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1-14-2021

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Columbia Journal of Race and Law

COLUMBIA JOURNAL OF RACE AND LAW

VOL. 11 **JANUARY 2021** **NO. 1**

NOTE

ENVIRONMENTAL JUSTICE AND PENNSYLVANIA'S ENVIRONMENTAL RIGHTS AMENDMENT: APPLYING THE DUTY OF IMPARTIALITY TO DISCRIMINATORY SITING

Jacob Elkin*

Since the 1970s, there has been a growing awareness that environmental hazards are disproportionately sited in low-income communities and communities of color. Under the label of the environmental justice movement, community groups have pursued various means to fight against the discriminatory concentration of environmental burdens in their neighborhoods. Yet in its Civil Rights Act and Equal Protection Clause jurisprudence, the Supreme Court has largely shut the door on federal environmental justice litigation by requiring plaintiffs to prove that the government acted with discriminatory intent in its siting and permitting decisions.

This Note argues that Pennsylvania's Environmental Rights Amendment provides an avenue for disparate impact environmental justice litigation at the state level. In its 2013 Robinson Township v. Commonwealth *decision, the Pennsylvania Supreme Court interpreted the state's Environmental Rights Amendment as imposing significant public trust obligations on the state legislature and other governmental*

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The author would like to thank Professor Olatunde Johnson for her thoughtful guidance throughout all stages of the writing process, along with Professors Peter Strauss and Michael Gerrard for their ideas and insight. The author would additionally like to thank the *Columbia Journal of Race and Law* staff, especially Tessa Baizer, Ariana Bushweller, Nicolás Galván, Seojin Park, and Vinay Patel for their input during various stages of the writing and editing process.

actors. While previous scholarship has analyzed Robinson Township*'s impact on environmental constitutionalism generally, this Note focuses on the decision's environmental justice implications. In particular, this Note argues that one public trust duty imposed by the Pennsylvania Supreme Court—the duty of impartiality—should prohibit state actors from continuing to site environmental hazards in communities that already bear disproportionate environmental burdens.*

I. INTRODUCTION

Advocates have long attempted to hold governments accountable for the disproportionate siting of environmental hazards such as landfills and power plants in communities of color and low-income communities. Under the label of the environmental justice movement, community groups have pursued various means to fight against the concentration of environmental burdens in their neighborhoods.[1] While the movement has had a number of legal successes, including President Clinton's signing of Executive Order 12898 ("Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations"),[2] federal litigation strategies focused on combating environmental racism and injustice have largely stalled.[3]

Several doctrinal roadblocks currently stand in the way of federal environmental justice litigation. Under modern Equal Protection Clause jurisprudence, governmental actions with racially disproportionate impacts are unconstitutional only when the government acted with an intent to discriminate.[4] Similarly, Title VI of the Civil Rights Act does not provide a private right of action to combat discrimination unless the plaintiff can prove the governmental agent in question acted with discriminatory intent.[5] It is incredibly hard—if not impossible—for litigants to

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[1] For a timeline of the environmental justice movement, including key milestones, see ROBERT D. BULLARD ET AL., ENVIRONMENTAL JUSTICE MILESTONES AND ACCOMPLISHMENTS: 1964–2014 (2014), https://www.racialequitytools.org/resourcefiles/Enviromental_justice.pdf [https://perma.cc/88DP-AWSW].

[2] EO 12898 directed that "each Federal agency . . . shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands." Exec. Order No. 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 16, 1994). The order also mandated the creation of an interagency working group on environmental justice. *Id.*

[3] *See* Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENV'T L. REV. 51, 63–77 (2009).

[4] Washington v. Davis, 426 U.S. 229, 239 (1976).

[5] *See* Alexander v. Choate, 469 U.S. 287, 293 (1985); Alexander v. Sandoval, 532 U.S. 275, 293 (1998). While the Civil Rights Act provides the Environmental Protection Agency (EPA) the power to administratively remedy disparate impact discrimination, the agency has largely failed to exercise that power to protect citizens from environmental injustice. As of 2016, the EPA's Office of Civil Rights had never found a violation of Title VI of the Civil Rights Act and was dismissing nine out of every ten complaints alleging environmental

establish that state actors intended to discriminate when making siting and permitting decisions.[6] As a result, federal challenges to pollution permits and waste facility siting decisions under the Equal Protection Clause and the Civil Rights Act have uniformly failed.[7]

While federal environmental justice litigation remains largely thwarted, legal inroads at the state level can still be made. [8] Optimistically, state-specific environmental justice litigation could serve as a laboratory for nation-wide innovation, and pragmatically, state courts may be the only viable forum left for environmental justice litigation. [9] Building off this state-oriented approach, this Note argues that recent developments under Pennsylvania's Environmental Rights Amendment (Amendment), a 1971 amendment to the Pennsylvania Constitution, present fertile ground for state litigation targeting the continued siting and permitting of environmental burdens in low-income communities and communities of color. Starting with *Robinson Township v. Commonwealth*, the Pennsylvania Supreme Court has held that the Environmental Rights Amendment imposes a "duty of impartiality" on the State, requiring state actors to balance the interests of all residents when making decisions that affect public natural resources such as ambient air and water quality.[10] While the scope of this duty remains undefined, this Note argues that it could serve as the foundation for litigation challenging discriminatory siting and permitting decisions.

Part II of this Note presents background information regarding patterns of environmental injustice in Pennsylvania and the United States, attempts to litigate environmental discrimination under the Equal Protection Clause and Civil

discrimination. Talia Buford & Kristen Lombardi, *Report Slams EPA Civil Rights Compliance*, CTR. FOR PUB. INTEGRITY (Sept. 23, 2016), https://publicintegrity.org/environment/report-slams-epa-civil-rights-compliance/ [https://perma.cc/AB8S-ABQL].

[6] *See* Maria Ramirez Fisher, *On the Road from Environmental Racism to Environmental Justice*, 5 VILL. ENV'T L.J. 449, 469 n.116 (1994) ("Critics attack the imposition of the burden of establishing discriminatory intent on the wrong party; discriminatory intent is easy to hide. Furthermore, since state action is based on multiple motives, the government always can identify a non-discriminatory motive for its action.") (citation omitted).

[7] Waterhouse, *supra* note 3, at 53.

[8] Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENV'T L. 135, 136 (2005).

[9] *Id.* at 158–60.

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

Rights Act, and the early history of Pennsylvania's Environmental Rights Amendment. Part III explores *Robinson Township*'s effect on jurisprudence under the Environmental Rights Amendment, focusing on the "duty of impartiality" as it is framed in the opinion and subsequent case law. Part IV argues that the duty imposes substantive obligations on state actors to cease siting environmental burdens in communities that are already disproportionately affected, as well as procedural obligations to consider the cumulative impact of environmental decision-making on affected communities when making siting and permitting decisions. Then, Part V analyzes whether other state constitutions provide the framework for similar developments.

II. ENVIRONMENTAL JUSTICE IN PENNSYLVANIA AND THE UNITED STATES

Numerous studies show that the distribution of environmental burdens in the United States is concentrated in communities of color and low-income communities. [11] This unfortunate fact is replicated within Pennsylvania.[12] Litigants both in Pennsylvania and around the country have attempted to use the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act to hold government actors accountable for concentration of environmental hazards in their communities, but Supreme Court jurisprudence has effectively foreclosed the potential for such litigation by requiring private litigants to prove discriminatory intent.[13]

Part II.A presents the substantial evidence of environmental inequality throughout the United States and Pennsylvania, and Part II.B summarizes the federal constitutional and statutory challenges to such inequality. Part II.C introduces Pennsylvania's Environmental Rights Amendment, a provision that could serve as the basis for future environmental justice litigation.

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[11] For an extensive review of such studies, see LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE ENVIRONMENTAL JUSTICE MOVEMENT app. at 167–83 (2001).

[12] *See* FOOD & WATER WATCH, PERNICIOUS PLACEMENT OF PENNSYLVANIA POWER PLANTS: NATURAL GAS-FIRED POWER PLANT BOOM REINFORCES ENVIRONMENTAL INJUSTICE (2018), https://www.foodandwaterwatch.org/sites/default/files/rpt_1806_pagasplants_web3.pdf [https://perma.cc/RR74-4NRD].

[13] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976); Alexander v. Choate, 469 U.S. 287, 293 (1985); Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

A. The Distribution of Environmental Burdens in the United States and Pennsylvania

The first information about distributional environmental inequities was published in 1971 in an annual report of the White House's Council on Environmental Quality.[14] Roughly a decade later, studies published in the 1980s enhanced the public understanding that environmental burdens were inequitably distributed along race and class lines. In a 1983 study, the U.S. Government Accountability Office found a correlation between the location of hazardous waste landfills and the racial and economic status of the surrounding communities in eight southeastern states.[15] Several years later, the United Church of Christ's Commission for Racial Justice conducted a nationwide study, titled *Toxic Waste and Race in the United States*, that concluded that race was an important variable associated with the siting of commercial hazardous waste facilities. [16] This research set the framework for numerous other studies into the inequitable distribution of environmental hazards.[17]

In their 2001 book *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, Luke W. Cole[18] and Sheila R. Foster[19] surveyed the numerous

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[14] Paul Mohai & Bunyan Bryant, *Race, Poverty & the Distribution of Environmental Hazards: Reviewing the Evidence*, RACE, POVERTY & ENV'T, Fall 1991–Winter 1992, at 24.

[15] U.S. GEN. ACCT. OFF., GAO/RCED-83-168, SITING OF HAZARDOUS WASTES LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983). The study focused on EPA Region 4 (Southeast), *id.*, which includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. *About EPA Region 4 (Southeast)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/aboutepa/about-epa-region-4-southeast [https://perma.cc/JX7L-FGTU] (last visited Aug. 23, 2020).

[16] UNITED CHURCH CHRIST COMM'N FOR RACIAL JUST., TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 9 (1987).

[17] *See e.g.*, COLE & FOSTER, *supra* note 11, at app. at 167–83.

[18] Luke Cole was the Co-Founder and Director of the Center on Race, Poverty, and the Environment, a national environmental justice organization that provides legal, organizing, and technical assistance to grassroots groups in low-income communities and communities of color. *Luke's Legacy*, CTR. ON RACE POVERTY & ENV'T, https://crpe-ej.org/donate-main/lukes-legacy/ [https://perma.cc/D3SN-7UQM] (last visited Mar. 22, 2020). He has been widely recognized as an early leader in the environmental justice movement. Dennis Hevesi, *Luke Cole, Court Advocate for Minorities, Dies at 46*, N.Y. TIMES (June 10, 2009), https://www.nytimes.com/2009/06/11/us/11cole.html [https://perma.cc/9AG3-8JCH].

