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Letter from Pollock to Payne (1 pg)
- attach: state constitutions, land use, and public resources: the gift outright (22 pgs
speech

23 pages

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SUPREME COURT OF NEW JERSEY

JUSTICE STEWART G. POLLOCK

COURT HOUSE
MORRISTOWN, N. J. 07960

March 15, 1984

Professor John Payne
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102

Dear John:

Thanks again for arranging for me to have the benefit of the services of Pam Reeve as a research assistant. She has performed faithfully and well. Right now, we are working on the footnotes. I gave the address last Saturday, and it was well received. I thought you might be interested in seeing a copy of my remarks.

Cordially,

STEWART G. POLLOCK

SGP:km
Enc.

STATE CONSTITUTIONS, LAND USE, AND PUBLIC RESOURCES: THE GIFT OUTRIGHT

ON DECEMBER 5, 1941, THE POET ROBERT FROST READ PUBLICLY FOR THE FIRST TIME HIS POEM "THE GIFT OUTRIGHT." HE READ IT JUST A SHORT DISTANCE AWAY AT A MEETING OF THE PHI BETA KAPPA SOCIETY OF WILLIAM & MARY COLLEGE. THE POEM IS ONLY EIGHTEEN LINES AND READS:

> The land was ours before we were the land's.
> She was our land more than a hundred years
> Before we were her people. She was ours
> In Massachusetts, in Virginia,
> But we were England's, still colonials,
> Possessing what we still were unpossessed by,
> Possessed by what we now no more possessed.
> Something we were withholding made us weak
> Until we found out that it was ourselves
> We were withholding from our land of living,
> And forthwith found salvation in surrender.
> Such as we were we gave ourselves outright
> (The deed of gift was many deeds of war)
> To the land vaguely realizing westward,
> But still unstoried, artless, unenhanced,
> Such as she was, such as she would become.

IN MY REMARKS I SHALL SKETCH THE RELATIONSHIP IMPLICIT IN FROST'S POEM BETWEEN AN IRREPLACEABLE RESOURCE, LAND, AND OUR MOST IMPORTANT PUBLIC RESOURCE, PEOPLE. I SAY "SKETCH" BECAUSE THE PICTURE IS, OF NECESSITY, INCOMPLETE. THE TOPIC IS TOO VAST FOR ONE SPEECH. BESIDES,

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The author wishes to thank Pamela Reeve, a law student at Rutgers University, Newark for her assistance in preparing these remarks.

Footnotes to be supplied.

institution, as Justice Cardozo observed, also "has a social function to fulfill." Property, like liberty, is subject to regulation for the general welfare. The power to protect health, safety, and the general welfare is a manifestation of the "police power" of the State and involves the principle of substantive due process.

What is in the "general welfare" may vary from state to state. Regulation of federal property may be extremely important to land use regulators in a state where the federal government owns over a half of the state. In another state where water is scarce, the diversion and protection of water rights may be crucial. And in states where people cannot afford decent housing, recognition of that problem may be unavoidable.

In each instance, one important consideration for a state supreme court is the identification of the role that it may legitimately play in the governmental process. That role will vary depending upon the jurisdiction of the court as defined in the state constitution and as applied in the every day business of government. It will vary also depending on the traditions of the court and expectations of the public.

In these remarks, I shall address three points. First, under the rubric of land use regulation, I shall discuss exclusionary zoning. As discussed in this speech, that concept refers to the use of the zoning power to exclude people of low or moderate income from a municipality.

Second, I shall describe the public trust doctrine, under which certain land, such as a public beach, is deemed subject to a trust for

the benefit of the public use. In analyzing these two topics, I shall refer to state court decisions, with special reference to two decisions of the New Jersey Supreme Court.

Candor compels me to disclose that I was not the author of the two opinions upon which I shall principally rely. The first decision, Southern Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., known generally as Mount Laurel II, involves exclusionary zoning and was written by Chief Justice Wilentz. The second decision, Matthews v. Bay Head, concerns the public trust doctrine and was written by Justice Schreiber.

