

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

John C. Dernbach*

ABSTRACT: This Article addresses an important question of Pennsylvania constitutional public trust law that is also central to understanding the public trust doctrine and the role it plays and can continue to play in other states and countries to address pressing environmental challenges. The public trust clause of Pennsylvania's environmental rights amendment recognizes the Commonwealth's responsibility to "conserve and maintain" "public natural resources" for the benefit of present and future generations. The state's supreme court has held that the Commonwealth has a fiduciary duty to conserve and maintain the public trust corpus—public natural resources—with prudence, loyalty, and impartiality. And it has held that present and future generations are simultaneous beneficiaries of this public trust. All of this is designed to protect public natural resources. But an important question about the constitutional text remains: what does it mean for "public natural resources" to be "the common property of all the people, including generations yet to come?"

This Article answers the question by arguing, first, that "public natural resources" include resources that can be owned in a conventional sense, like state forest and park land, as well as air, water, fish, and wildlife, that cannot be categorically owned in a conventional sense. Second, it explains the Commonwealth's duties in managing "common property"—duties that are based on longstanding public trust law and that supplement and reinforce those described above. Simply put, these duties involve public availability of public natural resources, which includes but is not limited to their protection. Because public natural resources are "the common property of all the people, including generations yet to come," they cannot be private property. The Commonwealth must ensure that they are used only for trust purposes, and that they are available to present and future generations. The Commonwealth cannot transfer ownership or control of public natural resources to private parties in ways that compromise their public availability or the terms of the trust.

This understanding of Pennsylvania's public trust clause provides a basis for strengthened protection of public natural resources. It also gives full effect to all of the words of the public trust clause. And it answers arguments that "common property" limits the meaning of public natural resources to property that can be owned in a conventional sense.

The concept of common property, moreover, is central to the meaning of the public trust doctrine, not only in Pennsylvania but in other states and countries. It focuses the government's trust duties on those natural resources most essential for human survival and well-being. It helps ensure that these resources can be used

* John C. Dernbach is Professor Emeritus at Widener University Commonwealth Law School. Thanks to Samantha Beers, Michael Blumm, John Childe, Kacy Manahan, David Mandelbaum, Devin McDougall, Bobby McKinstry, Zyg Plater, and Mary Wood for helpful comments on an earlier draft. Professor Dernbach can be reached at jcdernbach@widener.edu.

and enjoyed by all people in present and future generations, regardless of income or social status, not just some. And the concept of common property protects the availability of these resources for future generations because future availability requires their conservation and maintenance by the current generation. All of these are needed in the years and decades ahead because of the many environmental challenges society faces, including climate change.

I.	INTRODUCTION.....	2
II.	PUBLIC NATURAL RESOURCES AND THE PUBLIC TRUST.....	11
III.	COMMON PROPERTY AND THE PUBLIC TRUST.....	19
	<i>A. Text.....</i>	20
	<i>B. Legislative History.....</i>	21
	<i>C. Common Property in Public Trust Law.....</i>	24
	<i>D. Common Property and Article I, Section 27.....</i>	34
	<i>E. Public Values Served by Common Property.....</i>	39
IV.	CONCLUSION.....	44

I. INTRODUCTION

Constitutional environmental rights, and particularly the right to a clean and healthy environment, are gaining increasing national and international recognition, driven in no small measure by their potential for reducing the threat of climate disruption.¹ The right to a clean, healthy, and sustainable environment, and its application to climate change, were recognized in 2025 by the International Court of Justice² and the Inter-American Court of Human Rights.³

¹ THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT (John H. Knox & Ramin Pejan eds., 2018); JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2014); DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT (2012); PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW (James R. May ed., 2011).

² Obligations of States in Respect of Climate Change, Advisory Opinion, 2025 I.C.J. ____ (July 23), ¶ 393 (“under international law, the human right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights.”).

³ Climate Emergency and Human Rights, Advisory Opinion OC-32/25, Inter-Am. Ct. H.R. No. ____, Opinion ¶ 11 (May 29, 2025) (holding unanimously that “[u]nder the right to a healthy environment, States must (i) protect nature and its components from the impacts of climate change, and (ii) establish a strategy to move towards sustainable development....”).

Three years earlier, the U.N. General Assembly adopted a resolution recognizing that right as a human right.⁴

International decisions have been mirrored by major judicial decisions in some U.S. states.⁵ The Montana Supreme Court decided in 2024 that the state’s constitutional right to a “clean and healthful” environment includes a right to a “stable climate system,” and invalidated legislation that prohibited state consideration of greenhouse gas emissions in environmental impact reviews.⁶ The Hawai’i supreme court has concluded that the state’s constitutional right to a “clean and healthful” environment “subsumes a right to a life-sustaining climate system.”⁷ Much of the advocacy for “green amendments” to other state constitutions is driven by a quest for a legal mechanism to ensure a stable climate.⁸

While there is growing interest and activism at the state level in the U.S. on behalf of constitutionalizing environmental rights, most of this has been directed at a right to a clean environment, or words to that effect. Thus, the only constitutional environmental amendment adopted in the U.S in recent decades was in New York in 2021, which recognizes that “[e]ach person shall have a right to clean air and water, and a healthful environment.”⁹ The public trust

⁴ G.A. Res. A/76/L.75, The Human Right to a Clean, Healthy and Sustainable Environment (July 26, 2022).

⁵ See John C. Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis*, in ENVIRONMENTAL LAW BEFORE THE COURTS: A US-EU NARRATIVE 35 (Giovanni Antonelli et al. eds., 2023) (reviewing and analyzing judicial decisions on environmental rights provisions of U.S. state constitutions).

⁶ *Held v. Montana*, 560 P.3d 1235 (Mont. 2024). The Montana Constitution provides in part: “All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment....” MONT. CONST. art. II, § 3.

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

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

⁹ N.Y. CONST. art. I § 19.

for natural resources, a legal doctrine with a much older and more widely used lineage, has received far less attention.

This is paradoxical. Various forms of the public trust doctrine exist in every single state.¹⁰ Perhaps the most widely recognized version of the public trust for natural resources exists in the extensive common law applicable to navigable waters, non-navigable tidal waters, and their bottomlands.¹¹ Another well-known form of the public trust is for land that is dedicated for public purposes.¹² Two state constitutions recognize a public trust for natural resources--Pennsylvania¹³ and Hawai'i¹⁴---that is enforced by the courts.¹⁵ In both states, the constitutional public trust has expanded the scope of protected natural resources over those covered by the common law, and has strengthened protection of those resources.¹⁶

The constitutional public trust grows out of a long history of public trust law, particularly the common law, in Pennsylvania and every other state, and in the federal courts. It is not a novel concept; indeed, it dates at least as far back as Roman law.¹⁷ Despite state-to-state differences, the public trust doctrine involves governmental responsibilities to the public, including future generations, for designated natural resources. The government, Professor Joseph Sax wrote, has

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

¹¹ Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 918–23 (2007).

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

¹³ PA. CONST. art. I, § 27.

¹⁴ HAW. CONST. art. XI, § 1.

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

¹⁶ *Id.*

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

three basic responsibilities for public trust resources: 1) it must ensure that they “not only be used for a public purpose,” and must also hold them “available for use by the general public;” 2) it can sell these resources only in limited circumstances; and 3) it must maintain these resources “for particular types of uses,” either traditional uses of particular resources or those that are consistent with use of the particular resource in a “natural state.”¹⁸ These responsibilities, in turn, can be analyzed productively through the lens of a traditional private law trust structure, in which the public is the beneficiary, the government is the trustee, protected resources are the trust corpus, and the government’s specific responsibilities are the terms of the trust.¹⁹ Unlike environmental rights, moreover, the government’s public trust responsibilities are necessarily directed at both present and future generations.²⁰

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

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

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

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

²¹ PA. CONST. art. I, § 27.

²² *Id.* (“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.”).

²³ PEDF II, 161 A.3d at 931-32 (citation omitted).

is required to “conserve and maintain” “public natural resources.”²⁴ “The plain meaning of the terms conserve and maintain,” the court has stated, “implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.”²⁵ The Commonwealth must manage public natural resources “according to the plain language of Section 27, which imposes fiduciary duties consistent with Pennsylvania trust law.”²⁶ These duties, the court has held, require the Commonwealth to conserve and maintain the public trust corpus—public natural resources—with prudence, loyalty, and impartiality.²⁷ These fiduciary obligations extend to “all agencies and entities of the Commonwealth government, both statewide and local.”²⁸ And the court has held that present and future generations are simultaneous beneficiaries of this public trust, which means that the Commonwealth cannot “prioritize the needs of the living over those yet to be born.”²⁹ Article I, Section 27 is enforceable by the Commonwealth as trustee³⁰ and by beneficiaries.³¹ All of this is designed to protect public natural resources.

²⁴ *Id.* at 932, 935 (citing *Robinson Twp.*, 83 A.3d at 957).

²⁵ *Id.*

²⁶ *Id.* at 916.

²⁷ *Id.* at 932-33 (explaining each of these duties). The Commonwealth’s discretion in administering this public trust is limited by its terms and purposes, and by what is “necessary for the preservation of the trust.” *Id.* at 933 (quoting *In re Sparks’ Estate*, 328 Pa. 384, 196 A. 48, 57 (1938)).

