatory environmental harms.[55] These injustices manifest where contaminants in air, water, and soil and the effects of climate change have a disproportionate impact on marginalized communities. For example, in Colorado, those most likely to be adversely affected are low-income populations, communities of color, children, and individuals with chronic diseases.[56] Green Amendments "secure basic conditions necessary for everyone to live with dignity," and such protection from contamination and pollutants is particularly important for those suffering environmental injustices.[57] Elevating environmental rights to the level of constitutional protections advances environmental equality for these vulnerable, underserved communities.

Relatedly, Green Amendments provide mechanisms for protecting air, water, and environments that transcend statutes and regulations. Green Amendments shift the status quo by altering the way in which government is required to approach potential harms to the environment. Many environmental laws are designed to allow certain levels of contamination.[58] For example, the state may issue permits that allow parties to discharge pollutants into waters from a point source, and then monitor those parties for compliance with the regulations.[59] To file a claim challenging such laws, plaintiffs must show that they have suffered an "injury in fact" and that the harm is "actual or imminent."[60] But when environmental rights are recognized as constitutional, a paradigm shift occurs. A Green Amendment explicitly obligates state and local governments to address environmental issues at the front end of the decision-making process and to contemplate the environmental

54. Neil A.F. Popović, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENV'T L. J. 338, 347 (1996).

55. *Id.*

56. *See* COLO. HEALTH INST., GLOBAL ISSUE, LOCAL RISK: CHI'S HEALTH AND CLIMATE INDEX IDENTIFIES COLORADO'S MOST VULNERABLE REGIONS (April 22, 2019), https://www.coloradohealthinstitute.org/research/global-issue-local-risk.

57. MAY & DALY, *supra* note 4, at 53.

58. COLO. REV. STAT. § 25-7-109.3 (2021) (regulating hazardous air pollutants); *id.* § 25-7-114.1 (permitting emissions of air pollutants with notice).

59. *Id.* § 25-8-501.

60. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

constitutionality of their decisions prior to enacting them.[61] Legislators must enact laws that will best preserve natural resources and protect them for future generations.[62] The language of such laws should provide "protections which are both anticipatory and preventative."[63]

A Green Amendment also protects the environment by requiring that the state act as a trustee of natural resources.[64] When natural resources are at issue, courts have determined that under the public trust doctrine, the state, as trustee, has a duty to "protect the trust against damage or destruction."[65] The beneficiaries of this trust include both current *and* future generations.[66] The standard of review for such protection requires that agencies and legislatures act affirmatively to prevent "substantial impairment" of the natural resources held in trust through "continuous supervision and control."[67] The judiciary's role to enforce the trust in natural resources serves as a "vital check in the system of democracy."[68]

When a provision incorporates trust language, the courts must recognize the fiduciary duties of the trustee to exercise prudence, loyalty, and impartiality with regard to the trust.[69] Language that designates the state as trustee of public natural resources obligates the state, as a fiduciary, to use prudence, which requires that the trustee exercise the skill and care of an ordinary person.[70] When fundamental rights are at issue, prudence requires that legislators and agencies use the best available science and review cumulative impacts data to guide their decision-making.[71] Next, the duty of loyalty ensures that trustees will "administer the trust *solely* in the interest of the beneficiary."[72] Trustees must also demonstrate impartiality to all current and successive

61. *See generally* Robinson Twp. v. Commonwealth, 83 A.3d 901, 957-58 (Pa. 2013) (explaining that the trustee is prohibited from harming or encouraging harm to the trust and must act affirmatively to protect the trust) .

62. *See generally id.* at 958 (requiring that legislators enact laws to preserve and protect the trust under Pennsylvania's Green Amendment).

63. *See generally* Montana Env't Info. Ctr. V. Dep't of Env't Quality, 988 P.2d 1236, 1249 (Mont. 1999) (finding that delegates' intent in preparing a Green Amendment was to provide anticipatory and preventative protection).

64. VAN ROSSUM, *supra* note 9, at 233.

65. Gerald Torres & Mary Christina Wood, *Joseph Sax: The Public Trust in Environmental Law*, *in* PIONEERS OF ENVIRONMENTAL LAW 127, 140 (Jan G. Laitos & John Copeland Nagle eds., 2020).

66. *Id.*

67. *Id.*

68. *Id.* at 143.

69. Robinson Twp. v. Commonwealth, 83 A.3d 901, 957 (Pa. 2013).

70. RESTATEMENT (SECOND) OF TRS. § 174 (AM. L. INST. 2012).

71. VAN ROSSUM, *supra* note 9, at 43.

72. RESTATEMENT (SECOND) OF TRS. § 170 (AM. L. INST. 2012) (emphasis added).

beneficiaries[73] and must impartially consider the impacts of their decisions on all people regardless of their race or economic status.[74]

With trust language in a Green Amendment, the government's anticipatory actions in fulfilling its fiduciary duties will likely provide economic benefits for *all* citizens, benefits that mitigate the costs of health care, declining property values, and environmental cleanup.[75] Such a provision helps ensure that state and local governments are acting to protect the corpus of the trust—the public natural resources—when making decisions and fulfilling fiduciary obligations.

The constitutional protections afforded to all citizens when states implement Green Amendments exceed statutes and regulations. The protections are greater in strength, durability, and scope. Furthermore, these amendments provide a means by which citizens can better protect the natural resources and environments on which they depend for their health, welfare, and survival.

III. CURRENT LEGAL PARADIGMS ALLOW FOR COMPROMISED AIR QUALITY

A 2019 report by the American Lung Association ("ALA") compiled comprehensive air quality pollution data from across the country, which show that pollution has increased.[76] The study analyzed the levels of ozone and particle pollution, both of which cause negative health impacts, such as asthma attacks, respiratory infections, lung and heart diseases, and premature death.[77]

Currently, laws and regulations do not ensure that *all* people have access to clean air and healthy environments. For example, there is evidence that statutes in Colorado are not sufficiently protecting air quality. The Colorado Air Pollution Prevention and Control Act ("CAPPCA")[78] authorizes the Air Quality Control Commission to regulate air quality.[79] However, in many Colorado cities and counties, the air quality is poor. According to the ALA, Jefferson County, Colorado was one of the top 25 ozone-polluted counties in the country, receiving an "F" for the number of high-ozone days it had in unhealthy ranges.[80]

73. *Id.* § 232.
74. *Robinson Twp.*, 83 A.3d at 957.
75. VAN ROSSUM, *supra* note 9, at 205-07.
76. AM. LUNG ASS'N, STATE OF THE AIR 4 (2019) (on file with author).
77. *Id.* at 36-40.
78. COLO. REV. STAT. § 25-7-101 (2021).
79. *Id.* § 25-7-105.
80. AM. LUNG ASS'N, *supra* note *76*, at 24.

Denver-Aurora and Fort Collins were among the top 25 cities in the country that had the most ozone pollution.[81] Of the 25 counties rated in Colorado, 11 received "D"s and "F"s for having high ozone days, and Denver County received a "D" for having high particle pollution days.[82]

Significantly, it is marginalized communities that unduly endure the adverse impacts of polluted environments. CAPPCA includes a provision that requires the Commission to "identify and engage with disproportionately impacted communities."[83] Despite the fact that the Commission is authorized to consider marginalized communities, air quality disproportionately affects minority and low-income neighborhoods.[84] Furthermore, research shows a small increase in air pollutants greatly increases the risk of death from COVID-19.[85] Notably, Colorado communities of color are experiencing a higher percentage of COVID-19 cases and deaths than their white counterparts.[86] The following cases illustrate how environmental injustices have occurred even with air quality statutes and regulations in place.

A. *Elyria-Swansea, the Most Polluted City in the Country*

Environmental pollutants do not impact all Coloradans in the same way. These contaminants disproportionately affect minority and low-income communities, a conclusion supported by hundreds of studies establishing a "pattern of inequitable exposure and risk," and highlighting the institutional discrimination that creates environmental injustice.[87] A Green Amendment would provide greater protections than current statutes for these communities because, in securing environmental rights for all people, it would require that decision-makers give equitable consideration to marginalized communities.

The Elyria-Swansea neighborhood, a primarily Latinx and low-

81. *Id.* at 21.

82. *Id.* at 71.

83. COLO. REV. STAT. § 25-7-105(e)(3) (2021).

84. Christopher D. Ahlers, *Race, Ethnicity, and Air Pollution: New Directions in Environmental Justice*, 46 ENV'T L. 713, 713 (2016).

85. Xiao Wu et al., *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, 6 SCI. ADVANCES eabd4049, at 1 (2020), https://doi.org/10.1126/sciadv.abd4049.

86. Press Release, Colorado Dep't of Public Health & Env't. State Releases Initial Race and Ethnicity Data for COVID-19 Cases (April 13, 2020), https://covid19.colorado.gov/press-release/state-releases-initial-race-and-ethnicity-data-covid-19-cases.