Third, I shall discuss various state constitutional provisions that expressly treat protection of the environment and public resources.

The topic of land use regulations and public resources is so vast that I must mention some subjects that I do not have time to discuss fully. Time constraints preclude discussing the relationship between state constitutions and state land use regulations, on the one hand, and, on the other, the one-third of the United States that is owned by the federal government. Generally, state land use regulations, no matter what the source, end at the federal fence. Some have suggested that, except where the national interest is involved, federal lands should be subject to state land use regulations, but that is a topic for another day.

Second, I shall not discuss the possibility of section 1983 actions against municipalities, planning boards, or zoning boards of appeal. For present purposes, it is sufficient to note that under certain circumstances such claims may be brought in state or federal courts.

Third, I shall not discuss the potential conflict between state constitutional provisions and federal environmental controls or land use regulations. That territory is virtually unexplored by courts and scholars. I am told that even the Environmental Protection Agency has not researched potential conflicts between state constitutions and various federal environmental regulations.

For present purposes, it will suffice to note that various federal statutes expressly provide for cooperation between federal and state officials with respect to public lands and land use control. For example, existing federal legislation provides for cooperation between federal and state officials with respect to research and development facilities, surface coal mining, deep water ports, range lands, water in western states, the outer continental shelf, the coastal zone, and clean air.

I

At the risk of restating the familiar, I shall begin by outlining briefly the role of federal courts with respect to land use regulations. The traditional beginning point is Euclid v. Ambler, decided nearly fifty years ago, in which the United States Supreme Court declared that zoning ordinances will be sustained if they are a reasonable exercise of the police power, bearing a substantial relation to the public health, safety, morals, or the general welfare. As a general rule, however, federal courts have been disinclined to become involved in zoning cases. This attitude is due largely to the belief that state courts are more appropriate forums for the resolution of local land use matters.

To permit state courts to resolve land use issues under state law, federal courts generally abstain from resolving those issues under federal constitutional law. Furthermore, principles of federalism confirm the wisdom of federal court deference to state courts on important local and state policies.

The reluctance of federal courts to invalidate zoning ordinances on federal constitutional grounds is reflected in recent decisions of the United States Supreme Court. For example, in Village of Arlington Heights v. Metropolitan Housing Development Corporation, decided in 1977, the Court reversed the Circuit Court of Appeals which had invalidated a zoning ordinance that had a racially discriminatory effect. The Supreme Court held that exclusionary zoning is valid unless the local governing body acted with a racially discriminatory purpose.

Four years earlier, in Village of Belle Terre v. Boraas, the Court sustained a zoning ordinance that prohibited more than two unrelated people from inhabiting a single-family residential dwelling. In Belle Terre, the plaintiffs were homeowners who had rented their house to six unrelated college students. Relying on Euclid v. Ambler, the Court elected to defer to the determination of the local authorities that the zoning ordinance was a reasonable exercise of the police power. Several state courts, including the New Jersey Supreme Court, have rejected the reasoning of Belle Terre. In State v. Baker, for example, the New Jersey Supreme Court, relying on the State constitutional guarantees of due process and of the right of privacy, invalidated a zoning ordinance that prohibited more than four unrelated individuals from sharing a single housing unit.

During the late 1960's and the early 1970's, some commentators thought that the United States Supreme Court might view housing as a fundamental right. That issue was put to rest in 1973, however, in Lindsey v. Normet, in which the Court sustained an Oregon summary dispossess statute against a challenge that it violated the federal due process and equal protection clauses. The Court stated expressly that "[t]here is no constitutional guarantee of access to dwellings of a particular quality." Later in the same year, the Court found in San Antonio School District v. Rodriguez that wealth is not necessarily a suspect classification.

Entrusted as it is with defining the United States Constitution for an entire nation, it would have been difficult for the United States Supreme Court to invalidate exclusionary zoning on the basis of that Constitution. Yet, the inaction of that Court does not require inaction by a State Supreme Court. Indeed, the comparative inactivity of federal courts may serve as a stimulus to state court action.