[19] Sheila Foster is a Professor of Law and Public Policy at Georgetown University. She co-edited *The Law of Environmental Justice: Theories and*

studies and articles that analyzed the distribution of environmental hazards such as "garbage dumps, air pollution, lead poisoning, toxic waste production and disposal, pesticide poisoning, noise pollution, occupational hazards, and rat bites."[20] These studies "overwhelming[ly]" concluded that "environmental hazards are inequitably distributed by income or race." [21] Furthermore, studies comparing the distribution of hazards by income and race found that race was the more consistent predictor of exposure to environmental dangers.[22]

Contemporary studies continue to show a substantial correlation between the location of environmental hazards and the predominant race of surrounding communities. [23] A 2018 study by Environmental Protection Agency (EPA) scientists found that "non-Whites and those living in poverty face a disproportionate burden from [particulate matter]-emitting facilities."[24] The study also found that Black people "in particular are likely to live in high-emission areas."[25] The Third Circuit Court of Appeals recently recognized this issue, noting that "recent studies have shown that environmental pollution, including from landfills, has a disparate impact on racial-ethnic minorities and low-income communities."[26] Furthermore, since low-income communities and communities of color are home to a disproportionate number of polluting sites, they are particularly affected by the Trump Administration's weakening of environmental protections.[27]

Procedures to Address Disproportionate Risks with Michael B. Gerrard. *Sheila Foster*, GEO. L. https://www.law.georgetown.edu/faculty/sheila-foster/ [https://perma.cc/M7PF-V8RM] (last visited Mar. 22, 2020).

[20] COLE & FOSTER, *supra* note 11, at 54.

[21] *Id.* at 54–55.

[22] *Id.* at 55.

[23] Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480 (2018).

[24] *Id.*

[25] *Id.*

[26] Baptiste v. Bethlehem Landfill Co., 965 F.3d 214, 226 (3d Cir. 2020) (citing Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PROC. NAT'L ACAD. SCI. 6001, 6001 (2019); Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENV'T L. & POL'Y REV. 485, 498–505 (1997)).

[27] Rebecca Beitsch, *Critics Warn Trump's Latest Environmental Rollback Could Hit Minorities, Poor Hardest*, HILL (Jan. 12, 2020, 8:00 AM), https://thehill.com/policy/energy-environment/477798-critics-warn-trumps-latest-environmental-rollback-could-hit [https://perma.cc/GJ9C-6Z62].

The concentration of environmental hazards in low-income communities and communities of color, and the cumulative exposure to multiple environmental health stressors, severely impairs public health in those communities.[28] The effects of industrial development accumulate; while one single source of environmental harm may seem insignificant, the addition of many small impacts greatly increases the cause for concern.[29] In the environmental justice context, the cumulative impact of exposure to disproportionate numbers of polluting facilities correlates with asthma hospitalization rates.[30]

In line with the national data, environmental hazards in Pennsylvania are concentrated in low-income Black and Latinx

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[28] *See EJ 2020 Glossary*, U.S. ENV'T PROT. AGENCY, https://epa.gov/environmentaljustice/ej-2020-glossary [https://perma.cc/MJV4-NP2H] (last visited Aug. 24, 2020) ("Overburdened Community—Minority, low-income, tribal, or indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks. This disproportionality can be as a result of greater vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health, economic, or social conditions within these populations or places. The term describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities."). *See also* Rachel Morello-Frosch et al., *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30 HEALTH AFFS. 879, 881 (2011) ("Numerous studies have documented the disproportionate location of hazardous waste sites, industrial facilities, sewage treatment plants, and other locally undesirable and potentially polluting land uses in communities of racial or ethnic minorities and in socially disadvantaged neighborhoods. Residents living near such facilities can be exposed to more pollutants than people who live in more affluent neighborhoods located farther from these sources of pollution. The residents of communities near industrial and hazardous waste sites experience an increased risk of adverse perinatal outcomes, respiratory and heart diseases, psychosocial stress, and mental health impacts.").

[29] *See* INDIAN & N. AFFS. CAN., A CITIZEN'S GUIDE TO CUMULATIVE EFFECTS 2 (2007), https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-NWT/STAGING/texte-text/ntr_pubs_CEG_1330635861338_eng.pdf [https://perma.cc/4GM2-ZG8Z]. EPA's Council on Environmental Quality (CEQ) defines cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (2020). CEQ further notes that "[c]umulative impacts can result from minor but collectively significant actions taking place over a period of time." *Id.*

[30] *See* Emanuel Alcala et al., *Cumulative Impact of Environmental Pollution and Population Vulnerability on Pediatric Asthma Hospitalizations: A Multilevel Analysis of CalEnviroScreen*, 16 INT'L J. ENV'T RSCH. & PUB. HEALTH 2683 (2019).

communities.[31] In fact, Pennsylvania has the second largest racial "pollution gap" among all of the states.[32] Furthermore, a 2018 study found that Pennsylvania's 136 existing, new, and proposed fuel-fired power plants are disproportionately located near disadvantaged communities, defined as "areas with lower incomes, higher economic stress, lower educational levels and/or communities of color."[33] This distributional inequity manifests in the health of these communities, with Pennsylvania's Black and Latinx populations considerably more likely to experience negative health effects from pollution than its white population.[34] For example, the Pennsylvania Department of Environmental Protection (PADEP or DEP) found that the 2011 asthma hospitalization rate was five times higher for Black residents of Pennsylvania than for white residents.[35]

PADEP has responded to this inequity by creating an Office of Environmental Justice, which serves "as a point of contact for Pennsylvania residents in low income areas and areas with a higher number of minorities," and has a "primary goal" of "increas[ing] communities' environmental awareness and involvement in the DEP permitting process."[36] The Office has publicized a map of Environmental Justice areas in Pennsylvania, defined as "any census tract where 20 percent or more individuals live in poverty, and/or 30 percent or more of the population is minority."[37] The Office's Environmental Justice

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[31] *See* FOOD & WATER WATCH, *supra* note 12.

[32] Sydney Brownstone, *The 10 Most Polluted States for People of Color*, FAST CO. (Apr. 16, 2014), https://www.fastcompany.com/3029160/the-10-most-polluted-states-for-people-of-color [https://perma.cc/4U6F-FV87].

[33] *See* FOOD & WATER WATCH, *supra* note 12, at 2.

[34] *Id.* at 6–7. While not correlated with race, the recent boom in unconventional gas production, referred to as "hydraulic fracturing" or "fracking," has been concentrated in low-income, rural areas, leading to numerous negative health effects and dangers for those communities. *See* FOOD & WATER WATCH, *supra* note 12, at 7; Elena Pacheco, *It's a Fracking Conundrum: Environmental Justice and the Battle to Regulate Hydraulic Fracturing*, 42 ECOLOGY L.Q. 373, 380 (2015).

[35] *Pennsylvania Asthma Surveillance System*, PA. DEP'T HEALTH, https://www.health.pa.gov/topics/programs/Asthma/Pages/Surveillance-Reports.aspx [https://perma.cc/4GEV-CTPT] (last visited Mar. 22, 2020). In its study, PADEP did not attribute the differing asthma hospitalization rate to any particular cause.

[36] *Office of Environmental Justice*, PA. DEP'T ENV'T PROT., https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/default.aspx [https://perma.cc/3MPV-TYRT] (last visited Aug. 24, 2020).

[37] *Pa. Environmental Justice Areas*, PA. DEP'T ENV'T PROT. https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/PA-Environmental-Justice-Areas.aspx [https://perma.cc/62HG-K8HR] (last visited Aug. 24, 2020).

Advisory Work Group also helped create PADEP's 2004 Enhanced Public Participation Policy, which triggers community outreach, public participation, and public meeting requirements when certain types of permits are proposed in Environmental Justice areas.[38]

The Enhanced Public Participation Policy grew out of a 2001 report from Pennsylvania's then-formed Environmental Justice Work Group, [39] which detailed Pennsylvania's environmental justice history and recommended ways to "level[] the playing field" by devoting attention, energy, and resources to "the environmental health and safety of minority and low-income communities."[40] Along with its suggestion for enhanced public participation in the permitting process, the report recommended that PADEP examine the feasibility of mitigating the cumulative and/or disparate impacts of environmental permitting decisions and determine whether the benefits of the proposed activity outweigh the harm to the community. [41] These mitigation measures have not been implemented in state policy, and Pennsylvania's low-income communities and communities of color continue to be disproportionately affected by the state's permitting of environmental hazards.[42]

Of course, in Pennsylvania and nationally, the correlation between race, socioeconomic status, and the distribution of environmental burdens does not establish causation. The siting of environmental hazards in communities of color can be explained—at least in part—by ostensibly race-neutral siting criteria and market factors including cheap land values and appropriate zoning. [43] Yet, those "race-neutral" siting factors must be contextualized within the country's history of discriminatory land use policies that include explicitly racial

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[38] PA. DEP'T ENV'T PROT. POL'Y OFF., 012-0501-002, ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION POLICY (Apr. 24, 2004), http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=7918&DocName=ENVIRONMENTAL%20JUSTICE%20PUBLIC%20PARTICIPATION%20POLICY.PDF [https://perma.cc/R2SJ-5P8V]. This process applies to NPDES (water) Permits, Air Permits, Waste Permits, Mining Permits, Land Application of Biosolids Permits, and CAFO (Concentrated Animal Feeding Operation) Permits. *Id.* at 8.

[39] *Id.* at 3.

[40] ENV'T JUST. WORK GRP, REPORT TO THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION 13 (June 2001), http://files.dep.state.pa.us/PublicParticipation/Office%20of%20Environmental%20Advocacy/lib/environadvocate/EJReportFinal.pdf [https://perma.cc/32BM-GU9E]

[41] *Id.* at 16–18.

[42] *See supra* notes 31–35 and accompanying text.

[43] *See* COLE & FOSTER, *supra* note 12, at 70–74.

zoning,[44] racially restrictive covenants,[45] and redlining.[46] These historical practices continue to drive segregation: as examples, Detroit, Chicago, St. Louis, and Philadelphia all extensively utilized racially restrictive covenants, and those cities ranked first, eighth, tenth, and twelfth respectively in African American residential segregation as of 1990.[47] Furthermore, zoning bodies have historically "down-zoned" Black communities to industrial status while zoning similarly situated white neighborhoods as "residential."[48] Down-zoning then creates a cycle where new industrial development lowers land values, thereby attracting more industry, thereby lowering land values further.[49] Put generally, present-day siting criteria overlay a history of land use decision-making that is all but race-neutral, and those criteria continue to concentrate polluting facilities in low-income communities of color.[50] The question then becomes: what role can and should the law play in remedying that inequity?

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[44] *See* Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 744–45 (1993) ("Shortly after the turn of the century, when legally enforced segregation approached its zenith, several southern and border cities enacted strict racial zoning ordinances designating separate residential districts for whites and blacks. Such ordinances were a response to the mass migration of southern rural blacks to the cities and to white residents' fears of racial amalgamation. Baltimore passed the first such ordinance in 1910 and within six years more than a dozen cities followed suit.").

[45] *See id.* at 751. ("The use of racially restrictive covenants mushroomed during the 1930s and 1940s, particularly in the northern, western, and mid-western regions of the country.").

[46] *See id.* at 752 ("The [Federal Housing Administration] also encouraged the use of racial covenants and denied mortgage insurance to entire 'redlined' black and integrated neighborhoods based on the belief that black residents caused a devaluation of property."). Redlining "denotes the practice of denying mortgage financing on property located within certain geographic areas of a city." *Id.* at 752 n.57 (quoting Marcia Duncan et al., *Redlining Practices, Racial Resegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative,* 7 URB. L. 510, 513 (1975)).