87. Stephanie A. Malin et al., *Environmental Justice and Natural Resource Extraction: Intersections of Power, Equity and Access*, 5 ENV'T SOCIO. 109, 109 (2019), https://doi.org/10.1080/23251042.2019.1608420.

income community, is considered to have the highest environmental risk for property owners in the United States.[88] In 2008, it had the worst air quality in Colorado due to industrial facilities and interstate I-70 traffic situated in close proximity to its residents.[89] As compared to the rest of Denver, Elyria-Swansea has some of the highest rates of asthma, cancer, diabetes, and heart disease.[90]

To aggravate the issue, in 2016, the Colorado Department of Transportation ("CDOT") initiated an I-70 expansion project through the center of the neighborhood.[91] That was not the only option. There were alternative routes passing through more affluent, predominantly white neighborhoods.[92] However, despite several alternatives presented by community members and without performing complete environmental impact analyses, CDOT rejected the alternatives and chose the route that would impact residents in a Latinx neighborhood.[93]

In 2016, citizens challenged CDOT's decision under one of the few applicable laws, Title VI of the Civil Rights Act, which prohibits discrimination based on a finding of disparate impacts for federally funded projects such as this one.[94] The complainants claimed that the CDOT expansion violated Title VI because it would cause disparate impacts to a community where alternatives existed that would result in "less racial disproportionality."[95] Among other things, the project would cause increased air pollution and disturb highly contaminated soil, further degrading the environment in an already disproportionately impacted community that was comprised of more Latinx and low-income citizens than the alternate routes CDOT assessed, thereby violating Title VI

88. *See* Rachel Calvert, *Reviving the Environmental Justice Potential of Title VI Through Heightened Judicial Review*, 90 U. COLO. L. REV. 867, 868 (2019) (finding that "Denver's Elyria-Swansea neighborhood is the most polluted zip code in Colorado").

89. GROUNDWORK DENV., INC., HEALTHY AIR FOR NORTH DENVER: CARE GRANT FINAL REPORT S2.2.1: 1 (Dec. 23, 2008), https://www.epa.gov/sites/production/files/2016-08/documents/colorado_denver_healthy_air_hand_report-508.pdf [https://perma.cc/LFV4-AFB5].

90. Calvert, *supra* note 88, at 870.

91. *Id.*

92. *Id.* at 873.

93. Civil Rights Act Title VI Complaint from Heidi J. McIntosh & Joel Minor, Atty's, Earthjustice, to Leslie Proll, Dir., Off. of C.R., U.S. Dep't of Transp., at 29-31 (Nov. 15, 2016) (https://earthjustice.org/sites/default/files/files/I-70%20Title%20VI%20Complaint.pdf) [hereinafter Earthjustice Complaint].

94. *Id.* at 23.

95. *Id.* at 23, 29-30.

disparate impacts regulations.[96]

However, as this case shows, Title VI tends to be ineffective in environmental suits because of the judicial deference courts give to agency decisions, even in the absence of environmental social inequities analyses.[97] Agencies tend to rely on environmental statutory requirements in determining whether civil rights violations will occur or have occurred.[98] Tellingly, CDOT failed to assess the impact of increased pollutants from the project on the community's already compromised health, including the cumulative impact of these pollutants and toxic emissions from industrial facilities already in the neighborhood.[99]

Notwithstanding these inadequate assessments, the Federal Highway Administration ("FHA") found that there was no less discriminatory alternative.[100] The FHA reasoned that choosing Elyria-Swansea would "result in less adverse impacts to noise and reduced exposure to air pollution" in comparison to other alternatives.[101] It was possible the project would create "adverse, disparate impacts" on the neighborhood, but CDOT showed it had plans to mitigate the harms.[102] Furthermore, any "adverse, disparate impacts" were warranted because CDOT was able to show "substantial, legitimate justification" for choosing Elyria-Swansea, the justification being that Elyria-Swansea would experience less traffic on local streets because drivers would choose to use the freeway instead.[103]

Later in July 2017, Sierra Club filed suit requesting judicial review of the FHA's acceptance of CDOT's Environmental Impact Statement required under the National Environmental Policy Act.[104] In reviewing the agency's decision, the court was required to apply an "abuse of discretion" standard—a high bar for the plaintiffs—and determine whether the agency had considered the environmental consequences

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96. *Id.* at 23-24.

97. Calvert, *supra* note 88, at 876, 886.

98. *Id.* at 874.

99. Earthjustice Complaint, *supra* note 93, at 23-24.

100. Letter from Irene Rico, Assoc. Adm'r for C.R., U.S. Dep't of Transp., to Candi CdeBaca and Shailen P. Bhatt, Exec. Dir., Colo. Dep't of Transp. (Apr. 12, 2017), at 36 (https://www.denverpost.com/wp-content/uploads/2017/04/letterof-finding-i-70-project.pdf) [https://perma.cc/MC9E-2AAE].

101. *Id.*

102. *Id.* at 36-38.

103. *Id.* at 38.

104. LLOYD BURTON, COLO. SIERRA CLUB, REPORT TO THE CLUB ON THE SETTLEMENT OF SIERRA CLUB ET AL. V. CHAO, ET AL. (D. COLO. NO. 17-1679) 1, 4 (January 8, 2019).

based on informed decision-making and public comments.[105] The plaintiffs alleged that the Environmental Impact Statement conducted by CDOT was inadequate because it failed to accurately account for the adverse impacts of the increased air pollution on the neighborhoods despite adherence to air quality standards.[106]

To prevent the project from advancing, the plaintiffs filed a motion for a preliminary injunction and, in part, needed to show a likelihood of success on the merits of the case.[107] The court denied the motion because it determined that the plaintiffs would not likely succeed on the merits of their claim.[108] The court found the agency's analysis was sufficient and held, in part, that agencies may rely solely on compliance to air quality standards to conclude that the project would not impact human health *with no requirement to evaluate the health of the community*.[109] Additionally, the judge declined to admit expert testimony regarding air quality monitoring, FHA policy on considering health impacts to communities in Environmental Impact Statements, or additional scientific evidence in the record.[110]

Because the plaintiffs were not likely to succeed, they chose to settle.[111] Under the circumstances, the settlement provided the best outcome for them.[112] In return for the plaintiffs withdrawing the suit, CDOT agreed to provide $600,000 for a comprehensive community health study of the neighborhoods closest to the Central I-70 expansion.[113] The health study will provide a comprehensive picture of environmental impacts on a disadvantaged neighborhood, including scientific evidence that can be used to remediate or prevent future harms in other communities.[114] CDOT also agreed to install air monitors and to mitigate threats should specific levels of contamination occur.[115]

It is a grave injustice when disproportionately impacted citizens further sacrifice their health to determine the adverse effects of development.

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105. Sierra Club v. FHA, No. 17-CV-1661-WJM-MEH, 2018 U.S. Dist. LEXIS 56243, at *18 (D. Colo. Apr. 3, 2018).

106. *Id.* at *12.

107. *Id.* at *20.

108. *Id.*

109. *Id.*

110. BURTON, *supra* note 104, at 6.

111. *Id.* at 9-10.

112. *Id.* at 10.

113. *Id.*

114. *Id.*

115. *Id.*

A Green Amendment in a state constitution with language that provides *all* citizens a right to breathe clean air and live in healthy environments would increase protections for citizens such as those living in Elyria-Swansea, Colorado.[116] Under such an amendment, the state has a constitutional fiduciary duty as a trustee of natural resources, and therefore, is obligated to treat beneficiaries impartially when crafting laws and making decisions.[117] The public trust language in a Green Amendment ensures that low-income minority citizens have constitutional protections that require the government to put them on equal footing with affluent white citizens.[118]

Were the Elyria-Swansea plaintiffs able to root their challenges in a constitutional claim, a judge would not analyze CDOT's decision under the statutory review requirement (in that case, an abuse of discretion standard) but would instead be required to adhere to the strict standard of judicial review applied when there is an infringement of a fundamental right—strict scrutiny. The court most likely would have required CDOT to investigate the cumulative health impacts on a community that suffered from excessive industrial contamination and to exhaust less discriminatory alternatives before proceeding with the project. Furthermore, in ruling on a motion to stay, the court could not ignore the best available science when making a decision that impacts the environmental rights of citizens. Finally, in lieu of a "substantial legitimate justification," CDOT would need a "compelling state interest" to justify its decision.

B. *Colorado's Oil and Gas Policies Promote Pollution*

Notwithstanding statutes and regulations designed to protect public health, safety, and welfare, Coloradans have been adversely impacted by oil and gas operations. Were a Green Amendment in the Colorado Constitution, it is likely that the Colorado Oil and Gas Conservation Commission ("COGCC") would not have lawfully permitted an oil and gas operation within 1000 feet of a school playground. Furthermore, citizens in other communities would not have suffered health impacts related to emissions from numerous oil and gas wells. Absent enumerated environmental rights in the Colorado Constitution, such circumstances occurred.

In 2017, COGCC approved an oil and gas operation 1300 feet from

116. *See supra* text accompanying notes 88-93.

