

ENVIRONMENTAL RIGHTS AMENDMENTS AS CONSTITUTIONAL (NOT ENVIRONMENTAL) LAW

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On August 14, 2023, in a small state courtroom in Helena, Montana, sixteen youth plaintiffs took the stand in the nation's first-ever youth climate trial in *Held v. State of Montana*. The Montana youths alleged that a state law violated their constitutional environmental right to a clean and healthy environment. Their legal victory at the end of trial was the striking down of this state law. On June 20, 2024, the Governor of Hawaii announced a historic settlement in the constitutional climate case, *Navahine v. Hawaii Department of Transportation*, between thirteen Hawaiian youths and the state's Department of Transportation (HDOT). The theory of that case was premised on two alleged constitutional failures by HDOT—breaching obligations under the constitutional public trust and violating the youth plaintiffs' constitutional environmental rights. These successes keep environmental rights amendments (ERAs) in the public limelight, intriguing scholars and perpetuating a kind of allure with ERAs that began in Pennsylvania in 2013. Given the era of regression in our federal administrative state, many environmental activists and scholars have begun looking to state constitutions, and ERAs in particular, to address our environmental problems.

This Article is the first to provide a comprehensive defense of ERAs as primarily constitutional rights, not substantive environmental rights, by examining the fast-growing body of ERA jurisprudence in Montana, Pennsylvania, Hawaii, and New York. To be primarily constitutional rights means that ERAs reflect legal relationships between the people and the government regarding matters of self-governance. They do not function to directly secure substantive environmental outcomes. To show this, I first discuss against whom ERAs are assertable. Successful ERA litigation asserts the ERA against the government. Second, I lay out a taxonomy of claims that have been asserted pursuant to an ERA. ERAs have been successful in

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litigation when they are asserted as negative rights (limits on government powers), as vehicles for the people to participate in self-governance, and as justifications for the exercise of government discretion against corporate interests. They have been unsuccessful in litigation when they are asserted as substantive environmental obligations guaranteeing a particular environmental outcome. Last, I discuss the interpretative strategies that the state courts have used in applying their ERAs. Notably, Montana and Pennsylvania pull from federal constitutional jurisprudence in developing their scrutiny analysis for applying their ERAs. Overall, the developing jurisprudence suggests that ERAs are primarily constitutional rights, not environmental rights.

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INTRODUCTION

On August 14, 2023, in a small state courtroom in Helena, Montana, sixteen youth plaintiffs took the stand in the nation's first-ever youth climate trial in *Held v. State of Montana*.¹ The evidence presented at trial—that climate change is driven by human activity, including Montana state policy, and is harming the Montana youths—went to the question of the youth plaintiffs' standing to bring the lawsuit at all.² The theory of the case was premised on an environmental rights amendment (ERA) located in the Montana Constitution. The Montana youths alleged that a state law violated their constitutional environmental rights to a clean and healthy environment.³ Their legal victory at the end of trial was the court striking down this state law. On December 18, 2024, the

1. 2024 MT 312, ¶ 5, 560 P.3d 1235; Richard Forbes, *In the Nation's First Youth-Led Climate Trial, A Case for Hope*, HIGH COUNTRY NEWS (June 26, 2023), <https://www.hcn.org/articles/climate-change-in-the-nations-first-youth-led-climate-trial-a-case-for-hope/> [https://perma.cc/LM4S-CPT7].

2. *Held*, 2024 MT 312, ¶¶ 36, 42, 560 P.3d at 1249, 1252.

3. *Id.* ¶¶ 5–7, 560 P.3d at 1243.

Montana Supreme Court affirmed the trial court's decision, solidifying the youth plaintiffs' trial victory.⁴

On June 20, 2024, the Governor of Hawaii announced a historic settlement in the constitutional climate case between thirteen Hawaiian youths and the Hawaii Department of Transportation (HDOT).⁵ In *Navahine v. Hawaii Department of Transportation*,⁶ the youth plaintiffs targeted HDOT in an attempt to compel reductions in emissions in the state's transportation sector, which are alleged to account for sixty percent of total state emissions by 2030.⁷ The theory of the case was premised on two alleged constitutional failures by HDOT—breaching obligations under the constitutional public trust and violating the youth plaintiffs' constitutional environmental rights.⁸ Because of how the Hawaii ERA is worded, to survive HDOT's motion to dismiss the ERA claim, the youth plaintiffs needed the trial court to find other state laws that required the government to address climate change. Surviving the motion to dismiss was itself an enormous victory,⁹ and it ultimately facilitated the historic settlement.¹⁰

The successes of *Held* and *Navahine* keep ERAs in the public limelight,¹¹ intriguing scholars¹² and perpetuating a kind of allure with

4. *Id.* ¶ 1, 560 P.3d at 1235.

5. Press Release, Governor Josh Green, M.D., Historic Agreement Settles *Navahine* Climate Litigation (June 20, 2024), <https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-historic-agreement-settles-navahine-climate-litigation/> [https://perma.cc/NU5K-QH73].

6. No. 1CCV-22-0000631 (Haw. Cir. Ct. filed Jan. 1, 2022).

7. Complaint at 4, *Navahine v. Haw. Dep't of Transp.*, No. 1CCV-22-0000631 (Haw. Cir. Ct. Jan. 1, 2022).

8. *Id.* at 2.

9. See Ruling at 1, 5, *Navahine v. Haw. Dep't of Transp.*, No. 1CCV-22-0000631 (Haw. Cir. Ct. Apr. 6, 2023).

10. See Joint Stipulation & Order RE: Settlement; Exhibit "A" at 1–2, *Navahine v. Haw. Dep't of Transp.*, No. 1CCV-22-0000631 (Haw. Cir. Ct. Apr. 6, 2023).

11. See, e.g., Amanda Eggert, *Held v. Montana Plaintiffs Sue State Over Bills Passed by the 2025 Legislature*, MONT. FREE PRESS (Dec. 10, 2025), <https://montanafreepress.org/2025/12/10/held-v-montana-plaintiffs-sue-state-over-bills-passed-by-2025-legislature/> [https://perma.cc/V6EZ-N926]; Dharna Noor, *Montana Youth Activists Who Won Landmark Climate Case Push for Court Enforcement*, THE GUARDIAN (Dec. 10, 2025, at 17:08 ET), <https://www.theguardian.com/us-news/2025/dec/10/montana-climate-youth-activists-petition-law> [https://perma.cc/BN2A-HQJS]; Maya K. van Rossum, *The U.S. Constitution Left Out Nature. Green Amendments Could Fix That*, ATMOS (Nov. 29, 2025), <https://atmos.earth/climate-solutions/the-us-constitution-left-out-nature-green-amendments-could-fix-that/?utm> [https://perma.cc/FQ8F-AW2M]; Adam Aton, *Oregon Activists Push Referendum for 'Green Amendment'*, E&E NEWS BY POLITICO (July 23, 2025, at 6:14 ET), <https://www.eenews.net/articles/oregon-activists-push-referendum-for-green-amendment/?utm> [https://perma.cc/A33J-TGQE].

12. There has been much recent scholarship on ERAs. See, e.g., Tony Derron, *Environmental Rights, Original Meaning, and the Separation of Powers*, 2026 UTAH L.

ERAs that really began in Pennsylvania in 2013.¹³ Despite this fascination, Montana, Hawaii, and Pennsylvania are three of just six states that have ERAs in their constitutions. Those other three states are New York, Massachusetts, and Illinois.¹⁴ Except for New York, which ratified its ERA in November 2021, the other five ERAs were introduced and ratified in the 1970s before being promptly forgotten for nearly forty years.¹⁵

In earlier work, I suggested that the use of these constitutional environmental rights provisions as a means to achieve positive environmental outcomes was misguided.¹⁶ Based on the then-available ERA jurisprudence, I argued that these rights do not amount to substantive environmental rights. Because of that, invoking such rights to set, change, or improve environmental policy will leave environmentalists wanting. As cases continue to be litigated pursuant to these constitutional rights provisions, it has become clear that such an interpretation is somewhat orthogonal to the evolution of cases invoking ERAs. This is because constitutional rights are their own kind of legal right that is not necessarily intertwined with questions of procedural versus substantive rights, negative versus positive rights, or claim versus privilege rights.¹⁷

Perhaps it is stating the obvious to observe that constitutional law is not where we generally think substantive environmental (or any other

REV. (forthcoming) (on file with author); Katrina Fischer Kuh, Nicholas A. Robinson & Scott Fein, *New York's Constitutional Guarantee of Environmental Rights*, 27 LEG. & PUB. POL'Y 361, 361–62 (2024); John Dernbach, *The Value of Constitutional Environmental Rights and Public Trusts*, 41 PACE ENV'T L. REV. 153, 153 (2024); Quinn Yeargin, *Against Environmental Rights Supremacy*, 26 U. PA. J. CONST. L. 1323, 1326 (2024); Rebecca Bratspies, *Administering Environmental Justice: How New York's Environmental Rights Amendment Could Transform Business as Usual*, 41 PACE ENV'T L. REV. 100, 116 (2024); Sam Bookman, *Demystifying Environmental Constitutionalism*, 54 ENV'T L. 1, 1 (2024) [hereinafter Bookman, *Demystifying*]; Sam Bookman, *Defensive Environmental Constitutionalism: American Possibilities*, 26 U. PA. J. CONST. L. 1284, 1284–85 (2024) [hereinafter Bookman, *American Possibilities*]; Carolyn Drell & Mia Petrucci, *The Green Amendment: Assessing the Latest Tool in the Environmental Tool Belt*, 41 PACE ENV'T L. REV. 4, 10 (2023); John C. Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis*, in ENVIRONMENTAL LAW BEFORE THE COURTS: A US–EU NARRATIVE 35 (Giovanni Antonelli et al. eds., 2023).

13. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 951–53 (Pa. 2013).

14. Despite scholars occasionally including Rhode Island in this list, Rhode Island should be excluded from the list of states with ERAs. See Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 HASTINGS L.J. 123, 125–27, 127 n.17 (2022).

15. *Id.* at 127–28.

16. *Id.* at 174.

17. For a discussion of constitutional rights in the climate change context, see Quinn Yeargin, *Decarbonizing Constitutions*, 41 YALE L. & POL'Y REV. 1, 48–50 (2023) (critiquing constitutional environmental rights provisions as a useful tool for decarbonization).

kind of) policy is decided.¹⁸ Constitutional law is where the rules comprising a system of self-governance are formally articulated.¹⁹ These rules are often thought of as grounded in reasons that transcend mere politics and the social values of an era, reflecting “detached, disinterested, and visionary planning.”²⁰ The United States Constitution, which is the bedrock of constitutional theory in American legal thought, is “dedicated exclusively to limiting the scope of government and to keeping government out of the lives of its citizens”²¹ on natural law principles. Much of how we understand constitutional rights is based on this belief that the most salient threat to society is too much government,²² and therefore, constitutional rights are exclusively negative rights that function to restrain governmental power.²³

More recently, leading scholars have challenged the descriptive accuracy of this kind of federal constitutional theory in the context of state constitutions.²⁴ In her book, *Looking for Rights in All the Wrong Places*, Professor Emily Zackin argues that state constitutional rights were often proposed and ratified as a mechanism to overcome political obstacles that could not be addressed by statutory law alone.²⁵ Her work is a direct challenge to the concept of constitutional rights solely as limits on government powers in the context of state constitutional law.²⁶ Professor Jonathan Marshfield has gone further with his in-depth historical work on state bills of rights, arguing that state bills of rights

18. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS 2* (2013) (discussing the conventional wisdom about constitutional rights in America as not functioning to secure substantive outcomes). But see Jonathan L. Marshfield, *America’s Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 867–69 (2022) (noting that some provisions in state constitutions can be specific and “statute-like”).

19. See, e.g., Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1105 (1998) (“Written constitutionalism can only be properly understood, it can only claim legitimate authority, as an effort by a nation to achieve self-government over time, where self-government over time refers not to an ideal of governance at each successive moment . . . but rather to the nation’s struggle to lay down temporally extended commitments and to honor those commitments over time . . . it was and is America’s most innovative, most radical, and most influential contribution to the theory and practice of self-government.”).

20. See ZACKIN, *supra* note 18, at 19.

21. *Id.* at 4.

22. *Id.* at 2–3.

23. *Id.* at 2.

24. See, e.g., *id.* at 19; Marshfield, *supra* note 18; Jonathan L. Marshfield, *America’s Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 545–46 (2023); Jonathan L. Marshfield, *State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections*, 76 SMU L. REV. 519, 522 (2023).

25. See ZACKIN, *supra* note 18, at 15.

26. *Id.* at 66.

serve a different purpose from the Federal Bill of Rights.²⁷ The constitutional rights contained in the Bill of Rights were, and are, generally thought to function as a bulwark against majoritarian rule in the form of negative rights.²⁸ State bills of rights are quite different, as Marshfield argues, in that they “were created primarily as a device for democratic majorities to control wayward government officials and representatives.”²⁹

This insightful work on state constitutional rights is mostly historical with an eye towards disrupting the assumption that federal constitutional theory applies without alteration to state constitutions. However, for the forest, we sometimes miss the trees. Constitutional rights are not merely creatures of history; they are legal rights that have a life of their own inside of the case law that invokes and interprets them. This is especially true in the case of ERAs, where we have a variety of novel claims being brought pursuant to these constitutional provisions, and courts are being required to evaluate a variety of constitutional questions to resolve those disputes. Furthermore, although there may be historical differences justifying divergences between federal and state constitutional law jurisprudence, whether this occurs in ERA litigation is an open question. State courts are not bound to federal constitutional law principles in interpreting their own constitutions, but they may look to federal constitutional law to resolve disputes, nonetheless.

My goal in this Article is to show that despite having different, and perhaps less visionary, histories in their origin stories than federal constitutional rights, ERAs are primarily constitutional in nature, not primarily environmental in nature. This means that they function best in the negative rights paradigm while also demonstrating some usefulness as a mechanism for citizen participation in self-governance.³⁰ This makes ERAs a bit of a fool’s errand for environmentalists who seek progressive, substantive changes in environmental policy. I believe this has been largely overlooked in ERA scholarship and ignored in ERA politics, and it has important implications for our current political climate. With the extremely disruptive attacks on the federal administrative state from both

27. Marshfield, *supra* note 18, at 931.

28. *See id.* at 857–58.

29. *Id.* at 854, 859–60.