United States Supreme Court Justice William J. Brennan, a former member of the New Jersey Supreme Court, suggested as much in his landmark article in 90 Harv. L. Rev. 489 (1977), State Constitutions and the Protection of Individual Rights. Justice Brennan wrote:

> Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.

Nothing in the decisions of the United States Supreme Court precludes a state, in reliance on its own constitution, from addressing the problem of housing. Hence, no conflict arises between state and federal law, and preemption under the supremacy clause of the United States Constitution is not a problem If, however, land use regulations, whether based on a state judicial decision, statute, or constitution, should trench upon a federal constitutional right, such as a protectible private property right under the fifth amendment, we can expect the state law to yield. Apart from that kind of consideration, a state court is free to give a more expansive interpretation to equal protection and due process rights under its state constitution. To summarize, the United States Supreme Court has recognized that states may control land use, but federal courts have abstained generally from reviewing the legitimacy of zoning ordinances.

Now that we have set the stage, I would ask you to envision a hypothetical state in the United States. Imagine a state where, during the last twenty or thirty years, interstate highways have been built linking cities and suburbs. Many municipalities adopt zoning ordinances with minimum lot size and housing area requirements that put the purchase of homes beyond the ability of people of low and moderate income. Nonetheless, many other people earning greater incomes, often middle and upper level executives with corporate employers, move from the cities to the suburbs. As time passes, more and more employers move to the suburbs, but the lower level employees remain in the cities because they cannot afford housing in the suburbs. City housing deteriorates. What were single and multi-family buildings are boarded

up and vacant. The rate of unemployment and crime increases in the cities.

Those conditions, which may sound familiar to you, obtain in varying degrees in many states. In New Jersey, for example, the conditions obtain in Newark in northern New Jersey, Camden in southern New Jersey, and in other older cities throughout the State.

As further information, consider also that New Jersey with 7,364,823 residents and a population density of 986.2 people per square mile, is the most densely populated state in the union. Geographically, the State is approximately 70 miles wide and 166 miles long, and is located in the Boston-Washington corridor between two major urban centers, New York and Philadlphia.

The preceding facts provide a general setting for the decision of our Court in Mount Laurel I, decided in 1975. Furthermore, New Jersey has recognized for many years that in fulfilling the general welfare, zoning ordinances should consider not just municipal, but regional, needs.

In Mount Laurel I, the Court held that a zoning ordinance that contravened the general welfare violated the State Constitution. In particular, a developing municipality violated the State Constitution by excluding housing for lower income people. A municipality could satisfy its constitutional obligation by affording a realistic opportunity to meet its fair share of the present and prospective regional need for low and moderate income housing. 92 N.J. at 205; 67 N.J. at 174.

The majority based its decision on the assurance of equal protection of the laws and substantive due process under the State Constitution. In particular, the Court relied on article I, paragraph 1 of the State Constitution, which, among other things, guarantees certain natural rights, including the enjoyment of life and the right of "acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." Although the words "general welfare" do not appear in the State Constitution, that clause is commonly known as the General Welfare Clause.

Hoping to enlist the cooperation of municipalities, the Court in Mount Laurel I announced "[t]he municipality should first have full opportunity to itself act without judicial supervision." 67 N.J. at 192. That is, the Court hoped it would be sufficient if it set the agenda for municipal action.

One member of the Court wrote a concurring opinion. He agreed that exclusionary zoning contravened principles of general welfare, but stated that he would base the decision not on the general welfare clause of the State Constitution, but on the State statute delegating to municipalities the power to zone, a statute that expressly provides zoning must promote the general welfare.

In the interim between Mount Laurel I and Mount Laurel II, the executive and legislative branches did not resolve the problem of exclusionary zoning. One can wonder whether the other two branches of state government would have participated more readily in a solution if the Court had invalidated exclusionary zoning, not in reliance on the

general welfare clause of the State Constitution, but, as the concurring opinion suggested, on the comparable provision of the zoning act. Suffice it to state that history followed a different course. Municipalities, some in good faith, some for other reasons, resisted the Mount Laurel doctrine. Many municipalities made no provision for low and moderate income housing, and little housing of that type was built.