[47] *See* Dubin, *supra* note 44, at 751 n. 54 (citation omitted).

[48] *See* COLE & FOSTER, *supra* note 12, at 73.

[49] *Id.* at 72.

[50] Other ostensibly race-neutral siting criteria have similar effects. *See id.* at 73–74 ("Proximity to major transportation routes may also skew the siting process toward communities of color, as freeways appear to be disproportionately sited in such communities. Similarly, locational criteria—prohibitions against the siting of waste facilities near neighborhood amenities like hospitals and schools—skew the process toward underdeveloped communities of color, since such communities are less likely to have hospitals and schools. Hence, siting criteria that prohibit the siting of waste facilities close to such facilities perpetuate the historical lack of such amenities in those communities.").

B. Federal Environmental Justice Litigation Under the Equal Protection Clause and Civil Rights Act

In response to the overwhelming concentration of environmental hazards in low-income communities and communities of color outlined above, community groups and public interest legal organizations nationwide have brought numerous suits under the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964 challenging the practice of discriminatory siting. This litigation has been unsuccessful in holding governmental actors accountable for siting and permitting practices that disproportionately harm Black and Latinx communities, primarily because the Supreme Court has proven reluctant to impose liability on governmental actors without proof that the action arose from an intent to discriminate.[51]

The text of the Fourteenth Amendment, which prohibits states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws,"[52] would appear to prohibit the enforcement of siting and permitting schemes that sacrifice the health of low-income communities and communities of color for the benefit of wealthier, whiter communities. As such, numerous plaintiffs have brought suits alleging that the siting of landfills in their predominantly Black communities violated their rights under the Equal Protection Clause.[53] Yet, these claims have failed because the plaintiffs could prove only that the landfill siting produced disproportionate racial *impacts*, rather than prove that the government acted with discriminatory intent.[54]

Following the 1976 case *Washington v. Davis*, "a law or other official act . . . is [not] unconstitutional [s]olely because it has a racially disproportionate impact."[55] Furthermore, even when plaintiffs can prove that governmental action was "motivated in part by a racially discriminatory purpose," the government may still escape liability if it can prove that "the same decision would have resulted even had the impermissible

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[51] *See* Washington v. Davis, 426 U.S. 229, 239 (1976) ("[A] law or other official act . . . is [not] unconstitutional Solely [sic] because it has a racially disproportionate impact.").

[52] U.S. CONST. amend. XIV § 1.

[53] *See, e.g.*, R.I.S.E. v. Kay, 977 F.2d 573 (4th Cir. 1992); East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Plan. & Zoning Comm'n, 896 F.2d 1264 (11th Cir. 1989).

[54] *R.I.S.E.*, 977 F.2d at 2; *East-Bibb Twiggs Neighborhood Ass'n*, 896 F.2d at 1267.

[55] *Washington*, 426 U.S. at 239.

purpose not been considered."[56] While the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* stated that the discriminatory impact of official action could serve as evidence of discriminatory intent,[57] it has since ignored this aspect of its opinion. [58] As a result, environmental justice plaintiffs must look elsewhere for proof that governmental actors intended to discriminate when siting environmental hazards, but discriminatory intent is easy to hide, and siting decisions are often based on multiple criteria that are facially non-discriminatory.[59]

Similar roadblocks have stalled environmental litigation brought under Title VI of the Civil Rights Act. Title VI is the most far-reaching part of the Civil Rights Act, since it requires compliance by all recipients of federal funds. [60] Section 601 mandates that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." [61] Section 602 authorizes and directs federal agencies, including the EPA, to promulgate anti-discrimination regulations that give force to section 601.[62] As Title VI targets discrimination generally, it has been the statutory basis for significant environmental justice litigation.[63]

This litigation has also proven unsuccessful. As with the Equal Protection Clause, the Supreme Court has held that challengers to government action under section 601 of the Civil

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[56] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

[57] *Id.* at 266.

[58] Robert Nelson, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 341 (1986) (citing Hunter v. Underwood, 471 U.S. 222 (1985); Wayte v. United States, 470 U.S. 598 (1985); Mobile v. Bolden, 446 U.S. 55, 67–68 (1980); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

[59] *See* Fisher, supra note 6, at 469 n.116 ("Critics attack the imposition of the burden of establishing discriminatory intent on the wrong party; discriminatory intent is easy to hide. Furthermore, since state action is based on multiple motives, the government always can identify a non-discriminatory motive for its action.").

[60] *See* Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 763 (2013).

[61] 42 U.S.C. § 2000d (2018).

[62] 42 U.S.C. § 2000d-1 (2018). *See also* 40 C.F.R. §§ 7.10–7.135 (the EPA's nondiscrimination regulations promulgated pursuant to section 602).

[63] *See, e.g.*, Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998); S. Camden Citizens Action v. N.J. Dep't Env't Prot., 274 F.3d 771 (3d Cir. 2001).

Rights Act must prove that the government acted with a discriminatory *intent*; proving that a particular government action had a disparate impact on certain groups is insufficient to establish a civil rights violation.[64] For the reasons outlined above, plaintiffs face near-insurmountable burdens in establishing that officials intended to discriminate when making siting decisions. Accordingly, most cases of environmental discrimination cannot be litigated under section 601.

While litigants must prove that violations of section 601 of the Civil Rights Act arose from discriminatory intent in order to obtain restitution, agencies can still prohibit disparate impact discrimination through regulation.[65] As a result, private litigants have attempted to use section 602 regulations to challenge discriminatory siting of environmental hazards, and one such lawsuit—*Chester Residents Concerned for Quality Living v. Seif*—directly challenged siting practices in Pennsylvania.[66]

The town of Chester is located in Delaware County, Pennsylvania. As of 2002, Delaware County, excluding Chester, was 6.2% African American, while Chester itself was 65% African American.[67] Additionally, Chester's median family income was 45% lower than the rest of Delaware County's and its poverty rate was more than three times higher.[68] In an emblematic case of environmental racism, five of the seven commercial waste facilities that PADEP permitted in Delaware County between 1986 and 1996 were located in Chester.[69] Furthermore, the county processed all of its municipal waste and sewage in Chester, and over 60% of the county's waste-processing industries were located in the township.[70]

Chester residents organized to challenge the continued siting of waste facilities in their community. In *Chester Residents*

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[64] *See* Alexander v. Choate, 469 U.S. 287, 293 (1985) ("Title VI [of the Civil Rights Act of 1964] itself directly reached only instances of intentional discrimination.").

[65] *See id.* ("[A]ctions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."); *but see* Alexander v. Sandoval, 532 U.S. 275, 281–82 (2001) (assuming for the purposes of deciding the case that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups" but noting that such regulations are in "considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination").

[66] *Chester Residents Concerned for Quality Living*, 132 F.3d. at 927.

[67] COLE & FOSTER, *supra* note 11, at 34.

[68] *Id.*

[69] *Id.* at 34–35.

[70] *Id.* at 35.

Concerned for Quality Living v. Seif, Chester Residents Concerned for Quality Living (CRCQL), a local grassroots environmental justice organization, [71] argued that PADEP's issuance of a permit to Soil Remediation Services to operate a waste processing facility in Chester violated section 601 of the Civil Rights Act, the EPA's civil rights regulations promulgated pursuant to section 602, and PADEP's assurance that it would not violate those regulations.[72] The Third Circuit considered the section 602 claim on appeal, and held that Chester residents had a private right of action under regulations passed pursuant to section 602 to sue PADEP for siting practices that had racially disparate impacts. [73] However, that potentially-landmark decision was vacated after PADEP's denial of an operations permit to Soil Reclamation Services rendered the case moot.[74]

Soon after *Chester*, the Supreme Court shut the door on similar litigation, holding that no private right of action existed under Title VI to enforce section 602 regulations.[75] In *Alexander v. Sandoval*, a driver's license applicant claimed that the Department of Justice violated an anti-discrimination regulation promulgated pursuant to section 602 by administering state driver's license examinations only in English, which had the effect of subjecting non-English speakers to discrimination based on their national origin.[76] Justice Scalia wrote for the majority: "Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under section 602. We therefore hold that no such right of action exists."[77] As a result, one more avenue for environmental justice was closed to potential litigants.

After *Sandoval* prevented litigants from enforcing section 602 regulations directly, environmental justice activists attempted to enforce those regulations through 42 U.S.C. § 1983,

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[71] *Chester Environmental Justice*, EJNET, http://www.ejnet.org/chester/ [https://perma.cc/ML2N-8V7S] (last visited Mar. 23, 2020).

[72] Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 927–28 (3d Cir. 1997).

[73] *Id.* at 937.

[74] Seif v. Chester Residents Concerned for Quality Living, 524 U.S. 974 (1998); Rick Kearns, *Chester Lawsuit Declared Moot by U.S. Supreme Court: Environmental Justice Still Doable Through Courts Despite Recent Supreme Court Decision,* EJNET (Oct. 6, 1998), https://www.ejnet.org/chester/moot.html [https://perma.cc/8JPC-6ZNU].

[75] Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

[76] *Id.* at 278–79.

[77] *Id.* at 293.

a provision of the Civil Rights Act of 1871, which provides a remedy for deprivation under color of state law of "any rights . . . secured by the Constitution and laws."[78] In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, a community organization sued the New Jersey Department of Environmental Protection (NJDEP), claiming that its decision to issue an air pollution permit to a cement processing facility would produce a racially discriminatory impact.[79] Prior to the *Sandoval* decision, the New Jersey District Court held that plaintiffs could sue NJDEP under section 602.[80] Immediately following *Sandoval* and its preclusion of such a section 602 claim, the District Court allowed the plaintiffs to amend their complaint and add a claim to enforce section 602 through § 1983.[81] However, on appeal, the Third Circuit held that disparate impact regulations promulgated pursuant to section 602 cannot create private rights enforceable under § 1983, since only Congress, and not administrative agencies or courts, can create such rights.[82] After much litigation, environmental justice advocates were once again unable to hold governmental actors accountable for siting and permitting decisions that disproportionately harmed low-income communities and communities of color. Federal law in general had failed to provide private causes of action to combat environmental discrimination, rendering state law the only viable avenue for such actions.[83]

C. Pennsylvania's Environmental Rights Amendment

In May 1971, Pennsylvania formally adopted its Environmental Rights Amendment under article 1, section 27 of its constitution.[84] The Environmental Rights Amendment arose from the Pennsylvania Legislature's general effort, beginning in 1965, to reverse the history of widespread environmental destruction in the state.[85] Representative Franklin L. Kury

[78] 42 U.S.C. § 1983 (2018).

[79] S. Camden Citizens Action v. N.J. Dep't Env't Prot., 274 F.3d 771, 775–76 (3d Cir. 2001).

[80] *Id.* at 776.

[81] *Id.*

[82] *Id.* at 790.

[83] Klee, *supra* note 8, at 160.

[84] PA. CONST. art. I, § 27.