30. It is important to remember that constitutions reflect the agreement between a people and their government describing how that government is going to be structured and empowered to act. What I call “participation in governance” in this Article is somewhat distinct from our understanding of merely procedural rights because the ERAs are being invoked to allow citizens to rein in and correct wayward state administrative agencies, perhaps as Marshfield suggests state bills of rights were designed to do. *See infra* Section II.C.; Marshfield, *supra* note 18, at 860.

the Supreme Court of the United States³¹ and the U.S. President,³² it is not surprising that the people would look to the states to stave off as much environmental policy regression as possible.³³ However, we know from the robust debates of the 1960s and 1970s that it was intentional that modern environmental law be principally located in federal statutory law,³⁴ rather than state statutory or common law, or constitutional law (either state or federal).³⁵ So this renewed interest in ERAs is not only second-best (or worse) for progressive environmental outcomes, but it also indicates a failure of government to perform its proper function, which is to legislate and enforce such legislation to achieve the environmental outcomes reflected in the will of the people.

I devote the remainder of this Article to illustrating the constitutional nature of ERAs, which is—ERAs function as part of our self-governance machinery, not as setting environmental policy. This means that they have some value in staving off environmental regression but far less value

31. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (expanding the major questions doctrine in federal administrative law as a mechanism for federal courts to reduce the scope of federal agency power); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (overruling *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and thereby eliminating the deference that federal courts had given to agency interpretations of ambiguous statutory language for forty years).

32. See Robin Bravender, *Trump Admin Details Enviro Agency Exodus*, E&E NEWS BY POLITICO (Mar. 19, 2026, at 4:36 PM ET), <https://www.eenews.net/articles/trump-admin-details-enviro-agency-exodus/> [<https://perma.cc/86VL-RK3P>] (noting that more than 10,700 employees resigned from the EPA and the Department of Interior under President Trump's "deferred resignation program" designed to reduce energy and environmental agency staffing levels); Marianne Lavelle & Peter Aldhous, *EPA Hits 40-Year Lows in Staffing After Trump Targets Its Public Health Experts*, INSIDE CLIMATE NEWS (Mar. 6, 2026), <https://insideclimatenews.org/news/06032026/trump-epa-staffing-lows/> [<https://perma.cc/E53V-ALED>] (noting that President Trump had brought down EPA staffing to levels not seen since the Reagan Administration).

33. This is also true in the case of abortion rights, where activists are leveraging state constitutional law to enshrine a woman's right to choose in the wake of *Dobbs*. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113, 153 (1973), which held that a woman has a fundamental right to abortion contained within her 14th Amendment right to privacy). See ARIZ. CONST. art. II, § 8.1; COLO. CONST. art. II, § 32; MD. CONST. art. XLVIII; MO. CONST. art. I, § 36; MONT. CONST. art. II, § 36; N.Y. CONST. art. I, § 11 (amended 2024 to include "pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy" to the equal rights amendment in the state's bill of rights).

34. See Thomas R. Hendershot, *Federal Pollution Control: Participation by States and Individuals Enhances the National Pollution Control Effort*, 16 VILL. L. REV. 827, 827 (1971).

35. There was a time when it was thought that constitutional law might be a robust vehicle to achieve environmental goals. See Ferdinand F. Fernandez, *Due Process and Pollution: The Right to a Remedy*, 16 VILL. L. REV. 789, 792 (1971). Unfortunately, such optimism did not play out, and the majority of our modern environmental laws are codified in federal statute and depend on the federal administrative state for their efficacy.

in promoting and achieving environmental progression. I limit my focus to four states: Montana, Pennsylvania, Hawaii, and New York. I do this because the constitutional nature of ERAs is revealed through the jurisprudence that evolves as cases are litigated pursuant to the provisions, and these four states are the ones that have had to significantly develop their ERA jurisprudence. This Article is largely descriptive, with federal constitutional theory as the backdrop of what constitutions are and what constitutional rights do. It will become clear at various points that certain constitutional features are not as robust in some states' ERAs compared to others, and some states adhere more closely to federal constitutional theory compared to others. This might leave a reader wondering what it even is for something to be a state constitutional right. I leave such questions to future work. At a minimum, readers should notice how the language variation among these four ERAs can affect their conformance (or lack thereof) to various commitments of federal constitutional theory.

This Article proceeds as follows. In Part I, I begin with a discussion of the possible parties to claims being brought pursuant to an ERA. In federal constitutional theory, constitutional rights are asserted against the government, not private parties, but this does not hold universally in ERA litigation. In Part II, I discuss the nature of the claims being brought pursuant to an ERA. Many of the successful ERA claims are attempts to limit government powers, but most notably, this is not the case in Hawaii. In Part III, I discuss the interpretative strategies adopted by state courts in ERA litigation. This is perhaps where the states vary most widely, with both Montana and Pennsylvania showing significant influence from federal constitutional rights jurisprudence. Finally, I briefly conclude.

I. PARTIES TO THE CLAIM

I begin with the language of the four ERAs that are the focus of this Article. This is because the language contained in these constitutional provisions ostensibly articulates a *legal right*. New York's ERA states: "Each person shall have a *right* to clean air and water, and a healthful environment."³⁶ Montana's ERA states (in part): "All persons are born free and have certain inalienable rights. They include the *right* to a clean and healthful environment"³⁷ Pennsylvania's ERA states (in part): "The people have a *right* to clean air, pure water, and to the preservation

36. N.Y. CONST. art. I, § 19 (emphasis added).

37. MONT. CONST. art. II, § 3 (emphasis added). Montana's ERA has been interpreted as including an additional constitutional provision that is not part of Montana's Declaration of Rights. See *Mont. Env't Info. Ctr. v. Dep't of Env't Quality (MEIC)*, 1999 MT 248, ¶ 48, 988 P.2d 1236, 1243; MONT. CONST. art. IX, § 1.

of the natural, scenic, historic and esthetic values of the environment.”³⁸ Hawaii’s ERA states (in part): “Each person has the *right* to a clean and healthful environment”³⁹

Regardless of whether we think these provisions reflect (or are possibly grounded in) moral, natural, or human rights,⁴⁰ as legal rights, they must be thought of as discrete legal relations. All legal relations consist of two opposing sides. One side holds the legal right, and the other holds the legal detriment.⁴¹ The language of the ERAs makes it clear that the legal right holders, *i.e.*, those who can seek to enforce the constitutional right, consist of New Yorkers, Montanans, Pennsylvanians, and Hawaiians.⁴² This includes not just New Yorkers, Montanans, Pennsylvanians, and Hawaiians as individuals.⁴³ It also includes groups of New Yorkers, Montanans, Pennsylvanians, and Hawaiians organized in a variety of ways. They might be organized as a township,⁴⁴ a local business,⁴⁵ a trade association,⁴⁶ a homeowners’

38. PA. CONST. art. I, § 27 (emphasis added).

39. HAW. CONST. art. XI, § 9 (emphasis added).

40. *See, e.g.*, TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 9 (2005) (grounding constitutional environmental rights in the notion of a human right to an adequate environment).

41. *See* Heidi M. Hurd & Michael S. Moore, *The Hohfeldian Analysis of Rights*, 63 AM. J. JURIS. 295, 299–301 (2018); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913). This is often the legal obligation, as in the case of substantive environmental rights claims. But as will become clear in Part III, the negative rights claims raised pursuant to these ERAs are often assertions of legal disability on the part of the government. I will clarify what this means later on, but for this Part, the distinction is not important. *See infra* Part III.

42. *See supra* notes 36–39 and accompanying text.

43. *See, e.g.*, *Held v. State*, 2024 MT 312 ¶ 5, 560 P.3d 1235, 1243 (explaining that the plaintiffs were individual Montana youth); *Marte v. City of New York*, No. 159068/2022, 2023 WL 2971394, at *2 (N.Y. Sup. Ct. Apr. 17, 2023) (describing plaintiffs as individual New Yorkers who live near the proposed project site).

44. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 918 (Pa. 2013).

45. *See Seneca Lake Guardian, Inc. v. Seneca Meadows, Inc.*, 236 N.Y.S.3d 519, 525 (Sup. Ct. 2025).

46. *See Marcellus Shale Coal. v. Dep’t of Env’t Prot.*, 292 A.3d 921, 924 (Pa. 2023).

association,⁴⁷ a community organization,⁴⁸ or even the government itself.⁴⁹

It is not obvious that groups of any kind possess constitutional rights.⁵⁰ However, over many generations of clever lawyering, savvy politicking, and receptive Supreme Court Justices, business organizations have led the way in establishing federal group constitutional rights.⁵¹ Because business organizations fought for and won judicial recognition of many federal constitutional rights, such as Fourth Amendment protections against search and seizure of documents⁵² and First Amendment protections to donate to political campaigns,⁵³ I believe we more readily accept that groups can and do possess constitutional rights.⁵⁴

47. See *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1105–06 (Haw. 2010), *abrogated on other grounds by Tax Found. v. State*, 439 P.3d 127 (Haw. 2019).

48. See, e.g., *In re Haw. Elec. Light Co. (HELCO)*, 445 P.3d 673 (Haw. 2019); *In re Maui Elec. Co. (MECO)*, 408 P.3d 1, 5–6 (Haw. 2017); *MEIC*, 1999 MT 248, ¶ 4, 988 P.2d 1236, 1237; *Fresh Air for the Eastside, Inc. v. State*, 217 N.Y.S.3d 381, 384 (App. Div. 2024); *W.N.Y. Youth Climate Council v. N.Y. State Dep’t of Trans.*, 224 N.Y.S.3d 790, 802 (Sup. Ct. 2024); *Cottonwood Env’t Law Ctr. v. Mont. Dep’t of Env’t Quality*, 2024 MT 105N, 547 P.3d 1285 (unpublished table decision).

49. In Pennsylvania, the public trust language of the state’s ERA has been interpreted to give the state standing to assert a variety of tort claims against a polluter. See *Commonwealth v. Monsanto*, 269 A.3d 623, 635, 647 (Pa. Commw. Ct. 2021) (finding that the Pennsylvania ERA gave the Commonwealth and its agencies standing to assert claims for public nuisance, trespass, design defect, failure to warn and instruct, negligence, and unjust enrichment based on the defendant’s manufacture, distribution, and sale of products containing polychlorinated biphenyls (PCB)).

50. I am referring to federal constitutional rights because this issue has been significantly developed jurisprudentially in the federal context. See, e.g., ADAM WINKLER, *WE THE CORPORATIONS*, at xv (2018) (“Between 1868 . . . and 1912, . . . the [Supreme Court] justices decided 28 cases dealing with the rights of African Americans—and an astonishing 312 cases dealing with the rights of corporations.”). I am unaware of any comprehensive study of similar developments in state constitutional jurisprudence.

51. See generally *id.* at xxi–xxiii (describing how business organizations won the recognition of their constitutional rights).

52. Amazingly, “[i]t was only subsequent to the[] cases involving businesses that individuals would obtain judicial protection for [their Fourth and Fifth Amendment] rights.” See *id.* at 180; see also *Boyd v. United States*, 116 U.S. 616, 617–18, 633–635 (1886) (invoking a business partnership’s Fourth and Fifth Amendment rights); *Hale v. Henkel*, 201 U.S. 43, 73–76 (1906) (holding that corporations possess a Fourth Amendment right, though it is more limited in scope than an individual’s Fourth Amendment right and do not possess a Fifth Amendment right).

53. See *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010) (recognizing First Amendment rights in group entities such as corporations, labor unions, and other collective entities).

54. But see Susana Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 212 (2011) (discussing the movement seeking to declare that constitutional rights inhere only in human beings, not corporations). Part of the reason that business organizations were recognized as

Within ERA jurisprudence, there has not been any discussion regarding this issue of whether the constitutional environmental right inheres in the group itself, independently of the group's members.⁵⁵ Because federal constitutional law has developed a doctrine of organizational standing, where an organization can sue to assert its members' legal rights,⁵⁶ I do not think this issue is particularly noteworthy for ERAs unless a state court is considering deviating from federal constitutional doctrine in its state constitutional jurisprudence.

Particularly noteworthy for ERA jurisprudence is the much more interesting issue of against whom constitutional environmental rights are asserted. In federal constitutional theory, constitutional rights are only assertable against the government (or private actors engaging in state action).⁵⁷ They are not assertable against purely private actors.⁵⁸ A good example of this can be seen in a careful analysis of *Shelley v. Kraemer*,⁵⁹ where the Court faced a constitutional challenge to a racially restrictive covenant.⁶⁰ Restrictive covenants are agreements between private actors that restrict the landowner's use of their land.⁶¹ After the Court declared

possessing constitutional rights seems to be related to the fact that it was desirable to recognize business organizations as bearing legal duties and being legally responsible for their business activities. *See, e.g., N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495–96 (1909) (imposing criminal liability on a corporation based on the knowledge and intent of the corporation's agents because failure to do so would “give [corporations] immunity from all punishment” and “virtually take away the only means of effectually controlling” business activity); Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1139 (2011) (“Historically then, corporate personhood has both necessitated and bolstered discussions about corporate responsibility . . .”).

55. For example, in the same opinion, the Hawaii Supreme Court has moved between treating its ERA as inhering in the individuals that comprise an organization and the organization itself. *Compare HELCO*, 445 P.3d 673, 698 (Haw. 2019) (“LOL's members' right to a clean and healthful environment”) (emphasis added), *with id.* at 694–95 (“LOL's right to a clean and healthful environment”) (emphasis added).

56. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (establishing a three-part test for when an association has standing to bring a lawsuit on behalf of its members).

57. *See Shelley v. Kraemer*, 334 U.S. 1, 13, 22 (1948).

58. *See id.* at 13 (“Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1833), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”). Sometimes private action will count as state action such that the constitutional right may be asserted against the private actor. *See Marsh v. Alabama*, 326 U.S. 501, 509 (finding individuals can assert their First Amendment right against company towns); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724–25 (1961). However, this does not change the fact that constitutional rights cannot be asserted against purely private actors.

59. 334 U.S. 1 (1948).

60. *Id.* at 4.

61. *See Restrictive Covenant*, BLACK'S LAW DICTIONARY (12th ed. 2024).

racially restrictive ordinances unconstitutional in 1917,⁶² it became common to use racially restrictive covenants in the land transaction itself to effectuate the same goal—namely, the creation and maintenance of racial segregation in residential housing. When the constitutional challenge to this practice finally reached the Supreme Court in *Shelley*, the issue was not whether the private parties to the land transaction had committed a constitutional violation by including a racially restrictive covenant in the deed. Rather, the issue was whether judicial enforcement of the racially restrictive covenant constituted state action such that it was barred by the Fourteenth Amendment's equal protection clause.⁶³ This means that the equal protection claim was only assertable against the government, not purely private parties.⁶⁴

More abstractly, in federal constitutional theory, the constitutional relation is necessarily between the people and their government and never between purely private parties.⁶⁵ This has implications for any conceptualization of ERAs because many of our environmental problems are caused by private actors, not government actors. For example, locally undesirable land uses, such as hazardous waste facilities, landfills, and manufacturing facilities, are usually privately owned and run operations. Oil, gas, coal, and other mining operations are private industries. Ranchers on Bureau of Land Management (BLM) land are private actors. Perhaps the one area where the government still takes lead is in drinking water and wastewater treatment, but overall, most of our environmental regulation targets private actors participating in the marketplace.⁶⁶ Because of this, it matters whether ERAs follow federal constitutional theory in answering this question of “against whom is the right assertable?” If an ERA is not assertable against private actors, then structurally speaking, it cannot function to directly secure substantive environmental outcomes in most situations, because most polluters are private actors.