The eight years between Mount Laurel I and Mount Laurel II were marked by numerous lawsuits over such issues as whether a particular municipality was a "developing municipality," what was a region, and how was fair share to be calculated.

Inaction at all levels of government combined with increasing Mount Laurel litigation to force the Court to reconsider exclusionary zoning in Mount Laurel II. Interestingly, only three members of the Court who rendered the Mount Laurel I decision participated in the Mount Laurel II decision. Four new members had joined the Court in the interim. Nonetheless, no one involved in Mount Laurel II asked the Court to reconsider whether the Mount Laurel I doctrine should be continued.

Trying to avoid the problems implicit in determining what is a developing municipality, the Court declared that every municipality "should provide a realistic opportunity for decent housing for at least some part of its resident poor who now occupy dilapidated housing." 92 N.J. at 214. The duty to provide a realistic opportunity for a fair share of the regional housing need was no longer to be determined by whether a municipality was "developing," but by reference to whether the

municipality was within a "growth area" as defined by the Division of State and Regional Housing in the State Development Guide Plan.

To expedite the disposition of Mount Laurel litigation, all such cases are assigned to one of three judges selected by the Chief Justice with the approval of the Supreme Court. If one of those judges finds a zoning ordinance does not satisfy a municipality's Mount Laurel obligation and a municipality is unable to draft a satisfactory ordinance, the trial courts are authorized to appoint a Special Master to assist the parties in drafting an appropriate ordinance.

The Court expressly stated that "[t]he provision of decent housing for the poor is not a function of this Court. Our only role is to see to it that zoning does not prevent it, but rather provides a realistic opportunity for its construction as required by New Jersey's Constitution." Mount Laurel II, 92 N.J. at 352. Nonetheless, the Court found that the municipal obligation to provide a realistic opportunity for the construction of the municipality's fair share of low and moderate income housing could involve taking certain affirmative steps. Those steps include lower income density bonuses - e.g., permitting a developer to construct more units of lower income housing per acre than would otherwise be permissible - and mandatory set asides - i.e., requiring a developer to include a minimum amount of lower income housing in a project The Court further directed municipalities to cooperate with a developer's attempt to obtain federal and other governmental subsidies. Mount Laurel II, 92 N.J. 217, 266-68. Often all such a subsidy requires is the adoption of a "resolution of need,"

stating that "there is a need for moderate income housing" in the municipality. N.J.S.A. 55:14J-6(b); 92 N.J. at 264. The Court continued that sometimes a municipality might be required to grant tax abatements to developers. See N.J.S.A. 55:14J-8(f); 92 N.J. at 264. The Court stopped short, however, of requiring a municipality to create a housing authority to meet its Mount Laurel obligation.

Finally, the Court noted that mobile homes have become increasingly important as a source of low cost housing. Accordingly, the Court ruled: "that municipalities that cannot otherwise meet their fair share obligations must provide zoning for low-cost mobile homes as an affirmative device in their zoning ordinances." 92 N.J. at 275.

A contrapuntal theme running throughout Mount Laurel II is the need to protect conservation, agricultural, and environmentally sensistive areas. In this regard, large lot - e.g., five-acre - zoning is permissible, as long as a municipality can otherwise meet its Mount Laurel fair share obligation. In fact, "the need for agriculture, open space, and, perhaps most importantly, for geographic and aesthetic heterogeneity and variety in different areas of this state" led the Court to sustain the zoning of one of the six municipalities in Mount Laurel II. 92 N.J. at 315.

Several other states, such as New York, Pennsylvania, and California, have held that municipalities have an obligation to consider regional needs in their zoning decisions. None of these decisions, however, requires a municipality to provide its fair share of low and moderate income housing needs. 92 N.J. at 205. The decisions are most

easily understood as holding that municipalities, by failing to promote the regional welfare, are failing to promote the general welfare, the predicate for our decisions in Mount Laurel I and Mount Laurel II.