117. *Id.*

118. *Id.*

Bella Romero Academy, a 4th-8th grade school, and less than 1000 feet from its playground.[119] The school's students are predominantly Latinx and the majority of students are eligible for free or reduced-fee lunches.[120] The operation was originally intended to go near Frontier Charter Academy, a school with primarily white students, but instead was moved to the Bella Romero location.[121] Numerous studies show that industrial facilities move into low-income or minority neighborhoods, such as Bella Romero.[122]

In 2017, numerous nonprofits filed a lawsuit on behalf of community members living in the vicinity of Bella Romero.[123] The plaintiffs claimed that COGCC's permitting process was arbitrary and capricious, in part because COGCC failed to consider public comments that included hundreds of pages of health studies related to the impact of oil and gas operations on public health, particularly in children.[124] Many of the studies addressed the negative impacts that the carcinogenic gas benzene—often traced to oil and gas emissions—has on human health.[125]

The oil and gas operator, Extraction, and the Court of Appeals deemed the health studies irrelevant. Extraction intervened in the lawsuit and filed its own brief, arguing that the studies were irrelevant because the operations in those studies were not similar enough to Extraction's operation.[126] The Colorado Court of Appeals maintained that the health studies were irrelevant because the agency "implicitly considered and rejected" the studies.[127] The court further developed its own conclusion that the health studies were irrelevant because they were conducted in different counties and states and were not submitted in the same year that Extraction's operations were permitted.[128] Additionally, the court deferred to COGCC's determination that Extraction's best management practices sufficiently addressed the public health and safety concerns.[129]

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119. Weld Air & Water v. Colo. Oil & Gas Conservation Comm'n, 457 P.3d 727, 729-30 (Colo. App. 2019).

120. Brief for Colorado PTA as Amicus Curiae at 18, Colo. Oil & Gas Conservation Comm'n v. Martinez, 433 P.3d 22 (Colo. 2019).

121. *Id.*

122. *Id.* at 17.

123. *Weld Air & Water*, 457 P.3d at 730.

124. Case File at 32, Weld Air & Water v. Colo. Oil & Gas Conservation Comm'n, 457 P.3d 727 (Colo. App. 2019) (No. 2017CV31315) (on file with author).

125. *Id.* at 112, 115, 119, 123, 125, 230, 514.

126. *Id.* at 14, 21.

127. *Weld Air & Water*, 457 P.3d at 737.

128. *Id.*

129. *Id.*

Therefore, the court held that COGCC's decision to permit Extraction's operation was not arbitrary and capricious.[130]

However, according to subsequent emissions reports, Extraction's best management practices were not sufficient to protect the students from harmful emissions. The Colorado Department of Public Health and Environment ("CDPHE") released data from air monitoring done at the Bella Romero Academy showing that on November 5, 2019, benzene levels exceeded the health standards for one hour.[131] An independent analysis of these same data by Barrett Engineering revealed that under standards that are appropriate for children and the setting, the benzene levels exceeded health standards for 113 eight-hour periods.[132]

A follow-up investigative report by CDPHE revealed that it was very likely that emissions from Extraction's operations caused the elevated benzene levels.[133] Observations during most of the elevated readings show winds blowing from Extraction's operation less than 1000 feet from the school playground towards the school.[134] The elevated levels coincided with the times that Extraction was operating its wells.[135] These data indicate that Extraction's best management practices, deemed sufficient by COGCC, were not effective in protecting children from harmful gas emissions.

Colorado's oil and gas policies and regulations have also adversely impacted other communities. The testimonies of multiple Coloradans demonstrate that the best management practices of oil and gas operations do not adequately protect citizens from emissions and that some of the health standards informing the regulation of emissions may not be stringent enough. For example, residents of Erie, Colorado, whose homes were surrounded by oil and gas operations, had elevated levels of benzene in their blood.[136] One resident, a mother and scientist, lived within one

130. *Id.*

131. COLO. DEP'T OF PUB. HEALTH & ENV'T, AIR MONITORING AT BELLA ROMERO ACADEMY NEAR VETTING OIL AND GAS SITE 2 (Jan. 2020) (on file with author).

132. BARRET ENGINEERING, MONITORING RESULTS SHOW EXCEEDANCES OF SAFE LEVELS – BELLA ROMERO ACADEMY 1 (Feb. 2020) (on file with author).

133. COLO. DEP'T OF PUB. HEALTH & ENV'T, FOLLOW-UP INVESTIGATION AT BELLA ROMERO ACADEMY NEAR VETTING OIL AND GAS SITE 10 (Jan. 2020) (on file with author).

134. *Id.*

135. *Id.* at 3.

136. Jennifer Lee Kovaleski, *Erie Mom Concerned About Benzene Found in Son's Blood*, THE DENV. CHANNEL (April 30, 2018), https://www.thedenverchannel.com/news/local-news/erie-mom-concerned-about-benzene-found-in-sons-blood; Colorado Oil & Gas Conservation Commission, *COGCC Commission Hearing - July 31, 2019 - Part 1*, YOUTUBE (July 31, 2019), https://www.youtube.com/watch?v=vShGiTJ-Cfg.

mile of 158 wells.[137] Blood tests performed on her six-year-old son revealed benzene levels in the 85th percentile.[138] Another Erie mother testified that she and her children fell chronically ill after oil and gas operations were established a quarter mile from their home.[139] They were tested and found to have benzene levels in the 95th percentile.[140] Months after moving away from oil and gas operations, she had one of her children retested, and the level of benzene in her blood was reduced to zero.[141]

Another Colorado community, Broomfield, has also been adversely impacted by inadequate oil and gas regulation. At a COGCC hearing in 2019, a resident of Broomfield testified that she helped collect air samples to evaluate the air quality in her community.[142] She sent a copy of the samples to COGCC.[143] COGCC reported that the levels of pollutants fell below the Center for Disease Control and EPA standards.[144] However, air pollutants from the oil and gas operations caused the community to suffer from severe negative health impacts.[145] The standards that COGCC follows do not actually reflect the harms that people experience when exposed to these accepted levels of oil and gas pollutants[146] and, therefore, do not adequately protect Coloradans.

Although more stringent oil and gas regulations are required under S.B. 19-181,[147] certain loopholes render the bill ineffective. COGCC conducted a rulemaking process to meet the new requirements of the statute, including the mandate that COGCC no longer "foster" but "regulate" the industry to better protect public health, safety, welfare, and the environment.[148] However, in conjunction with the more rigorous requirements, the bill allows operators to apply for exceptions from certain constraints, such as the distance the operations are to be setback

137. Jennifer Lee Kovaleski, *Erie Mom Concerned About Benzene Found in Son's Blood*, THE DENV. CHANNEL (April 30, 2018), https://www.thedenverchannel.com/news/local-news/erie-mom-concerned-about-benzene-found-in-sons-blood.

138. *Id.*

139. Colorado Oil & Gas Conservation Commission, *COGCC Commission Hearing - July 31, 2019 - Part 1*, YOUTUBE (July 31, 2019), https://www.youtube.com/watch?v=vShGiTJ-Cfg.

140. *Id.*

141. *Id.*

142. Colo. Oil & Gas Conservation Comm'n, *COGCC Commission Hearing - February 26, 2020*, YOUTUBE (Feb. 26, 2020), https://www.youtube.com/watch?v=wNLvzJQmNSM.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. S.B. 19-81, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

148. *Id.*

from homes.[149] Notably—since these regulations are statutorily mandated—were there a change in political will, a new statute could replace S.B. 19-181 and eliminate the more stringent regulations.

Fundamental environmental rights must be enumerated in constitutions to provide foundational protections more enduring and revered than statutes and regulations. Green Amendments, recognizing environmental rights as fundamental rights, strengthen protections for citizens, particularly vulnerable populations, from agency decisions that compromise air quality and the environment.[150] Because of the state's fiduciary duty to act with prudence, agencies are required to consider the best available scientific data and cumulative impacts when making decisions that could infringe upon citizens' environmental rights whether such considerations are statutory requirements or not.[151] And due to the consistent fiduciary expectations of regulatory agencies and the enduring nature of constitutional rights, such protections also provide greater certainty for industries, such as oil and gas, with regard to the limits of their activities.

With a Green Amendment, all citizens benefit. Data showing elevated levels of airborne benzene in the vicinity of a school, elevated levels of benzene in children's blood, and other negative health impacts due to oil and gas operations would have to be considered when the COGCC decides whether to permit oil and gas operations, grant variances, or enforce violations. The COGCC's decisions would not only be based on industry compliance but also the industry's impacts on air quality, human health, and the environment.

IV. THERE IS NOT PURE WATER FOR ALL

Under current law, all citizens do not have access to pure water and healthy aquatic environments. The extreme drought in the western U.S. underscores how critical this inequitable access has become.[152] As water shortages become more acute, so will the disproportionate impacts to low-income and marginalized communities.[153] However, statutes do not address such issues; they are designed to allocate water to those fortunate

149. *See* COLO. REV. STAT. § 34-60-105(1)(a) (2021); 2 COLO. CODE REGS. § 404-1(502) (2021).