[85] *Pennsylvania's Environmental Rights Amendment*, CONSERVATION ADVOC., https://conservationadvocate.org/pennsylvanias-environmental-rights-amendment/ [https://perma.cc/W8JX-8LYT] (last visited Mar. 22, 2020); Robinson Twp. v. Commonwealth, 83 A.3d 901, 976 (Pa. 2013) ("As we have explained, Pennsylvania has a notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its water, its air, its flora and fauna, and its people. The lessons

drafted the Amendment and introduced the associated House Bill, citing the need for an "over-all governmental framework in which to carry on the fight for conservation . . . that is clearly stated and beyond question . . . [and] will firmly guide the legislature, the executive and the courts alike." [86] As Pennsylvania law requires,[87] the General Assembly approved the Amendment in two successive legislative sessions—first in 1969–70 and then in 1971–72—before a majority of voters approved it in a public referendum on May 18, 1971.[88]

> As enacted, the Amendment reads as follows:
>
> > The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[89]

At the time of its proposal, commentators hoped that the Amendment would be more than a "statement of policy," and would instead give "citizens a weapon which may be used in the courts, in litigation, to protect and enhance the quality of [their] environment."[90] Representative Kury claimed that he drafted the Amendment to "strengthen substantially the legal weapons available to protect our environment from further destruction."[91]

Despite the legislature's clear intention for the Amendment to serve as a substantive legal tool in the hands of Pennsylvania's citizens, the Pennsylvania judiciary soon undermined the Amendment's force. In *Payne v. Kassab*, responding to an action to enjoin a street-widening project that would result in the taking of part of a river, the Commonwealth

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learned from that history led directly to the Environmental Rights Amendment, a measure which received overwhelming support from legislators and the voters alike.").

[86] 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, 189–90 (2015).

[87] *See* PA. CONST. art. XI, § 1.

[88] Dernbach & Sonnenberg, *supra* note 86, at 184.

[89] PA. CONST. art. I, § 27.

[90] Robert Broughton, *Analysis of HB 958, the Proposed Pennsylvania Environmental Declaration of Rights*, 41 PA. BAR ASS'N Q. 421 (1969–70), *reprinted in* Dernbach & Sonnenberg, *supra* note 86, at 220.

[91] Dernbach & Sonnenberg, *supra* note 86, at 271.

Court[92] established a three-part test for determining whether a state actor violated its public trust duties under the Environmental Rights Amendment:

> The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[93]

The Court claimed that this test established a "realistic" rather than "legalistic" standard for judicial review,[94] and the *Payne* test quickly replaced the text of the Environmental Rights Amendment as the "all-purpose test for applying article I, section 27 when there is a claim that the Amendment itself has been violated."[95]

On its face, *Payne* established an almost insurmountable bar for challengers to state action. As long as the state actor in question complied with applicable statutes and regulations, the courts would largely defer to the state's decision-making process.[96] Accordingly, during the roughly four decades in which *Payne* was good law, only one of twenty-four court cases decided under the *Payne* test found that the state had violated the

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[92] The Commonwealth Court is one of Pennsylvania's two statewide intermediate appellate courts. It is primarily responsible for matters involving state and local governments and regulatory agencies, and it acts as a trial court in suits filed by or against the Commonwealth. *Learn*, UNIFIED JUD. SYS. PA., http://www.pacourts.us/learn/ [https://perma.cc/V7CM-VHJ5] (Nov. 2016).

[93] Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 323 A.2d 407 (Pa. Commw. Ct. 1974), *aff'd*, 361 A.2d 263 (Pa. 1976).

[94] *Id.*

[95] John C. Dernbach et al., *Recognition of Environmental Rights for Pennsylvania Citizens:* Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 70 RUTGERS U. L. REV. 803, 812–13 (2018) [hereinafter Dernbach et al., *Recognition of Environmental Rights*] (quoting Pa. Env't Def. Found. v. Commonwealth, No. 228 M.D. 2012, 2013 WL 3942086, at *8 (Pa. Commw. Ct. Jan. 22, 2013)).

[96] *See Payne*, 361 A.2d at 273 ("Having determined that Act 120 was complied with, we have no hesitation in deciding that the appellee Commonwealth of Pennsylvania has not failed in its duties as trustee under the constitutional article.").

Environmental Rights Amendment, and only eight of fifty-five cases heard by the Environmental Hearing Board—which hears appeals of PADEP decisions[97]—found the same.[98]

After four decades of undermining the Environmental Rights Amendment under the *Payne* test, the Pennsylvania Supreme Court did a significant about-face in its 2013 plurality opinion in *Robinson Township v. Commonwealth*.[99] In a landmark opinion, the supreme court dismissed *Payne* as incompatible with the Environmental Rights Amendment's text and interpreted the Amendment to provide a number of significant protections to citizens.[100] While the section of the opinion that interprets and applies the Environmental Rights Amendment was joined by a mere plurality of the justices, making it non-precedential, much of that section's content was reiterated in the subsequent majority opinion of *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF*).[101] The *PEDF* opinion likewise dismissed the *Payne* test and interpreted the text of the Amendment as granting environmental protections that largely overlap with those granted by the plurality in *Robinson Township*.[102] Part III of this Note further discusses the degree to which the *PEDF* decision codified—or failed to codify—key aspects of the *Robinson Township* opinion.

The *Robinson Township* decision overhauled Pennsylvania's jurisprudence under the Environmental Rights Amendment and serves as the current bedrock for environmental

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[97] *Welcome*, PA. ENV'T HEARING BD., http://ehb.courtapps.com/public/index.php [https://perma.cc/BW2R-GRQQ] (last visited Mar. 22, 2020).

[98] John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 344–48 (2015).

[99] Robinson Twp. v. Commonwealth, 83 A.3d 901, 967 (Pa. 2013). *Robinson Township* again reached the Pennsylvania Supreme Court in 2016, although that opinion does not concern the Environmental Rights Amendment and is therefore not discussed in this Note. Robinson Twp. v. Commonwealth, 147 A.3d 536 (Pa. 2016).

[100] *Id.*

[101] *See* Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 713 n.2 (Pa. Commw. Ct. 2018) (Ceisler, J., dissenting) ("Our Court has, in the past, expressed a clear desire to limit the *Robinson Township* plurality's persuasive power as much as possible. . . . However, given the Supreme Court's *PEDF II* opinion, in which the majority liberally quotes and repeatedly cites *Robinson Township*, I believe we must now recognize that authority of former Chief Justice Castille's plurality opinion has been greatly enhanced.") (citation omitted).

[102] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 916 (Pa. 2017).

constitutionalism in the state.[103] It also presents a new inroad for environmental justice litigation. Part III summarizes this decision and subsequent case-law in this context.

III. *ROBINSON TOWNSHIP* AND THE DUTY OF IMPARTIALITY

The *Robinson Township* court finally established the Environmental Rights Amendment as a legitimate and practical tool for environmental advocates in Pennsylvania. Part III.A provides an overview of the *Robinson Township* opinion and describes its relationship to the Pennsylvania Supreme Court's later *PEDF* decision.[104] Part III.B narrows in on these decisions' still-unsettled environmental justice implications and outlines two alternate understandings of Pennsylvania's obligations under the Environmental Rights Amendment. Under the *Robinson Township* approach, state actors are bound by a substantive duty to avoid environmental decision-making that disproportionately harms certain communities;[105] under the *PEDF* approach, they must merely *consider* those disproportionate impacts in their decision-making process.[106] As Part III.B illustrates, neither of these two understandings has firmly settled in Pennsylvania environmental law, leaving room for environmental justice advocates to shape the law through future litigation.

A. The *Robinson Township* and *PEDF* Decisions

In *Robinson Township*, seven municipalities, an environmental organization, two individuals, and a physician collectively challenged several provisions of Act 13 of 2012, a set of amendments to Pennsylvania's Oil and Gas Act designed to foster unconventional gas production (hydraulic fracturing or fracking).[107] Among a number of other claims, the challengers

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[103] John C. Dernbach et al., Robinson Township v. Commonwealth of Pennsylvania*: Examination and Implications*, 67 RUTGERS U. L. REV. 1169, 1195 (2015) [hereinafter Dernbach et al., *Examination and Implications*] ("The plurality's opinion in *Robinson Township*, however, opens the door to fresh interpretations of constitutionally-embedded environmental rights provisions, especially those found to be 'on par' with other constitutional rights.").

[104] *Pa. Env't Def. Found.*, 161 A.3d at 916.

[105] *See* Robinson Twp. v. Commonwealth, 83 A.3d 901, 980 (Pa. 2013) ("This disparate effect is irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of 'all the people.' A trustee must treat all beneficiaries equitably in light of the purposes of the trust.") (quoting PA. CONST. art. I, § 27).

[106] *See Pa. Env't Def. Found.*, 161 A.3d at 933 ("The duty of impartiality requires the trustee 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.").

[107] Dernbach & Prokopchak, *supra* note 98, at 352.

argued that several of the act's provisions violated the Environmental Rights Amendment.[108] The court ruled unconstitutional sections of the act that asserted that the act preempted and superseded all local regulation of oil and gas operations;[109] that mandated state-wide uniformity among local ordinances to allow for "the reasonable development of oil and gas resources";[110] that required localities to permit industrial uses as a matter of right in every type of pre-existing zoning district;[111] and that mandated the PADEP to waive setback requirements for gas development as long as a permit applicant submitted a plan to protect Commonwealth waters.[112] Of particular relevance in the environmental justice context, the court based its ruling in part on the fact that the blanket provisions of the ordinance ignored the reality that industrial uses would "carry much heavier environmental and habitability burdens [in some communities] than others."[113] The court reasoned that the Commonwealth could not fulfill its mandate to "manage the corpus of the trust for the benefit of 'all the people'" if it could not consider the disparate effects of industrial uses in its siting decisions.[114]

In its ruling, the court dismissed the *Payne* test as incompatible with the text and purpose of the Amendment.[115] The court identified three primary infirmities in the *Payne* test: that it described the Commonwealth's obligations in far narrower terms than the Amendment itself; that it assumed that judicial relief was contingent upon legislative action; and that it minimized the constitutional duties of executive agencies and the judicial branch.[116]

As a result of these infirmities, the *Robinson Township* court turned to the text of the Amendment and identified three clauses therein.[117] The court found that the Amendment's first clause establishes a private right "of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment"; it also "affirms a limitation

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[108] *Robinson Twp.*, 83 A.3d at 913.

[109] 58 PA. CONS. STAT. § 3303 (2012) ("The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.").

[110] *Id.* § 3304 (b).

[111] *Id.* § 3304 (b)(3).

[112] *Robinson Twp.*, 83 A.3d at 971–1000.

[113] *Id.* at 980.

[114] *Id.*

[115] *Id.* at 967.

[116] *Id.*

[117] *Id.* at 950.

on the state's power to act contrary to this right."[118] The Amendment's second and third clauses establish Pennsylvania's public natural resources as part of a public trust under the common ownership of all people and impose fiduciary duties on the Commonwealth to conserve and maintain those resources.[119]

The court interpreted the scope of "public natural resources" broadly and as encompassing "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."[120] The court also recognized that, in enacting the Environmental Rights Amendment, the Pennsylvania Legislature intended the definition of "public natural resources" to "change over time to conform, for example, with the development of related legal and societal concerns."[121]

Rather than merely affirming that the state holds public natural resources in trust, the *Robinson Township* court described at length the specific fiduciary duties imposed upon the state.[122] The court held that state actors have duties "both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations)" over the public natural resources encompassed by the Amendment.[123] Furthermore, drawing on private trust law, the *Robinson Township* court identified three primary fiduciary duties—prudence, loyalty, and impartiality—under which the Commonwealth is bound in its

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[118] *Id.* at 951.