If nothing else, the New Jersey experience with exclusionary zoning points up the strength of a federalist system. As Justice Brandeis stated, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." Other states with housing problems comparable to New Jersey may want to observe the New Jersey experience in evaluating exclusionary zoning in their own states.

Traditionally, cross-pollination between jurisdictions in land use decisions has occurred in state courts looking not to decisions of federal courts, but to decisions of other state courts. in this area of the law, horizontal federalism is the norm, and state courts have always provided examples for each other.

In deciding whether the Mount Laurel doctrine can be transplanted to another state, other courts will want to consider, among other things, the provisions of their own constitutions, the traditions of the court, and the relationship of the court to other branches of government, as well as the expectations and needs of the public. in reaching a decision, however, it would be well to recall Robert Frost's suggestion that ours is a "land of living." A more familiar source in Virginia, Thomas Jefferson, said it this way: "The earth belongs always to the living generation." In legal parlance, I interpret this to mean

that land use may be regulated in the general welfare. What is in the general welfare is a matter to be determined by each state.

To summarize, federal courts generally abstain from cases involving land use regulations and zoning. In rendering land use decisions, states generally look to decisions from within their own jurisdiction and from other states for guidance. Several states have used a substantive due process analysis to review exclusionary zoning ordinances. New Jersey has expressly based its analysis on the general welfare clause of the State Constitution. It is not clear whether other states that have considered regional needs have done so on the basis of the state constitution. It remains to be seen whether other states adopt the substantive due process analysis used by the New Jersey Supreme Court to invalidate exclusionary zoning ordinances in Mount Laurel I and Mount Laurel II.

II

Still another rationale exists for remitting land use regulation to state courts. Although our focus at this conference is on state constitutions, we should not lose sight of the ability of state courts to develop common-law principles appropriate for a modern society. The accommodation of private property to societal needs is a familiar task for state courts. As an interpreter of the common law, state courts are uniquely qualified to mold it to the public interest. One of the most dynamic common-law principles involving the accommodation of the public interest and private property is the public trust doctrine.

In Matthews v. Bay Head, Justice Schreiber summarized the doctrine:

> The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities.

Actually the public trust doctrine describes a variety of concepts, and I cannot discuss all of them today. Some believe that a public trust can be imposed on any kind of property, but the development of that theme must await another occasion.

As a recent decision from the Maine Supreme Court illustrates, the reach of the doctrine extends far beyond beaches and lakes. That court has held "Maine tidal lands and resources, including marine worms", are held by the state in public trust for the people of the state. Having invoked that principle, the court struck down the worm digging ordinance of the Town of Westbath that would have required payment of $25 for a worm digging license. For those who might not appreciate the elevation of the lowly worm to the res of a public trust, I hasten to add that our host state, Virginia, accords constitutional protection to oysters - or at least oyster beds.

For our purposes, I shall confine my discussion to more traditional notions of the public trust doctrine. As a common-law principle, the public trust doctrine is not rooted in any constitution, state or federal. Nonetheless, the doctrine has an ancient and honorable lineage. In its traditional form, it provides that land covered by navigable waters belongs to the sovereign for the common use of the people.

Under Roman law, the public had access to the sea and could use the seashore for fishing. At English common law, the King, as sovereign, was obliged to use his lands and waters consistently with the public interest. As explained by Professor A.E. Dick Howard in the Virginia Law review: "Thus where rivers, tidal waters, or their beds were concerned, this interest included public rights of navigation, travel, and fishing."

Since the time of Magna Carta, tidelands and navigable waters have been subject to a public trust and have been deemed held for the benefit of the public, even in those instances where the English Crown granted title of lands to private individuals. Following the American Revolution and upon formation of the United States, ownership of the lands covered by tidal waters vested in the separate states, which succeeded to the rights of the Crown.