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

²⁹ *Pa. Env’t Def. Found. v. Commonwealth* 255 A.3d 289, 309-310 (Pa. 2021) (PEDF V).

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

³¹ In *Payne v. Kassab*, 312 A.2d 86, 97 (Pa. Commw. Ct. 1973), *aff’d* 361 A.2d 263 (Pa. 1976), the commonwealth court decided that plaintiffs had standing to enforce the public trust clause of Article I, Section 27 to protect a public park). In PEDF II, the supreme court cited with approval its previous affirmation in *Payne* “that the second and third sentences of Section 27 do not require legislative action in order to be enforced against the Commonwealth in regard to public property.” 161 A.3d at 937 (citing *Payne v. Kassab*, 361 A.3d at 272).

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

In PEDF II, 161 A. 3d at 937, the supreme court held that “the Commonwealth’s obligations as trustee ‘create a right in the people to seek to enforce the obligations.’” (quoting *Robinson Township*, 83 A.3d at 974). In PEDF II, the Court not only presented concurring analyses from earlier cases, but pointed to additional support in the

Article I, Section 27 was nearly dormant between its adoption in 1971 and 2013,³² when a landmark plurality opinion by the Pennsylvania supreme court in *Robinson Township v. Commonwealth*³³ resurrected it. Since then, the court has applied these principles in significant decisions involving public spending,³⁴ regulation of oil and gas,³⁵ and greenhouse gas emissions.³⁶ These decisions have emphasized the amendment's text as well as the use of private trust law in interpreting the public trust.³⁷ All of this helps ensure that the public rights recognized by the amendment have the same constitutional protection as other rights recognized by the state constitution.³⁸

This Article addresses an important question of Pennsylvania's constitutional public trust law that has received less attention. This question is also central to understanding the public trust doctrine and the role it plays and can continue to play in other states and countries to address pressing environmental challenges. The first sentence of the public trust clause of Pennsylvania's amendment provides: "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come."³⁹ This sentence has no analogue in Hawai'i's

amendment's legislative history that demonstrated the General Assembly's intent that the amendment "immediately create rights to prevent the government (state, local, or an authority) from taking positive action which unduly harms environmental quality." *Id.* at 938 (citing Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 Pa Bar Ass'n Q. 421 (1970), reprinted in 1970 Pa. Legis. Journal-House 2272, 2281 (April 14, 1970)).

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

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

³⁴ PEDF II; PEDF V; *Pennsylvania Env't Defense Foundation v. Commonwealth*, 279 A.3d 1194 (Pa. 2022) (PEDF VI)

³⁵ *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 292 A.3d 921 (Pa. 2023).

³⁶ *Shirley v. Pennsylvania Legislative Reference Bureau*, 318 A.3d 832 (Pa. 2024).

³⁷ PEDF VI, 279 A.3d at 1202, *citing* PEDF II, 161 A.3d at 930.

³⁸ PEDF II, 161 A.3d at 916 ("In 1971, by a margin of nearly four to one, the people of Pennsylvania ratified a proposed amendment to the Pennsylvania Constitution's Declaration of Rights, formally and forcefully recognizing their environmental rights as commensurate with their most sacred political and individual rights.").

³⁹ PA. CONST. art. I, § 27.

constitution.⁴⁰ As explained above, Pennsylvania courts have addressed the intergenerational aspect of this sentence. But what does it mean for “public natural resources” to be “the common property of all the people?” Where does that fit into this trust structure?

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

This Article answers the question by arguing, first, that public natural resources includes resources that can be owned in a conventional sense, like state forest and park land, ownership of which is demonstrated and passed by deeds of title. It also includes air, water, fish, and wildlife, that cannot be categorically owned in a conventional sense. People may catch individual fish; hunt or trap individual animals, ducks, or geese; and appropriate specified quantities of water for their own use—all subject to regulation, of course. But taken as a whole, air, water, fish, and wildlife are outside the boundaries of traditional property law. Still, under Section 27, these public natural resources are the people’s “common property.”

Second, the Article explains the Commonwealth’s duties in managing “common property”—duties that are based on longstanding public trust law and that supplement and reinforce those described above. Simply put, these duties involve public availability of public natural resources,

⁴⁰ HAW. CONST. art. XI, § 1 (“For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.”).

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

These rules all derive from well-established understandings of what common property means in the public trust context. And they embrace a set of governmental responsibilities that reinforce and to some degree extend beyond the meaning of preventing and remedying “degradation, diminution, or depletion” of public natural resources. The constitutional public trust requires the government not only to protect these resources; it also requires the government to ensure their public availability. And both responsibilities apply to present and future generations.

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

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

decades ahead because of the many environmental challenges society faces, including climate change. The concept of common property makes clear the role that the public trust doctrine, including its particular expression in Article I, Section 27, can play in helping to address these challenges.

This Article proceeds as follows. Part II explains the foundational role of the term “public natural resources” in understanding the Article I, Section 27 public trust, and how its legislative history as well as subsequent judicial decisions shed light on the meaning of that term. Part III explains the meaning of “common property” by analyzing its text and legislative history, as well as judicial decisions interpreting the term over many centuries in major public trust cases. It also shows how these cases apply to Pennsylvania’s constitutional public trust and explains the importance of common property.

II. PUBLIC NATURAL RESOURCES AND THE PUBLIC TRUST

The term “public natural resources” includes two distinct categories of resources—those that can be owned in a conventional property sense, such as public lands, and those that cannot be owned in this way, such as air, water, fish, and wildlife. The term was written broadly, so that courts would be free to identify additional public natural resources as the need arises. This understanding is reflected in both the legislative history of the amendment and in the case law.

The scope of the public trust for natural resources defines what resources a particular public trust protects. The scope varies from state to state, and from trust to trust in states that recognize more than one form of public trust for natural resources.⁴¹ Some are limited to

⁴¹ See *supra* note 10.

navigable waterways.⁴² Others, like the constitutional public trusts in Pennsylvania⁴³ and Hawai'i,⁴⁴ are broader, covering “public natural resources.” Because, in Pennsylvania, these public natural resources “are the common property of all the people, including generations yet to come,” it is necessary to start with an analysis of what “public natural resources” means.

The legislative history is a useful starting point. Article I, Section 27 was adopted as an amendment to the state constitution by public referendum in May 1971, pursuant to a constitutional requirement that such amendments be passed by both houses of the legislature in one session, then passed by both houses in the next legislative session, before being submitted to the voters for approval.⁴⁵ Two amendments to the definition of natural resources as the environmental rights amendment went through the legislative process are central to understanding its meaning.

To begin with, as originally introduced, the first sentence of the public trust clause provided: “Pennsylvania's natural resources, including the air, waters, fish, wildlife, and the public lands and property of the Commonwealth, are the common property of all the people, including generations yet to come.”⁴⁶ It thus declared “Pennsylvania’s natural

⁴² See, e.g., *White Bear Lake Restoration Association ex rel. State v. Minnesota Department of Natural Resources*, 946 N.W.2d 373, 376 (Minn. 2020) (refusing to extend state common law public trust doctrine beyond navigable waterways to a claim “that the Minnesota Department of Natural Resources failed as trustee to maintain the waters of a lake for public use by authorizing the pumping of aquifer water for other public uses in the state”); *Chernaik v. Brown*, 475 P.3d 68, 83-84 (Or. 2020) (refusing to extend state common law public trust doctrine beyond “submerged and submersible lands underlying navigable waters and the navigable waters themselves” to “require the state to protect public trust resources from effects of greenhouse gas emissions and consequent climate change”).

⁴³ PA. CONST. art. I, § 27.

⁴⁴ HAW. CONST. art. XI, § 1.

⁴⁵ See PA. CONST. Art. XI, § 1. Two versions of the legislative history for Article I, Section 27 are available. The first is John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania, Showing Source Documents* (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660. The second, which shows only material that is relevant to section 27, and not the extraneous material that is often included in the pages of some of the source documents where both section 27 as well as other matters are shown, is John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181 (2015). All of the bills, articles, speeches, and other information cited in this Article from the legislative history are available in both of these documents. Instead of citing to these legislative histories, this Article cites to the source documents themselves.

⁴⁶ H.B. 958, Printer’s No. 1105, 168th Pa. Sess. (Pa. 1969).

resources” to be “common property of all the people.” The absence of the word “public” before “natural resources,” however, suggested that the Amendment might convert private property containing natural resources into the people’s “common property.” The Amendment’s drafters believed that such a result would likely violate the constitutional prohibition against the taking of private property for public use without just compensation.⁴⁷ The language was thus changed to “Pennsylvania’s *public* natural resources.”⁴⁸

Second, the drafters used “public natural resources,” a relatively general term, without any examples, to assure the amendment’s adaptability to changing conditions over a long period. They sought neither to immediately change nor permanently freeze the boundary between public and private property. The original version of the environmental rights amendment, as shown above, contained a list of protected resources: “air, waters, fish, wildlife, and the public lands and property of the Commonwealth.”⁴⁹ While there was no objection to this list of resources, some worried that a future court might limit the list to those resources.⁵⁰ As a result, the legislature removed the illustrative list, leaving the term “public natural resources” in place.⁵¹ In so doing, the Pennsylvania Supreme Court explained in *Pennsylvania Environmental Defense Foundation v. Commonwealth* (PEDF II), the legislature intended to “discourage courts from limiting the scope of natural resources covered.”⁵² In this way, the drafters authorized development of public trust law under Article I, Section 27 to resources not specifically identified on the initial list. Professor Robert Broughton addressed this point in an article about the amendment that was published before it was

⁴⁷ Broughton, *supra* note 31, at 425.