150. *See supra* text accompanying notes 54-63.

151. *See supra* text accompanying notes 70-71.

152. Tom Housel, *When the Rivers Run Dry: Adapting Prior Appropriation Systems to Protect Marginalized Communities in Times of Drought*, 36 J. ENV'T L. & LITIG. 237, 238 (2021).

153. *Id.* at 248-49.

enough to have water rights[154] Additionally, although certain statutes seek to regulate water quality and maintain instream flows to protect ecosystem health,[155] many of these existing laws are inadequate. The following cases exemplify the gaps in Colorado water law, which deprive some citizens access to pure water and fail to protect and maintain healthy aquatic environments. A Green Amendment would enshrine an enduring right to pure water, explicitly elevating that right to the level of other fundamental rights, and requiring courts to scrutinize situations in which the right to clean water is infringed.

A. *Coloradans Suffer from Exposure to Contaminated Drinking Water*

Extant laws and regulations do not effectively protect Coloradans from harmful levels of contaminants in their drinking water. Nor do decision-makers believe that they have the legal authority to set more rigorous water quality standards. Together, these policies and this belief have compromised citizens' access to pure water, negatively impacting the health, safety, and welfare of Coloradans.

In October of 2015, water providers for the approximately 64,000 residents of Fountain, Security, and Widefield ("FSW"), Colorado disclosed the presence of perfluorooctanoic acid and perfluoro octane sulfonate chemicals (collectively "PFAS") in the drinking water.[156] These compounds have been designated as "forever chemicals" because they do not break down in the environment and instead, bioaccumulate in fish, wildlife, and humans.[157] When humans ingest PFAS, the chemicals can remain in the body for two to eight years and are linked to serious medical conditions such as kidney and liver damage, cancer, and low birth weights.[158]

Despite these dangers, state and federal regulations did not protect citizens from the widespread contamination of their water caused by these toxic chemicals. The source of the chemicals in FSW water was the Peterson Air Force Base, which for decades used a fire suppressant foam

154. *See* COLO. REV. STAT. §§ 37-92-101 to -103, -301 (2021).

155. *Id.*

156. Complaint at 6, Ingemansen v. 3M Co., Civil Action No. 1:18-CV-01167 (D. Colo. May 14, 2018) [hereinafter Ingemansen Complaint].

157. Laura Paskus & Caitlin Coleman, *When Water Justice is Absent, Communities Speak Up*, WATER EDUC. COLO. (Mar. 23, 2020) https://www.watereducationcolorado.org/publications-and-radio/headwaters-magazine/spring-2020-pursuing-water-justice/when-water-justice-is-absent-communities-speak-up/.

158. *Id.*

containing PFAS to put out fires in training exercises.[159] It was not until April 2012 that the Environmental Protection Agency ("EPA") required water systems in FSW to be tested for contaminants including PFAS; and only in October 2015 did residents of FSW first hear about the presence of these chemicals in their drinking water.[160] Seven months later, the EPA established a health advisory level for PFAS of 70 parts per trillion (ppt)—a nonbinding standard.[161] Tests revealed levels of the chemicals in some areas around FWS up to 20 times greater than the EPA safety standard.[162] Further testing by the Army Corp of Engineers and CDPHE revealed widespread water contamination caused by the chemicals.[163] Yet, two years later in July 2018, no government agency, including CDPHE, had methodically investigated the health impacts of the PFAS contamination or monitored the PFAS levels in the Fountain Creek watershed.[164]

In May, 2018, citizens of FSW and Broomfield (a nearby community), many of whom have children, filed a class action lawsuit against the companies that produced, sold, and distributed firefighting foam, alleging that the companies knew the foam contained harmful contaminants that leached into the communities' water supplies.[165] Although this case was aimed at the companies, it is evidence that the laws in Colorado do not provide stringent enough regulations to monitor toxic products, such as the firefighting foam, that cause such widespread contamination.

Colorado's laws and regulations do not ensure citizens have pure, healthy drinking water. Notably, CDPHE and Colorado's Attorney General, Phil Weiser, have doubts as to whether the EPA's health advisory limit of 70 ppt is stringent enough to protect public health.[166] Other states have adopted their own PFAS standards because of the perceived inadequacy of the federal standards, some as low as 12 ppt

159. *Colorado Springs Attorney Files 2nd Suit v. PFC Manufacturers*, 20 CLASS ACTION REP., July 26, 2018 [hereinafter *Colorado Springs Attorney*].

160. Ingemansen Complaint, *supra* note 156, at 6.

161. *Id.* at 7.

162. Bruce Finley, *Drinking Water in Three Colorado Cities Contaminated with Toxic Chemicals Above EPA Limits*, DENV. POST, (June 15, 2016), http://www.denverpost.com/2016/06/15/colorado-widefield-fountain-security-water-chemicals-toxic-epa/.

163. Ingemansen Complaint, *supra* note 156, at 8.

164. *Colorado Springs Attorney*, *supra* note 159.

165. Ingemansen Complaint, *supra* note 156, at 59.

166. John Herrick, *Colorado Health Officials Want Better Monitoring and Cleanup of Toxic PFAS Chemicals in State's Water,* COLO. INDEPENDENT (Jan. 24, 2020), https://www.coloradoindependent.com/2020/01/24/toxic-pfas-chemicals-health-regulation/.

because of the federal government's inaction on PFAS.[167] But CDPHE is hesitant to set PFAS standards lower than the federal recommendation.[168] Director John Putnam believes cities, water managers, and other groups concerned about financial liabilities would challenge such a standard, subjecting CDPHE to extensive litigation.[169] Such groups have exerted clear influence over efforts designed to regulate PFAS chemicals: H.B. 20-1119, a bill introduced to the Colorado legislature designed to regulate PFAS, did not pass until key monitoring and enforcement provisions were struck.[170] One provision required public drinking water providers to test their waters for PFAS and the other granted CDPHE authority to enforce PFAS standards.[171] Furthermore, the final version of the bill created an exemption that allows Denver International Airport to use the toxic foam for training.[172]

A Green Amendment enshrines access to pure water as a fundamental right. With a Green Amendment, considerations of the dangers of PFAS contaminating drinking water would factor centrally in the decision-making process at the state level. As a fiduciary of natural resources, the state would be required to exercise prudence regarding water quality, regardless of statutory requirements. The state's prudential mandate would bind the legislature to include adequate monitoring and enforcement provisions in statutes concerning water quality. It is likely a bill such as HB20-1119 that fails to include such protective provisions would not pass constitutional muster, as those provisions would be necessary for the state to guarantee its citizens' right to pure water. A Green Amendment would also enable CDPHE to respond to challenges to enhanced PFAS standards by grounding its authority to set and enforce stringent standards in the constitutional right of all Coloradans to access pure water.

B. *Sovereign Tribes Need Improved Access to Water*

For centuries, states have treated tribal nations unjustly regarding access to natural resources such as water. In Colorado, Indigenous Peoples have rights to water that state actors have failed to recognize. A Green Amendment would allow tribes to root their claims in the

167. *Id.*

168. *Id.*

169. *Id.*

170. H.B. 20-1119, 72nd Gen. Assemb., 2nd Reg. Sess. (Colo. 2020).

171. H.B. 20-1119, 72nd Gen. Assemb., 2nd Reg. Sess. (as introduced in Colo., Jan. 15, 2020).

172. H.B. 20-1119, 72nd Gen. Assemb., 2nd Reg. Sess. (Colo. 2020).

constitution and demand equitable treatment when states seek to abridge their fundamental right to pure water.

The Ute Mountain Ute and Southern Ute Tribes ("Ute Tribes") have federal Indian reserved water rights, which are held in trust by the U.S. government and are exempt from state water appropriations law.[173] However, for over one-hundred years non-Indian farmers, ranchers, and communities came to depend on water from Colorado rivers under state water law, even though the rights to much of that water belonged to the Ute tribes.[174] To determine the extent and quantity of the Ute Tribes' water rights, the tribes, the federal government, the State of Colorado, and major water users negotiated a settlement[175] designating the Ute Tribes' claims to Colorado streams.[176]

The state plays a crucial role in ensuring whether the Ute Tribes' settlement agreement is recognized. Therefore, the state should be required to involve tribes in conversations surrounding their water rights and ensure the tribes have enough water to maintain their reservations. Yet, when the Colorado River Basin states gathered in 2007 and 2012 to discuss management of the Colorado River, Indian Tribes were not fully included.[177] Furthermore, a study revealed that tribes are unable to fully realize their water rights because of ongoing disputed claims or legislators' disregard of tribal rights.[178] Under the settlement, the state should ensure tribal nations are able to access their federally-promised water rights, but this has not been the case. Even though the Ute Tribes' water rights have been negotiated, they have needed to continue to fight for implementation and protection of their water rights.[179]

The Ute Tribes in Colorado exemplify sovereign tribes who have a legal right to water, but are unable to access some of that water and, as a result, have constituents lacking clean water.[180] Providing Indian Tribes

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173. *See* Winters v. United States, 207 U.S. 564, 577 (1908) (affirming the power of the federal government to reserve waters on federal land, including reservations, and exempt those waters from appropriation under state laws).