62. See *Buchanan v. Warley*, 245 U.S. 60, 81–82 (1917). Notably, *Buchanan* was not decided as an equal protection case. It was decided as a property rights case. *Id.* That is—the racially restrictive ordinance violated the seller's due process right under the Fourteenth Amendment by preventing him from selling his property to a constitutionally qualified buyer. *Id.*

63. See *Shelley*, 334 U.S. at 13–14.

64. It follows that if private parties were to agree to a racially restrictive covenant in a land transaction today, such a provision is not assertable as a constitutional violation by the parties to the transaction. They may be liable for committing a Fair Housing Act (FHA) violation, but the FHA is a federal statute, not the Constitution.

65. See, e.g., *Shelley*, 334 U.S. at 13.

66. See Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORN. L. REV. 129, 133 (2013) (explaining that the traditional public regulation of environmental requirements for private actors has shifted toward private standards and enforcement).

The four jurisdictions that are the focus of this Article are split on whether their ERA is assertable against purely private actors. This split tracks differences in the constitutional language between the four states. The Montana ERA is and the Hawaii ERA should be assertable against purely private parties, although they have very different constitutional language from one another. In relevant part, Montana's ERA states: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment In enjoying these rights, *all persons recognize corresponding responsibilities*."⁶⁷ Additionally, Montana's ERA is read in conjunction with the following non-rights-based constitutional provision: "The state and *each person* shall maintain and improve a clean and healthful environment in Montana for present and future generations."⁶⁸

Almost all the cases that have been litigated pursuant to the ERA in Montana have named government defendants.⁶⁹ However, in *Cape-France Enterprises v. Estate of Peed*,⁷⁰ the Montana Supreme Court commented in dicta that Montana's ERA binds purely private parties.⁷¹ *Cape-France* involved a real estate transaction between purely private parties where potential contamination issues on the property required the seller to drill a test well for the transaction to proceed.⁷² However, due to contamination in the area, drilling a test well would have risked spreading that contamination into the groundwater, and this would have exposed the seller to financial liability "of an unquantifiable nature."⁷³ The case was briefed and resolved on contract grounds.⁷⁴ Yet, the Montana Supreme Court relied on an unbriefed ERA analysis as the "decisive" factor for concluding that the seller could rescind the contract.⁷⁵ In doing so, the court noted that "the text of [the non-rights-based constitutional provision] applies the protections and mandates of [the ERA] to private action—and thus to private parties"⁷⁶ To

67. MONT. CONST. art. II, § 3 (emphasis added).

68. MONT. CONST. art. IX, § 1 (1) (emphasis added).

69. See, e.g., *MEIC*, 1999 MT 248, ¶ 1, 988 P.2d 1236, 1237; *N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, ¶ 3, 288 P.3d 169, 171; *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 202, ¶ 1, 477 P.3d 288, 292.

70. 2001 MT 139, 29 P.3d 1011.

71. *Id.* ¶ 32, 29 P.3d at 1017.

72. *Id.* ¶¶ 4, 8, 29 P.3d at 1013.

73. *Id.* ¶ 24, 29 P.3d at 1016.

74. *Id.* ¶¶ 12, 29, 29 P.3d at 1014, 1016 (affirming the lower court's determination that the seller could rescind the contract on the basis of mutual mistake of fact, impossibility, and impracticability of performance).

75. *Id.* ¶¶ 30–31, 29 P.3d at 1016; *id.* ¶¶ 74–75, 29 P.3d at 1025 (Gray, C.J., dissenting).

76. *Id.* ¶ 32, 29 P.3d at 1017 (citing *MEIC*, 1999 MT 248, ¶ 64, 988 P.2d 1236, 1246).

compel the seller to drill the test well and complete the land transaction would “be to require a private party to violate the [Montana] Constitution—a remedy that no court can provide”⁷⁷

Hawaii’s ERA should also apply to purely private actors, although this has not been directly articulated by Hawaii courts. In relevant part, Hawaii’s ERA states: “Each person has the right to a clean and healthful environment, *as defined by laws relating to environmental quality* Any person may enforce this right against any party, public or *private*”⁷⁸ The Hawaii courts have been clear and consistent that Hawaii’s ERA does not stand on its own but rather must be invoked in tandem with some state environmental law.⁷⁹ The plain language of the Hawaii ERA would seem to indicate that it is assertable against purely private parties, but the case law supports this conclusion only indirectly.

To see this, we must read two cases together. The first case, *Pono v. Molokai Ranch, Ltd.*,⁸⁰ was a lawsuit brought by an unincorporated neighborhood association against a private landowner, Molokai Ranch (MR), and Maui County (a government defendant).⁸¹ The plaintiffs sought to enforce state land use permitting requirements under Hawaii Revised Statutes Chapter 205 before MR built a campsite on its property.⁸² The Hawaii Intermediate Court of Appeals (ICA) held that Chapter 205 provided no private right of action for citizens to enforce such permit requirements.⁸³ Two years later, the Hawaii Supreme Court abrogated *Pono* in *County of Hawaii v. Ala Loop Homeowners*,⁸⁴ and held that the state’s ERA creates a private right of action for citizens to enforce Chapter 205.⁸⁵ *Ala Loop*, however, did not include any purely private parties as defendants because the county and homeowners’ association in that case were trying to enforce Chapter 205 against a charter school.⁸⁶ So, it is only through reading *Pono* and *Ala Loop* together that we can see the thread of enforcing state environmental laws against purely private parties. This is to say that the Hawaii ERA is assertable against a purely private party if, and only if, the underlying state environmental law is assertable against a purely private party. This makes the Hawaii ERA unique in that it is a constitutional mechanism

77. *Id.* ¶ 34, 29 P.3d at 1017.

78. HAW. CONST. art. XI, § 9 (emphasis added).

79. *See infra* notes 80–84 and accompanying text.

80. 194 P.3d 1126 (Haw. Ct. App. 2008).

81. *Id.* at 1127–28.

82. *Id.* at 1129.

83. *Id.* at 1149.

84. 235 P.3d 1103 (Haw. 2010), *abrogated on other grounds by Tax Found. v. State*, 439 P.3d 127 (Haw. 2019).

85. *Id.* at 1120.

86. *Id.* at 1105.

for creating the private rights needed to enforce otherwise privately unenforceable environmental obligations.

On the contrary, neither New York's nor Pennsylvania's ERA is assertable against purely private parties. Pennsylvania's ERA is comprised of three separate clauses, none of which contain any language that would suggest the constitutional right is assertable against purely private parties.⁸⁷ Instead, the third clause of Pennsylvania's ERA, which is the public trust clause, suggests that the ERA is only assertable against the government: "As trustee of these [natural] resources, the *Commonwealth* shall conserve and maintain them for the benefit of all the people."⁸⁸ There are two Commonwealth Court⁸⁹ opinions that confirm this interpretation of Pennsylvania's ERA. In *Feudale v. Aqua Pennsylvania, Inc.*,⁹⁰ defendant Aqua was a private water service provider to nearly 1.4 million Pennsylvania residents, and the *pro se* plaintiff attempted to assert Pennsylvania's ERA against Aqua, challenging its replacement of century-old water lines.⁹¹ The Commonwealth Court rejected this claim because "Aqua is not a Commonwealth entity and thus not a trustee under the Environmental Rights Amendment," and the court was "unaware of any case law applying th[e public trustee] duty to non-Commonwealth entities."⁹²

In *Clean Air Council v. Sunoco Pipeline L.P.*,⁹³ the plaintiffs attempted to assert the ERA against Sunoco to stymie Sunoco's plans to build two liquid natural gas pipelines through an exercise of eminent domain.⁹⁴ In particular, the plaintiffs alleged that Sunoco, as a public utility, had fiduciary duties as trustee to consider the impact of its pipeline on public natural resources, an assessment which Sunoco had not undertaken.⁹⁵ The Commonwealth Court interpreted this as an allegation that "Sunoco, and Sunoco alone . . . violated the Environmental Rights Amendment in choosing to proceed with the project."⁹⁶ On interlocutory appeal, the court noted that "the Environmental Rights Amendment does not impose duties or obligations on private parties."⁹⁷ There had been no

87. PA. CONST. art. 1, § 27.

88. *Id.* (emphasis added).

89. This is the second highest court in the state and one of two intermediate appellate courts for Pennsylvania. *Courts*, THE UNIFIED JUD. SYS. OF PA., <https://www.pacourts.us/courts> [<https://perma.cc/YY8M-3ZN4>] (last visited Sept. 4, 2026).

90. 122 A.3d 462 (Pa. Commw. Ct. 2016).

91. *Id.* at 464.

92. *Id.* at 466.

93. 185 A.3d 478 (Pa. Commw. Ct. 2018).

94. *Id.* at 482.

95. *Id.* at 485.

96. *Id.* at 493.

97. *Id.* at 494.

determination of whether Sunoco's exercise of the eminent domain power as a public utility made them part of the Commonwealth; for the purposes of the ERA, the Commonwealth Court directed the trial court to transfer the matter to the Commonwealth Court on remand for an original determination.⁹⁸

New York has the simplest ERA language: "Each person shall have a right to clean air and water, and a healthful environment."⁹⁹ As such, it is the most silent with respect to the assertability of the ERA against private parties. Perhaps, due to this silence, which mirrors the silence of federal constitutional rights, the New York courts have had to evaluate whether private actions amount to state action to determine whether the ERA is assertable against a purely private party.¹⁰⁰ This is precisely how federal constitutional rights jurisprudence has developed for those situations, where private parties are not acting in a purely private capacity, but rather in a governmental capacity.¹⁰¹ So, New York has clearly adopted federal constitutional jurisprudence on this issue in its state ERA jurisprudence.¹⁰²

The two cases that have required the New York courts to address this issue both involve the operation of private landfills. In *Fresh Air for the Eastside, Inc. v. State*,¹⁰³ the plaintiff nonprofit corporation was comprised of over two hundred individuals who lived within four miles of the High Acres Landfill, which is owned and operated by Waste Management of New York, LLC (WM), a private entity.¹⁰⁴ The plaintiff sued WM (and other New York government entities) over the chronic, noxious emissions from the landfill.¹⁰⁵ While Fresh Air did "not dispute WM's contention that the Green Amendment only 'governs the rights of citizens with respect to their government and not the rights of private individuals against private individuals,'" it did try to assert New York's ERA against WM by arguing that WM's operation was "so entwined with governmental policies and had such governmental character that its actions can be regarded as state action."¹⁰⁶ The Appellate Division of the New York Supreme Court concluded that "[a]lthough the disposal of

98. *Id.* The Commonwealth Court is the court of original jurisdiction for this matter in Pennsylvania. *See id.*; *see also Marcum v. Columbia Gas Transmission, LLC*, 549 F. Supp. 3d 408, 427 (E.D. Pa. 2021) (refusing to impose the trustee duty on a private actor in a land use dispute with another private landowner).

99. N.Y. CONST. art. 1, § 19.

100. *See SHAD All. v. Smith Haven Mall*, 488 N.E.2d 1211, 1215 (N.Y. 1985).

101. *See, e.g., United States v. Pervaz*, 118 F.3d 1, 5–6 (1st Cir. 1997).

102. *See SHAD All.*, 488 N.E.2d at 1217 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

103. 217 N.Y.S.3d 381 (App. Div. 2024).

104. *Id.* at 384.

105. *Id.*

106. *Id.* (quoting *SHAD All.*, 488 N.E.2d at 1215) (citations omitted).

municipal solid waste has traditionally been a governmental function, the fact that landfill operation is a regulated industry and that WM's customers are predominantly municipal entities is insufficient to impute state action to WM's conduct."¹⁰⁷

Undeterred by this result in *Fresh Air*, the plaintiffs in *Seneca Lake Guardian, Inc.*¹⁰⁸ attempted to assert New York's ERA against Seneca Meadows, Inc. (SMI) for persistent and noxious odors emanating from SMI's privately owned and operated Seneca Meadows Landfill.¹⁰⁹ Attempting to distinguish *Fresh Air*, the plaintiffs argued that the New York State Department of Environmental Conservation's (DEC) on-site monitoring of the landfill "constitutes meaningful participation in the Landfill's operation" such that SMI's failure to control the noxious emissions from the landfill counts as state action.¹¹⁰ In particular, DEC was tracking the Seneca Meadows Landfill's odors at a granular level, going so far as to maintain daily reports in which DEC "mark[ed] down whether that day's odors were actually inspected by SMI employees."¹¹¹ The Supreme Court, Albany County, held that this was insufficient to impute state action to SMI and dismissed the plaintiffs' Green Amendment claim against SMI.¹¹² The court noted that "plaintiffs, who are private parties, cannot assert a claim against SMI, another private party, for its alleged violation of plaintiff's constitutional rights under the Green Amendment."¹¹³

In sum, Montana clearly views its ERA as assertable against purely private parties.¹¹⁴ Hawaii probably does as well, but only because its ERA functions to create individual rights to enforce state environmental obligations, many of which are borne by purely private parties.¹¹⁵ Both Pennsylvania and New York, in their lower state courts, have explicitly denied that their ERAs are assertable against purely private parties.¹¹⁶ This is important for litigation strategy, as to what can be accomplished with the current ERAs, and for activist strategy, as to what language is preferable if new ERAs are being debated. If the goal is to hold private polluters accountable for their pollution, something like Montana's or Hawaii's ERA is preferable to the language of Pennsylvania's or New York's ERA.

107. *Id.* at 385.

108. *Seneca Lake Guardian, Inc. v. Seneca Meadows, Inc.*, 236 N.Y.S.3d 519 (Sup. Ct. 2025).

109. *Id.* at 523.

110. *Id.* at 536 (citation omitted).

111. *Id.* at 537 (citation omitted).

112. *Id.* at 538–39.

113. *Id.* at 539 (citation omitted).

114. *See supra* notes 67–77.

115. *See supra* notes 78–86.

116. *See supra* notes 87–107.

Who the parties can be is just the first step in fully describing a legal relation. The next important feature of all legal relations is the nature of the underlying claim between the parties. I turn to this next for the four ERAs.