[119] *Id.* at 954–56. These public trust duties expand upon the traditional American notion of the public trust doctrine, which historically centers on "[t]he principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public's right to the use." *Public-Trust Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 459 (1892) ("The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare.").

[120] *Robinson Twp.*, 83 A.3d at 955. Legislative history also suggests that "public natural resources" has a broad scope, with Representative Kury citing air pollution from vehicles on roads and highways as one of the environmental harms the Amendment was meant to remediate. Dernbach & Sonnenberg, *supra* note 86, at 189.

[121] *Robinson Twp.*, 83 A.3d at 975. The court noted that Act 13 and fracking affect the public natural resources of surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest. *Id.* at 975.

[122] *Id.* at 954–59.

[123] *Id.* at 955–56.

role as trustee of Pennsylvania's public natural resources.[124] The first of these duties requires trustees "to exercise ordinary skill, prudence, and caution in managing the corpus of the trust";[125] the second requires them to "administer [the] trust solely in [the] beneficiary's interest."[126] It is the third of these duties—the duty of impartiality—that directly relates to the equitable distribution of environmental hazards.

In describing the duty of impartiality, the court stated that "dealing impartially with all beneficiaries means that the trustee must treat all equitably in light of the purposes of the trust."[127] Applying this duty, provisions of Act 13 were found unconstitutional when the Legislature's failure "to account for local conditions cause[d] a disparate impact upon beneficiaries of the trust."[128] Furthermore, the court found that the act violated the duty of impartiality because "the Department of Environmental Protection [was] not required, but [was] merely permitted, to account for local concerns in its permit decisions . . . [which] fail[ed] to ensure that any disparate effects [were] attenuated."[129] The court likewise took issue with the fact that the Act "marginalize[d] participation by residents, business owners, and their elected representatives with environmental and habitability concerns."[130] The court enjoined the application and enforcement of the sections of the act that violated these trustee duties.[131]

Because it was a plurality opinion, *Robinson Township* itself is merely persuasive on future courts.[132] However, the Pennsylvania Supreme Court's majority opinion in *PEDF* made much of its analysis in *Robinson Township* binding law.[133] Importantly, that opinion—like *Robinson Township*—relied on private trust law to determine that the state was bound by a duty of impartiality in managing its public trust assets.[134]

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[124] *Id.* at 957.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 959.
[128] *Id.* at 984.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 1000.
[132] Dernbach et al., *Recognition of Environmental Rights*, *supra* note 95, at 813.
[133] *See* Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).
[134] *Id.* at 930–33.

In *PEDF*, an environmental organization challenged the Commonwealth's decision to utilize proceeds from oil and gas leases for non-conservation purposes as violating the state's trustee duties.[135] The Pennsylvania Supreme Court held that state entities could use proceeds generated from public trust assets only for conservation and maintenance purposes.[136] In doing so, the court solidified *Robinson Township*'s rejection of the *Payne* test and declared that the text of the Amendment "contains an express statement of the rights of the people and the obligations of the Commonwealth with respect to the conservation and maintenance of our public natural resources."[137] The court also quoted *Robinson Township*'s imposition of the duties of prudence, loyalty, and impartiality, and stated that "[t]he duty of impartiality requires the trustee 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."[138] The court did not explicate on the duty further, nor reiterate the *Robinson Township* plurality's claim that the duty requires state actors to attenuate disparate impacts arising from their environmental decision-making. As a result, the aspects of the *Robinson Township* opinion that most directly relate to the environmental justice concerns discussed in Part II of this Note remain merely persuasive on Pennsylvania courts. Part III.B discusses the ramifications of this fact and examines the still uncertain role of the duty of impartiality after *PEDF*.

B. Environmental Justice Under the Revamped Environmental Rights Amendment

In its *Robinson Township* opinion, the court never connects its concerns about disparate environmental impacts to racial or socioeconomic discrimination. Yet, the court's central concern—the permitting of industrial uses without regard to the preexisting character of the affected community—parallels environmental justice advocates' concerns about siting additional environmental hazards in communities that already bear disproportionate burdens. As the court recognized, permitting industrial uses in certain communities creates a greater harm than permitting them elsewhere.[139] That is especially true when those communities are already encumbered by other industrial facilities.[140] If the duty of impartiality requires state actors to

[135] *Id.* at 925.
[136] *Id.* at 935.
[137] *Id.* at 916.
[138] *Id.* at 932–33.
[139] Robinson Twp. v. Commonwealth, 83 A.3d 901, 980 (Pa. 2013).
[140] *See supra* notes 28–30 and accompanying text.

consider local factors that cause certain communities to be disproportionately impacted by siting decisions, there is no reason why those factors could not encompass the cumulative environmental risks already facing overburdened communities.

In this regard, *Robinson Township* can be understood to have set the stage for environmental justice litigation challenging the continued siting of environmental hazards in low-income communities and communities of color that already bear a disproportionate number of polluting facilities. Yet following *Robinson Township* and *PEDF*, Pennsylvania courts have not further explicated the state's exact obligations under the duty of impartiality, and the *Robinson Township* and *PEDF* opinions in fact point to different understandings of those obligations. This section accordingly analyzes different ways this duty might be understood under current law, specifically as it relates to the siting and permitting of environmental burdens in overburdened communities.

PEDF, unlike *Robinson Township*, was a binding majority opinion. The *PEDF* court described the duty of impartiality as "requir[ing] the trustee 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."[141] Taken alone, this paragraph may be read as imposing on the state only procedural requirements to consider the interests of all trust beneficiaries—in this case, the communities affected by environmental decision-making—before making a decision that may or may not align with those interests. Such an understanding would roughly follow the model imposed by statutes such as the National Environmental Policy Act (NEPA), under which the judiciary analyzes whether a federal agency adequately considered and disclosed its impact on the environment as a matter of procedure, rather than considering the substance or merits of an agency action.[142]

In contrast, the plurality opinion in *Robinson Township* points to the duty of impartiality as a substantive duty that requires agencies to avoid environmental decisions that produce disparate impacts on certain communities. As discussed above, the *Robinson Township* court found that the duty of impartiality had been violated when the Legislature's failure "to account for local conditions cause[d] a disparate impact upon beneficiaries of

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[141] *Pa. Env't Def. Found.*, 161 A.3d at 933.

[142] Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENV'T L. REV. 207, 208 (1992).

the trust," and when the Legislature "fail[ed] to ensure that any disparate effects [were] attenuated."[143] While the first failure aligns with the sort of procedural considerations that the *PEDF* court would adopt, the second failure suggests that the Legislature would violate its fiduciary duty of impartiality if it produced disparate impacts without attenuating those impacts, thereby imposing a more substantive obligation on the state. This substantive obligation is reflected elsewhere in the opinion, such as in the court's insistence that "the disparate impact on some citizens sanctioned by Section 3304 of Act 13 [is] incompatible with the express command of the Environmental Rights Amendment."[144]

In *Delaware Riverkeeper Network v. Commonwealth*, which was adjudicated after *Robinson Township* and *PEDF*, the Environmental Hearing Board had the opportunity to further examine the relationship between the duty of impartiality and state siting and permitting decisions.[145] In a consolidated appeal, environmental organizations and private residents challenged PADEP's decision to issue and reissue permits for fracking wells.[146] The appellants claimed that the Department "breached its duty of impartiality by treating the Geyer Well Site as if it were no different than any other wellsite, despite the presence of a large, health-sensitive population nearby—children and by approving an unknown amount of further degradation to local air quality in a community that they assert is already suffering from degraded air."[147] In analyzing this claim, the Board repeated *PEDF*'s characterization of the duty of impartiality, noting that it "requires the trustee 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."[148]

Ultimately, the Board concluded that the Department had not "failed to give due regard to the interests of the various beneficiaries of the public natural resources in the vicinity of the Geyer Well Site."[149] However, its reasoning rested primarily on issues of evidence and failed to reveal much about the Board's understanding of PADEP's obligations under the duty of impartiality. The Board found that the appellant's expert report

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[143] *Robinson Twp.*, 83 A.3d at 984.

[144] *Id.* at 981.

[145] Del. Riverkeeper Network v. Commonwealth, No. 2014-142-B, 2015-157-B, 2018 WL 2294492 (Pa. Env't Hearing Bd. May 11, 2018).

[146] *Id.*

[147] *Id.* at *32 (citations omitted).

[148] *Id.* at *25.

[149] *Id.* at *33.

"was [not] sufficiently related to the particular circumstances at the Geyer Well Site to require the Department to have given it additional consideration beyond the review it conducted and the requirements outlined in the Geyer Well Permits," and decided that the appellants had "not proven that there will be unreasonable degradation of the local air quality as a result of the Department's permitting action."[150] The Board did not specify what the Department's obligations would have been had appellants established that the Greyer Well Site would have unreasonably degraded the local air quality. As a result, the Board's opinion failed to further solidify an understanding of the duty of impartiality in Pennsylvania environmental law.

Following *PEDF*, PADEP has seemed to adopt a procedural understanding of the duty of impartiality. In 2018, PADEP's Policy Office proposed an amendment to its Environmental Justice Public Participation Policy that provides non-binding procedures for community input when a company applies for an environmental permit to operate in an environmental justice community. In its proposed amendment, PADEP suggests that these procedures for community input satisfy the department's obligations to low-income communities and communities of color under the Environmental Rights Amendment.[151]

The proposed Public Participation Policy reflects a procedural understanding of the duty of impartiality, which is satisfied by consideration of a decision's impact on affected communities. However, a deeper analysis of the duty of impartiality in Pennsylvania law reveals that PADEP and the Pennsylvania courts should also adopt the *Robinson Township* decision's substantive requirements. Part IV accordingly argues

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[150] *Id.*

[151] PA. DEP'T ENV'T PROT. POL'Y OFF., 012-0501-002, DRAFT: ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION POLICY 3 (June 13, 2018), http://files.dep.state.pa.us/PublicParticipation/Office%20of%20Environmental%20Advocacy/EnvAdvocacyPortalFiles/2018/06-10/Draft%20EJ%20Public%20Participation%20Policy.pdf [https://perma.cc/44A9-SEBE] ("The Equal Rights Amendment (ERA) can be used as a tool available to the community to address equal justice in low income and minority communities, and may help the most vulnerable communities while improving a sustainable Pennsylvania."). While the quotation mentions the "Equal Rights Amendment" rather than the "Environmental Rights Amendment," context indicates that PADEP in fact meant the latter. The constitutional provision commonly referred to as Pennsylvania's Equal Rights Amendment does not relate to either environmental justice or low-income and minority communities more generally, but instead mandates that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28.

that the Pennsylvania judiciary should understand the duty of impartiality as prohibiting the additional siting of environmental hazards in communities that already bear disproportionate burdens.