In Matthews we relied on an earlier decision, Van Ness v. Borough of Deal, 78 N.J. 174 (1978), which applied the doctrine to municipally-owned dry sand beaches immediately landward of the high water mark. The effect of the Deal decision was to preclude municipalities from discriminating between residents and non-residents with respect to the use of public beaches.

Matthews extended the doctrine to the dry sand area owned by a property owners association that was so closely tied to the municipal government as to be a quasi-public body. Matthews also recognizes a public right of access across the dry sand area, without which the public right to use the foreshore would be meaningless. Furthermore, it

is not enough to allow the public reasonable access to cross the dry beach to the ocean. A swimmer, no matter how strong, has to come out of the water and sit on the beach at some time.

The guiding principle of the Matthews decision was our awareness that the beaches of New Jersey are a unique and irreplaceable resource. These beaches are vital sources of recreation not only for our citizens, but for visitors from New York and Pennsylvania, as well as from other states and countries. We took judicial notice that "compared to 1976, the State's salt water swimming areas 'must accommodate 764,812 more persons by 1985 and 1,021,112 persons by 1995.'" As with the proper role of zoning, the development of the public trust doctrine reflects a court's perception of the values and needs of a society. Our federalist system recognizes those needs may vary from state-to-state. The public trust doctrine expects and authorizes states, including their judiciaries, to mold laws to meet the developing needs of a diverse people.

Some states have resorted to other common-law principles in recognizing public rights in dry sand areas. In Oregon, for example, the Supreme Court viewed the dry sand area as an adjunct of the wet sand area since the formation of the state. Other states have predicated public access upon the implied dedication of an easement; still others have relied on the doctrine of prescription. Wisconsin has extended the doctrine to navigable lakes and streams; so extended, the doctrine includes not only navigation, but also fishing, hunting, and other forms of recreation. California also has been active in applying the doctrine to safeguard natural resources.

Just last week, the United States Supreme Court heard oral argument on a controversial decision of the California Supreme Court involving the public trust doctrine. In City of Los Angeles v. Venice Peninsula Properties, the California Supreme Court applied the doctrine to permit the City to dredge a lagoon and construct seawalls and other improvements without first exercising the power of eminent domain. The decision in Venice Peninsula Properties is significant for several reasons. Previously the court had applied the doctrine to tidelands and to lands between high and low water in nontidal navigable lakes. Furthermore, the court impressed the lagoon with a public trust even though title to the land beneath it passed directly from the Mexican government to plaintiff's predecessors in 1839, while California was part of that country. A dissenting opinion pointed out that the land beneath the lagoon was never publicly owned. Nevertheless, the majority found that under Mexican law, the public had a right, similar to a common-law public trust, to use the tidelands. The inescapable result is that state courts have tremendous flexibility in striking a proper balance of private rights and the public interest in natural resources.

III

My third point concerns state constitutions that contain express constitutional provisions concerning environmental protection and public resources. Preliminarily, the Federal Constitution contains no express guarantee of a right to a decent environment. Although some environmentalists and conservationists have sought to imply such a right from the ninth amendment, or from the due process clauses of the fifth and fourteenth amendments, the United States Supreme Court has declined

to find such a federal constitutional right. Nonetheless, Congress has created elaborate statutory schemes to regulate air and water quality, and other vital aspects of the environment. The federal system, then, is founded in statutes and regulations, but not in the Federal Constitution.

States, of course, are free to provide their citizens fundamental rights beyond those found in federal law. Accordingly, many states have granted additional rights under their state constitutions. An unusual example is Hawaii's constitutional provision which expressly states that the "[l]ands granted to the State of Hawaii shall be held by the state as a public trust for native Hawaiians and the general public." The California Constitution protects the public's right of access to navigable waters and public access to beaches. That Constitution also expressly prohibits the transfer of tidelands within two miles of an incorporated town or city fronting on navigable waters. Similarly, Wyoming has interpreted its Constitution to protect the public's use of the surface waters of a non-navigable stream bounded by private property. The Wyoming Supreme Court found that the public has a right not only to float on the water, but also to wade, hunt, and fish, as long as they do not violate the property rights of the owner. Thus, the public trust doctrine has been elevated to constitutional status in several states. Still other states have amended their constitutions to provide expressly for conservation of natural resources and protection of environmental quality. In addition to their constitutional provisions, states also have enacted elaborate statutory and regulatory schemes pertaining to public resources.