II. NATURE OF THE CLAIMS

The next step in elucidating the constitutional nature of ERAs is to examine the nature of the underlying claims that have been brought in court pursuant to these provisions. As an initial matter of state constitutional jurisprudence, the Hawaii and Pennsylvania Supreme Courts have held their ERAs to be self-executing.¹¹⁷ One New York trial court has found New York's ERA to be self-executing,¹¹⁸ and the issue has not been decided by either the Supreme Court or Court of Appeals of New York. Montana has avoided the constitutional issue of self-execution,¹¹⁹ even though at least one trial court has found the Montana ERA to be not self-executing.¹²⁰ In general, the state courts have been interpreting claims brought pursuant to the ERAs without state legislation being required first to "implement" the right.¹²¹ In other words, ERAs have content regardless of whether there exists any state legislation providing them content.

What does that content look like? I do not intend to provide a complete taxonomy of what claims could be brought pursuant to these ERAs. I leave the task of creative lawyering to the public interest law firms. What I will discuss in this Part is the nascent taxonomy of the kinds of claims that have been brought pursuant to an ERA, some of which have been successful and some of which have not. My goal in this Part is to emphasize the distinction between constitutional claims and substantive environmental claims. This will be most clear when I discuss

117. See *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1122–23 (Haw. 2010); *Pa. Env't Def. Found. v. Commonwealth (PEDF II)*, 161 A.3d 911, 937 (Pa. 2017).

118. See *Fresh Air for the Eastside, Inc. v. State*, No. E2022000699, 2022 WL 18141022, at *7 (N.Y. Sup. Ct. Dec. 20, 2022). For a defense of the claim that New York's ERA should be held to be self-executing, see Rebecca M. Bratspies & Jaclyn Spencer, *Avoiding Mistakes in Implementing New York's Green Amendment*, SSRN, 4–5 (Dec. 20, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4670844 [<https://perma.cc/HAL9-C66T>].

119. See *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 165 P.3d 1079, 1093.

120. *Cottonwood Env't L. Ctr. v. Mont. Dep't of Env't Quality*, 2024 MT 105N, ¶ 14, 547 P.3d 1285, at *2 (unpublished table decision) ("On December 28, 2022, the District Court dismissed Cottonwood's constitutional challenges, ruling that the Montana Constitution's 'clean and healthful' provisions are not self-executing and may not provide a cause of action standing alone.").

121. See, e.g., *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976).

ERAs as limits on government powers (discussed first) versus ERAs as substantive environmental obligations producing desired environmental outcomes (discussed second). However, the line of ERA cases in these four jurisdictions does not produce a taxonomy quite that clean. In particular, Hawaii's ERA has produced a series of cases where the ERA functions to enable citizen participation in state agency deliberation (discussed third). Finally, there are two cases, one out of Hawaii and one out of Pennsylvania, that suggest ERAs can justify exercises of government discretion.

The first kind of claim is often what we think of as a constitutional right because it is the quintessential negative constitutional right.¹²² The third and fourth kinds of ERA claims are constitutional in a broad sense in that they relate generally to a system of self-governance and the relationship between citizens and their government.

A. ERAs as Limitations on Government Powers

Federal constitutional rights are often invoked as limitations on government powers. I do not mean the term "power" here colloquially, but rather in the technical legal sense of being able to alter a person's legal rights and obligations.¹²³ Governments exercise legal powers through legislation at the federal and state level. Governments also exercise powers through the passing of ordinances at the local level. Both exercises of power change the legal rights and obligations of those subject to the law-making body's jurisdiction. Legislatures and city or county councils, however, are not all powerful. Their ability to legislate or enact ordinances is limited by constitutions, and one of the ways constitutions limit law-making power is through the articulation of individual constitutional rights, which the law-making body cannot violate. We can see this negative rights interpretation of constitutional rights clearly in a variety of federal constitutional rights case law where federal, state, or local laws are invalidated as violating federal constitutional rights.

For example, First Amendment rights are invoked to challenge and invalidate state and federal laws that violate the freedom of religion,¹²⁴ the freedom of speech,¹²⁵ and the freedom of association.¹²⁶ The Second Amendment right to bear arms has been invoked to challenge and

122. See ZACKIN, *supra* note 18, at 37.

123. See Hohfeld, *supra* note 41, at 44–45.

124. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 207–09 (1972).

125. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399–400 (1989).

126. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451–53 (1958).

invalidate a variety of gun laws, including a ban on handguns,¹²⁷ handgun registration laws,¹²⁸ age restrictions on carrying handguns in public,¹²⁹ and concealed carry restrictions.¹³⁰ The Equal Protection clause of the Fourteenth Amendment, which protects fundamental rights from being violated by the states, has been invoked to strike down laws prohibiting interracial¹³¹ and gay marriage,¹³² restricting contraception whether the couple is married¹³³ or unmarried,¹³⁴ and restricting voting rights.¹³⁵

This understanding of constitutional rights as limitations on government powers has been used somewhat frequently in ERA litigation. It properly describes the nature of the claims brought in many of the cases that we can classify as ERA victories. For example, the first real ERA victory came out of Montana in 1999.¹³⁶ In *Montana Environmental Information Center v. Department of Environmental Quality (MEIC)*,¹³⁷ the plaintiffs challenged an exploration license that the Department of Environmental Quality (DEQ) had issued without performing a nondegradation review pursuant to a statutory exemption under Montana's Water Quality Act (WQA).¹³⁸ In a victory for the plaintiffs, the Montana Supreme Court remanded the case for a determination of whether that statutory exemption from nondegradation review under the WQA, in regards to that particular exploration license, was unconstitutional as violating the plaintiffs' environmental rights.¹³⁹ Therefore, *MEIC* is properly interpreted as an as-applied constitutional challenge to a state environmental law rather than as a substantive environmental challenge to the exploration license.

There are several additional cases in Montana that invoke the ERA as a limit on government powers. In *Northern Plains Resource Council v. Board of Land Commissioners*,¹⁴⁰ the plaintiffs challenged a coal lease executed by the State Land Board because they did not conduct an

127. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 573–76, 635 (2008).

128. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 750, 752 (2010).

129. See, e.g., *Worth v. Jacobson*, 108 F.4th 677, 683 (8th Cir. 2024).

130. See, e.g., *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2125 (2022); *Christian v. James*, 753 F. Supp. 3d 273, 275–76 (W.D.N.Y. 2024); *Schoenthal v. Raoul*, No. 3:22-cv-50326, 2024 WL 4007792, at *1 (N.D. Ill. Aug. 30, 2024).

131. See *Loving v. Virginia*, 388 U.S. 1, 2–3 (1967).

132. See *Obergefell v. Hodges*, 576 U.S. 644, 654–55, 675 (2015).

133. See *Griswold v. Connecticut*, 381 U.S. 479, 480–83 (1965).

134. See *Eisenstadt v. Baird*, 405 U.S. 438, 440–41, 443 (1972).

135. See *Harper v. Va. Bd. of Elections*, 338 U.S. 663, 664, 666 (1966).

136. See *MEIC*, 1999 MT 248, ¶ 64, 988 P.2d 1236, 1246.

137. 1999 MT 248, 988 P.2d 1236.

138. *Id.* ¶¶ 1, 6, 988 P.2d at 1237–38.

139. *Id.* ¶¶ 79–82, 988 P.2d at 1241–42.

140. 2012 MT 234, 288 P.3d 169.

environmental impact statement (EIS) prior to executing the lease.¹⁴¹ The State Land Board did not conduct an EIS because the Montana Environmental Protection Act (MEPA) provided a statutory exemption from the EIS requirement for executing coal leases.¹⁴² So, the *Northern Plains* plaintiffs were challenging the constitutionality of the MEPA exemption upon which the State Land Board relied as violating their constitutional environmental rights.¹⁴³

The first case in Montana to result in the Montana Supreme Court facially striking down a state environmental law as violating the plaintiffs' constitutional environmental rights came in *Park County Environmental Council v. Montana Department of Environmental Quality*.¹⁴⁴ In that case, the plaintiffs successfully challenged a mining exploration license issued by DEQ, but the question remained as to what the appropriate remedy was to be while the license was being reconsidered by DEQ.¹⁴⁵ This was an issue because in 2011, the state legislature had amended MEPA to prohibit the courts from enjoining a defectively-issued permit.¹⁴⁶ The Montana Supreme Court held those 2011 MEPA amendments facially unconstitutional as violating the plaintiffs' environmental rights.¹⁴⁷ This is a quintessential example of a negative constitutional right: The Montana legislature lacked the power to eliminate the availability of equitable remedies to successful MEPA challenges because of the ERA.¹⁴⁸

Most recently, in *Held v. State of Montana*,¹⁴⁹ the youth plaintiffs challenged a specific provision in MEPA, called the MEPA Limitation, which prohibited state agencies from considering actual or potential environmental impacts beyond Montana's borders when conducting environmental impact reviews of proposed projects.¹⁵⁰ Prior to 2011, state agencies had considered greenhouse gas emissions when evaluating coal, oil, and gas mining projects, but after the legislature amended MEPA to include the MEPA Limitation in 2011, the state agencies had stopped including greenhouse gas emission analyses in their decision-

141. *Id.* ¶ 7, 288 P.3d at 172.

142. *Id.*

143. *Id.* Ultimately, the court held that mere execution of an exclusive right to apply for state permits to commence mining activities did not implicate the plaintiffs' constitutional environmental rights, and so it did not address the question of whether the statutory exemption from conducting an EIS violated the plaintiffs' environmental rights. *Id.* ¶ 8, 288 P.3d at 175.

144. 2020 MT 303, 477 P.3d 288.

145. *Id.* ¶ 53, 477 P.3d at 302.

146. *Id.*

147. *Id.* ¶¶ 86–89, 477 P.3d at 309–10.

148. *Id.* ¶ 90, 477 P.3d at 311.

149. 2024 MT 312, ¶ 1, 560 P.3d 1235.

150. *Id.* ¶ 5, 560 P.3d at 1243.

making.¹⁵¹ The Montana Supreme Court affirmed the trial court's decision that the MEPA Limitation violated the youth plaintiffs' constitutional environmental rights and held the MEPA Limitation facially unconstitutional.¹⁵² Notably, however, such a legal determination mandates no particular substantive environmental outcome on any project before DEQ. It only functions as a negative right: a limitation on the Montana legislature's power to statutorily obligate agencies to ignore greenhouse gas emissions when performing environmental review of proposed projects.

Several of the ERA victories out of Pennsylvania are also properly described as invoking the ERA as a limitation on government power. For example, in *Robinson Township v. Commonwealth*,¹⁵³ the plaintiffs' claim was that several major provisions in Act 13, a state oil and gas statute, were unconstitutional as violating the plaintiffs' environmental rights.¹⁵⁴ Most importantly, Act 13 preempted local governments from passing ordinances or making zoning decisions regarding oil and gas activity within their jurisdictions.¹⁵⁵ Act 13 also contained provisions granting oil and gas permittees automatic waivers of setbacks that are intended to protect sensitive waters from drilling activity.¹⁵⁶ Both provisions of Act 13 were struck down as facially unconstitutional for violating Pennsylvania's ERA.¹⁵⁷ This is Pennsylvania's ERA functioning as a limitation on the state legislature's powers in oil and gas regulation.

In *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF II)*,¹⁵⁸ the plaintiffs invoked the Pennsylvania ERA to challenge several state statutes that allocated the revenue derived from oil and gas leases on state forest and park lands to the state's general fund.¹⁵⁹ Money in the state's general fund is used for a variety of purposes unrelated to the conservation of the state's natural resources.¹⁶⁰ In *PEDF II*, the Pennsylvania Supreme Court held that royalty revenue streams derived from oil and gas leases could not be diverted to the general fund, and accordingly, the state statute which did this was held to be facially unconstitutional as violating the ERA.¹⁶¹ It took another trip to the

151. *Id.*

152. *Id.* ¶¶ 68, 73, 560 P.3d at 1260–61.

153. 83 A.3d 901 (Pa. 2013).

154. *Id.* at 915–16.

155. *Id.* at 915.

156. *Id.* at 930.

157. *Id.* at 981, 983–84.

158. 161 A.3d 911 (Pa. 2017).

159. *Id.* at 921–25.

160. *Id.* at 925 (quoting John Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENV'T L. 463, 488 (2015)).

161. *Id.* at 938.

Pennsylvania Supreme Court for the other statutes, which diverted bonus payments, yearly rental fees, and interest penalties from the oil and gas leases to the general fund, to be declared facially unconstitutional as well for violating the ERA.¹⁶² Again, the Pennsylvania ERA is limiting the state legislature's power to allocate oil and gas revenues in certain ways.

What is important about recognizing this specific avenue for using ERAs successfully in court is that there is no other legal mechanism for challenging a law-making body's legal powers except via a constitutional route. When the legislature enacts a law that citizens disapprove of, the political solution is to vote out the old legislature and vote in a new legislature that will change the law. Unfortunately, with the influence of business interests in political races pursuant to *Citizens United*,¹⁶³ it is hard for the people to influence law directly that way.¹⁶⁴ So, constitutions and constitutional rights play this very important role in citizen participation in self-governance. They allow individual citizens to challenge the boundaries of their law-making body's legal powers and check wayward exercises of those powers. In this period of social and environmental regression, the value of an ERA that functions as this kind of "backstop" cannot be overstated. Both Act 13 and the MEPA Limitation are regressive state environmental laws that had no business being enacted in the first place. The fact that the citizens of Pennsylvania and Montana had ERAs in their state constitutions that provided a legal mechanism to challenge such regressive environmental laws is a good thing. Unfortunately, this is not the same thing as the ERAs being a legal mechanism to produce substantive environmental outcomes, to which I turn next.

B. ERAs as Substantive Environmental Obligations

In the prior Section, I discussed how ERAs have been successfully asserted as negative rights, *i.e.*, limiting lawmakers' legal powers. The constitutional language of all four ERAs, however, strongly suggests that they should also be assertable as positive rights, *i.e.*, entitling the citizens

162. *Pa. Env't Def. Found. v. Commonwealth (PEDF III)*, 255 A.3d 289, 292–93 (Pa. 2021).

163. 558 U.S. 310 (2010).