IV. UNDERSTANDING THE DUTY OF IMPARTIALITY IN PENNSYLVANIA LAW

Since *PEDF*, Pennsylvania courts have not defined the exact scope of the duty of impartiality. The *Robinson Township* court's mandate that state actors must "treat all [beneficiaries] equitably in light of the purposes of the trust" does not resolve the issue, as differing conceptions of environmental equity would result in differing state obligations.[152] In light of this uncertainty, future Pennsylvania courts should take seriously the *PEDF* court's statement that "the proper standard of judicial review [for the Environmental Rights Amendment] lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment."[153] Since the text of the Amendment does not detail the state's trustee duties, Pennsylvania trust law provides the basis for my analysis of the state's obligations.[154]

In order to analyze the duty of impartiality in the context of environmental equity, Part IV.A first summarizes how different conceptions of equitable treatment correlate with different siting schemes. Part IV.B next analyzes how the duty of

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[152] Robinson Twp. v. Commonwealth, 83 A.3d 901, 959 (Pa. 2013).

[153] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 930 (Pa. 2017).

[154] The legislative history associated with the Amendment provides little help in determining what conception of environmental equity the Amendment embodies. Broadly speaking, the legislative history frames the Amendment as a response to the depletion and degradation of humanity's physical environment. *See* Dernbach & Sonnenberg, *supra* note 86, at 188–90. It does not consider the array of distributional concerns broadly encompassed under the term "environmental justice." The closest that the legislative history gets to addressing matters of environmental inequality can be found in broad statements about maintaining the environment for the benefit of *everyone*, rather than a select few. In a Question and Answer accompanying the Amendment's adoption, Representative Kury, the Amendment's Chief Legislative Sponsor, clarified that the Amendment "establishes that the public natural resources of the Commonwealth belong to all the people, including future generations, and that the Commonwealth is to serve as Trustee of our natural resources for future generations." *Id.* at 270. He further stated that "[t]he Resolution would benefit all of the people, and would go a long way toward tempering any individual, company, or governmental body which may have an adverse impact on our natural or historic assets." *Id.* While these statements may emphasize the Amendment's broad applicability, they do not explain how the government should manage its public trust resources nor clarify whether the Amendment could or should serve as a baseline for progressive siting.

impartiality functions in Pennsylvania trust law and argues that it imposes substantive requirements on trustees to avoid actions that would harm one trust beneficiary for the benefit of another, along with procedural requirements to consider the interests of all beneficiaries in the first place. Finally, Part IV.C argues that Pennsylvania courts, in maintaining fidelity to Pennsylvania trust law, should enforce a scheme of substantive environmental equity, in which state actors are prohibited from the continued siting and permitting of environmental hazards in communities that already bear disproportionate environmental burdens.

A. Differing Conceptions of Environmental Equity

As the duty of impartiality requires state actors to "treat all [beneficiaries] equitably in light of the purposes of the trust," [155] future courts deciding the limits of the duty of impartiality must provide a definition for "equitable" treatment. The definition is not self-evident, as New York University Law Professor Vicki Been makes clear in her 1993 article *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*.[156] In her article, Professor Been "explores what various conceptions of equality would look like if translated into concrete siting programs."[157] The article considers the siting of Locally Undesirable Land Uses (LULUs) generally, a category which includes environmental hazards such as waste sites alongside other land uses including homeless shelters and low-income housing. Her study originates from a recognition that "different theories of fairness should lead to radically different siting programs, so that one cannot adequately evaluate a fair siting proposal without first identifying its underlying conception of fairness."[158] As the duty of impartiality centers on treating all beneficiaries equitably, different understandings of equity or fairness should generate different understandings of the obligation of the state and the courts in upholding the duty.

Professor Been begins her study by outlining seven conceptions of fairness and grouping them into three categories: those that focus on the pattern of distribution of LULUs, those that focus on the efficiency of the distribution, and those that

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[155] *Robinson Twp.*, 83 A.3d at 959.

[156] Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

[157] *Id.* at 1006.

[158] *Id.* at 1009.

focus on the procedure by which the distribution was effected.[159] The first category includes conceptions of fairness as requiring equal division between the burdens of LULUs, in terms of either pure geographic distribution or compensation for unequal distribution of burdens; as requiring progressive siting of LULUs in advantaged neighborhoods; and as requiring an equal initial split of LULUs and competitive bidding for and against LULUs after the initial split.[160] The second category encompasses a notion of fairness as cost-internalization, in which those that benefit from LULUs internalize the costs through physical distribution or compensation schemes.[161] Finally, the third category encompasses fairness as requiring the treatment of individuals and communities as equals, leading to siting processes that are equally attentive to the interests of all communities regardless of race or class.[162]

This final, procedural conception of fairness drives the "impact statement" approach of environmental justice, in which "agencies must consider the concentration of uses in choosing or approving sites."[163] The impact statement approach underlays President Clinton's Executive Order 12898 ("Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations"), which focuses on "identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [agency] programs, policies, and activities on minority populations and low-income populations,"[164] without requiring that environmental justice factors "play a determining factor in siting, rulemaking, and permitting decisions."[165]

In contrast, the first category of fairness underpins legislation that requires dispersion and deconcentration of LULUs by prohibiting their siting in communities once those communities reach a certain threshold concentration, along with legislation that requires all communities bear a "fair share" of LULUs.[166] Such legislation imposes substantive obligations on

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[159] *Id.* at 1028.

[160] *Id.* at 1028–55.

[161] *Id.* at 1055–60.

[162] *Id.* at 160–68.

[163] *Id.* at 172.

[164] Exec. Order No. 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 16, 1994).

[165] Albert Huang, *The 20th Anniversary of President Clinton's Executive Order 12898 on Environmental Justice*, NAT. RES. DEF. COUNCIL (Feb. 10, 2014), https://www.nrdc.org/experts/albert-huang/20th-anniversary-president-clintons-executive-order-12898-environmental-justice [https://perma.cc/8QEY-M6X2].

[166] Been, *supra* note 156, at 1068–72, 1074–76.

the state, prohibiting siting and permitting decisions when those decisions have discriminatory effects. Of course, in order to fulfill these substantive obligations, the state must first consider the impact of potential decisions on affected groups. In other words, procedural requirements for the identification of disproportionate impacts are necessary preconditions for the implementation of a dispersive or progressive siting scheme. As Part IV.B demonstrates, this mixture of substantive and procedural obligations, rather than the merely procedural requirements of the "impact statement" approach, most readily parallels the obligations imposed on trustees by the duty of impartiality in Pennsylvania trust law.

B. The Duty of Impartiality in Pennsylvania Private Trust Law

A survey of how the duty of impartiality functions in Pennsylvania trust law reveals that it imposes both substantive and procedural obligations on trustees. In surveying Pennsylvania trust law, this section begins by analyzing the five sources cited by the *Robinson Township* and *PEDF* courts, which together provide a substantial but non-exhaustive account of the duty of impartiality at the time of the enactment of the Environmental Rights Amendment. The *Robinson Township* court provided three citations for the duty of impartiality in Pennsylvania trust law: 20 Pa. Cons. Stat. section 7773, Restatement (Second) of Trusts section 232 (Impartiality between Successive Beneficiaries), and the 1980 Pennsylvania Supreme Court opinion from *In re Hamill's Estate*.[167] The *PEDF* court additionally cited Restatement (Second) of Trusts section 183 and the 1979 Pennsylvania Supreme Court opinion in *Estate of Sewell*.[168]

Of these sources, neither 20 Pa. Cons. Stat. section 7773, which implements in Pennsylvania Law section 803 of the Uniform Trust Code, nor the Restatement (Second) of Trusts clarifies the extent to which the duty of impartiality imposes substantive obligations on trustees. However, both *In re Hamill's Estate* and *Estate of Sewell* indicate that the courts understood the duty as imposing substantive obligations,[169] a view which is supported by the more recent Restatement (Third) of Trusts.[170]

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[167] Robinson Twp. v. Commonwealth, 83 A.3d 901, 959 (Pa. 2013).

[168] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 933 (Pa. 2017).

[169] Estate of Sewell, 409 A.2d 401, 402 (Pa. 1979); *In re* Hamill's Estate, 410 A.2d 770, 773 (Pa. 1980).

[170] RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. c (AM. L. INST. 2007).

> 20 Pa. Cons. Stat. section 7773 reads as follows:
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> > If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests in light of the purposes of the trust. The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes of the trust.[171]

Under this statute, the trustee must give "due regard" to the beneficiaries' interests; in other words, the trustee must consider those interests when investing, managing, and distributing the trust property.[172] Beyond that requirement, the trustee must "act impartially" and "treat the beneficiaries equitably."[173] However, as discussed above, demands for "equitable" treatment do not necessarily correlate with demands for substantive equity and could, in theory, be satisfied by mere consideration of the beneficiaries' interests. The Uniform Law Comment associated with the statute does not resolve the ambiguity. It states that, "[i]n fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law."[174] While this comment suggests that decisions as to future allocation of trust assets can be based on past inequities, it does not mandate that trustees act in a certain way.

Restatement (Second) of Trusts sections 183 and 232 also fail to provide significant clarity. Section 183 states in part: "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."[175] Section 232 does little more than expand the general rule contained in section 183 to successive beneficiaries, reading: "If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests."[176] Neither of these sections explain what specific actions trustees must take to satisfy their obligations under the

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[171] 20 PA. CONS. STAT. § 7773 (2020).
[172] *Id.*
[173] *Id.*
[174] 20 PA. Stat. and Cons. Stat.§ 7773 uniform law cmt. (West 2020).
[175] RESTATEMENT (SECOND) OF TRUSTS § 183 (AM. L. INST. 1959).
[176] RESTATEMENT (SECOND) OF TRUSTS § 232 (AM. L. INST. 1959).

duty. However, the editors' comments to the sections are of more help; in particular, comments under section 232 clearly indicate that the duty imposes substantive obligations on the trustee.[177]

Comment b of section 232 provides the clearest explication of the substantive obligations imposed under the duty of impartiality. It outlines the trustee's duties to successive beneficiaries, including the duty "not to sacrifice income for the purpose of increasing the value of the principal," and the "duty to a life beneficiary not to purchase or retain unproductive property." [178] While these particular substantive obligations specifically apply in the context of subsequent beneficiaries, case law indicates that substantive obligations also apply in the context of simultaneous beneficiaries.[179]

The private trust law cases that the Pennsylvania Supreme Court cited in *Robinson Township* and *PEDF* both indicate that the duty of impartiality imposes substantive obligations on trustees. In *In re Hamill's Estate*, the court cited section 232 comment b to support the rule that a trustee has an obligation to maintain the trust for the benefit of present and future beneficiaries and should not sacrifice the interest of one for the other.[180] In *Estate of Sewell*, the Pennsylvania Supreme Court found that a trustee violated the duty when the trustee (1) failed to "confirm appellant's status as a beneficiary" and (2) "continu[ed] to make payments of trust income to" a single beneficiary. [181] The duty here is twofold and encompasses obligations both procedural—the duty to consider the status of

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[177] RESTATEMENT (SECOND) OF TRUSTS § 232 cmt. b. (AM. L. INST. 1959).