⁴⁸ Compare H.B. 958, Printer’s No. 1105 (original language), with H.B. 958, Printer’s No. 2860, 168th Pa. Sess. (Pa. 1969) (amended language).

⁴⁹ See H.B. 958, Printer’s No. 1105, 168th Pa. Sess. (Pa. 1969); see also Broughton, *supra* note 31, at 424.

⁵⁰ “The introducing word, “including, would not ordinarily be so interpreted, but a list always presents some danger that a court may sometime use the list to limit, rather than expand, a basic concept.” *Id.* at 425–26.

⁵¹ Compare H.B. 958, 153d Leg., 2nd Sess. (Pa. 1969) (Printer’s No. 2860) with H.B. 958 (Printer’s No. 1105).

⁵² *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017).

adopted.⁵³ Representative Franklin Kury, the environmental rights amendment's drafter and chief sponsor, inserted the article into the legislative record, making it part of the legislative history.⁵⁴ Broughton observed that neither public trust resources nor private property are legally fixed.⁵⁵ Previously recognized forms of private property have disappeared, he said, and future public property rights, perhaps relating to ecological diversity, might someday be recognized.⁵⁶ Such public property rights for ecological diversity, now called biological diversity, could mean that ownership of particular lands, for example, might be divided between private and public owners.⁵⁷ The final language, Broughton observed, neither requires nor prohibits further changes in the boundary between public natural resources and private property rights.⁵⁸

Significantly, the original list contains two distinct categories of public natural resources. It includes resources which the Commonwealth owns in a conventional sense of the term property—"the public lands and property of the Commonwealth." It also includes resources for which the Commonwealth has a public trust responsibility but for which it does not have formal title: "air, waters, fish, [and] wildlife."⁵⁹ As Rep. Kury explained:

The bill as we will vote on it today, affirms the trusteeship of the Commonwealth over resources owned by the Commonwealth and also affirms the trusteeship of the Commonwealth over resources like air, waters, fish and wildlife and also all those not owned by the Commonwealth but which, nevertheless, involve a public interest."⁶⁰

⁵³ See Broughton, *supra* note 31.

⁵⁴ *Id.*

⁵⁵ Broughton, *supra* note 31, at 425–26. Cf. Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENV'T L. 473, 474 (1989) (explaining likely change in boundary between public and private rights in water in western states caused by need to "retrieve some water from traditional water users to sustain streams and lakes as natural systems and to protect water quality").

⁵⁶ Broughton, *supra* note 31, at 425 (citation omitted).

⁵⁷ See, e.g., Mary Christina Wood, *The Oregon Forest Trust: An Ecological Endowment for Posterity*, 101 OR. L. REV. 515, 593–607 (2023) (arguing that state of Oregon has public trust interest in private forest lands where such forests are integral to ecosystem function).

⁵⁸ See *id.* at 426. Restrictions on the use of public natural resources do, of course, indirectly affect uses of private property.

⁵⁹ PA. CONST. art. I, § 27, cl. 2.

⁶⁰ Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2271-72 (1970) (statement by Rep. Kury).

The Pennsylvania Supreme Court cited Kury’s statement with approval in *PEDF II*.⁶¹

His explanation tracked the list of resources in the original language of the amendment—resources owned and not owned by the Commonwealth.⁶² Each of the four listed resources involve public concern. Air and water are vital for all life. Air quality is essential for public health, and a stable climate is essential for a functioning society and economy. Water quality is necessary for human health and flourishing aquatic ecosystems. Fish and wildlife provide food and recreational opportunities, and support a significant part of the outdoor recreation economy.

It is also significant that, as Rep. Kury stated, public natural resources involve “all those [other natural resources] not owned by the Commonwealth but which, nevertheless, involve a public interest.” In saying that, he echoed a point made in what is easily the most influential public trust case ever decided, *Illinois Central Railroad Co. v. Illinois*.⁶³ In that case, the U.S. Supreme Court indicated that the trust obligation applied to natural resources “in which the whole people are interested,” which it also called resources of “public concern.”⁶⁴

The environmental rights clause of Article I, Section 27 provides a helpful way of understanding what public interest or public concern means in the public trust context. This clause, which is separate from the public trust clause, provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the

⁶¹ PEDF II, 161 A.3d 911, 931 n.22 (Pa. 2017).

⁶² Because of the care and attention given in the legislative process to the scope of protected public trust resources, it is also significant that there is not a single indication in the legislative history that the term “common property” is limited to natural resources that the Commonwealth owns in conventional property terms. Nor is there a scintilla of evidence that use of “Pennsylvania’s public natural resources” in the first sentence of the public trust clause was intended to limit those resources to resources that the Commonwealth owns. It makes more sense to say that this language focuses the amendment on public natural resources in Pennsylvania, whether the Commonwealth owns them in conventional terms or not.

⁶³ *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (holding that states hold submerged lands under navigable waters in trust for certain public purposes and cannot alienate those lands except in conformance with those purposes and their fiduciary responsibilities).

⁶⁴ *Id.* at 453.

environment.”⁶⁵ This clause recognizes a public right to high quality air and water, and to the preservation of certain values in the environment.⁶⁶ The supreme court has explained: ‘This clause places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.’⁶⁷ The public trust and environmental rights clauses overlap but are distinct. It is highly likely, for example, that most public natural resources cannot be significantly impaired without also violating the environmental rights clause. This has significant consequences for protection of natural resources, because each clause provides a separate cause of action.⁶⁸ But the environmental rights clause may also apply to state action that significantly impairs the natural, scenic, historic, and esthetic values of purely private property. And while the two clauses are different, the environmental qualities and values protected by the environmental rights clause could be relevant in an appropriate public trust case to determine whether additional specific natural resources should be protected under the public trust clause.

Courts have used the public concern or public interest formulation to expand the historical scope of the common law public trust doctrine when additional natural resources become more publicly important.⁶⁹ Under the Hawai’i constitution, “public natural resources” includes “land,

⁶⁵ PA. CONST. art. I, § 27.

⁶⁶ For a more detailed discussion of the environmental rights clause, and its relationship to the public trust clause, see John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 142-50 (1999).

⁶⁷ PEDF II, 161 A.3d at 933.

⁶⁸ See, e.g., *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677 (Pa. Commw. Ct. 2018) (addressing claims that each of the two clauses of Section 27 had been violated).

⁶⁹ See, e.g., *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 121 (N.J. 2005) (quoting *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984)) “[W]e perceive the public trust doctrine not to be ‘fixed or static,’ but one to ‘be molded and extended to meet changing conditions and needs of the public it was created to benefit.’”); 64 *Env’t Law Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr.3d 393, 400 (2018) (applying the public trust to groundwater).

water, air, minerals and energy sources” that implicate the public interest in some way.⁷⁰ Similarly, the Hawai’i supreme court has expanded this list of public natural resources protected under its constitutional public trust to include water runoff, native trees, and forest habitat,⁷¹ and has suggested that the constitutional public trust may extend to endangered species.⁷² And Robert McKinstry and I have argued that public natural resources under Article I, Section 27 include a stable climate.⁷³

The Pennsylvania Supreme Court and Commonwealth Court have issued opinions about the scope of public natural resources that reflect this understanding. In *Robinson Township v. Commonwealth*, a plurality of the Supreme Court stated that public natural resources include resources owned and not owned by the Commonwealth: “At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.”⁷⁴

Similarly, Pennsylvania courts have decided that public natural resources under Article I, Section 27 include resources that the state or local governments own in a conventional property sense, such as state parks and forests,⁷⁵ the oil and gas under these parks and forests,⁷⁶ and municipal parks.⁷⁷ The courts have also decided that “public natural resources” includes other

⁷⁰ HAW. CONST. art. XI, § 1. They include, but are not limited to, the resources protected under traditional trust law—water resources and state lands. They also apply to marine waters and submerged lands. *Umberger v. Dep’t of Land & Nat. Res.*, 403 P.3d 277, 298 (Haw. 2017).

⁷¹ *In re Maui Elec. Co., Ltd.*, 506 P.3d 192, 204–05 (Haw. 2022).

⁷² *Morimoto v. Bd. of Land & Nat. Res.*, 113 P.3d 172, 177 n.16, 184 (Haw. 2005).

⁷³ Robert B. McKinstry, Jr. & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 9 MICH. J. ENV’T & ADMIN. L. 50 (2018).

⁷⁴ *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 955 (Pa. 2013).

⁷⁵ PEDF II, 161 A.3d 911, 931 (Pa. 2017) (public natural resources include “the state forest and park lands leased for oil and gas exploration....”).

⁷⁶ *Id.* (public natural resources include “the oil and gas” under state forests and park lands).