164. *See Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (holding that "the government may not suppress political speech on the basis of the speaker's corporate identity"); *see* Daniel I. Weiner, *Citizens United, Explained*, BRENNAN CTR. FOR JUST. (Jan. 29, 2025), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained> [<https://perma.cc/MUH6-2P9X>] ("The ruling has ushered in massive increases in political spending from outside groups, dramatically expanding the already outsized political influence of ultra-wealthy donors, corporations, and special interest groups.").

of the four states to some minimum quality of their environment.¹⁶⁵ A good example of an ERA being asserted as a substantive environmental obligation comes out of Massachusetts in *Hootstein v. Amherst-Pelham Regional School Commission*.¹⁶⁶ In that case, the *pro se* plaintiff asserted that elevated lead levels in his grandson's school's drinking water violated the Massachusetts ERA.¹⁶⁷ The plaintiff sought, not monetary damages, but injunctive relief that would reduce the lead levels in the school's drinking water.¹⁶⁸ The federal district court refused to recognize this private cause of action because nowhere in the state's ERA jurisprudence had the Supreme Judicial Court of Massachusetts indicated that the ERA produced a private right of action.¹⁶⁹

Most of the ERA claims that have asserted a substantive environmental obligation in a legal case are not as clear cut as the *Hootstein* case. Many are integrated into non-constitutional challenges to administrative action, such as EISs, permit issuance, or permit enforcement. They have not been successful. The line of cases developing in New York is informative on this point.

In *Marte v. City of New York*,¹⁷⁰ the plaintiffs sought a declaratory judgment compelling the city and real estate developer defendants to take various actions in relation to a housing development project.¹⁷¹ The plaintiffs argued that the development would negatively affect air quality, the amount of open space, and light in the neighborhood, and they raised several issues with the EIS produced for the development.¹⁷² Ultimately, the plaintiffs were trying to stop the development tout court,¹⁷³ and they were using New York's ERA to try to get the EIS, which had previously survived state administrative review, declared unconstitutional in the alternative.¹⁷⁴ The court did not allow the plaintiffs another "bite at the apple,"¹⁷⁵ and so this was an unsuccessful invocation of New York's ERA as a substantive environmental obligation requiring a particular environmental outcome.

165. See ZACKIN, *supra* note 18, at 165–67.

166. 361 F. Supp. 3d 94 (D. Mass. 2019). I do not discuss Massachusetts's ERA in this Article because beyond this particular case, there is little to note in the development of their ERA jurisprudence.

167. *Id.* at 100–01.

168. *Id.* at 101.

169. *Id.* at 113–15.

170. No. 159068/2022, 2023 WL 2971394, at * 1 (N.Y. Sup. Ct. Apr. 17, 2023).

171. *Id.* at *2; see also *Seneca Lake Guardian, Inc. v. Seneca Meadows, Inc.*, 236 N.Y.S.3d 519, 538–40 (Sup. Ct. 2025) (presenting a nearly identical case to *Marte* on the mandamus issue of enforcing air permits against noxious landfills).

172. *Marte*, 2023 WL 2971394, at *2.

173. *Id.* at *6.

174. *Id.*

175. *Id.*

In *Western New York Youth Climate Council v. New York State Department of Transportation*,¹⁷⁶ the plaintiffs filed a lawsuit seeking a preliminary injunction to halt the commencement of the Kensington Expressway redevelopment project.¹⁷⁷ The court construed the plaintiffs' ERA claim as an allegation that continuing to maintain the Kensington Expressway at all counted as a violation of the plaintiffs' constitutional environmental right because the highway causes air pollution.¹⁷⁸ In rejecting this claim, the court made two notable determinations in terms of the ERA as a substantive environmental obligation. First, because the highway predated the ratification of New York's ERA, the maintenance of the highway could not violate the ERA.¹⁷⁹ This is a curious temporal limitation on any potential substantive environmental content New York's ERA could have. Second, and more importantly, the court determined that the only alternative to maintaining the highway was to let it fall into disrepair, which begged the question of whether the plaintiff was alleging all New York roads violate the ERA.¹⁸⁰ This suggests that courts may be faced with competing government obligations, in this case maintaining the environment and maintaining roads, when an ERA is asserted as a substantive environmental obligation. It also suggests that courts may be reluctant to step in and completely override other legitimate government obligations.¹⁸¹

Similar unsuccess has occurred in New York with respect to compelling state agencies to take environmental enforcement actions. In *Fresh Air for the Eastside, Inc. v. New York*,¹⁸² the plaintiffs filed their ERA lawsuit against the state, the Department of Conservation (DEC), the city, and the landfill to abate the noxious odors and emissions that were emanating from the landfill.¹⁸³ The nature of the substantive environmental claim against the state was that they were not properly enforcing the landfill's air permits and that violated the plaintiffs'

176. 224 N.Y.S.3d 790 (Sup. Ct. 2024).

177. *Id.* at 795.

178. *Id.* at 804.

179. *Id.* at 805.

180. *Id.*

181. The *Robinson Township* court explicitly recognized that the substantive environmental rights language of the Pennsylvania ERA may conflict with other government obligations, and it does not necessarily override those obligations. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 953 (Pa. 2013) ("The Environmental Rights Amendment does not call for a stagnant landscape; nor, as we explain below, for the derailment of economic or social development; nor for a sacrifice of other fundamental values."). Instead, the court suggested, somewhat amorphously, that the ERA be melded into those other obligations. *See id.* ("But, when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, as further explained in this decision, if it is to pass constitutional muster.").

182. 229 A.D.3d 1217, 1217 (N.Y. App. Div. 2024).

183. *Id.* at 1217.

constitutional environmental rights.¹⁸⁴ The appellate court interpreted this claim as an action in mandamus to compel the state to take enforcement actions against the landfill for its air emissions.¹⁸⁵ However, because permit enforcement actions are discretionary agency actions, the court refused to side with the plaintiffs and order the state to take action against the landfill.¹⁸⁶ This is another example of the ERA being invoked unsuccessfully to enforce substantive environmental obligations.

In *Streeter v. New York City Department of Environmental Protection*,¹⁸⁷ the plaintiff was reporting idling vehicles to the city's "Idling Portal" when one of his reports was rejected as a duplicate report.¹⁸⁸ The plaintiff filed the lawsuit to compel the city to either prosecute this report or allow plaintiff to self-prosecute the report, and failure to do either, the plaintiff alleged, violated the plaintiff's constitutional environmental right.¹⁸⁹ The court again construed the plaintiff's ERA claim, not formally as an action in mandamus, but as an action "to modify the Administrative Code" and refused to grant the plaintiff the relief he sought.¹⁹⁰ The ERA in this case failed to facilitate the prosecution of New York City's anti-idling law, which was enacted to reduce vehicle emissions and thereby improve air quality in the city.¹⁹¹ So, again, the ERA is failing to enforce substantive environmental obligations.

New York is not the only state where invoking the ERA as a substantive environmental obligation has been met with failure. Recall from Section II.A. that the plaintiffs in the *Robinson Township* case in Pennsylvania were successful in getting Act 13's preemption of local land use decisions on fracking struck down as facially unconstitutional for violating Pennsylvania's ERA.¹⁹² The next logical application of Pennsylvania's ERA after *Robinson Township* towards securing substantive environmental outcomes was to challenge the local land use decisions themselves that allow fracking in the community. There are several cases in Pennsylvania where plaintiffs challenged rezoning decisions and/or specific fracking permits issued to an oil and gas company consistent with those zoning plans. None have been successful

184. *Id.* at 1217–20.

185. *Id.* at 1219.

186. *Id.* at 1219–20.

187. 213 N.Y.S.3d 865 (Sup. Ct. 2024).

188. *Id.* at 867–68.

189. *Id.* at 868.

190. *Id.* at 870.

191. *Citizens Air Complaint Program*, NYC ENV'T PROT., <https://www.nyc.gov/site/dep/environment/idling-citizens-air-complaint-program.page#> [https://perma.cc/U78Q-GJ8U] (last visited Aug. 24, 2026).

192. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 982 (Pa. 2013).

in invoking the ERA to strike down the rezoning or fracking permit issued.

For example, in *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*,¹⁹³ the plaintiffs challenged the Township's Zoning Hearing Board's Ordinance 127, which allowed "oil and gas well site development" in a variety of zoning districts.¹⁹⁴ The Hearing Board also issued a permit to R.E. Gas Development, LLC (Rex), pursuant to Ordinance 127, to commence oil and gas well site development on a private farm.¹⁹⁵ All of the plaintiffs' challenges to Ordinance 127 and the permit issued to Rex were unsuccessful, including its ERA challenge.¹⁹⁶ The plaintiffs' goals in this case were substantive—they wanted to stop industry from establishing a fracking well on this particular farm. Pennsylvania's ERA was ineffective in achieving that outcome.

We see an almost identical challenge in *Frederick v. Allegheny Township Zoning Hearing Board*.¹⁹⁷ The plaintiffs used the ERA to challenge Zoning Ordinance 01-2010, which supplemented the Township's Zoning Ordinance to allow oil and gas well operations in every zoning district, so long as such operations satisfied certain standards to protect the public health, safety, and welfare.¹⁹⁸ The Township had also issued a permit to conduct oil and gas well operations in an R-2 Agricultural/Residential Zoning District pursuant to Zoning Ordinance 01-2010.¹⁹⁹ The Commonwealth Court again found that the Township's zoning decisions did not violate the plaintiffs' constitutional environmental rights.²⁰⁰ The court noted that Pennsylvania's ERA had been interpreted by the Pennsylvania Supreme Court to not require "derailment of economic or social development."²⁰¹ Because zoning decisions are exercises of the police power, courts are often reluctant to invalidate them just because a party disagrees with a locality's substantive determination of the proper balance of competing interests. In

193. No. 1229 C.D. 2015, No. 1323 C.D. 2015, No. 2609 C.D. 2015, 2017 WL 2458278, at *1 (Pa. Commw. Ct. June 7, 2017).

194. *Id.* at *2.

195. *Id.* at *1.

196. *Id.* at *14, *18. The Commonwealth Court applies the *Payne* balancing test to reject the plaintiff's ERA challenge in this case. However, the *Payne* decision was abrogated by the Pennsylvania Supreme Court in *PEDF II*, 161 A.3d 911, 930 (Pa. 2017). I do not consider this a significant jurisprudential issue, because subsequent similar cases, as discussed in the ensuing text body, have turned out the same way absent the *Payne* test.

197. 196 A.3d 677 (Pa. Commw. Ct. 2018).

198. *Id.* at 679.

199. *Id.*

200. *Id.* at 697–98.

201. *Id.* at 694 (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 953 (Pa. 2013)).

Pennsylvania, the ERA does not seem to change this with respect to oil and gas siting.²⁰²

Montana's ERA has been unsuccessfully invoked as a substantive environmental obligation on a private party in the context of legacy pollution to land. In *Sunburst School District No. 2 v. Texaco, Inc.*,²⁰³ Texaco had polluted land with their oil refinery operations in Sunburst, Montana, in the first half of the twentieth century, and only in 2003 did Texaco agree to a cleanup plan of "monitored natural attenuation" (MNA).²⁰⁴ MNA is a cheap pollution remedy that essentially monitors the pollution as it dilutes on its own over time.²⁰⁵ Unhappy with this cleanup plan, which had been approved after notice and comment by the Montana DEQ, the plaintiff school district brought a variety of common law claims against Texaco as well as a claim under Montana's ERA.²⁰⁶ The common law claims included trespass, strict liability for abnormally dangerous activity, private and public nuisance, wrongful occupation of property, and constructive fraud.²⁰⁷ At trial, the jury awarded the plaintiffs \$226,000 for private nuisance, public nuisance, and the constitutional tort of violating the plaintiff's constitutional environmental right.²⁰⁸ The Montana Supreme Court overturned the jury's award because the court held that in the face of adequate common law remedies, the plaintiff had no cause of action for the constitutional tort of violating the plaintiff's environmental right.²⁰⁹

It is an open question in Montana of what would count as violating the state's ERA as a constitutional tort but would not simultaneously give rise to a sufficient action at common law. Looking to the case law, we can recall in *Cape-France* that the buyer in a real estate transaction wanted the seller to drill a test well into an area of known contamination to complete the sale.²¹⁰ The Montana Supreme Court observed that compelling the seller to drill the test well would have exposed the seller to financial liability "of an unquantifiable nature."²¹¹ If we were to imagine that the seller drilled the well of its own accord and the contamination plume spread, causing damages of "an unquantifiable

202. See also *Protect PT v. Pa. Twp. Zoning Hearing Bd.*, 220 A.3d 1174, 1196–98 (Pa. Commw. Ct. 2019) (holding that local oil and gas zoning decisions did not violate plaintiffs' constitutional environmental rights).

203. 2007 MT 183, 165 P.3d 1079.

204. *Id.* ¶¶ 10, 15, 165 P.3d at 1083–84.

205. See *id.* ¶ 16, 165 P.3d at 1084.

206. *Id.* ¶¶ 16, 19, 165 P.3d at 1084.

207. *Id.* ¶ 19, 165 P.3d at 1084.

208. *Id.* ¶ 24, 165 P.3d at 1085.

209. *Id.* ¶ 64, 165 P.3d at 1093.

210. *Cape-France Enters. v. Est. of Peed*, 2001 MT 139, ¶ 25, 29 P.3d 1011, 1016.

211. *Id.* ¶ 24, 29 P.3d at 1016.

nature,” the seller would have been at least negligent in so drilling the test well. So, the constitutional tort would not be needed to provide the injured plaintiff(s) compensation because ordinary negligence would be available.

This thought experiment, however, does not answer the real question left open by *Sunburst*, which is whether Montana’s ERA can expand tort liability on those who degrade the environment by creating a constitutional environmental tort in the absence of a common law environmental tort. There are some scholars who have suggested that an ERA can expand the reach of public nuisance.²¹² The thought is that because public nuisance is an unreasonable interference with a right of the public and the ERA is an articulation of the “right of the public,” the ERA should expand the reach of public nuisance.²¹³ The little court guidance on this issue suggests that at most, the ERA eliminates the specialized injury requirement for bringing a public nuisance claim.²¹⁴ Even if the ERA were able to expand public nuisance, that still does not imply that it is assertable as a standalone constitutional environmental tort. Furthermore, there is the open question of how Montana, or the other three states, would view the allegation of a constitutional environmental tort pursuant to an ERA in the face of violations of federal environmental laws. There is currently no guidance in the case law on this issue, but we know that New York will not allow the ERA to be used to compel state agencies to enforce environmental permits, and we know that ERAs cannot be asserted against private parties in Pennsylvania and New York who are usually the permit violators.

Hawaii’s ERA is the outlier compared to what we see in New York, Pennsylvania, and Montana. Because the Hawaii ERA states that the right is “as defined by laws relating to environmental quality,”²¹⁵ it can only ever be invoked in the context of some substantive environmental obligation. That substantive environmental obligation, however, is not open for the courts to decide. It is determined exclusively by state environmental law.²¹⁶ So, while the Hawaii ERA can function to secure

212. See, e.g., Matthew Russo, *Productive Public Nuisance: How Private Individuals Can Use Public Nuisance to Achieve Environmental Objectives*, 2018 ILL. L. REV. 1969, 1969 (2018) (advocating for greater use of public nuisance in environmental claims and discussing how the Illinois ERA may facilitate that by eliminating the special injury requirement for standing in public nuisance claims).