174. Scott B. McElroy, *History Repeats Itself: A Response to Opponents of the Colorado Ute Indian Water Rights Settlement Act of 1988*, 2 U. DENV. WATER L. REV. 244, 249 (1999).

175. Agreement for the Colorado Ute Indian Water Rights Final Settlement (Dec. 10, 1986), http://hdl.handle.net/1928/21763.

176. McElroy, *supra* note 174, at 249.

177. Kelly Bastone, *Welcoming Tribes to the Table*, WATER EDUC. COLO. (Nov. 20, 2019), https://www.watereducationcolorado.org/publications-and-radio/headwaters-magazine/fall-2019-contingency-plan/welcoming-tribes-to-the-table/.

178. *Id.*

179. BUREAU OF RECLAMATION, COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP TRIBAL WATER STUDY 5.2-25 (Dec. 2018).

180. Paskus & Coleman, *supra* note 157.

and their future generations with sufficient quantities of pure water exemplifies environmental justice and good public policy, especially in light of a past littered with broken promises to Indigenous Peoples.[181] This could be ensured by implementing a Green Amendment.

A Green Amendment adds a layer of constitutional protection for tribal nations when their rights are violated. The amendment would make it unconstitutional for state actions to abridge Indigenous Peoples' fundamental right to pure water. Furthermore, it would mandate that the state act impartially as a trustee of natural resources, including drinking water. The state has a fiduciary duty to equitably consider marginalized communities, such as Indigenous Peoples, when determining how water is allocated. Decision-makers would be required to recognize Tribes' fundamental right to pure water and ensure they can access that water.

C. *Courts Do Not Consider Environmental Harms When Issuing Water Rights*

In the following case illustration, *Board of County Commissioners v. United States* ("*Arapahoe*"), the Colorado Supreme Court created precedent that could have detrimental effects on riparian areas. To understand the Court's decisions in this case and how a Green Amendment may have altered the decision or could prevent a fallout from the decision, it is helpful to have a general understanding of Colorado water law including instream flow protections.

The prior appropriations doctrine governs allocation of water in Colorado. The Colorado Constitution provides that senior water right holders have priority of appropriations over junior right holders.[182] Natural stream water that is not appropriated is property of the public,[183] but "the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[184] "Beneficial use" is the "amount of water reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose" for the appropriation.[185] If a public or private entity wants to secure a right to use unallocated water for a beneficial use, the party must adjudicate their water right in a water court.[186] The Water Right Determination and Administration Act of 1969

181. McElroy, *supra* note 174, at 245.

182. COLO. CONST. art. XVI, § 6.

183. *Id.* § 5.

184. *Id.* § 6.

185. COLO. REV. STAT. § 37-92-103(4) (2021).

186. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1153-54, 1156 (Colo. 2001) (discussing the adjudication of water right decrees).

provides the statutory framework for allocating and diverting these waters.[187]

In 1973, the Colorado General Assembly passed legislation so that "beneficial use" also included the protection of instream flows and lake levels by appropriating under applicable law minimum flows in specific stretches of river to preserve the environment to a "reasonable degree."[188] The Colorado Water Conservation Board ("CWCB") has the sole authority to manage and protect these instream flow rights on behalf of the public[189] "[f]or the benefit and enjoyment of present and future generations."[190] This authority is burdened by a statutory fiduciary duty to appropriate the minimum amount of water necessary to preserve the natural environment.[191]

With a Green Amendment, the courts would also be required to consider the right to pure water and healthy environments when reviewing decreed water rights. The following case demonstrates how—without an environmental rights provision in the Colorado Constitution—the laws and the courts have failed to protect water resources for the benefit of people and the environment when they make allocation decisions.[192] Were environmental rights enumerated, the following case would have been reviewed by the judiciary with more scrutiny.

In *Arapahoe*, the Colorado Supreme Court held that it is not the role of the courts to consider environmental concerns when issuing water rights.[193] In that case, the county filed an application for conditional water rights for a large reservoir that would draw water from tributaries on the Gunnison River.[194] When issuing a water right decree, the court must establish that the water is going to be put to a beneficial use.[195] Cross-appellants, including homeowners and environmental groups, argued that beneficial use inherently includes the protection of the environment.[196] They stated that courts should consider environmental impacts to a river

187. COLO. REV. STAT. §§ 37-92-101 to -602 (2021).

188. *Id.* § 37-92-102(3).

189. *Id.*

190. *Id.* § 37-92-103(4)(c).

191. Aspen Wilderness Workshop v. Colo. Water Conservation Bd., 901 P.2d 1251, 1256-57 (Colo. 1995).

192. Larry Myers, *To Have Our Water and Use It Too: Why Colorado Water Law Needs a Public Interest Standard*, 87 U. COLO. L. REV. 1041, 1043-44 (2016).

193. Bd. of Cnty. Comm'rs v. United States (*In re* Application for Water Rights of the Bd. of Cnty. Comm'rs), 891 P.2d 952, 971 (Colo. 1995).

194. *Id.* at 957.

195. *Id.* at 959.

196. *Id.* at 971.

basin, including *inter alia* water quality, recreation, and wildlife habitat, prior to determining whether to grant a conditional water right decree.[197]

The Court determined that there was already a statutory mechanism in place to protect the environmental interests of the public, the 1973 instream flow legislation,[198] the statute that gave CWCB the "exclusive authority" to manage and protect instream flow rights on behalf of the public.[199] Additionally, the Court acknowledged that the Water Quality Control Act, which recognizes the need to protect water quality, failed to provide protections to the extent the cross-appellants desired.[200] Nevertheless, the Court held that it was not its role to consider environmental concerns when issuing water rights.[201] The Court applied the separation of powers principle and stated that "[a]lthough environmental factors might provide a reasonable and sound basis for altering existing law," any change in judicial precedent is the function of the legislature.[202]

However, sustaining the environmental health and resilience of rivers is critical to achieving water security for all citizens, and effective governance of such issues is becoming increasingly important.[203] Green Amendments offer support for citizens wanting to present a constitutional challenge when their rights to pure water and healthy environments are abridged. In addition to CWCB, all state government officials would have a fiduciary duty to act in the interest of the beneficiaries. The state and its officials would be obligated to act as trustees of water resources and habitats and anticipate how decisions regarding instream flows would impact aquatic environments.

Therefore, with a Green Amendment, where a fundamental right is at issue, the courts cannot defer to an agency, such as the CWCB, or point to the ballot box, as they did in *Arapahoe*. Where actions of the state abridge a constitutional right, the judiciary has the authority and the responsibility to use its discretion, consider the best available science, act with prudence and impartiality, and overturn precedent if necessary.

The impartiality requirement of a Green Amendment would play an

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 972.

201. *Id.*

202. *Id.*

203. *See* Avril C. Horne et al., *Research Priorities to Improve Future Environmental Water Outcomes*, 5 FRONTIERS ENV'T SCI. 1, 8 (Dec. 8, 2017), https://www.frontiersin.org/articles/10.3389/fenvs.2017.00089/full.

important role in Colorado water law because it is debated whether the state's current water law framework is equitable. The prior appropriations doctrine has operated for almost 150 years, dividing water among competing users based on seniority of the decree, beneficial use, and available water.[204] Some scholars believe it is an "exercise in distributive justice" where water owned by the public can be decreed as a use right.[205] The recognition of the public's ownership in the water has limited what the state appropriates, thereby preventing riparian landowners and speculators from monopolizing water use.[206] However, other scholars see the prior appropriations doctrine as a "special interest legal doctrine that essentially imbues water with private property qualities similar to those traditionally associated with real property interests."[207] Development, mining, and agriculture benefit most from the doctrine, where such special interests can claim continued distribution levels treating the water essentially as private property.[208]

A constitutional environmental right would address both sides by strengthening the validity of the current laws in Colorado that are designed to allocate water to citizens and maintain instream flows, while at the same ensuring clean water and healthy environments for all citizens. Such rights should be enumerated in the constitution so that when water is allocated to certain rights owners, it does not adversely impact other rights holders, the public, or the environment. Two states have recognized these environmental rights in Green Amendments.[209]

V. GREEN AMENDMENT DECISIONS PROTECTING CITIZENS' ENVIRONMENTAL RIGHTS

Pennsylvania and Montana courts recognize the environmental rights of their citizens by virtue of their Green Amendments.[210] Such amendments provide an elevated layer of protection for environmental rights and the prevention of environmental degradation.[211] With a Green Amendment, the state as fiduciary has a heightened standard and must

204. Gregory J. Jr. Hobbs, *Distributive Water Justice: Colorado's Doctrine of Prior Appropriation Incorporates Instream Flow Rights on Behalf of the People*, 22 U. DENV. WATER L. REV. 377, 378 (2019).