⁷⁷ *Payne v. Kassab*, 312 A.2d 86, 97 (Pa. Commw. Ct. 1973), *aff’d* 361 A.2d 263 (Pa. 1976) (deciding that plaintiffs had standing to enforce the public trust clause of Article I, Section 27 “as part of the public and as owners of property fronting” a local public park to “object to the appropriation of part of the [park] for highway purposes.”

resources that are not publicly owned in a conventional sense, such as air,⁷⁸ surface water,⁷⁹ and groundwater.⁸⁰ This list, it should be noted, does not exclude the possibility of mixed common and private ownership, particularly for real property.⁸¹

III. COMMON PROPERTY AND THE PUBLIC TRUST

The meaning of common property in the public trust context is different from its meaning in other legal contexts, such as tenancy in common.⁸² The term has repeatedly been used in the common law public trust context to refer to resources that are held by the government for public purposes *and* that cannot be conveyed to private parties. The legislative history as well as the limited case law under Article I, Section 27 are consistent with that understanding. Moreover, the

⁷⁸ Com., Dep’t of Environmental Resources v. Locust Point Quarries, Inc., 396 A.2d 1205, 1209 & n.15 (Pa. 2019) (“The Commonwealth is committed to the conservation and maintenance of clean air by Art. I, § 27 of the Pennsylvania Constitution” and identifying the Commonwealth as a trustee under the amendment); Air-Serv Group, LLC v. Com., 18 A.3d 448, 453–54 (Pa. Commw. Ct. 2011) (explaining that the atmosphere is a part of the public natural resources—common property of all the people—and not subject to private ownership).

⁷⁹ National Wood Preservers, Inc. v. Com., Dept. of Environmental Resources, 414 A.2d 37, 41 (Pa. 1980) (citing the entire amendment, including public trust clause, as supporting application of Clean Streams law to surface water pollution). The pollution in question was first detected in Naylor’s Run. *Id.* at 39.

⁸⁰ *Id.* at 41. An investigation of the pollution in Naylor’s Run led to the conclusion that the “major amount of” the polluted water “appears to be pooled under the surface of the property...” *Id.* at 40. *See also* Adams Sanitation Co., Inc. v. Com., Dept. of Environmental Protection, 715 A.2d 390, 394 (Pa. 1998) (citing the entire amendment as supporting application of Clean Streams Law to groundwater pollution). The case involved a landfill operator’s challenge to a DER order requiring it to, among other things, submit and implement a groundwater pollution abatement plan. *Id.* at 392.

⁸¹ Public natural resources could, for example, include conservation easements owned by government entities on private land. In addition, New Jersey and Oregon courts have authorized public easements on private land under limited circumstances in order to access public beaches. *Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005); *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969).

⁸² *See* BLACK’S LAW DICTIONARY 1471 (Bryan A. Garner ed., 11th ed., 2019), stating one definition of common property as “real property that is held by two or more persons with no right of survivorship”). For Pennsylvania uses of common property in that context (i.e., tenancy in common), *see* *Lund v. Heinrich*, 189 A.2d 581, 583 (Pa. 1963); *Beers v. Pusey*, 132 A.2d 346, 348 (Pa. 1957). A tenancy in common is form of co-ownership in which each owner has the right to use and enjoy the entire property, but “[e]ach tenant’s interest is alienable, inheritable, and devisable.” JOSEPH WILLIAM SINGER, PROPERTY § 8.2.1 (5th ed., 2017). This is readily distinguishable from the common property recognized in Article I, Section 27. Among other things, the ability of a tenant in common to convey their share of the property during their lifetime means that a tenant in common can benefit financially from the tenancy in common. Yet the Pennsylvania Supreme Court has held that Article I, Section 27 does not create income entitlements to public trust beneficiaries. *PEDF V*, 255 A.3d at 310-14. Not only is there no language in the amendment providing for such entitlements, but it is impermissible to divert money from the trust for nontrust purposes. *Id.* A tenancy in common provides an income entitlement, either for the co-owners or their heirs or devisees.

rich history of public trust cases decided prior to 1971 provides the foundation and background for the environmental rights amendment. Indeed, Professor Robert Broughton, whose article is part of the amendment’s legislative history, explained that the purpose of the public trust clause was to place “Pennsylvania among the jurisdictions which adhere to the public trust theory of public natural resource management.”⁸³ These public trust cases repeatedly use common property as not only an expression of what particular resources are subject to the public trust, but also to enforce their status as public resources available to all. Common property thus serves important public values—ensuring that resources essential for public well-being are available to the people and protecting public expectations that these resources will continue to be available, including to future generations.

A. Text

The first sentence of Section 27’s public trust clause states: “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come.”⁸⁴ That became legally true on May 18, 1971, the date that Section 27 was enacted.⁸⁵ Whatever the legal status of Pennsylvania’s public natural resources prior to that date,⁸⁶ they were then, and still are now, common property. That had several immediate consequences. To begin with, because the second sentence of the public trust clause recognizes the Commonwealth as trustee for these resources, it follows that the people, as common owners, are beneficiaries of this public trust. Under traditional private trust law, which is to be used to interpret Section 27, the people, including

⁸³ Broughton, *supra* note 31, at 222; 1970 Pa. Legis. Journal-House 2272, 2273, 2275 (April 14, 1970), quoted in PEDF II, 161 A.3d at 942 (Baer, J., concurring and dissenting).

⁸⁴ PA. CONST. art. I, § 27.

⁸⁵ Jt. Res. 3, Pub.L. 769 (1971).

⁸⁶ Some, such as navigable waterways and their bottomlands, were already considered common property. *Carson v. Blazer*, 2 Binn. 475, 494-95 (Pa. 1810). *See also* Broughton, *supra* note 31, at 422 (explaining that public trust doctrine “has not been clearly enunciated in Pennsylvania”).

future generations, are the equitable or beneficial owners of the trust corpus.⁸⁷ In addition, beneficiaries have the right to sue Commonwealth trustees for failure to carry out their Section 27 fiduciary duties.⁸⁸ The ability of beneficiaries to sue to enforce Pennsylvania’s common law public trust was unclear prior to Section 27’s adoption.⁸⁹

B. *Legislative History*

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

Second, “common property” is not limited to property that can be owned in a conventional sense. If the legislature had meant that, it would have limited the original list of natural resources—“air, waters, fish, wildlife, and the public lands and property of the Commonwealth”—to “the public lands and property of the Commonwealth.” The first sentence of the public trust clause might thus have been written as follows: “Pennsylvania’s public lands and property are the

⁸⁷ See *infra* notes 156 to 157 and accompanying text.

⁸⁸ See *supra* note 31 and accompanying text. They also have the right to intervene in cases challenging Commonwealth actions involving protection of public natural resources when the Commonwealth fails to use Article I, Section 27 to support its actions. *Shirley v. Pennsylvania Legislative Reference Bureau*, 318 A.3d 832 (Pa. 2024).

⁸⁹ Broughton, *supra* note 31, at 423 n.5.

common property of all the people, including generations yet to come.”⁹⁰ Language like this would plainly have generally excluded “air, waters, fish, [and] wildlife” from the constitutional public trust. But that is not how the legislature proceeded, or how Article I, Section 27 reads. Put differently, “common property” intentionally and necessarily includes public natural resources that cannot be owned in a conventional sense. These include, but are not limited to, “air, waters, fish, [and] wildlife.”

The Commonwealth Court confirmed both of these meanings in *Air-Serv Group, LLC v. Commonwealth*,⁹¹ a tax case. Air-Serv Group (ASG) “owns, installs, maintains, and services coin operated air vending machines,” which are used primarily to inflate automobile tires at gas stations and convenience stores.⁹² ASG challenged a Department of Revenue decision that the use of these vending machines was subject to a state sales tax. The parties stipulated that these vending machines pump atmospheric air through a compressor that inflates tires.⁹³ The Department argued that it was authorized to tax ASG’s vending machines because this pressurized air “is not the equivalent of atmospheric air.”⁹⁴ The Commonwealth Court rejected this argument because state sales tax law indicates “that air taken from the atmosphere is taxable only when it has been changed, separated, processed and/or bottled and then sold commercially.”⁹⁵ And the court also rejected this argument based on public trust law. Because the “atmosphere is not subject to ownership by any private individual, group, or entity,”⁹⁶ the court decided, ASG cannot be taxed

⁹⁰ If it had done that, the second sentence of the public trust clause would likely read something like this: “As trustee of these lands and this property, the Commonwealth shall conserve and maintain them for the benefit of all the people” (substituting “these lands and this property” for “these resources”).

⁹¹ *Air-Serv Group, LLC v. Commonwealth*, 18 A.3d 448 (Pa. Commw. Ct. 2011).

⁹² *Id.* at 449.

⁹³ *Id.* at 452.

⁹⁴ *Id.*

⁹⁵ *Id.* at 453.