213. *Id.* at 1987, 1990.

214. See *City of Elgin v. County of Cook*, 660 N.E.2d 875, 891 (Ill. 1995). But see *Seneca Lake Guardian, Inc. v. Seneca Meadows, Inc.*, 236 N.Y.S.3d 519, 530–33 (Sup. Ct. 2025) (rejecting plaintiffs’ public nuisance claim, which could have but did not invoke New York’s ERA because they did not show they had suffered a special injury).

215. HAW. CONST. art XI, § 9.

216. See *MECO*, 408 P.3d 1, 13 (Haw. 2017) (“A committee report from the 1978 Constitutional Convention explained that the right would be defined by environmental statutes, rules, and ordinances to lend flexibility to the definition of the

substantive environmental obligations,²¹⁷ its only function to secure substantive environmental obligations that are already codified in state law.

What can we take away from this haphazard case law when it comes to treating ERAs as substantive environmental obligations? I think it is important to recognize that allegations of substantive environmental obligations take many different forms. So, when ERAs are being invoked as substantive environmental obligations, plaintiffs are asking judges to use ERAs to change different areas of law. For example, the problem of mandamus in the line of New York cases has to do with the state agency's role in effectuating substantive environmental outcomes through environmental permit enforcement action. Mandamus is a long-established constitutional principle that defines boundaries in the separation of powers.²¹⁸ Courts generally refuse to order the executive branch to do something in particular when the executive branch has discretion in deciding what to do. From this perspective, it should not be surprising that ERAs are far less effective at achieving substantive environmental outcomes than might be assumed.

In Pennsylvania, the ERA may have successfully returned certain authority over oil and gas wells to local governments, but it has not, to this point, substantively changed what those local governments are able to do. The line of cases in Pennsylvania challenging oil and gas rezoning and permitting decisions by local governments has to do with the scope of the police power of local governments, another important constitutional principle. While the ERA could conceivably be interpreted to shift the boundaries of how we understand local governments' zoning powers, the Pennsylvania courts have been reluctant to interpret it that way. This is partially due to the *Robinson Township* court's interpretation of Pennsylvania's ERA as "not call[ing] for a stagnant landscape," "for the derailment of economic or social development," or "for a sacrifice of other fundamental values."²¹⁹ But there is another factor at play. Zoning decisions determine *where* oil and gas drilling may take place, but state law still regulates *how* oil and gas drilling is performed.²²⁰ So, when the plaintiffs in this line of cases are challenging the oil and gas well operations, the court is interpreting this substantive environmental

right over time Defining the right in terms of present laws imposes no new legal duties on parties").

217. See *infra* Sections II.C, III.C.

218. See Z. Payvand Ahdout, *Separation of Powers Avoidance*, 132 YALE L.J. 2360, 2377 (2023) (listing mandamus as one area of law where separation of powers issues are implicated).

219. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 953 (Pa. 2013).

220. See *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 697 (Pa. Commw. Ct. 2018).

challenge as something that should have been addressed to the state agencies that issued the drilling permit.²²¹

An important open question in Pennsylvania is why the ERA in these cases has not been successfully asserted as a negative right. After all, many of the Second Amendment cases have asserted the right to bear arms as a negative right to strike down city ordinances enacted pursuant to the city's police power restricting gun ownership.²²² It could be that courts are quite deferential to land use decisions made by local governments.²²³ It also could be that the issue needs to be taken up by the Pennsylvania Supreme Court. At least one Commonwealth Court judge would have invalidated an oil and gas ordinance as violating the state's ERA.²²⁴ It may also be the fact that these kinds of zoning decisions require evidentiary hearings and findings of fact on whether the ordinance "unreasonably impairs" plaintiffs' constitutional environmental rights.²²⁵ This is a kind of balancing that we do not see in the jurisprudence of fundamental federal constitutional rights. It is a substantive determination weighing the interests of the locality in oil and gas development against the risk of environmental harm. Courts are reluctant to substitute their judgment of the correct balance in such cases.²²⁶

Finally, Montana suggests that there could be some interplay between its ERA and traditional common law environmental torts. However, it remains to be seen how the ERA could be asserted as a substantive environmental obligation in a way that does not overlap with the common law environmental torts such as private or public nuisance, trespass, or strict liability.

I do not intend for this Section to dissuade attempts at creative lawyering to find ways to invoke ERAs as substantive environmental obligations. The point of this Section is to recognize that treating ERAs as substantive environmental obligations requires ERAs to compete in a complex web of existing common law, statutory law, and constitutional law principles that have already established how substantive environmental obligations are determined. It is unclear how ERAs can be effective in directly changing substantive environmental obligations. From the case law that has developed so far, I think this largely comes

221. *See id.*

222. *See supra* Section II.A.

223. *See Frederick*, 196 A.3d at 698 n.40 ("Whether a zoning ordinance is wise or uses the best means to reach the desired result are matters best left to the Township supervisors, not the courts.").

224. *Id.* at 711–15 (Ceisler, J., dissenting) (arguing that the ordinance violated the ERA because of the vague wording and conditions and because it provided no way for township residents or other parties to offer input during the permitting process).

225. *See id.* at 698 n.40.

226. *See id.* at 701.

from constitutional law principles that limit the role of courts in agency discretion and make courts reluctant to second guess exercises of the police power.

While the bulk of ERA litigation has occurred around ERAs as negative rights, or ERAs as substantive environmental obligations, there is a distinct third category of ERA jurisprudence in the context of citizen participation in self-governance. These cases come out of Hawaii and Pennsylvania, and I turn to this in the next Section.

C. ERAs as Vehicles for Citizen Participation in Governance

Despite the substantive rights language of the ERAs, case law has developed out of Hawaii and Pennsylvania that clearly affirms that those ERAs contain at least one procedural right. The procedural right that has been recognized as contained in the Hawaii ERA is the right to intervene in certain state agency proceedings.²²⁷ Intervention in agency proceedings is one way that citizens can participate in a system of self-governance, though it provides citizens no direct control over substantive environmental outcomes. In Pennsylvania, the ERA has been successfully invoked to intervene in litigation over a state climate law.²²⁸ Intervention in litigation is not usually considered participation in governance, but I will discuss how it functions that way in this Pennsylvania case. I begin with a discussion of the Hawaii cases first before concluding with a discussion of the Pennsylvania case.

There are three successful intervention cases that come out of Hawaii, all of which deal with electricity regulation in the state.²²⁹ In Hawaii, the electric utility companies select which companies will produce electricity for their customer base by entering into contractual agreements called power purchase agreements (PPA) with the producers of electricity. Because electricity is a natural monopoly with captive consumers, those PPAs are evaluated by the state's Public Utilities Commission (PUC), which has the power to reject a PPA if it is not in the public interest. In these three cases, the plaintiffs were all denied the ability to intervene in the PUC's proceedings during which it evaluated the respective PPAs, and so the issue at the Hawaii Supreme Court was whether the plaintiffs were wrongfully denied the opportunity to intervene in the PUC proceedings.

In the first intervention case, *MECO*,²³⁰ the electric utility Maui Electric proposed a PPA wherein it would continue to purchase electricity

227. See cases cited *infra* note 229.

228. See *Shirley v. Pa. Leg. Ref. Bureau*, 318 A.3d 838 (Pa. 2024).

229. See *MECO*, 408 P.3d 1, 6, 16 (Haw. 2017); *HELCO*, 445 P.3d 673, 677, 700 (Haw. 2019); *In re Gas Co.*, 465 P.3d 633, 636, 654 (Haw. 2020).

230. 408 P.3d 1 (Haw. 2017).

from a Hawaiian Commercial & Sugar plant that burned a number of fossil fuels, including coal and petroleum.²³¹ Sierra Club asserted “a fundamental due process right to participate in a hearing on the grounds that the [PPA] would impact Sierra Club members’ health, aesthetic, and recreational interests.”²³² However, Sierra Club was denied intervention during the PUC’s proceedings evaluating the PPA and at the ICA.²³³

The Hawaii Supreme Court ultimately reversed the ICA, concluding that Sierra Club possessed a due process right grounded in the state’s ERA entitling it to a hearing before the PUC made its decision on the PPA.²³⁴ The path the court took to reach this conclusion is not direct. First, Sierra Club had to establish that it had a protected property interest, which means some benefit to which it was legitimately entitled.²³⁵ To do this, Sierra Club looked to the Hawaii ERA.²³⁶ The court was clear, however, that the Hawaii ERA does not contain a “freestanding interest in general aesthetic and environmental values.”²³⁷ So, the court had to look to state statutory law to find the protected property interest to which Sierra Club was legitimately entitled.²³⁸ The relevant state law was found in Chapter 269, where the state legislature directed the PUC to recognize the need to reduce reliance on fossil fuels when carrying out its statutory duties, including evaluating PPAs.²³⁹

What is the ERA really doing inside of this logic? It is tempting to view the ERA as producing a due process right to intervene in the PUC proceedings out of thin air, because in effect, it does. However, it only does so because the PUC has statutory obligations to recognize the need to reduce the state’s reliance on fossil fuels that the Hawaii Supreme Court thought the PUC had not adequately fulfilled. In essence, then, Sierra Club’s right to intervene is grounded on the PUC’s obligation to consider the need to reduce reliance on fossil fuels. The ERA provides the bridge between the due process right and the state’s obligation,²⁴⁰ and intervention in the PUC proceedings via a hearing is how citizens hold the PUC to its statutory obligation.

This interpretation of the Hawaii ERA accurately describes the other two successful electricity intervention cases. In *In re Hawaii Electric*

231. *Id.* at 5.

232. *Id.* at 6.

233. *Id.* at 7–8.

234. *Id.* at 23.

235. *Id.* at 12.

236. *Id.* at 12–13.

237. *Id.* at 16.

238. *Id.* at 13.

239. *Id.* at 13–14.

240. This is structurally identical to how the Hawaii ERA provides the bridge between environmental rights and private parties’ statutory environmental obligations, discussed above. *See supra* Part I.

Light Co. (HELCO),²⁴¹ the environmental nonprofit Land of Life (LOL) sought to intervene in the PUC proceedings but was only granted limited participant status.²⁴² The PUC held no hearing on the PPA.²⁴³ The PPA was between Hawaii Electric Light Company (HELCO) and Hu Honua Bioenergy, LLC, an electricity producer that planned on refurbishing a biomass facility in reliance on selling the electricity produced at that facility pursuant to the PPA.²⁴⁴ Upon appeal to the Hawaii Supreme Court, the court again affirmed LOL's due process right grounded in the PUC's Chapter 269 obligations, bridged by the state's ERA.²⁴⁵ Because the PUC failed to demonstrate "express consideration" of the reduction of greenhouse gas emissions and failed to consider hidden and long-term environmental and public health effects of the biomass facility under the PPA, it again failed in satisfying its Chapter 269 obligations, and LOL was entitled to a full hearing and full participant status at that hearing.²⁴⁶

Finally, in the case *In re Gas Co.*,²⁴⁷ the PPA at issue would have passed the costs associated with the electricity producer's move away from synthetic natural gas to liquid natural gas onto consumers.²⁴⁸ The PUC had approved this PPA, and LOL and Ka Lei Laile Ali'I, another activist organization, were denied intervention and granted only limited participant status in the PUC's evaluation of the PPA.²⁴⁹ Again, up to the Hawaii Supreme Court, the PUC attempted to defend its decision as satisfying its Chapter 269 obligations on the ground that the PUC was not required to consider greenhouse gas emissions outside of the state of Hawaii,²⁵⁰ which is where many of the emissions associated with this PPA would occur due to liquid natural gas leakage.²⁵¹ The court was not persuaded and further refined the PUC's statutory obligations under Chapter 269 as requiring them to consider such extraterritorial greenhouse gas emissions when evaluating PPAs.²⁵²

A more recent electricity case was an unsuccessful challenge to the approved PPA but continues developing the ERA jurisprudence in this direction. In *In re Application of Maui Electric Co.*,²⁵³ the Pono Power Coalition (Pono Power), a community group, challenged another PPA

241. 445 P.3d 673 (Haw. 2019).

242. *Id.* at 677.

243. *Id.*

244. *Id.*

245. *See id.* at 688–89.

246. *Id.* at 689.

247. 465 P.3d 633 (Haw. 2020).

248. *Id.* at 636.

249. *Id.*

250. *Id.* at 647.

251. *Id.* at 648.

252. *See id.* at 650.

253. 506 P.3d 192 (Haw. 2022).

approving a solar-plus-battery plant located on Ulupalakua Ranch on the island of Maui.²⁵⁴ During the PUC proceedings, Pono Power moved to intervene, though it was only granted participant status by the PUC.²⁵⁵ The PUC held a two-day evidentiary hearing on the PPA, which included witness testimony, PPA negotiations, pricing, greenhouse gas emission analysis, community outreach, and studies relating to the project's impact on cultural and natural resources.²⁵⁶ On appeal, Pono Power alleged that the PUC had failed to make affirmative findings about trust resources pursuant to its constitutional public trust obligations under article XI, section 1 of the Hawaii Constitution.²⁵⁷ Such public trust obligations are in addition to the PUC's statutory obligation pursuant to Chapter 269.²⁵⁸ On appeal, the Hawaii Supreme Court determined that the PUC had fulfilled both its constitutional public trust obligations and its Chapter 269 obligations in approving the PPA.²⁵⁹ However, the court's analysis upholding the PPA still functioned to further refine the PUC's statutory and constitutional duties. Notably, Pono Power was not granted full intervenor status, but because the PUC held a full evidentiary hearing, the due process right to intervene and have a hearing was not an issue.

The Hawaii ERA has limitations when it comes to its interactions with other areas of law. In a more recent electricity case, LOL challenged a PPA for a wind farm that had been approved more than five years prior to the filing of the lawsuit.²⁶⁰ One of the challenges to the PPA was that the PUC had failed to include an analysis of the greenhouse gas emissions impact of the wind farm.²⁶¹ The Hawaii Supreme Court concluded that the PUC did not err in refusing to reopen its order approving the PPA because LOL could have raised the Chapter 269 issue in a timely manner when the PPA was originally approved.²⁶² Of course, because the PPA was approved in 2014, and the first successful intervention case allowing private parties to hold the PUC to its Chapter 269 obligations was not decided until 2017,²⁶³ LOL could not have known that such an appeal would have been successful in 2014. But this was not addressed by the court. So, similar to federal constitutional jurisprudence, the state's ERA does not extend the timeline for challenges to be brought pursuant to the ERA.