205. *Id.*

206. *Id.*

207. Carol Necole Brown, *Drinking from a Deep Well: The Public Trust Doctrine and Western Water Law*, 34 FLA. ST. U. L. REV. 1, 3 (2006).

208. *Id.*

209. *See supra* note 8.

210. VAN ROSSUM, *supra* note 9, at 52.

211. *Id.* at 55-56.

consider the best available science, cumulative impacts, and expert testimony during the legislative decision-making process.[212] The state must anticipate and prevent actions which will harm the environment at the expense of environmental rights. Green Amendments give citizens the power to challenge actions taken by the legislature that allow for the degradation of the environment if those actions infringe upon their environmental rights.[213] When claims are grounded in a constitutional challenge, courts must apply heightened scrutiny in adjudicating the dispute, only allowing for the infringement of rights if the government acted based on a compelling state interest.[214]

Other states that enumerate environmental rights in their constitutions can benefit by analyzing the following cases in which citizens were able to successfully root their claims in Green Amendments to challenge government decisions. The plaintiffs in these cases demonstrated that state actions would cause substantial adverse impacts to the environment and infringe upon their environmental rights. These successful claims prevented significant harm. In states that implement Green Amendments, citizens and communities can look to these cases to effectively challenge state actions that degrade the environment.

A. *Pennsylvania*

The Environmental Rights Amendment ("ERA") in Article I, Section 27 of Pennsylvania's constitution secures the following rights as fundamental:

> 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.[215]

Although both houses of the Pennsylvania legislature passed this provision in 1971, many early court cases did not meaningfully apply the newly passed constitutional provision.[216] At first, plaintiffs interpreted the provision too broadly and attempted to bring challenges based on aesthetic concerns, rather than trying to protect citizens' rights to clean

212. *Id.* at 56.
213. *Id.* at 49.
214. *Id.* at 56.
215. PA. CONST. art. I, § 27.
216. VAN ROSSUM, *supra* note 9, at 53.

air, water, and healthy environments.[217] For example, in *Commonwealth v. National Gettysburg Battlefield Tower*, the state used the ERA to challenge the construction of an observation tower overlooking the Gettysburg Battlefield.[218] The plaintiffs claimed that it would detract from the natural, historic, and aesthetic value of the battlefield.[219] The lower courts found that there was not enough evidence to support such a claim.[220] The Supreme Court agreed and went further to state that the ERA was not self-executing, but merely a "general principle of law."[221]

These decisions could have damaged the strength and legitimacy of Pennsylvania's ERA.[222] However, in 2013, a landmark Pennsylvania Supreme Court case, *Robinson Township v. Commonwealth*, changed how courts interpret the ERA. It is no longer regarded as a policy statement, but rather considered self-executing, thereby unequivocally elevating the environmental rights it contains to the status of other fundamental rights.[223] The court went even further, recognizing that environmental rights are inherent and indefeasible and the ERA secured, rather than bestowed, these rights.[224]

In 2012, the Pennsylvania legislature passed Act 13, amending the Pennsylvania Oil and Gas Act to expand the rights of oil and gas operations.[225] The Delaware Riverkeeper Network, its Executive Director Maya van Rossum, and several municipalities ("citizens") filed a citizens' suit challenging the constitutionality of Act 13.[226] In *Robinson Township v. Commonwealth*, the Pennsylvania Supreme Court, in a plurality opinion, held that certain provisions of Act 13 were unconstitutional and incompatible with the ERA.[227] The Declaration of Rights in Article I of the Pennsylvania Constitution limits the power of the legislature where rights and powers are reserved for the people.[228] The *Robinson* Court held

217. *Id.* at 54.

218. Commonwealth v. Nat'l Gettysburg Battlefield Tower, 311 A.2d 588, 590 (Pa. 1973).

219. *Id.*

220. *Id.*

221. *Id.* at 594-95.

222. VAN ROSSUM, *supra* note 9, at 54.

223. Robinson Twp. v. Commonwealth, 83 A.3d 901, 975 (Pa. 2013).

224. *Id.* at 948 n.36.

225. *See* 58 PA. CONS. STAT. §§ 2301-3504 (2021).

226. *Robinson Twp.*, 83 A.3d at 901.

227. *Id.* at 1000 (citing 58 PA. CONS. STAT. §§ 3303, 3304, and 3215(b)(4) and (d)).

228. *Id.* at 927. Subsequently, the Court adopted the plurality opinion in *Robinson* and held that the ERA mandated that the state has a fiduciary duty to hold natural resources in public trust for the benefit of its citizens. *Pa.* Env't. Def. Found. v. Commonwealth, 161 A.3d 911, 932 (Pa. 2017).

that Article I did not delegate police powers to the General Assembly,[229] but created legally enforceable rights that could be vindicated by the courts.[230]

The ERA has two main objectives: 1) it identifies fundamental, protected rights that limit the state's actions and 2) requires the state to act affirmatively in developing and enforcing those rights.[231] In *Robinson*, the citizens rooted their arguments in the ERA to challenge the harmful provisions in Act 13.[232] One provision of Act 13 displaced local zoning ordinances and permitted oil and gas operations in all zoning districts, including residential districts, exposing protected areas to industrial disturbances.[233] Another provision prohibited local governments from requiring mitigation measures, such as setbacks, fencing, or durational limitations, which would protect citizens' water, air, and aesthetic interests.[234] Act 13 also allowed for existing setbacks to be waived without any "ascertainable standards" for protecting natural resources and without the opportunity for appeal.[235]

The court determined that the General Assembly infringed upon the citizens' constitutional right to clean, healthy environments and failed in its duty as a trustee to protect natural resources and prevent disproportionate impacts to the citizens.[236] The first clause of the ERA limits the state's power by prohibiting it from acting in ways that infringe upon the rights to pure water, clean air, and to the preservation of natural and aesthetic environmental values.[237] Pursuant to the ERA, when any branch of government at the state or local level is engaged in decision-making, it must anticipate impacts to the environment based on available data *prior* to taking action.[238] Although economic interests in oil and gas are a legitimate state interest, "economic development cannot take place at the expense of an unreasonable degradation of the environment."[239] Any laws that "unreasonably impair" the rights to pure water and clean air are unconstitutional.[240] The General Assembly exceeded its power and

229. *Robinson Twp.*, 83 A.3d at 947 n.35.
230. *Id.* at 952-53.
231. *Id.* at 950.
232. *See id.*
233. *Id.* at 979.
234. *Id.* at 980.
235. *Id.* at 982-83.
236. *See id.* at 981.
237. *Id.* at 951.
238. *Id.* at 952.
239. *Id.* at 953-54.
240. *Id.* at 951.

violated the state constitution when it required local governments to ignore the constitutional obligations of the ERA and reverse existing local environmental protections to comply with the regulatory regime of Act 13.[241]

The second and third clauses of the ERA obligate the government as trustee to protect the corpus of the trust—natural resources—by preventing or remediating "degradation, diminution, or depletion" of those resources.[242] The state must take affirmative legislative action to protect the environment, taking into consideration cumulative impacts not only to the present, but also to future generations.[243] The state can violate its obligation through its actions or by failing to act.[244]

In *Robinson*, the state failed in its duty to protect the environment because Act 13 required zoning changes that would degrade the quality of citizens' lives by diminishing the aesthetic and natural environment.[245] Act 13 would also cause disproportionate environmental harms to some communities, in conflict with the clause in the ERA that requires environmental rights be conserved and maintained "for the benefit of *all* the people."[246] Additionally, the trustee violated its fiduciary duty of impartiality because there would be disproportionate harms to certain beneficiaries.[247]

Finally, by passing Act 13, the General Assembly limited local governments' ability to take actions that would mitigate the harms caused by industrial operations, hindering their ability to protect citizens' environmental rights.[248] However, the plaintiffs stated, and the court agreed, "this dispute is not about municipal power, . . . but it is instead about compliance with constitutional duties."[249] By preventing the local government from mitigating environmental degradation and protecting its citizens, the state violated its duty to protect the corpus of the trust.[250]

In Pennsylvania, citizens were able to successfully root their claims in the ERA because of the strategic language and placement of the amendment. States implementing Green Amendments should ensure the

241. *Id.* at 978.
242. *Id.* at 957.
243. *Id.* at 958-59.
244. *See id.* at 957.
245. *Id.* at 979.
246. *Id.* at 978 (emphasis added) (citations omitted).
247. *Id.* at 984.
248. *Id.* at 980.
249. *Id.* at 974.
250. *Id.* at 980-81.

amendment is self-executing and that the language is explicit regarding the limitations and fiduciary obligations of the state. Furthermore, the *Robinson* case was successful because the plaintiffs' claims addressed environmental violations beyond aesthetics and presented evidence of environmental degradation that would disproportionately harm residents. The court's holding that the state failed to address disproportionate impacts, in violation of the ERA, underscores how important it is to include the trust language in Green Amendments.