⁹⁶ *Id.* at 454.

for selling what it does not own. The air is *res communes*,⁹⁷ the court held, explaining that this conclusion is consistent with Article I, Section 27 because public natural resources such as air are “the common property of all the people, including generations yet to come.”⁹⁸

The people’s common property means that the people are common owners of it. The Pennsylvania supreme court has repeatedly explained the meaning of common property in those terms. The Robinson Township plurality explained that “[t]his environmental public trust was created by the people of Pennsylvania, as the common owners of the Commonwealth’s public natural resources....”⁹⁹ In a later case, the majority explained that the first sentence of the public trust clause of Article I, Section 27 recognizes “the common ownership by the people, including future generations, of Pennsylvania’s public natural resources.”¹⁰⁰ This common ownership, the court stated, applies to public natural resources, including the list of resources in the original version of the amendment—air, water, fish, and wildlife, as well as the public lands and property of the Commonwealth.¹⁰¹

From all of this, two conclusions are unmistakable: Common property is not private property, and it includes resources like air that cannot be owned in a conventional sense. Both of these conclusions are also reflected in common law public trust cases that long predate Article I, Section 27. And these cases spell out some of the legal consequences of these conclusions.

⁹⁷ *Id.* at 454-54 (quoting BLACK’S LAW DICTIONARY 1427 (9th ed. 2009)).

⁹⁸ *Air-Serv Group, LLC v. Commonwealth*, 18 A.3d at 454.

⁹⁹ *Robinson Twp.*, 83 A.3d at 956.

¹⁰⁰ *PEDF II*, 161 A.3d at 931.

¹⁰¹ *Id.* In a later case, the court held that the Commonwealth cannot, “as trustee of the constitutional trust created for the conservation and maintenance of the public natural resources that are owned by ‘all of the people,’ ...divert for its own use revenue generated from the trust and its administration.” *PEDF V*, 255 A.3d at 313.

C. Common Property in Public Trust Law

The term common property appears frequently in public trust law. The concept dates at least as far back as Roman law, and critical features of common property are represented in English history. This history provides context for a more detailed examination of the most prominent and relevant public trust cases, which sheds additional light on its meaning.

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

By the law of nature these things are the common property to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.¹⁰²

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

Common property, to be sure, is not the only expression of this concept. Another is *res communes*, which means “[t]hings common to all; things that cannot be owned or appropriated, such as light, air, and the sea.”¹⁰³ Still another is *jus publicum*, which historically expressed the

¹⁰² J. Inst., Proemium, 2.1.1 (T. Sandars trans., 4th ed. 1867).

¹⁰³ *Air-Serv Group, LLC v. Commonwealth*, 18 A.3d 448, 453-54 (Pa. Commw. Ct. 2011); BLACK’S LAW DICTIONARY 1562 (Bryan A. Garner ed., 11th ed. 2019); MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/res%20communes#:~:text=res%20com%C2%B7%E2%80%8Bmu%C2%B7%E2%80%8B,in%20of%20entire%20exclusive%20appropriation> (nearly identical definition of *res communes*). See also Gerald Torres, *Who Owns the Sky?*, 18 Pace Env’t L. Rev. 227 (2001). Professor Torres writes:

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

Id. at 234–35 (emphasis in original).

public right to navigation and fishing in the sea and inland waterways.¹⁰⁴ But Article I, Section 27 uses “common property,” and the Pennsylvania Supreme Court has made clear that its interpretation is to be guided by its text.¹⁰⁵ It is therefore necessary to focus this analysis on common property.

Common property and private property law in England evolved over many centuries, and this complex history resists easy generalizations. Still, it is possible to discern the development of these two ideas in this history.¹⁰⁶ The Magna Carta (“Great Charter”) of 1215 is best known for King John’s promise that he and future sovereigns would govern according to the rule of law.¹⁰⁷ But it also contains the seeds of the public trust doctrine for waterways by requiring that all fish weirs on the Thames and Medway rivers “and throughout all England” “be removed altogether,” “except upon the seashore.”¹⁰⁸ A weir is a rock or wooden structure, built partly or entirely across rivers, that is used to trap or channel fish. Unlike nearly all of the rest of the Magna Carta, which granted rights to Norman nobles, this part “gave rights to commoners who fished—for subsistence and commerce—and navigated—for travel and commerce.”¹⁰⁹ Several centuries later, perhaps as early as the sixteenth century, English common law courts and treatise writers decided that the sovereign owned submerged and tidal lands and the waters that flowed over them.¹¹⁰ The courts also decided that sovereign ownership extended to navigable waters, but that the beds of non-

¹⁰⁴ Larry W. George, *Public Rights in West Virginia Watercourses: A Unique Legacy of Virginia Common Lands and the Jus Publicum of the English Crown*, 101 W. VA. L. REV. 407, 415-17 (1998) (explaining English history of the term).

¹⁰⁵ PEDF VI, 279 A.3d at 1202, *citing* PEDF II, 161 A.3d at 930 (also stating that private trust law is to be used to guide interpretation of the text).

¹⁰⁶ Erin Ryan, *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law*, 39 VIR. ENV’T L.J. 135, 143-45. (2020)

¹⁰⁷ *Id.* at 143-44. *See also* DAN JONES, *MAGNA CARTA: THE BIRTH OF LIBERTY* (2016).

¹⁰⁸ MAGNA CARTA – 1215: ENGLISH TRANSLATION ch. 33 (2018) (using *kydell* to refer to fish weir). This translation is copyrighted by the Lillian Goldman Law Library, Yale Law School. *Id.* at 1 n.1.

¹⁰⁹ Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 VT. L. REV. 1, 7 (2018).

¹¹⁰ Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 727-29 (1986).

navigable waters could be privately owned.¹¹¹ In this way, public rights to use navigable waters were recognized.

Public rights to use certain lands as a commons developed in a somewhat similar way, but these rights were lost on many common lands through the enclosure movement. Two years after the Magna Carta, in 1217, King Henry III added the Charter of the Forest to the Magna Carta.¹¹² Essentially, the king restored the rights of commoners to use public commons—rights that William the Conqueror had undermined—by promising not to interfere with their “rights to graze animals, forage, plant crops, and collect lumber on open lands subject to Forest Law.”¹¹³ This was no small thing; about one third of English land was considered forested at the time.¹¹⁴ The Forest Charter, by recognizing “public rights in common resources owned by the Crown,” provides another foundation for the public trust doctrine.¹¹⁵ It also has had an enduring legacy.¹¹⁶ Nor was the Forest Charter the only basis for the common use of land. “Before enclosure, common land was the most common form in England: land on which anybody could grow food, graze cattle, sleep, eat and revel.”¹¹⁷

¹¹¹ Ryan, *A Short History*, *supra* note 103, at 145.

¹¹² THE FOREST CHARTER (1217); Ryan, *A Short History*, *supra* note 103, at 144.

¹¹³ *Id.* See also Paul Babie, *Magna Carta and the Forest Charter: Two Stories of Property*, 94 N.C. L. REV. 1431, 1460 (2016) (“From the perspective of its contemporaries, the Forest Charter did not so much restore individual property rights to landowners as it restored common property rights to all inhabitants of the forests.”).

¹¹⁴ Daniel Magraw and Natalie Thomure, *Carta de Foresta: The Charter of the Forest Turns 800*, 47 ENV’T L. REP. (Env’t L. Inst.) 10934, 10936 (2017) (explaining that English understanding of covered forest land included not only woodlands but also “grasslands, farmland, waterways, even parts of towns”).

¹¹⁵ Blumm & Engel, *supra* note 109, at 8.

¹¹⁶ For a detailed history of the Forest Charter, including its subsequent impact, see Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature, in MAGNA CARTA AND THE RULE OF LAW* 311 (Daniel Barstow Magraw et al., eds. 2014). “The Forest Charter shaped England’s constitution as well as its landscape, and it continues to confer benefits for both law and the biosphere today.” *Id.* at 312.

¹¹⁷ CHARLIE HARRIS, UNIVERSITY OF OXFORD & OXFORD CENTRE FOR GLOBAL HISTORY, *ENCLOSING THE ENGLISH COMMONS: PROPERTY, PRODUCTIVITY AND THE MAKING OF MODERN CAPITALISM* 1 (2022), <https://globalcapitalism.history.ox.ac.uk/files/case26-enclosingtheenglishcommonspdf>.

The history of the commons, not only in medieval England but also in the rest of Europe, illustrates not only the value of public rights to use the commons as common property.¹¹⁸ This history also illustrates the apparently ceaseless tug of war between public and private interests over the use of this common property involving privatization, class distinction, and the considerable value of often-scarce resources.¹¹⁹ These all came together in the enclosure movement, which resulted in more than half the land of England becoming private property.¹²⁰ Enclosure was accomplished over many centuries, first through informal and formal agreements, and then through acts of Parliament.¹²¹ Commoners, whose expectations about their continued ability to use this land were frustrated by its conversion to private property, often used violence to resist.¹²²

To be sure, the natural resources subject to the commons—not only in medieval Europe but also at present anywhere in the world—are not necessarily subject to the same governing structure as those governing natural resources under the public trust doctrine. The commons is typically governed by a set of informal, community-based rules and principles that the community itself enforces.¹²³ The public trust, by contrast, is administered by the government.¹²⁴ The commons also embraced (and in many places continues to embrace) a set of agricultural practices

¹¹⁸ Joseph L. Sax, *Liberating the Public Trust from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 189 (1980) (“It was only natural that these places should be commonly available, since their common use was necessary for the maintenance of the feudal economy.”).