254. *Id.* at 195–96.

255. *Id.* at 197.

256. *Id.*

257. *See id.* at 200.

258. *See id.* at 202.

259. *See id.* at 203–04.

260. *In re Haw. Elec. Co., Inc.*, 489 P.3d 1255, 1258 (Haw. 2021).

261. *Id.*

262. *Id.* at 1259.

263. *See MECO*, 408 P.3d 1, 5 (Haw. 2017).

An interesting feature of these successful intervention cases out of Hawaii is that they have functioned to allow the Hawaii Supreme Court to refine the contours of the PUC's statutory duties under Chapter 269 more than anything else. The success of each case depended on the court deciding that the PUC had failed in executing its Chapter 269 duties. This failure is what gave rise to the plaintiffs' right to intervene in the PUC proceedings. The ERA is not only functioning as this bridge between the people and the PUC to compel the PUC to satisfy its statutory environmental obligations. It has also resulted in the Hawaii Supreme Court interpreting the content of the PUC's statutory environmental obligations because the intervention issue was intertwined with the substantive environmental obligation issue. So, while I have called this a procedural right, it really is functioning as a mechanism for the people to robustly participate in the governance of Hawaii's electricity sector.

Shirley v. Pennsylvania Legislative Reference Bureau,²⁶⁴ the intervention case recently decided in Pennsylvania, does not deal with intervention in state agency proceedings, but rather intervention in litigation.²⁶⁵ Intervention in litigation is not generally considered a vehicle for citizen participation in self-governance in the way that intervention during state agency proceedings is. The administrative state contains a variety of democratic features,²⁶⁶ of which intervention is one, or so I previously suggested. Litigation is not democratic in this way. So, a brief explanation is needed as to why I include *Shirley* in this Section.

The issues in *Shirley* have to do with Pennsylvania's participation in the Regional Greenhouse Gas Initiative (RGGI), a coalition of eleven eastern states, which aims to establish what is effectively a cap-and-trade system on carbon dioxide emissions from electric power plants.²⁶⁷ In 2019, Governor Tom Wolf issued an executive order directing Pennsylvania's DEP to develop a rulemaking package to join the RGGI.²⁶⁸ As soon as that package was completed, it was disapproved by the Pennsylvania State Senate Environmental Resources and Energy Committee and then by the full senate.²⁶⁹ The full house also disapproved of the rulemaking package, but Governor Wolf vetoed these disapprovals.²⁷⁰ The Pennsylvania Legislative Reference Bureau (LRB)

264. 318 A.3d 832 (Pa. 2024).

265. *Id.* at 839.

266. See Kamaile A. N. Turcan, *Shaping Administrative Law for a Participatory Democracy*, U. HAW. L. REV. (forthcoming) (Manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5433454 [<https://perma.cc/J65B-NTYZ>] (discussing how notice and comment, petitioning agencies, and arbitrary and capricious review function as public participation in government through the administrative state).

267. *Id.* at 838–39.

268. *Id.* at 839.

269. *Id.*

270. *Id.* at 839–40.

twice refused to publish DEP's rulemaking package.²⁷¹ So, the lawsuit in *Shirley* was initiated by DEP and the Pennsylvania Environmental Quality Board (EQB) to get the rulemaking package published by the LRB and deemed approved by the General Assembly.²⁷² Several senators and representatives sought to intervene in the lawsuit, which was granted, and then they moved to enjoin the RGGI rulemaking package in its entirety.²⁷³

At this point, Citizens for Pennsylvania's Future, Clean Air Council, and Sierra Club (Nonprofits)²⁷⁴ moved to intervene in the litigation to defend the RGGI package under the state's ERA.²⁷⁵ So, this litigation involved a political battle between the state's legislative and executive branches, which is unusual for litigation, and the Nonprofits sought to permissively intervene on the side of the executive branch, defending the RGGI rulemaking package pursuant to the state's ERA.²⁷⁶

Permissive intervention under Pennsylvania law requires that the petitioning intervenor demonstrate that they have standing and that their interests are not adequately represented by the parties to the litigation.²⁷⁷ The Nonprofits presented testimony from their members demonstrating injury from climate change and the role of greenhouse gas emissions in exacerbating climate change, which satisfied the standing requirement for the majority.²⁷⁸ In that majority opinion, the importance of the ERA was in the Nonprofits' demonstration that their interests were not adequately represented by the parties to the litigation.²⁷⁹ More specifically, the DEP and EQB had failed to invoke the ERA in their defense of the RGGI rulemaking package.²⁸⁰ The logic of the argument goes like this. The senators alleged that the RGGI cap-and-trade scheme amounted to an unconstitutional state tax.²⁸¹ However, ERA precedent had concluded that proceeds from the sale of the state's natural resources could only be used for the conservation and maintenance of those resources, not as general revenue for the government.²⁸² The majority found this defense of the RGGI rulemaking package on the basis of the ERA both salient and

271. *Id.* at 839.

272. *Id.* at 840.

273. *See id.* at 841.

274. *Id.* at 839.

275. *Id.* at 842.

276. *Id.* at 841–42.

277. *Id.* at 852.

278. *Id.* at 853–55.

279. *Id.* at 855.

280. *Id.*

281. *Id.*

282. *Id.* (citing *PEDF II*, 161 A.3d 911, 938 (2017)).

undefended by DEP and EQB, justifying Nonprofits' permissive intervention in the case.²⁸³

In her concurrence, Justice Christine Donohue invoked the public trust language of the ERA to justify the permissive intervention of the Nonprofits.²⁸⁴ Because the court had interpreted the public trust language of the state's ERA through the lens of private trust law, Justice Donohue appealed to those principles in concluding that the Nonprofits were entitled to intervene. Under Pennsylvania private trust law, trust beneficiaries have rights in rem in the trust corpus itself.²⁸⁵ This allows a trust beneficiary, in virtue of nothing more than their beneficiary status, to enforce the trust, have a breach of the trust enjoined, and obtain redress for a breach of the trust.²⁸⁶ Under the ERA's public trust language, the Nonprofits (by way of their members) possess this beneficiary status regarding the public natural resources, *i.e.*, the ERA trust corpus. The Nonprofits alleged that enjoining the RGGI rulemaking package threatens to diminish and/or destroy the public natural resources.²⁸⁷ On this logic, then, Justice Donohue would conclude that the Nonprofits have standing to intervene.²⁸⁸

These cases out of Hawaii and Pennsylvania seem to be unique to each jurisdiction and not generalizable to other jurisdictions. This is because of the work that the constitutional language is doing in each state to drive the jurisprudence in this area. We can see that the Hawaii ERA really functions as a bridge allowing citizens to enforce environmental obligations against either private parties (discussed in Part I) or the state itself (discussed in this Section). This is because the language of the ERA defines the citizens' rights in terms of state law. As such, it does not change the underlying substantive environmental obligations codified in state statute, but it does provide a route by which citizens can sue to enforce those obligations and courts can be called upon to refine their boundaries. In the case of government obligations, being able to enforce substantive environmental obligations against the state is a way for citizens to participate in their own self-governance.

Shirley is a unique case because of the political infighting between the legislative and executive branch over DEP's rulemaking. The lawsuit is a contest between the legislative and executive branches of government, so citizens' ability to participate in the lawsuit is an opportunity to participate in the political process over the RGGI rulemaking package. However, the way in which the Pennsylvania ERA

283. *Id.*

284. *Id.* at 859–60 (Donohue, J., concurring).

285. *Id.* at 859 (Donohue, J., concurring).

286. *Id.* (Donohue, J., concurring).

287. *Id.* at 859–60 (Donohue, J., concurring).

288. *See id.* at 860 (Donohue, J., concurring).

functions to make this intervention happen depends entirely on the ERA's trust language. None of the other five previously mentioned states with ERAs have public trust language in their ERA provisions.²⁸⁹ So, it is unlikely that whatever comes from *Shirley* in the long run will be generalizable to other jurisdictions.

A final reflection on these cases considers the issue of what, if anything, makes these cases expressions of constitutional rights. They certainly play a role in facilitating citizen participation in self-governance, as I have described previously. If we think of constitutions as defining the structure of government and the relationship between the people and their government, the use of ERAs to facilitate this participation certainly seems constitutional in that regard. We might think that state administrative procedure acts also facilitate participation in governance without being constitutional (because they are statutory). Perhaps those acts reflect more limited forms of participation in governance, such as notice and comment, which leave much discretion to the state agencies. The Hawaii cases seem to suggest a stronger form of participation in governance through compelling state agencies to affirmatively meet their substantive environmental obligations. But perhaps the line between administrative law and constitutional law is not so sharp here.

The final category to date worth discussing regarding the content of ERAs has to do with the state invoking its ERA to justify exercising its discretion in an environmentally protective way. I turn to this in the next Section.

D. ERAs as Justifying Exercises of Government Discretion

After New York ratified its ERA in 2021, there was much excitement over what the new constitutional right would mean for environmental progress in the state. Professor Rebecca Bratspies suggested that the ERA could inform state decisionmakers in fulfilling their governmental duties at every point of discretion they exercise.²⁹⁰ Bratspies further argued that New York's ERA provides state actors "new grounds to justify more rigorous enforcement or to defend state environmental legislation from attack by polluting industry."²⁹¹

Relatedly and recently, Professor Sonya Ziaja has undertaken empirical investigation into how ERAs are used by state natural resources

289. See MONT. CONST. art. II, § 3; ILL. CONST. art. XI, § 2; HAW. CONST. art. XI, § 9; N.Y. CONST. art. I, § 19; MASS. CONST. art. XCVII.

290. See Rebecca Bratspies, *Administering Environmental Justice: How New York's Environmental Rights Amendment Could Transform Business as Usual*, 41 PACE ENV'T L. REV. 100, 116 (2024).

291. *Id.*

agencies in Hawaii and Montana.²⁹² Disappointingly, Professor Ziaja's interviews revealed that some of the state natural resources employees in Hawaii and Montana do not even know about their state's ERA.²⁹³ Those that do know about the ERA either do not use it in their daily work or do not think that it should be used in their daily work.²⁹⁴ The state natural resources employees are more likely to be influenced in their daily work by their personal values and identities and their political economy (political power dynamics and budget concerns).²⁹⁵

With these aspirational and empirical perspectives in mind, what can we learn from the developing ERA jurisprudence regarding ERAs as justifying exercises of government discretion? The answer is simply that courts seem poised to uphold exercises of agency discretion that further the purpose of an ERA. There is one case in Hawaii and one case in Pennsylvania that both support Professor Bratspies's suggestion that state agencies can, and should, use ERAs to advance environmental progress when exercising discretion within their governmental decision-making powers.

The relevant case out of Hawaii is the end of the *HELCO* saga, which I discussed briefly in the previous Section as one of the successful PUC intervention cases. As a quick reminder, in *HELCO*, LOL, the citizen nonprofit group, sought to intervene in the PUC proceedings that approved a PPA between HELCO and Hu Honua Bioenergy, LLC.²⁹⁶ Hu Honua was planning on refurbishing a biomass power plant under the guarantee of the PPA that it would be able to sell the electricity generated from that plant to HELCO's customer base. The PUC originally approved the PPA, but LOL successfully litigated the intervention issue.²⁹⁷ Upon remand, the PUC was directed by the Hawaii Supreme Court to consider the reasonableness of the proposed project's costs and greenhouse gas emissions as well as the project's impacts on LOL members' right to a clean and healthy environment.²⁹⁸

292. See Sonya Ziaja, *Why Constitutional Environmental Rights Do Not Matter*, 56 ELR 10231, 10232 (2026). Pennsylvania and New York state natural resource agencies declined to be interviewed by Professor Ziaja.

293. *Id.* at 10241.

294. *See id.*

295. *See id.*

296. *See HELCO*, 445 P.3d 673, 698 (Haw. 2019).

297. *See id.* at 700.

298. *In re Haw. Elec. Light Co. (HELCO III)*, 526 P.3d 329, 331 (Haw. 2023) (quoting *HELCO*, 445 P.3d at 698).

After the case was remanded a second time by the Hawaii Supreme Court,²⁹⁹ the PUC held a contested hearing on the PPA.³⁰⁰ After the hearing, the PUC issued an order rejecting the PPA, and in that order, the PUC made numerous findings regarding the anticipated greenhouse gas emissions from Hu Honua's plan.³⁰¹ First, the project front loaded all the greenhouse gas emissions, more than eight million metric tons of them.³⁰² Second, Hu Honua's plan for offsetting these emissions was to plant trees, but it produced no firm commitment on exactly where all these trees were to be planted or how it was to be assured that these trees would sequester all those emissions.³⁰³ Finally, Hu Honua promised that if such a sequestration effort failed, it would purchase carbon offsets at \$15/ton from "reputable sources."³⁰⁴

The PUC determined in its order rejecting the PPA that the overall project would not be carbon neutral until 2047, two years after Hawaii's 2045 zero emissions target.³⁰⁵ Furthermore, the PUC determined that the project would be a significant net emitter for its first twenty-five years, causing damage that could not be easily undone if Hu Honua failed in its sequestration commitments.³⁰⁶ The project would significantly increase costs for rate-payers, and it would displace more environmentally friendly renewal energy projects.³⁰⁷ On these grounds, the PUC determined that the PPA was not in the public interest and rejected the PPA.³⁰⁸

At this point, Hu Honua had already had its PPA approved, then sent back for reconsideration, and finally rejected, so it appealed the PUC's determination rejecting the PPA, which is what led to *HELCO III*.³⁰⁹ Because these Hawaii electricity intervention cases are ultimately about holding the PUC to its statutory duties under Chapter 269, most of the court's analysis upholding the PUC's rejection of the PPA focuses on the PUC's Chapter 269 duties. Inside of the PUC's Chapter 269 duties, it must consider greenhouse gas emissions inside of public-interest-minded balancing.³¹⁰ Hu Honua argued that the PUC should have

299. *See In re Haw. Elec. Light Co. (HELCO II)*, 487 P.3d 708, 709–10 (Haw. 2021) (holding that the PUC was entitled to deny Hu Honua a waiver from the competitive bidding process).

300. *HELCO III*, 526 P.3d at 331.

301. *Id.* at 333.

302. *Id.* at 332.

303. *Id.*

304. *Id.*

305. *Id.* at 333.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 331–33.