B. *Montana*

Similar to Pennsylvania's Environmental Rights Amendment, Montana has environmental rights provisions in its constitution which recognize: 1) the inalienable right to a "clean and healthful" environment,[251] 2) that it is the legislature's duty to "maintain and improve" such an environment, and 3) that the legislature shall protect the environment "from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."[252]

In *Montana Environmental Information Center v. Department of Environmental Quality*, the Supreme Court of Montana ruled that a waiver in a water quality statute violated a fundamental constitutional right to a clean and healthy environment.[253] The statute broadly excluded certain activities from "nondegradation" review, thereby failing to consider the type or volume of pollutants being discharged into the water.[254] The lawsuit arose when the state agency in charge of protecting water quality approved a permit that, under the water quality statute, waived review of the discharge of highly contaminated groundwater from a mine site into two high-quality rivers.[255]

In analyzing the state's action, the court determined that strict scrutiny applied because, where a statute or rule implicates a fundamental right, the state is required to present a compelling state interest to justify the action.[256] Any authorized waiver must be "closely tailored to effectuate only that interest," using "the least onerous path" to reach the state's objective.[257] Applying such scrutiny, the court held that the state's enactment of the water quality statute violated the constitutional rights of

251. MONT. CONST. art. II, § 3.
252. *Id.* art. IX, § 1.
253. Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1249 (Mont. 1999).
254. *Id.*
255. *Id.* at 1237-38.
256. *Id.* at 1246.
257. *Id.* at 1240.

Montana citizens to a "clean and healthy environment" that is "free from unreasonable degradation," because the statute's waiver permitted the discharge of toxins that threatened water quality and public health.[258] The court concluded that the legislature failed to adequately *anticipate* and prevent environmental degradation that could be "conclusively linked to ill health or physical endangerment."[259] In sum, strict scrutiny—required under a constitutionally-protected right—created a legislative obligation to anticipate the impact of laws on citizens' environmental rights prior to enacting such laws.

Another case before the Montana Supreme Court, *Cape-France Enterprises v. Estate of Peed,* addressed whether a provision in a contract could be enforced if performance of the contract could cause substantial environmental degradation, in violation of Montana citizens' fundamental right to a clean and healthful environment.[260] The contract in that case required a private business entity to drill a well on its property to complete a land sale transaction.[261] If the party drilled the well, there was a high risk that it would spread contaminated water into other aquifers, causing significant degradation and negative health impacts.[262] The court held that enforcing the contract was not a compelling state interest and violated the environmental mandates of the Montana Constitution.[263] In states that have Green Amendments, the courts are required to consider whether the environmental impacts of a contractual obligation violate the fundamental right to a healthy environment prior to mandating specific performance.

The Montana Constitution is also being used to establish a right to a stable climate. In August 2021, a state trial court allowed a climate change lawsuit rooted in Montana's environmental rights provision to proceed to trial.[264] The plaintiffs, sixteen youth, have sued the State of Montana for violating their constitutional right to a clean and healthful environment by promoting dangerous levels of fossil fuel emissions that contribute to the climate crisis.[265] The youth claim they have been harmed in numerous ways by the climate crisis, including physical and psychological injuries.[266] The plaintiffs seek a declaration that the state policies that

258. *Id.* at 1249.

259. *Id.*.

260. Cape-France Enters. v. Est. of Peed, 29 P.3d 1011, 1016 (Mont. 2001).

261. *Id.*

262. *Id.*

263. *Id.* at 1016-17.

264. Ord. on Motion to Dismiss at 25, Held v. Montana, No. CDV-2020-307 (Dist. Ct. Mont. Aug. 4, 2021).

265. *Id.* at 11-12.

266. *Id.* at 14.

promote fossil fuels are unconstitutional.[267] Although this case has not been decided as of December 2021, a Green Amendment is a promising tool for challenging state governments' systemic contributions to the climate crisis, using declaratory relief as a remedy.

Like Pennsylvania and Montana's amendments,[268] a Green Amendment with clear language and strategic placement would advance all citizens' environmental protections. Strict scrutiny would apply when citizens challenge laws and regulations that substantially threaten their pure water, clean air, healthy environments, and a stable climate. This prospective review would catalyze the legislative and executive branches to better anticipate the consequences of their decisions. Such considerations would help shift the status quo from simply managing harms to actively anticipating and preventing them.

VI. PLACING ENVIRONMENTAL RIGHTS IN THE COLORADO CONSTITUTION

In many states, there are constitutional provisions that serve to protect the environment and regulate resources, but do not recognize citizens' inherent environmental rights. For example, the Colorado Constitution's "Great Outdoors Colorado Program" addresses conservation by providing guidelines for preserving open space through the use of state lottery funds.[269] No mandates or rights for citizens are explicitly recognized. Another example is the "Water of Streams Public Property" provision that states, "[t]he water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."[270] Although this provision states that water not appropriated is property of the public, it "was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to waters for purposes other than appropriation."[271] Neither of these provisions recognize a fundamental right of citizens to pure water and clean air.

States should implement environmental rights amendments with language and placement that meet the criteria of Green Amendments. Currently, a group of stakeholders facilitated by Maya van Rossum plans

267. *Id.* at 17-18.
268. *See supra* note 8.
269. COLO. CONST. art. XXVII, § 1.
270. *Id.* art. XVI, § 5.
271. People v. Emmert, 597 P.2d 1025, 1028 (Colo. 1979).

to add a Green Amendment to the Colorado Constitution. They are collaborating on language that will best suit the state and fulfill the criteria that a Green Amendment requires. Imagine a Colorado where the following rights are recognized:

1) All people have a right to a clean and healthy environment, including pure water, clean air, healthy ecosystems, and a stable climate, and to the preservation of the natural, cultural, scenic, and healthful qualities of the environment.
2) The state's natural resources, among them its waters, air, flora, fauna, climate, and public lands, are the common property of all the people, including both present and future generations. The state, including each branch, agency, and political subdivision, shall serve as trustee of these resources. The state shall conserve, protect, and maintain these resources for the benefit of all the people.
3) The rights stated in this section are inherent, inalienable, and indefeasible and are among those rights reserved to the people. This provision and the rights stated herein are self-executing.

Such an amendment, placed in each state constitution, would benefit all people, future generations, and the environment.

This is not the first effort to add an environmental rights amendment to the Colorado Constitution. There have been attempts in the past to place environmental rights initiatives on the ballot; although those amendments differed from a Green Amendment, some aspects were similar. Furthermore, those environmental amendments had the same objective as a Green Amendment: to recognize the fundamental right to a healthy environment. This section addresses the impediments to, and concerns about, the previous environmental amendments proposed in Colorado.

In the last decade, citizens of Colorado have attempted to add environmental rights amendments to the Colorado state constitution twice. In 2014, U.S. Representative Jared Polis and the organization Coloradans for Safe and Clean Energy proposed Amendment #89, an initiative that would declare Colorado's environment, including clean air and pure water, as the "common property" of all Coloradans.[272] The state and local governments, as trustees of the environment, would be required to conserve it.[273] The environmental rights amendment did not make it on

272. *Colorado Environmental Rights Amendment (2014)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Environmental_Rights_Amendment_(2014).

273. *Id.*

to the November ballot because the governor at the time, John Hickenlooper, was concerned the measure would hurt the state economy.[274] Hickenlooper and Polis came to an agreement; Polis kept his environmental initiative off the ballot and the oil and gas industry withdrew pro-hydraulic fracturing ballot measures.[275]

There was also controversy over the trustee language in Amendment #89. Although the Colorado Supreme Court affirmed the Ballot Title Setting Board's findings that the initiative satisfied the requirement to contain a single subject and clear title, the dissent, written by Justice Hobbs, expressed opposition to the trust language.[276] Justice Hobbs articulated his concern that the "common property" right in the amendment would "impose a public trust over the environment with corresponding duties on state and local government officials, who would be required to act adversely to the interests of private parties and governmental entities that own property rights not currently held in common."[277] According to Justice Hobbs, using water law as an example, Colorado has historically managed natural resources by balancing private use rights with public regulation.[278] He expressed concern that citizens would regularly sue the state to enforce their common property rights because the state, as trustee, would have an obligation to protect the environment.[279]

In 2016, citizens proposed another environmental initiative, initiative #63, to amend the Colorado Constitution to include the right of all citizens to a healthy environment.[280] However, the initiative's proponents did not submit the necessary signatures to the Colorado Secretary of State's office by the deadline.[281]

Nevertheless, the Colorado Water Congress ("CWC") issued comments on initiative #63. The mission of CWC is "to initiate and advance programs to conserve, develop, administer, and protect the water resources of Colorado."[282] CWC believed the amendment would

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274. *Id.*

275. *Id.*

276. *In re* Title, Ballot Title, & Submission Clause for 2013-2014 #89, 328 P.3d 172, 181 (Colo. 2014).

277. *Id.*

278. *Id.* at 183.