¹¹⁹ *Id.* at 189-91.

¹²⁰ ENCLOSING THE ENGLISH COMMONS, *supra* note 117, at 1. For a detailed account, see J.A. YELLING, COMMON FIELD AND ENCLOSURE IN ENGLAND 1450-1850 (1977).

¹²¹ ENCLOSING THE ENGLISH COMMONS, *supra* note 117, at 1.

¹²² See also Connor B. McDermott, *Monopolizers of the Soil: The Commons as a Source of Public Trust Responsibilities*, 61 NAT. RES. J. 125 (2021) (recounting, among other things, periodic violent uprisings by commoners in response to enclosure).

¹²³ See MARY CHRISTINA WOOD, NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 161-63 (2014). A considerable body of empirical data shows when these informal systems have worked well, resulting in sustainable use of common property resources over time, and when they have not. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

¹²⁴ WOOD, NATURE’S TRUST, *supra* note 123, at 161-63.

that are not ordinarily covered by the public trust doctrine.¹²⁵ Still, it is not hard to see many of the roots of the public trust, including common property, in the history of the commons.

Four foundational public trust cases¹²⁶ have roots in this history. These cases—all of which used and explained “common property”—were decided in the nineteenth century by the Pennsylvania and New Jersey Supreme Courts and the U.S. Supreme Court. The first three involve waterways, and the fourth concerns game animals.

In 1810, the Pennsylvania Supreme Court held in *Carson v. Blazer* that the Susquehanna River is navigable and that the state thus owned the bottomland of the river. As a result, the Court decided, a private owner of land along the bank of the river—a riparian owner—lacked the exclusive right to fish immediately in front of his land.¹²⁷ The case is a landmark in the early development of U.S. public trust law because it broke with English common law, which held that navigable rivers were limited to those in which the tides ebb and flow.¹²⁸ On non-navigable rivers, riparian owners own the land under the river to its middle, and can thus exclude others from fishing and navigation over the river bottomland they own.¹²⁹ The English navigability rule, which applied only to tidal waters, would have allowed riparian owners on most of the Delaware River as well as the Susquehanna River to exclude others from passage or fishing—essentially making these rivers their private property and precluding public uses of these rivers. That result, the court explained, is not acceptable, and particularly so because the river’s bottomlands were never granted to riparian owners in the first place.¹³⁰ The Court thus held the Susquehanna river to be navigable, which means that the state owns the bottom land of the river, and that the river is open

¹²⁵ *Id.* at 163-64.

¹²⁶ THE PUBLIC TRUST DOCTRINE, *supra* note 19, at 67-78, 258-64 (excerpting three of these as general “foundation cases” and the fourth as foundational for the public trust in wildlife).

¹²⁷ *Carson v. Blazer*, 2 Binn. 475, 494-95 (Pa. 1810).

¹²⁸ *Id.* at 484.

¹²⁹ *Id.*

¹³⁰ *Id.* at 484-85.

to all for fishing, commerce, navigation, and other reasonable uses.¹³¹ Justice Brackenridge explained the river's public trust status by describing it as "a common property," and not one for "exclusive enjoyment."¹³² A long line of subsequent Pennsylvania cases has confirmed this holding that navigable waterways are open for public use and applied it to other waterways.¹³³

In 1821, in *Arnold v. Mundy*,¹³⁴ the New Jersey Supreme Court of Judicature provided a more detailed explanation of common property in the public trust context. In this case, Mundy and others harvested oysters in a part of the Raritan River that was adjacent to land that Arnold owned. Arnold had planted oysters there and had staked off that part of the river. Mundy prevailed in the ensuing litigation. The Supreme Court ruled that the river is navigable and therefore the oyster bed cannot be Arnold's private property. In so doing, it explained that the Raritan River is the "common property" of the people. Most property, Chief Justice Kirkpatrick said, is "divided among the individuals of the nation," and is private property.¹³⁵ The rest, public property, consists of property that is "reserved for the necessity of the state" and is "used for the public benefit," while the remaining public property "is called *common property*."¹³⁶ Common property, the court explained, is "common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use."¹³⁷ The court added that common

¹³¹ Thus, for example, "every man may of common right fish with lawful nets in a navigable river; that the proprietors of the land on each side have not the exclusive right of fishery therein, but that the fishery is common and public." *Id.* at 485.

¹³² *Id.* at 494. The court stated that navigable rivers "belong to the common wealth," *Id.* at 475, and are "common by law to all the citizens of the commonwealth." *Id.* at 482. The court also refers to "the common right of fishing." *Id.* at 488.

¹³³ See *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 719-22 (Pa. Super. 1999).

¹³⁴ *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821).

¹³⁵ *Id.* at 71.

¹³⁶ *Id.* (emphasis in original).

¹³⁷ *Id.*

property, "according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts."¹³⁸

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

But inasmuch as the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people.¹³⁹

Chief Justice Kirkpatrick explained that the king of England, under the English common law, could not "intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation..."¹⁴⁰ Rather, the king's grantee, the Duke of York, was required to exercise royal authority over "common property of which the rivers, bays, ports, and coasts of the sea were part...for the public benefit, and not as the proprietor of the soil, and for his own private use."¹⁴¹ Neither could the king, in making grants of property in the American colonies, "grant what is called the common property as to convert it into private property."¹⁴² This part of the English common law became applicable in the United States after independence.¹⁴³ Thus, this limitation of the power of the king also applies to the state legislature:

The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.¹⁴⁴

¹³⁸ *Id.*

¹³⁹ *Id.* at 71.

¹⁴⁰ *Id.* at 72.

¹⁴¹ *Id.* at 77.

¹⁴² *Id.* at 77.

¹⁴³ *Id.* at 78.

¹⁴⁴ *Id.*

In 1842, the U.S. Supreme Court reached the same result in *Martin v. Waddell's Lessee*,¹⁴⁵ a factually similar case that may have been an effort in federal court to overturn *Arnold v. Mundy*. Claiming ownership of 100 acres of submerged lands in the Raritan River, Waddell's lessee filed suit in federal court seeking to eject Martin and others from harvesting oysters there. The Supreme Court rejected the claim by Waddell's lessee, reasoning that the title to land under navigable waters is not a private property right, and that the state held this land in trust for the benefit of the public. The court described *Arnold v. Mundy* in some detail, including its analysis of common property, and applied the same reasoning as in that decision.¹⁴⁶ It described English common law on the "use of fisheries and rivers, as common property," to be "peculiarly applicable to" European settlers in the United States.¹⁴⁷ *Martin* is also the first public trust case in which trust language was used.¹⁴⁸

Finally, in its 1896 decision in *Geer v. Connecticut*,¹⁴⁹ the U.S. Supreme Court determined that game animals were common property held in trust by the state for the benefit of the public. In a part of the decision that was later overruled,¹⁵⁰ the court also held that a statute prohibiting out-of-state shipment of wildlife did not violate the Commerce Clause of the U.S. constitution. The first part of the opinion was not overruled, however, and continues to be used.¹⁵¹ Its explanation of the state's public trust responsibility for game animals as common property reflects many of the same elements as the waterways cases described above:

¹⁴⁵ *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842).

¹⁴⁶ "A majority of the court seem to have adopted the doctrine of *Arnold v. Mundy*...." *Id.* at 419 (Thompson, J., dissenting).

¹⁴⁷ *Id.* at 382.

¹⁴⁸ THE PUBLIC TRUST DOCTRINE, *supra* note 19, at 67.

¹⁴⁹ *Geer v. Connecticut*, 161 U.S. 519 (1896).

¹⁵⁰ *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (holding that an Oklahoma statute prohibiting the shipping of Oklahoma minnows out of state violated the Commerce Clause).

¹⁵¹ Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1462-65 n.204 (explaining that 48 states claim ownership of wildlife).

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government *as* a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.¹⁵²

This brief survey of the use of common property in public trust cases is illustrative and not exhaustive. The only public trust textbook used in law schools repeatedly uses “common property” to describe public trust resources.¹⁵³ Courts in other public trust cases decided after 1971 have also employed the term “common property.”¹⁵⁴

D. Common Property and Article I, Section 27

This history and these cases inform the meaning of Article I, Section 27, and particularly common property as it is used in the amendment. They make clear that common property includes specific types of public natural resources for which the Commonwealth does not have formal title. They also show that the government’s interest in common property is best understood as a legal trustee whether or not it has formal title to public natural resources, and that the public’s legal

¹⁵² *Geer*, 161 U.S. at 529. This public trust responsibility, the Court held, provided the necessary authority for the statute being challenged. *Id.* In overruling the second part of *Geer*, the *Hughes* court stated:

the whole [state] ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy and the constitutional command that the State exercise that power . . . so as not to discriminate without reason against citizens of other States.

Id. at 334.

¹⁵³ *See, e.g.*, THE PUBLIC TRUST DOCTRINE, *supra* note 19, at 19, 74, 75, 261, 356, 597, 620, and 642. These references exclude excerpted cases and constitutional provisions, which contain many more uses of the term.