[178] *Id.* Comments under section 183 indicate that a trustee may be empowered to favor one beneficiary over the other if the trust or will at issue clearly indicates an intent for such favoritism. RESTATEMENT (SECOND) OF TRUSTS § 183 cmt. a (AM. L. INST. 1959) ("By the terms of the trust the trustee may have discretion to favor one beneficiary over another. The court will not control the exercise of such discretion, except to prevent the trustee from abusing it"). In *Estate of Pew*, a private trust case, the Pennsylvania Superior Court analyzed this comment and stated that "[w]hether or not the testator has empowered his trustees here to favor the named income beneficiaries over the charitable remainderman, or vice versa, is a question of intent." 655 A.2d 521, 542 (Pa. Super. Ct. 1994). The Court further clarified that such "intent must be derived from an examination of the entire will, viewed in the light of the circumstances of the testator." *Id.*

[179] *See* Estate of Sewell, 409 A.2d 401, 402 (Pa. 1979) (holding that a trustee whose status is not open to dispute is entitled to trust income along with other trustees).

[180] *In re* Hamill's Estate 410 A.2d 770, 773 (Pa. 1980).

[181] *Estate of Sewell*, 409 A.2d at 402.

all beneficiaries—and substantive—allocating payments in an equitable fashion.

More recently, in *Snyder v. Commonwealth*, the Pennsylvania Supreme Court held:

> [In the case of] a trust with two life beneficiaries, neither of whom's needs were to be considered dominant, the trustee was required to carefully consider how his actions toward one beneficiary would affect the other; and he could not justifiably act to benefit one when to do so would irreparably damage the interest of the other.[182]

In this framing, the question of whether the trustee *intended* to benefit one beneficiary over the other is not determinative; the key issue is whether the trustee did in fact create disparate effects by benefitting one beneficiary while hurting the other. These cases, two of which were cited in the *Robinson Township* and *PEDF* opinions, together indicate that the duty of impartiality is both procedural and substantive.

The Restatement (Third) of Trusts section 79 (Duty of Impartiality; Income Productivity) has upheld that understanding of the duty. A comment under section 79 identifies "'substantive' aspects of impartiality."[183] These substantive aspects require trustees to "avoid injecting their personal favoritism into their decision[-]making and conduct in trust administration and . . . make diligent and good-faith efforts to identify, respect, and balance the various beneficial interests when carrying out the trustees' fiduciary responsibilities in managing, protecting, and distributing the trust estate, and in other administrative functions."[184] This comment clarifies that the trustee must both "identify" and "balance" the beneficiaries' interests: obligations that are procedural and substantive.[185] Furthermore, in requiring trustees to balance the beneficiaries' interests, the Restatement imposes a duty to avoid inequitable trust allocation even when that allocation does not derive from an intentional decision to favor one beneficiary at the expense of another.

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[182] Snyder v. Commonwealth, 598 A.2d 1283, 1287 (Pa. 1991). Other Pennsylvania cases touch on the duty of impartiality without adding substantive analysis. *See, e.g.*, *In re* Neafie's Estate, 191 A. 56 (Pa. 1937); *In re* Tr. Under Agreement of Kaiser, 572 A.2d 734 (Pa. 1990); *In re* Weiss's Estate, 309 A.2d 793 (Pa. 1973); *In re* Longbotham's Estate, 29 A.2d 481 (Pa. 1943).

[183] RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. c (AM. L. INST.. 2007).

[184] *Id.*

[185] *Id.*

This study of Pennsylvania trust law reveals that the duty of impartiality imposes both procedural and substantive requirements on the state. Following the *Robinson Township* and *PEDF* courts' usage of Pennsylvania private trust law as the basis for its understanding of the state's public trust duties,[186] Pennsylvania courts should require the state to not only consider whether siting and permitting decisions would have a disparate impact on certain communities, but also to actually avoid those impacts. As such, the duty of impartiality should allow litigants a cause of action against the sort of disparate impact environmental discrimination litigated under the Civil Rights Act prior to *Sandoval*.

C. Shaping an Environmental Justice Claim Under the Duty of Impartiality

Causes of action under the duty of impartiality could take several forms. Following in the footsteps of the *Robinson Township* and *PEDF* petitioners, litigants may file a Complaint for Declaratory Judgment pursuant to Pennsylvania's Declaratory Judgments Act, seeking the Commonwealth Court to declare Pennsylvania's current permitting scheme unconstitutional. Litigants could alternatively appeal the issuance of specific permits that disproportionately impact overburdened communities. Litigants may also have claims against municipalities or local land use boards that have used their zoning powers to concentrate environmental hazards in communities of color, although such a claim follows less directly from *Robinson Township*'s discussion of disparate impacts arising from the permitting process.

1. Claims Under the Declaratory Judgments Act

Pennsylvania's Declaratory Judgments Act provides that "[c]ourts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations," and that such "declaration[s] may be either affirmative or negative in form and effect . . . [and] shall have the force and effect of a final judgement or decree."[187] The *Robinson Township* petitioners challenged Act 13 under the Declaratory Judgments Act, [188] and the *PEDF* petitioners used this act to seek the Commonwealth Court's declaration as to whether Pennsylvania's

[186] Robinson Twp. v. Commonwealth, 83 A.3d 901, 954–59 (Pa. 2013); Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 930 (Pa. 2017).

[187] 42 PA. CONS. STAT. § 7532 (2020).

[188] *Robinson Twp.*, 83 A.3d at 990.

Fiscal Code and the General Assembly's fiscal appropriations violated the Environmental Rights Amendment.[189]

Litigants could likewise use the Declaratory Judgments Act to seek the court's declaration as to whether the Commonwealth's environmental permitting legislation and PADEP's implementing regulations violate the Environmental Rights Amendment by failing to include a mechanism for preventing the continued siting of environmental hazards in overburdened communities. Of course, the regulatory scheme governing the permitting of environmental hazards differs depending on the facility being permitted—for example, waste facilities as opposed to hydraulic fracturing wells—and litigants would have to separately challenge the permitting of different sorts of environmental hazards. Given the *Robinson Township* and *PEDF* petitioners' success in using the Declaratory Judgments Act to challenge state action under the Environmental Rights Amendment, this procedure stands out as the most feasible method to challenge Pennsylvania's siting scheme.

In a successful Declaratory Judgments Act petition, the court's order would declare the applicable statutes or regulations unconstitutional, and the General Assembly and/or PADEP would then be tasked with remedying that unconstitutionality. In doing so, the federal Environmental Equal Rights Act of 1993 could provide one model for how to incorporate distributive criteria into permitting decisions to remedy any constitutional violation. The Environmental Equal Rights Act was an unsuccessful attempt to amend the Solid Waste Disposal Act to incorporate racial criteria into evaluations of siting approvals.[190] Under the act, affected citizens could have challenged the siting of a waste facility if the proposed location was within two miles of another waste facility, Superfund site, or facility that releases toxic contaminants; the proposed location was within a community with a higher than average percentage of low-income people or people of color; and the proposed facility would have adversely affected the human health, air, soil, or other environmental asset of the community or a portion of the community.[191] The challenge would fail if the defendant could prove that no alternative location existed within the state that posed fewer risks to human health and the environment and that the proposed facility would not release contaminants or was

[189] *Pa. Env't Def. Found.*, 161 A.3d at 925.
[190] H.R. 1924, 103d Cong. (1993).
[191] *Id.*

unlikely to increase the cumulative impact of contaminants on any residents of the community.[192] While these exact protocols are merely one example of standards by which to incorporate environmental equity concerns into permitting decisions, they could serve as a template for legislation and regulation seeking to incorporate the duty of impartiality.

2. PADEP Permit Appeals

In addition to challenging the statutory and regulatory schemes for the permitting of environmental hazards under the Declaratory Judgments Act, affected citizens and community groups can also directly challenge the issuance of environmental permits for facilities to be operated in disproportionately burdened communities. The specific mechanisms for such a challenge would vary based on the type of facility being permitted. For example, 25 Pa. Code section 271.201 provides permit criteria for the approval of municipal waste facilities. That regulation mandates that a "permit application will not be approved unless the applicant affirmatively demonstrates that . . . [t]he requirements of PA. CONST. art. 1, § 27 have been complied with."[193] Community groups could use this regulation to sue PADEP for violating the duty of impartiality by issuing a municipal waste permit in a community that already bears a disproportionate burden. The Municipal Waste Planning, Recycling and Waste Reduction Act requires PADEP to "[a]dminister the municipal waste planning, recycling and waste reduction program pursuant to the provisions of this act and the regulations promulgated pursuant thereto,"[194] and provides that "any aggrieved person may commence a civil action on his own behalf against any person who is alleged to be in violation of this act." [195] The Environmental Hearing Board has original jurisdiction over citizen suit actions brought against PADEP under the aforementioned provision,[196] and the Commonwealth Court in turn has exclusive appellate jurisdiction over any Environmental Hearing Board final order. [197] Litigants could accordingly use 25 Pa. Code section 271.201 to challenge PADEP's failure to comply with the duty of impartiality by permitting a waste facility in an already disproportionately burdened community.

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[192] *Id.*
[193] 25 PA. CODE § 271.201.
[194] 53 PA. CONS. STAT. § 4000.301(a) (2020).
[195] 53 PA. CONS. STAT. § 4000.1711(a) (2020).
[196] 53 PA. CONS. STAT. § 4000.1711(b) (2020).
[197] 42 PA. CONS. STAT. § 763(a)(2) (2020).

Since "the public trust provisions of Section 27 are self-executing,"[198] affected individuals could challenge facilities even if the governing regulations for permitting of those facilities do not explicitly incorporate the Environmental Rights Amendment. Pennsylvania administrative law provides that "[a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals."[199] Parties can use such an appeal to "question[] the validity of the statute" which governed the agency action.[200] As a result, permit appeals could be a forum for challenging permitting schemes that fail to adequately fulfill the Commonwealth's duty of impartiality by attenuating the disparate impacts of permitting decisions.

3. Challenges to Municipalities or Local Agencies

While the most obvious defendant for a duty of impartiality claim would be PADEP or the Commonwealth as a whole, suits could also proceed against local governments and land use agencies that concentrate environmental hazards in overburdened communities via zoning or other land use decisions. The *Robinson Township* court implied that municipalities are bound by the same trust obligations as the state, noting in dicta that "[t]he aggrievement alleged by the political subdivisions is not limited to vindication of individual citizens' rights but extends to allegations that the challenged statute interferes with the subdivisions' constitutional duties respecting the environment and, therefore, its interests and functions as a governing entity."[201] In asserting that subdivisions have constitutional duties to respect the environment, the court opened the door for litigation directly challenging municipalities' abuse of discretion in exercising those duties. [202]

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[198] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 937 (Pa. 2017).

[199] 2 PA. CONS. STAT. § 702 (2020). A party's interest must also be substantial. *See* MEC Pa. Racing v. Pa. State Horse Racing Comm'n, 827 A.2d 580, 588 (Pa. Commw. Ct. 2003), *as amended* (July 15, 2003). A "direct" interest arises when the adjudication causes harm to the appellant's interest, and a "substantial" interest arises when there is a discernible adverse effect to an interest other than the abstract interest of all citizens in having others comply with the law. *See id.* (citing Pa. Auto. Ass'n v. State Bd. of Vehicle Mfr., Dealers & Salespersons, 550 A.2d 1041, 1043 (Pa. Commw. Ct. 1988); William Penn Parking Garage Inc. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975)).