Altogether 16 states have enacted constitutional provisions pertaining to the environment or natural resources. Many of these provisions, bespeaking renewed interest in the quality of life in the last two decades, are of recent origin. Several of the provisions speak of the development as well as the protection of natural resources. Regardless of the specific terms of the constitutional provision, the point remains that some states, unlike the federal government, have elevated the preservation of natural resources and of the environment to a constitutional level.

A detailed catalogue of the various provisions of state constitutions is beyond the scope of these remarks. In general, the provisions reflect specific concerns of individual states. From Virginia's protection of oyster beds to Arizona's concern with water and Alaska's interest in fisheries, state constitutions mirror the diverse needs of a varied nation.

Nine state constitutions contain express policy statements about the protection or development of natural resources. The constitutional policy of New York is to conserve and protect not only its natural resources, but also its scenic beauty. The Florida Constitution contains a similar provision and further mandates the abatement not only of "air and water pollution, but also excessive noise." Pennsylvania's amendment provides, among other things, for the preservation of "natural, scenic, historic, and aesthetic values of the environment."

An interesting Pennsylvania case, Commonwealth v. National Gettysburg Battle Tower, Inc., 454 Pa. 193, 311 A.2d 588 (Sup. Ct.

1973), points up a recurring question arising under a constitutional mandate to protect the environment or to acquire natural resources. The question is whether the constitutional provision is self-executing or requires legislative inplementation.

The Gettysburg case involved a 307 foot tower at the site of the third day of the Civil War battle On one side was the builder, who had negotiated an agreement with the National Park Service to construct the tower. On the other side was the Commonwealth of Pennsylvania, which sought to enjoin the construction in reliance on the constitutional provision for the protection of scenic, historic, and aesthetic values. No zoning ordinance existed in that municipality or, indeed, in that entire county. The trial court denied an injunction to stop construction of the tower, finding that the constitutional provision was not self-executing and that the Legislature had not enacted appropriate legislation. That court also found that the construction would not impair the natural, scenic, or historic value of Gettysburg.

The Intermediate Court of Appeals affirmed, finding that the state had failed to establish that the tower would injure the Gettysburg environment. But the judges of the Intermediate Court could not agree whether the constitutional provision was self-executing.

On appeal, the Supreme Court of Pennsylvania affirmed, but without a majority opinion. Two justices agreed with the lower court that the statute was not self-executing. Chief Justice (then Justice) Nix concurred in the result. Justice (later Chief Justice) Roberts filed a concurring opinion, joined by another member of the court, in which he

stated that he would have based the decision on the failure of the Commonwealth to establish its entitlement to relief.

Former Chief Justice Jones, joined by one other Justice, dissented, finding that legislative action was not required to enforce the constitutional provision. In a later case, the Pennsylvania Supreme Court indicated, however, that the constitutional provision would be self-executing. Although the battle over legal theory may have been won by the constitutionalists, the builder won the war. As recent visitors to Gettysburg can attest, the observation tower stares down on the battlefield.

I conclude these remarks as I began them, with the words of Robert Frost. The land is ours, as he pointed out, and we are "her people." Traditionally, the relationship between people and land, particularly land use regulation, has evolved in state courts. Through common-law development, statutory construction, and constitutional interpretation, state courts share in the fulfillment of "The Gift Outright."

Although land use problems vary from state-to-state, the federalist system permits each state to accommodate its land and public resources to the needs of its people. Quite apart from federal law, individual states have developed legal solutions that may assist other states in solving their own land use problems. For the balance of this century, as in the past, the dominant constitutional doctrine in the regulation of land use and public resources will emanate not from the federal courts interpreting the United States Constitution, but from state courts interpreting state constitutions.