¹⁵⁴ Many of these cite one of the cases described above. *See, e.g.*, *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1426 (10th Cir. 1986) (“[I]t is well settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised ‘as a trust for the benefit of the people’”) (citing *Geer v. Connecticut*); *Matthews v. Bay Head Imp. Ass’n*, 471 A.2d 355, 360-62, 364 (N.J. 1984) (describing *Arnold v. Mundy* in detail and describing the area seaward of the mean high tide line, to which the public has access for swimming and bathing, as “common property”).

interest is best understood as that of beneficiary. That is what it means for these resources to be “the common property of all the people, including generations yet to come.” In addition, these cases emphasize the importance of holding common property resources open for public use and enjoyment, and limiting the ability of private parties to use or restrict the use of these resources in ways that adversely affect constitutional public rights.

To begin with—and remarkably—the types of resources identified in *Arnold v. Mundy*—“the air, the running water, the sea, the fish, and the wild beasts”—are essentially the same as the four core types of public natural resources that cannot be owned in a conventional sense that are protected under Pennsylvania’s constitutional public trust--“air, waters, fish, [and] wildlife.” This suggests that the drafting of Pennsylvania’s amendment may have been influenced by this particular case.

These cases also provide a way of understanding what common property means that comports with private trust law. Because common property in Article I, Section 27 is expressed in terms of a trust relationship between the Commonwealth as trustee and “the people” as beneficiaries, common property can only be understood in terms of trust law.¹⁵⁵ As the supreme court has repeatedly stated, judicial review of Commonwealth actions under Article I, Section 27 requires consideration of “the text of Article I, Section 27 as well as the underlying principles of Pennsylvania private trust law in effect at the time of its enactment.”¹⁵⁶ Pennsylvania’s longstanding private trust law recognizes two kinds of ownership in trust property. The trustee is the legal owner, and is legally responsible for managing the trust for the benefit of the beneficiaries. The beneficiaries are the equitable owners, and have a legal right to enjoy the benefits of the

¹⁵⁵ It is legally impossible, for example, for the Commonwealth to hold fee simple title to lands that are public natural resources, without any attending equitable ownership by beneficiaries.

¹⁵⁶ PEDF VI, 279 A.3d at 1202, *citing* PEDF II, 161 A.3d at 930.

trust.¹⁵⁷ In that sense, public natural resources are the common property of all people, including future generations, and they are common owners of that property, with the right to benefit from the public trust.

In these cases, the public's interest is expressed in terms of the right to use navigable waterways for fishing, navigation, and other purposes. As the court stated in *Arnold v. Mundy*, common property "is 'common to all the citizens, who take of them and use them, each according to his necessities....'"¹⁵⁸ The government's interest is not expressed in terms of absolute or fee simple ownership. Because title to common property cannot "be vested in all the people," the law "has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit."¹⁵⁹

Professor Gerald Torres explains it this way:

The principle of *res communes* was expressed in the English common law and in 19th century American law as *jus publicum*. The historic limitation of the reach of the public trust moderated to the extent that public property such as natural resources are owned by the state for the people. How does the state own it? Is it always and everywhere the same as ordinary private fee simple ownership? The lesson of the public trust doctrine is that such properties are held by the state for the people and are limited by those interests that are clearly public. In addition, to the extent that the state ownership is of *res communes*, that ownership is incomplete ownership. The beneficial interest in any *res communes* is held by the people in common. The state does not *own* a river or the sky like it owns the furniture in the state house. The power of the government to divest the people of their common interest is limited by the interests of the people.¹⁶⁰

¹⁵⁷ See *In Re: The John Wilde and Josephine A. Wilde Income Only Protector Trust*, 303 A.3d 902, 908 (Pa. Commw. Ct. 2023) (citations omitted) (explaining trustee as legal owner and beneficiary as equitable owner). This is basic trust law. RESTATEMENT (FOURTH) OF PROPERTY § 1.3 cmt. a (AM. L. INST. Sept. 2025). See also *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) (explaining distinction between legal and equitable interest in public trust context for submerged lands).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 71.

¹⁶⁰ Torres, *supra* note 103, at 242. See also Wood, *Securing Ecology*, *supra* note 20, at 1233 (explaining that the public trust doctrine "establishes public property rights, so it provides a direct check against the privatization and monopolization that has caused so many resources to be treated as commodities for the singular benefit of profiteers").

This trust relationship for common property between the government and the people has other legal consequences under Article I, Section 27. To begin with, because public natural resources cannot be private property, private parties cannot permanently appropriate these resources as their own property in ways that exclude or limit others in their use or enjoyment of these resources. This was, in fact, the key holding in all three of the navigable waterways cases. Significantly, in each of them, private parties tried to prevent others from accessing parts of waterways that they claimed as their own property, thus impairing their public availability. In so doing, they invoked what may be the most fundamental property right, the right to exclude.¹⁶¹ And they lost because these resources were not their exclusive property in the first place.

In addition, because public natural resources are common property, the government must manage these resources according to the terms of the constitutional public trust and its fiduciary duties to ensure not only protection but also their continued public availability. To be sure, many of the navigability claims concerning waterways involve suits by private parties against other private parties, and this is not an argument for displacing the role of such litigation. Rather, it means that the Commonwealth cannot act in ways that substantially impair public access to public natural resources, and must protect against private actions that would significantly intrude against public availability, now and in the future. It also means that the Commonwealth may not allow some persons to use these resources in ways that violate the terms of the trust or compromise the ability of these resources to be used by others, including future generations.

The *Arnold v. Mundy* court made this point more explicitly than the court in *Carson v. Blazer*. It is one thing to say, as the *Carson* court did, that navigable waterways must be open to all. It is quite another to also say, as the *Arnold* court appears to do, that the government must

¹⁶¹ Rose, *supra* note 110, at 711 (citing to Blackstone's Commentaries and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (the right to exclude is the most valuable element of property)).

ensure that these waterways are open to all. Still, the obligation in Article I, Section 27 to conserve and maintain public natural resources means that the government must conserve and maintain them as “common property for all the people,” including future generations.¹⁶²

As a consequence, the Commonwealth cannot use public natural resources for its own purposes, use them for non-trust purposes, or convey them to private parties so as to divest the people of their “common right” to these resources.¹⁶³ The Commonwealth, as the *Arnold v. Mundy* court explained, may not act as a proprietor of public natural resources, using them for its own benefit.¹⁶⁴

None of these resolve the myriad specific conflicts that can and do exist between and among people and Commonwealth entities over protection and availability of public natural resources. But they do provide a structure and legal guardrails for addressing them. Supreme court decisions have made clear the Commonwealth’s obligations to conserve and maintain public natural resources, not only for the present generation, but also for future generations.¹⁶⁵ These obligations mean that the Commonwealth must “prevent and remedy the degradation, diminution, or depletion of our public natural resources.”¹⁶⁶ Conservation, one of the

¹⁶² The obligation to engage in active management for this purpose also avoids the potential for multiple users who, without self-regulation or government regulation, destroy or severely damage common property. See Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). See BURNS H. WESTON AND DAVID BOLLIER, GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS 240–41.(2013). But there is considerable evidence that informal self-regulation actually works. See OSTROM, *supra* note 123.

¹⁶³ See *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).

¹⁶⁴ *Arnold v. Mundy*, at 77. See also, *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) (“[T]he power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.”); *State v. Rodman*, 59 N.W. 1098, 1099 (Minn. 1894) (“We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative, and for the benefit, of all its people in common.”).

As part of the legislative history for Article I, Section 27, Professor Robert Broughton made the same point—that the Commonwealth must act as a trustee of these resources, and not as a proprietor. Broughton, *supra* note 31. The supreme court has frequently cited Broughton on this point. See, e.g., PEDF II, 161 A.3d at 932.

¹⁶⁵ See *supra* notes 22 to 31 and accompanying text.

¹⁶⁶ PEDF II, 161 A.3d at 932, 935 (citing *Robinson Twp.*, 83 A.3d at 957).

Commonwealth's core constitutional duties, refers to a set of practices that combine the use of land and resources with environmental protection: "Genuine conservation can occur only when humans intentionally use resources at less than maximum sustainable rates or forego the use of some resources altogether."¹⁶⁷ The *Robinson Township* plurality referred to the realization of both protection *and* use as sustainable development.¹⁶⁸

E. Public Values Served by Common Property

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

Common property provides a legal foundation for protecting resources essential to human life and wellbeing. It involves public rights to use waterways for navigation, fishing, shellfish harvesting, and other purposes—which in the early 1800s were necessary not only for commerce but also for food. As suggested above, these should also include resources necessary for protection of the qualities and values expressed in the environmental rights clause of Article I, Section 27—"clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of

¹⁶⁷ FRED VAN DYKE & RACHEL L. LAMB, CONSERVATION BIOLOGY: FOUNDATIONS, CONCEPTS, APPLICATIONS 3 (3rd ed. 2020).