279. *Id.*

280. *Colorado "Right to a Healthy Environment" Amendment (2016)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_%22Right_to_a_Healthy_Environment%22_Amendment_(2016)

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281. *Id.*

282. *Mission, Purpose, Core Beliefs and Values,* COLO. WATER CONG.,

incentivize increased water regulation at the state and local levels and restrict industrial development.[283] The organization expressed concern that protecting healthy environments would cause expensive litigation, creating costly delays even if the lawsuits had merit.[284]

These concerns could arise again if a Green Amendment were to become a ballot measure. The trust language in the proposed Green Amendment recognizes the state as a trustee of Colorado's natural resources, requiring the state to "conserve, protect, and maintain" those resources.[285] The language refers to the corpus of the trust, the natural resources, as "the common property of the people."[286]

Scholars have debated whether to acknowledge the natural environment as the corpus of the public trust in Colorado, where the government is designated as the trustee and current and future citizens as beneficiaries.[287] Opponents of using the trust language have argued, as mentioned previously, that creating a publicly-held "common property" right in natural resources would "override existing private . . . property rights."[288] Yet Article XVI, Section 5 of the Colorado Constitution explicitly states that citizens who hold a property interest in appropriated water have a private right to use that water.[289] Senior and junior water rights-holders maintain a constitutional right to use appropriated water, and therefore possess a constitutional common property right in natural resources. A "common property" right for all citizens would not automatically override appropriated water rights but would be on par with those rights.

The fact that these rights may conflict is neither unusual nor insurmountable. The U.S. Supreme Court has noted that, although the government does not typically interfere with matters concerning property rights, correlative rights "of the citizen to exercise exclusive dominion over property . . . , and that of the state to regulate the use of property . . .

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https://www.cowatercongress.org/mission.html.

283. *Initiative #63: Right to a Healthy Environment,* COLO. WATER CONG., https://www.cowatercongress.org/initiative-63.html.

284. *Id.*

285. *See supra* pp. 42.

286. *Id.*

287. Bruce C. Waters, Student Symposium, *A Brief History of The Public Trust Doctrine in Colorado: Arguments Made for and Against its Application*, 18 U. DENV. WATER L. REV. 456, 458 (2015).

288. *In re* Title, Ballot Title, & Submission Clause for 2013-2014 #89, 328 P.3d 172, 181 (Colo. 2014).

289. COLO. CONST. art. XVI, §§ 5-6.

, are always in collision."[290] When such conflict occurs, the Court has ruled that property rights are not absolute, and citizens may not use their property to the detriment of fellow citizens:[291] "fundamental with the private right is that of the public to regulate [the private right] in the common interest."[292] The state government has a duty to promote the health and welfare of the public.[293] Access to pure water and clean air is essential to one's health and welfare, so it is the responsibility of the state to promote such a right.

Environmental rights, however, are also not absolute. The *Robinson* Court determined that the application of environmental rights may be limited where property rights are guaranteed.[294] In balancing competing constitutional rights, the protection of one right may lead to diminution of the other.[295] The intent of Pennsylvania's ERA was not to deprive citizens of their property rights, but to ensure that the state "promotes sustainable property use" and prohibits development that would cause "unreasonable degradation of the environment."[296]

One use that may be considered an unreasonable degradation of the environment is the "buy and dry" process, where municipalities purchase water rights from farmers to provide water for growing urban populations.[297] When water being used for irrigation is transferred to the cities, the land dries up.[298] For example, Crowley County, Colorado had 50,000 acres of irrigated agricultural land in the late 1960s.[299] However, in the 1970s and 1980s, farmers sold their rights to nearby municipalities.[300] As of 2017, only 4,600 acres of irrigated farmland remained, and the rest of the land is a dustbowl.[301] Municipalities were supposed to revegetate the dried-up land with native grasses, but they did a poor job and the grasses died.[302] Consequently, residents must deal with

290. Nebbia v. New York, 291 U.S. 502, 523-25 (1934).

291. *Id.* at 523.

292. *Id.*

293. *Id.* at 523-24; *see* U.S. CONST. amend. X.

294. Robinson Twp. v. Commonwealth, 83 A.3d 901, 954 (Pa. 2013).

295. *Id.*

296. *Id.*

297. Kate Mailliard, *Expanding Pockets, Shrinking Farms: How the "Buy and Dry" Method Creates Vulnerability in the Farming Labor Market*, 22 U. DENV. WATER L. REV. 723, 732 (2019).

298. *Id.*

299. Sofia Jeremias, *Will the West Figure Out How to Share Water?*, DESERET NEWS (Nov. 12, 2020), https://www.deseret.com/indepth/2020/11/11/21513056/will-the-west-figure-out-how-to-share-water.

300. *Id.*

301. *Id.*

302. Marianne Goodland, *Buying and Drying: Water Lessons from Crowley County*, THE

constantly blowing dust.[303] Furthermore, the sale of water rights resulted in a reduction of water levels in two major lakes, causing noxious odors and the loss of fish.[304] The "buy and dry" process even smells like unreasonable degradation.

Relatedly, California recognizes both an appropriative rights system—a variation of the prior appropriations doctrine—and the public trust doctrine.[305] In the Mono Lake Case, the California Supreme Court determined how the state must apply the two doctrines when water rights are at issue.[306] The court established that it may be necessary for the state to appropriate water rights despite foreseeable harm to the corpus of the trust. "[H]owever, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust."[307] Although California's water appropriations system differs from that of Colorado, Colorado courts could look to the California Supreme Court for guidance in establishing a balance between the prior appropriations doctrine and the proposed duty of the state as trustee to protect natural resources.

Including trust language in a Green Amendment in the Colorado Constitution would not strip citizens of their water rights. However, the trust language would provide citizens with a legal tool to challenge the constitutionality of municipalities purchasing water rights under the prior appropriations doctrine when there is a risk of significant environmental harms.

The Colorado Water Congress and Justice Hobbs also expressed concerns that an environmental rights amendment would result in regular lawsuits, potentially meritless, to protect environmental rights.[308] However, in Pennsylvania and Montana, the two states with Green Amendments that incorporate trust language,[309] there has not been an onslaught of frivolous lawsuits. Instead, thoughtful and reasonable

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COLO. INDEP. (July 9, 2015), https://www.coloradoindependent.com/2015/07/09/buying-and-drying-water-lessons-from-crowley-county/.

303. *Id.*

304. *Id.*

305. Nat'l Audubon Soc'y v. Superior Court (*Mono Lake case*), 658 P.2d 709, 727 (Cal. 1983).

306. *Id.*

307. *Id.* at 728.

308. *In re* Title, Ballot Title, & Submission Clause for 2013-2014 #89, 328 P.3d 172, 183 (Colo. 2014); *Initiative #63: Right to a Healthy Environment,* COLO. WATER CONG., https://www.cowatercongress.org/initiative-63.html.

309. *See supra* note 8.

challenges have helped to clarify the meaning of the states' Green Amendments.[310] Furthermore, scholars have found that established environmental rights do not cause ineffectiveness and economic inefficiency so much as they "foster statutory and regulatory frameworks for managing environmental resources," which could aid attorneys and courts in determining the scope and merits of legal arguments.[311]

Additionally, when meritless and frivolous suits challenging the constitutionality of decision-makers' actions are brought before the courts, lawyers risk their reputations and are subject to discipline[312] or sanctions.[313] Conversely, if numerous cases were brought claiming violations to environmental rights and those cases were *not* deemed frivolous, it would underscore the necessity of a Green Amendment to remedy long-lasting injustices to the public, particularly marginalized communities, and the environment.

VII. CONCLUSION

As the U.S. population continues to grow, development has progressed rapidly to accommodate citizens and provide resources, sometimes at the expense of people's health and to the detriment of the environment. It is critical for each state to consider more impactful and enduring legal pathways to protect the health of current and future generations and the natural environment.

A strategically placed Green Amendment in every state constitution will provide stronger safeguards for the environmental rights of all citizens than statutory alternatives. Such constitutional language would secure citizens' inherent and inalienable rights to pure water, clean air, healthy environments, and a stable climate. Once ratified, an environmental rights provision places constitutional limitations on state and local governments, obligates those governments to act affirmatively to protect such rights, and requires courts to use strict scrutiny in determining if state or local governments infringed upon those rights. Furthermore, implementation unequivocally and impartially guarantees all citizens these rights, regardless of zip code, income, or skin color.

By adopting a Green Amendment, citizens would have assurances that when state and local decision-makers act, they will consider impacts to

310. *Frequently Asked Questions & Answers*, GREEN AMENDMENTS FOR THE GENERATIONS (Sept. 13, 2019), https://forthegenerations.org/wp-content/uploads/2020/01/FAQs-2020-01-13.pdf.

311. MAY & DALY, *supra* note 4, at 39.

312. COLO. RULES OF PROF CONDUCT r. 3.1 (COLO. BAR ASS'N 2020).

313. COLO. R. CIV. P. 11.

humans as well as natural ecosystems. The health of the natural environment is dependent on people, and environmental health is critical to the well-being and survival of the human race. Where citizens successfully implement a Green Amendment, they will provide a legacy that not only protects, but also respects the integrity of wild places and the health and well-being of all people, including future generations.