[200] 2 PA. CONS. STAT. § 703 (2020).

[201] Robinson Twp. v. Commonwealth, 83 A.3d 901, 920 (Pa. 2013).

[202] Dernbach et al., *Examination and Implications*, *supra* note 103, at 1185.

More recently, the Pennsylvania Commonwealth Court addressed the extent to which the Environmental Rights Amendment binds local governments.[203] The court noted that, "[w]hen a municipality enacts a zoning ordinance, it is bound by the Environmental Rights Amendment and by all the rights protected in Article I of the Pennsylvania Constitution." [204] However, the court also found that *Robinson Township* "did not give municipalities the power to act beyond the bounds of their enabling legislation," meaning that "[m]unicipalities lack the power to replicate the environmental oversight that the General Assembly has conferred upon DEP and other state agencies."[205] Finally, the court noted that, in the context of oil and gas development, "a municipality may use its zoning powers only to regulate *where* mineral extraction takes place . . . [and] does not regulate *how* the gas drilling will be done."[206] While this decision limited municipalities' environmental obligations, it did not rule out potential actions against them for violating the duty of impartiality since environmental justice in this context is precisely a matter of *where* the permitted activity takes place. Accordingly, causes of action can arise at the level of local land use decision-making, rather than being confined to permitting decisions by PADEP and other state-wide actors.

Litigants could use the Declaratory Judgments Act to seek a declaration that the actions of municipalities or local land use agencies violated the duty of impartiality. Alternatively, they could appeal the decision of a local land use agency pursuant to 2 Pa. Cons. Stat. section 752, which provides that "[a]ny person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals." [207] These local actions would allow individuals the opportunity to challenge the zoning decisions that underlay the inequitable permitting of environmental hazards,[208] rather than only challenging the permitting schemes themselves.

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[203] Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 695 (Pa. Commw. Ct. 2018), *appeal denied*, 208 A.3d 462 (Pa. 2019).

[204] *Id.*

[205] *Id.* at 697.

[206] *Id.*

[207] 2 PA. CONS. STAT. § 752 (2020).

[208] *See supra* notes 43–50 and accompanying text.

V. THE POSSIBILITY FOR ENVIRONMENTAL JUSTICE LITIGATION UNDER THE DUTY OF IMPARTIALITY IN OTHER STATES

The *PEDF* court found Pennsylvania's obligations under the Environmental Rights Amendment to be relatively unique, claiming that "Pennsylvania deliberately chose a course different from virtually all of its sister states," and arguing that this was a reflection of "the Commonwealth's experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens' quality of life."[209] Despite these claims, Pennsylvania is not wholly unique in incorporating the public trust doctrine into its constitution. This section accordingly analyzes other states' constitutions to identify where jurisprudential developments similar to those associated with *Robinson Township* may be possible. This survey merely identifies which states are the likeliest candidates for such developments and should not be understood to categorically rule out the possibility of similar developments elsewhere.

Of course, the most direct way for the duty to be incorporated in other states or federally is through direct adoption of new constitutional amendments that codify the government's duty. As a result of *Robinson Township* and the revamped Environmental Rights Amendment jurisprudence, a "Green Amendment Movement" has advocated for "constitutional-level protections for the inalienable right for a healthy environment in every constitution, in every state across the nation, and eventually at the federal level."[210] *Robinson Township* co-plaintiff and Delaware Riverkeeper Maya van Rossum has specifically advocated for the nation-wide adoption of constitutional amendments that would impose duties of impartiality on state actors under the theory that such amendments would serve environmental justice goals by preventing said actors from "target[ing] or sacrific[ing] a single community with repeated environmental harm in order to better protect the environment, health, goals, and rights of another

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[209] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 918–19 (Pa. 2017).

[210] Natasha Geiling, *The Radical Movement to Make Environmental Protections a Constitutional Right*, THINKPROGRESS (Dec. 22, 2017, 1:18 PM), https://archive.thinkprogress.org/green-amendment-movement-45a19f7c1ce7/ [https://perma.cc/6J8H-AEAF].

community." [211] At the federal level, the adoption of an environmental amendment that directly imposes responsibilities on the federal government has long been a focus of advocates,[212] but the ratification of such an amendment does not seem likely in the near future.

Since the possibility of passing state or federal amendments largely comes down to political will, and the federal judiciary has casted doubt on the existence of a federal public trust doctrine,[213] this Note instead analyzes which states already have the constitutional framework for the judicial application of fiduciary duties including the duty of impartiality. Because the duty arises as a public trust obligation, it could serve to invigorate environmental justice advocacy in states with expansive constitutional public trust doctrines, particularly in those states that foreground the duty of impartiality in their private trust law. If a state has both, then it is a good candidate for the imposition of the duty in the public trust context.

While the constitutions of forty-two states mention the environment or natural resource conservation, [214] only three states—Virginia,[215] Pennsylvania,[216] and Hawaii[217]—explicitly use public trust language in their environmental provisions. And while Virginia's constitution establishes that the Commonwealth has a policy "to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth," the only resources explicitly held in trust are "[t]he natural oyster beds, rocks, and shoals in the waters of the Commonwealth."[218] In contrast to the limited public trust assets defined in Virginia's constitution, Hawaii provides a broad framework for a

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[211] Maya K. van Rossum, *Letter in Support of Maryland House Bill 472*, GREEN AMENDS. FOR GENERATIONS (Feb. 20, 2019), https://forthegenerations.org/wp-content/uploads/2019/02/SD-MD-20190220-Mkvr-Testimony-and-Attachments.pdf [https://perma.cc/WNL5-YS8U].

[212] *See* Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment: Affirming Responsibilities Rather Than Declaring Rights May Be the Most Promising Route to the Objective*, 1 DUKE ENV'T L. & POL'Y F. 1 (1991).

[213] *See* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014) (citing PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012)).

[214] Klee, *supra* note 8, at 167.

[215] VA. CONST. art. XI, § 3.

[216] PA. CONST. art. I, § 27.

[217] HAW. CONST. art. XI, § 1.

[218] VA. CONST. art. XI, § 3.

constitutional public trust that could incorporate the duty of impartiality as a limit on environmental decision-making.[219]

Like Pennsylvania, Hawaii's Constitution explicitly incorporates the language of environmental rights[220] and the public trust. Its public trust provision reads:

> 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.[221]

By its terms, this provision should establish the same sort of public trust obligation as Pennsylvania's Environmental Rights Amendment. Furthermore, Hawaii's constitutional provisions regarding the environment, like Pennsylvania's Environmental Rights Amendment, are self-executing. [222] As of now, the Hawaiian courts have limited the "public natural resources" governed by encompassed by article 11, section 1 to "natural resources which are or have been in the possession of the State."[223] This differs from the *Robinson Township* court's claim that the state holds in trust all natural resources that implicate the public interest. [224] Even still, the public trust assets encompassed by this provision are far broader than those encompassed by the common law public trust doctrine in most states. [225]

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[219] HAW. CONST. art. XI, § 1.

[220] Article 11, section 9 of Hawaii's constitution, which establishes environmental rights, reads as follows: "Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law." HAW. CONST. art. XI, § 9.

[221] HAW. CONST. art. XI, § 1.

[222] Kent D. Morihara, *Hawai'i Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources*, 19 U. HAW. L. REV. 177, 214 (1997).

[223] *Id.* at 198.

[224] Robinson Twp. v. Commonwealth, 83 A.3d 901, 955 (Pa. 2013).

[225] *See* Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENV'T L. 431, 439 (2015)

Hawaii trust law cites the Restatement (Third) of Trusts section 79 when discussing the duty of impartiality.[226] As discussed above, section 79 imposes substantive obligations on trustees.[227] As such, Hawaii is likely the state where the judiciary could most readily establish that fiduciary duties including the duty of impartiality apply in the public trust context, thereby creating a constitutional mandate for equity in environmental decision-making.

Of course, similar developments may prove possible elsewhere. Yet, pending constitutional amendment, more barriers currently exist to applying the duty of impartiality in the public trust context in other states. For one, certain state constitutions such as Montana's impose trust-like obligations on the state and even private parties without explicitly stating that the state holds environmental resources in "trust."[228] As the *Robinson Township* and *PEDF* courts' use of the duty of impartiality arose from an analogy to private trust law, the absence of trust language in constitutions such as Montana's will likely stand in the way of similar jurisprudential developments. Furthermore, for states in which the public trust doctrine remains a matter of common law, public trust assets are generally limited to navigable waters and submerged lands and do not encompass other natural resources, such as the air, which are most frequently impacted by permitting decisions.[229] While some states including New York and New Jersey have somewhat expanded the scope of public trust assets through the common law,[230] they have failed to approach the scope of public trust

("This writing illustrates how litigants have now used the public trust doctrine for over four decades in efforts to protect traditional water-based resources as well as, in some states, public lands, parks, shoreland and beaches, the atmosphere, animals, and plant species. However, it is important to keep in mind that in the majority of states, the public trust doctrine remains limited to navigable waters and submerged lands and has not been extended beyond access to and use of those resources.").

[226] Awakuni v. Awana, 165 P.3d 1027, 1036 (Haw. 2007).

[227] RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. c (AM. L. INST. 2007).

[228] *See* MONT. CONST. art. IX, § 1 ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").

[229] *See* Klass, *supra* note 225, at 439.

[230] *See* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 707–08 (2006) ("In certain states, courts have expanded the doctrine from its historic domain of ensuring public access to navigable waters to protecting use, access to, and preservation of all waters usable for recreational purposes, the dry sand area of beaches for public recreation purposes, parklands, wildlife and wildlife habitat connected to navigable waters, drinking water resources, and inland wetlands. Courts have also used the doctrine to resolve water appropriation issues and

assets contained in Pennsylvania's and Hawaii's constitutions. As a result, the framework does not currently exist in those states for the sort of jurisprudential developments exemplified by *Robinson Township* and *PEDF*. Advocates in those states should therefore continue to push for a constitutional amendment that incorporates the public trust doctrine and requires state actors to manage environmental resources in a sustainable and equitable fashion.

VI. CONCLUSION

While largely untested, Pennsylvania's Environmental Rights Amendment's imposition of the duty of impartiality on state actors should provide a significant tool for litigation targeting environmental racism and discrimination. In light of the recent *Robinson Township* and *PEDF* decisions, Pennsylvania agencies must consider the cumulative impact of previous environmental decision-making when making siting and permitting decisions and cease siting and permitting environmental hazards in communities that already bear a disproportionate burden. Furthermore, as the public trust doctrine and environmental constitutionalism continue to evolve in other states, the duty could help ensure that states are protecting all residents' environments equally. Of course, that result is far from guaranteed, but given the many roadblocks facing federal environmental justice litigation, such a state-oriented approach is one worth pursuing.

have held that even preexisting water rights may be curtailed if necessary to prevent reduction of water in inland streams or lakes that provide aesthetic values or habitats for animal and plant species or other natural resources.").