¹⁶⁸ The plurality stated:

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

Robinson Twp., 83 A.3d at 958 ((citations omitted).

the environment.”¹⁶⁹ “[T]he logic animating the trust,” Professor Mary Christina Wood has written, “is that citizens would never give their government power to impair resources crucial to their survival and welfare, so they implicitly reserve unto themselves common property rights to these vital resources.”¹⁷⁰ This is even more true in Pennsylvania because the environmental rights amendment is explicitly set out in Article I of the constitution, the state’s declaration of rights. Article I, Section 1 affirms that all citizens “have certain inherent and inalienable rights.”¹⁷¹ As the supreme court has explained, these rights include those in the environmental rights amendment.¹⁷² Article I, Section 25, moreover, states that all provisions of Article I are “excepted out of the general powers of government and shall forever remain inviolate.”¹⁷³ The constitutional status of this limitation underscores the importance of protecting these vital resources.

Second, common property helps ensure that these resources are available, as Article I, Section 27 says, to “all the people, including generations yet to come.” Availability and protection are mutually reinforcing principles. Availability to public natural resources by future generations requires protection (in the form of conservation and maintenance) by the current generation. The private trust principle of impartiality, endorsed by the supreme court for use in applying Article I, Section 27, requires the Commonwealth to manage “the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust.”¹⁷⁴ This principle applies not only to protection of public natural resources; it also applies to availability.

¹⁶⁹ PA. CONST. art. I, § 27.

¹⁷⁰ Mary Christina Wood, *The Oregon Forest Trust*, *supra* note 57, at 578–82 (2023).

¹⁷¹ PA. CONST. art. I, § 1.

¹⁷² “‘The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution—vis-à-vis the government created by the people—are inherent in man’s nature and preserved rather than created by the Pennsylvania Constitution.’” PEDF V, 255 A.3d at 313 (quoting *Robinson Twp.*, 83 A.3d at 948).

¹⁷³ PA. CONST. art. I, § 25.

¹⁷⁴ PEDF II, 161 A.3d at 932.

A plurality of the supreme court has applied the principle of impartiality to conservation and maintenance of public natural resources. In *Robinson Township*, the Pennsylvania Supreme Court held several provisions of recently adopted shale gas legislation to be unconstitutional.¹⁷⁵ A plurality of the court based their decision on Article I, Section 27, and stated that two of these provisions violated the duty of impartiality. In both, the plurality did not address whether the legislature intended for disparate effects to occur; instead, the plurality said that these provisions were unlawful because they had different effects on different groups of beneficiaries. One provision required local governments to approve unconventional (i.e., shale) gas permits in all zoning districts, including residential zoning districts.¹⁷⁶ Under that provision, the court reasoned, “some properties and communities will carry much heavier environmental and habitability burdens than others.”¹⁷⁷ The plurality reasoned that this result is inconsistent with the express constitutional obligation that the trustee act for the benefit of “*all the people*.”¹⁷⁸ The second legislative provision allowed, but did not require, the Department of Environmental Protection (DEP) to consider comments by municipalities on applications for well permits, and it specifically prohibited municipalities from appealing DEP well permit decisions even though permit applicants were allowed to appeal.¹⁷⁹ This provision “marginalizes” participation by municipalities, the plurality found. Such “inequitable treatment of trust beneficiaries is irreconcilable with the trustee duty of

¹⁷⁵ *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013). The plurality opinion was joined by two other justices on the seven-member court. Justice Baer concurred in the plurality opinion, providing a fourth vote for holding these statutory provisions unconstitutional. Justice Baer reached his decision on the basis of substantive due process, not Article I, Section 27. *Id.* at 1001.

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

¹⁷⁷ *Robinson Twp.*, 83 A.3d at 980.

¹⁷⁸ *Id.* (emphasis added).

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

impartiality.”¹⁸⁰ What is true for protection is also true for availability, particularly because these public natural resources are the common property of all people.

Moreover, while the public may use these resources for fishing, hunting, navigation, commerce, drinking water, and the like, no one—now or in the future—can appropriate them in ways that permanently constrain their public availability. Indeed, the public trust doctrine in the United States developed as a way of preventing the privatization and monopoly control of natural resources essential for public well-being.¹⁸¹ The common property cases involving navigable waterways discussed above all involve judicial rejection of efforts by private parties to control access to, and thus the public availability of, common property.

Third, the concept of common property protects reasonable public expectations in the continued availability of public natural resources as provided by the constitution. The public trust clause of Article I, Section 27 emphasizes the need for multi-generational continuity by stating that common property is to be available to both present and future generations. As noted earlier, the state supreme court has held that present and future generations are “simultaneous beneficiaries” of the constitutional public trust.¹⁸² Just as “respect for reasonable expectations” is essential for private property, so it is or should be for common property.¹⁸³ The chief purpose of the public trust doctrine, Professor Joe Sax wrote, is to prevent “the destabilizing disappointment of expectations held in common but without formal recognition such as title.”¹⁸⁴

¹⁸⁰ *Id.* at 984 (citing *Hamill’s Est.*, 410 A.2d 770, 773 (Pa. 1980); 20 PA. CONS. STAT. § 7773)).

¹⁸¹ Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENV’T AFFAIRS L. REV. 1 (2017).

¹⁸² PEDF V, 255 A.3d at 309-310. *See also*, Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198 (1990).

¹⁸³ Sax, *Liberating the Public Trust*, *supra* note 118, at 186-87.

¹⁸⁴ *Id.* at 188.

The Robinson Township plurality used a somewhat similar rationale for invalidating legislation under Article I, Section 27.¹⁸⁵ In addition to the legislative provisions described above, the challenged legislation substituted statewide rules for determining the location of shale gas facilities such as wells and compressor stations for local zoning rules that historically had determined their location. The plurality decided that this statute violated Section 27 because existing local environmental regulation “created reasonable expectations in the resident citizenry”¹⁸⁶ and that the state’s police power “does not encompass such authority as to fundamentally disrupt those expectations respecting the environment.”¹⁸⁷ The new statute “alters existing expectations of communities and property owners and substantially diminishes natural and esthetic values of the local environment.”¹⁸⁸ It “effectively disposed of the regulatory structures upon which citizens and communities made significant financial and quality of life decisions, and has sanctioned a direct and harmful degradation of the environmental quality of life in these communities and zoning districts.”¹⁸⁹

The present and growing impact of climate change on public natural resources¹⁹⁰ is perhaps the most important example of “destabilizing disappointment” of public expectations. These impacts include increased air pollution, greater water pollution, the loss of trout in many waterways, growing forest mortality, more flooding, and sea level rise in the Delaware River estuary.¹⁹¹ Writing long before climate change became prominent, Sax’s words are prescient.

¹⁸⁵ Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013).

¹⁸⁶ *Id.* at 977.

¹⁸⁷ *Id.* at 978.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 980.

¹⁹⁰ McKinstry & Dernbach, *supra* note 73, at 63-68. *See also*, PENNSYLVANIA DEP’T OF ENV’T PROTECTION, PENNSYLVANIA CLIMATE IMPACTS ASSESSMENT (2024) (available for downloading at <https://www.pa.gov/agencies/dep/residents/climate-change/impacts#:~:text=As%20with%20previous%20Impacts%20Assessments,Health%20impacts%20tracking>).

¹⁹¹ McKinstry & Dernbach, *supra* note 73, at 65-66.

"[O]ne of the most basic and persistent concerns of the legal system," he stated, is a commitment to "evolutionary rather than revolutionary change, for the rate of change and the capacity it provides for transition are precisely what separate continuity and adaptation from crisis and collapse."¹⁹² The speed and scale at which the climate is changing will be increasingly destabilizing, and require governments as trustees to protect present and future generations as beneficiaries.¹⁹³

IV. CONCLUSION

This Article uses Pennsylvania's constitutional public trust as a lens for examining broader questions about the role of common property in any public trust. It argues that public natural resources, and thus common property in Pennsylvania, includes resources that can be owned in a conventional sense, like state forest and park lands, as well as air, water, fish, and wildlife, that cannot be categorically owned in a conventional sense. It has also explained the Commonwealth's duties in managing "common property"—duties regarding public availability that supplement and reinforce constitutional duties that are based on longstanding public trust law and that supplement and reinforce the Commonwealth's responsibility for conserving and maintaining public natural resources.

More generally, common property in the Pennsylvania amendment can only be understood if one understands this clause in terms of its place in overall public trust law, in Pennsylvania and elsewhere, and not as a legal novelty. The supreme court has made clear that the public trust clause is to be interpreted based on both its text, which states that public natural resources are the common

¹⁹² Sax, *Liberating the Public Trust*, *supra* note 118, at 188.

¹⁹³ McKinstry & Dernbach, *supra* note 73, at 63-72.

property of present and future generations, and private trust law.¹⁹⁴ If Pennsylvania environmental lawyers and decision makers need to learn private trust law, so too should they learn public trust law.

Finally, the meaning of this term in Pennsylvania law helps unpack the core meaning of the public trust doctrine in other states and countries. Some natural resources are so important to public well-being that they must be managed by government as a trustee, acting on behalf of present and future generations as simultaneous beneficiaries. As the courts have long made clear, it does not matter whether these natural resources can be owned in a conventional sense or not. The public trust doctrine is thus an important legal tool in protecting reasonable public expectations about the continuing quality and availability of these resources, and enabling us to better face the serious environmental challenges, including climate change, with which we are confronted.

¹⁹⁴ PEDF VI, 279 A.3d at 1202, *citing* PEDF II, 161 A.3d at 930.