310. HAW. REV. STAT. § 296-6 (2025).

interpreted this duty as comparing their biomass power plant to only fossil fuel power plant alternatives, not renewable power plant alternatives.³¹¹ It also argued that a recent minor amendment to Chapter 269, Act 82, exempted their proposed project from the PUC's greenhouse gas emission analysis.³¹² The court rejected both of these arguments, relying on the state's ERA and the fact that Chapter 269 reflects the PUC's constitutional obligation to protect a life-sustaining climate system.³¹³ "The PUC was under no obligation to evaluate an energy project conceived of in 2012 the same way in 2022. Indeed, doing so would have betrayed its constitutional duty."³¹⁴

This may not be a case of agency discretion *a la* mandamus that we see in the New York case law, but the court does interpret the PUC's statutory environmental obligations in favor of the agency's determination to reject a previously approved PPA, an exercise of discretion that favors environmental progress over business interests. It is a huge win for the court to back the PUC on reversing its decision on the PPA, because industry can be quite entitled in this regard and because courts are the final arbiter in such disputes. It also sets precedent that the court will back an agency that reevaluates a prior decision and comes to the conclusion that the prior decision was not environmentally justifiable. This is important for state environmental agencies that are often underfunded and reluctant to be drawn into litigation.³¹⁵

The case in Pennsylvania where the ERA is used to justify exercises of agency discretion once again involves Act 13, the state oil and gas statute that was the focal point of *Robinson Township*.³¹⁶ In *Marcellus Shale Coalition v. Department of Environmental Protection*,³¹⁷ the legal challenge was not the people challenging the limits on governmental power. Instead, it was industry challenging the DEP's rulemaking under parts of Act 13 that survived *Robinson Township*.³¹⁸ Act 13 applies to any "applicant proposing to drill a well at a location that may impact a public resource."³¹⁹ Act 13 does not define public resource, but it contains a non-exclusive list of six items following this language that includes "other critical communities."³²⁰ DEP promulgated regulations defining "other critical communities," and the Marcellus Shale Coalition, a

311. *HELCO III*, 526 P.3d at 333.

312. *Id.* at 335.

313. *Id.* at 336.

314. *Id.*

315. *See* Ziaja, *supra* note 292, at 10247.

316. *See supra* Section II.A.

317. 292 A.3d 921 (Pa. 2023).

318. *Id.* at 923–24.

319. *Id.* at 937 (quoting 25 PA. CODE § 78a.15 (2026)).

320. *Id.* at 924–25 (quoting 58 PA. CONST. STAT. § 3215(c) (2023)) (cleaned up).

natural gas industry coalition, challenged three of those regulatory definitions.³²¹

Pennsylvania law does not follow federal administrative law lockstep, though its approach does reflect *Chevron*³²² in many regards.³²³ The Pennsylvania Supreme Court looked to whether DEP was statutorily authorized to promulgate regulations defining “other critical communities” and then asked whether those definitions were reasonable.³²⁴ “Other critical communities” was part of the “public resources” in the statute, and the meaning of “public resources,” the court observed, is rooted in Pennsylvania’s ERA.³²⁵ So much so that the court stated that the ERA was “decisive in ascertaining legislative intent”³²⁶ because Act 13 declared one of its purposes to be “[p]rotect[ing] the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.”³²⁷ The ERA was so decisive that the court held “the proper test is whether the items chosen by the Agencies fall within the ERA’s conception of a ‘public resource.’”³²⁸

The three regulatory definitions that DEP included in “other critical communities” were: certain species of special concern (though not yet endangered or threatened), common areas of a school’s property, and playgrounds.³²⁹ In upholding all three definitions, the court relied on the ERA.³³⁰ First, the court noted that species of special concern are “public resources” as contemplated by the ERA.³³¹ The Commonwealth as trustee must operate on an incredibly long timeline in conserving and maintaining the public natural resources, and it cannot prioritize the living over future generations.³³² Second, the court noted that common areas of a school’s property and playgrounds are closely connected to “[u]nadulterated outdoor recreation space [and are] a basic component of quality of life . . . encompassed in the broadly defined values of the environment protected by the ERA.”³³³ These were added to the regulatory definition after public comments.

321. *Id.* at 925–26.

322. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

323. *Marcellus Shale*, 282 A.3d at 928–29 (Pa. 2023).

324. *Id.* at 937.

325. *Id.* at 939.

326. *Id.*

327. *Id.* at 941 (quoting 58 PA. CONS. STAT. § 3204(4) (2026)).

328. *Id.* at 945.

329. *Id.* at 945–47.

330. *Id.* at 945.

331. *Id.*

332. *Id.* (quoting *PEDF III*, 255 A.3d 289, 310 (Pa. 2021)).

333. *Id.* at 947.

Marcellus Shale is an example of the Pennsylvania ERA being invoked to assist the court in statutory interpretation when evaluating whether an agency had acted reasonably in implementing Act 13. It ultimately functioned to support DEP's exercise of discretion in implementing Act 13 in an environmentally conscientious way, much to the chagrin of the oil and gas industry. This is a unique administrative law jurisprudence, as there is nothing like it in federal administrative law.

These two cases are complex and unique. However, they suggest that ERAs might help shield agencies from corporate pressure when rejecting environmentally unfriendly projects and when promulgating environmentally friendly rules pursuant to state environmental law. Both are important areas of state agency autonomy. This shielding function of an ERA is not constitutional in the same way as I have been discussing in this Article—namely, the people being involved in their self-governance. This shielding function operates more like a wedge between corporate America and state agencies, which is crucial right now given the depth to which corporate interests have captured government in the United States.

I have discussed who the parties are to the court cases asserting ERA claims, and I have provided a first pass at a taxonomy of the kinds of claims being brought in these cases. I move now to the final part of this Article to discuss the interpretative strategies that courts employ in resolving claims brought pursuant to an ERA.

III. COURTS' INTERPRETATIVE STRATEGIES

In this Part, I will discuss the interpretative strategies that courts have employed in resolving claims brought pursuant to an ERA.³³⁴ The interpretative strategies vary across jurisdictions, in large part due to differences in the constitutional language itself. However, there are some similarities that can be seen between Montana and Pennsylvania, primarily because Montana and Pennsylvania both look to federal constitutional law jurisprudence in interpreting their ERAs. In some ways, this should be expected.³³⁵ The ERAs in Montana, Pennsylvania, and New York are enshrined as fundamental rights in their respective state constitutions. There is significant interpretative machinery at the

334. Some scholars are developing suggestions for the state courts in interpreting their ERAs. *See, e.g.*, Michael Lewyn, *Can Green Amendments Stop Car Pollution?*, 37 DUKE ENV'T L.J. (forthcoming) (on file with author) (for an ERA rule of interpretation that mixes the Pennsylvania and Montana rules).

335. *See, e.g.*, Kuh, Robinson & Fein, *supra* note 12, at 402–03 (implicitly appealing to federal constitutional law principles that “[e]very word in [New York’s ERA] should be given effect consistent with its plain meaning; the contemplations of the voters who adopted the amendment . . .”).

federal level for how fundamental constitutional rights are applied in legal disputes, so it should not surprise us that state courts appeal to this in their ERA jurisprudence.

I will discuss the states individually in this Part. The goal of this Part is to highlight the influence (or lack thereof, in the case of Hawaii) of federal constitutional jurisprudence on the development of ERA jurisprudence as well as to examine how the state's jurisprudence may impact the content of the claims brought pursuant to the ERA.

A. Montana

I begin with a discussion of Montana's strategy for interpreting its ERA because Montana was the first state to give its ERA any teeth with *MEIC* back in 1999.³³⁶ In *MEIC*, when the Montana Supreme Court looked for jurisprudential machinery to interpret Montana's ERA, it utilized scrutiny analysis,³³⁷ which has its origins in federal constitutional law.³³⁸ The court has interpreted Montana's ERA provision, which is located in the state's declaration of fundamental rights,³³⁹ in conjunction with another constitutional provision, which is not located in the state's declaration of fundamental rights.³⁴⁰ Recall from my discussion in Part I, it is this non-fundamental rights provision which allows Montana's ERA to be asserted against purely private parties.³⁴¹

Considering the ERA first, the court in *MEIC* held that strict scrutiny applies because the ERA is articulated as a fundamental right in the state's constitution.³⁴² In articulating this strict scrutiny standard, the court did not pull verbatim from federal constitutional jurisprudence. In federal constitutional law, scrutiny analysis begins with a determination of whether state action "infringes" on a fundamental right.³⁴³ State action infringes on a fundamental right when it "directly and substantially" interferes with the right.³⁴⁴ From there, the state action will only be

336. *MEIC*, 1999 MT 248, 988 P.2d 1236.

337. *See id.* ¶ 54, 988 P.2d at 1244 ("In order to address the issue raised on appeal, it is necessary that we determine the threshold showing which implicates the rights provided for by article II, section 3 and article IX, section 1 of the Montana Constitution and the level of scrutiny to be applied to each provision.").

338. *See, e.g.*, Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J. L. & PUB. POL'Y 475 (offering an explanation for the creation of the tiers of scrutiny in federal constitutional law in the twentieth century).

339. *See* MONT. CONST. art. II, § 3.

340. *See* MONT. CONST. art. IX, § 1.

341. *See supra* Part I.

342. *MEIC*, 1999 MT 248, ¶ 60, 988 P.2d 1236, 1245 (quoting *Wadsworth v. State*, 911 P.2d 1165, 1174 (Mont. 1996)).

343. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 666 (2014); *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978).

344. *See Zablocki*, 434 U.S. at 387.

upheld as constitutional if it survives the “two-step examination,” which asks whether the state action is “further[ing] compelling governmental interests” and “narrowly tailored—i.e., necessary—to achieve that interest.”³⁴⁵

For the ERA as a fundamental right, the court looks first to whether the state action “interferes with,” “intrudes upon,” or “implicates” the ERA.³⁴⁶ If it does, then the question is whether there is a “compelling state interest.”³⁴⁷ To survive Montana strict scrutiny, the state action must be “closely tailored” to that compelling state interest, and it must also be “the least onerous path that can be taken” to achieve it.³⁴⁸ This scrutiny analysis reflects federal strict scrutiny in structure, if not verbatim.

In *MEIC*, the court also had to address the non-fundamental rights provision found in article IX, section 1.³⁴⁹ Article IX of the Montana Constitution generally lays out important principles regarding the management of Montana’s environment and natural resources.³⁵⁰ The reason article IX, section 1 is read in conjunction with the article I ERA is because the ERA’s constitutional history shows that the framers intended the two provisions to be read together.³⁵¹ The *MEIC* court had to decide, then, what level of scrutiny to apply to article IX, section 1 because non-fundamental constitutional rights typically receive only “middle-tier” scrutiny in Montana.³⁵² Concluding that the provisions are to be read together, the court concluded that article IX, section 1 would also be subject to strict scrutiny.³⁵³

MEIC was decided on implication grounds.³⁵⁴ However, the court provided very little by way of guidance as to when state action implicates Montana’s ERA.³⁵⁵ One parameter that the court mentions is that state statutes as well as state agency rules can be subject to an ERA challenge.³⁵⁶ The reason the implication question is so important is because almost all state action affects the environment in some way, shape, or form. *MEIC* does not provide any generalizable test for when state action implicates the ERA.

345. See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2161–62 (2023) (citations omitted).

346. *MEIC*, 1999 MT 248, ¶¶ 60, 61, 63, 988 P.2d at 1245–46.

347. *Id.* ¶ 63, 988 P.2d at 1246.

348. *Id.* ¶ 63, 988 P.2d at 1246.

349. *Id.* ¶ 64, 988 P.2d at 1246.

350. See MONT. CONST. art. IX, §§ 1–7.

351. *MEIC*, 1999 MT 248, ¶¶ 64–67, 988 P.2d at 1246–49.

352. *Id.* ¶ 64, 988 P.2d at 1246.

353. *Id.* ¶¶ 64, 77, 988 P.2d at 1246, 1249.

354. *Id.* ¶¶ 77–79, 988 P.2d at 1249.

355. See Polk, *supra* note 14, at 136.

356. See *MEIC*, 1999 MT 248, ¶ 79, 988 P.2d at 1249.

Appealing to federal constitutional law for this purpose may not provide much by way of help. Fundamental constitutional rights at the federal level are invariably privilege (or liberty) rights, and so state action that infringes on these rights “burdens” those individual freedoms.³⁵⁷ The one Supreme Court case that asserted a claim right, rather than a privilege right, was the right to education, and the Court concluded that the right to education is not a fundamental right.³⁵⁸ Because the ERA is not a privilege right, federal constitutional law provides little guidance on when a right to a clean and healthful environment will be implicated.

The ERA is not invoked when state action burdens individual freedoms. The ERA is invoked when state action threatens the maintenance of a clean and healthful environment. But all state action affects the environment in some way, and no human activity is fully and completely sustainable. That is, no human activity perfectly maintains the environment because all human activity is extractive from nature in some way or another. The risk is that much state action (including all environmental or natural resources decisions) implicates the Montana ERA and could be challenged pursuant to it. For example, in *Held*, the Montana Supreme Court was willing to accept that the MEPA Limitation implicates the ERA on the basis that the greenhouse gas emissions from a single project in Montana may still “significantly affect the quality of the human environment” or “result in unconstitutional degradation to a clean and healthful environment.”³⁵⁹ Therefore, a state law prohibiting the consideration of greenhouse emissions when issuing project permits implicated the ERA.³⁶⁰

Such a broad interpretation of implication places all the work on the state showing that there is a compelling state interest, that the state action is closely tailored, and that the state action is the least onerous path to achieving that interest. However, this standard is rarely satisfied in federal constitutional law.³⁶¹ In one federal case where it was satisfied, *Burson v. Freeman*,³⁶² the ultimate rationale of the Court depended on the fact that the restriction on free speech was to further another

357. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

358. See generally *S.A. Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that a right to education does not meet the protection of the Due Process Clause as it does not fall within the limited category of rights recognized as guaranteed by the Constitution).

359. *Held v. State*, 2024 MT 312, ¶ 66, 560 P.3d 1235, 1259 (quoting in part *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 31, 477 P.3d 288, 298).

360. *Id.* ¶ 66, 560 P.3d at 1259.

361. See *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (“[I]t is the rare case in which we have held that a law survives strict scrutiny.”).

362. 504 U.S. 191 (1992).

fundamental right—the right to vote.³⁶³ In the context of Montana’s ERA, the competing government interests are rarely going to be other fundamental rights. Instead, the competing government interest will often be economic development. It is impossible to say that such an interest is categorically compelling or not compelling.³⁶⁴ It may be that courts will be called upon to assess whether advancing certain projects, or whole industries for that matter, count as compelling state interests. Then there is the question of whether a state action that implicates the ERA is closely tailored and the least onerous path to achieving economic development. This will be challenging for courts, at best. All economic development comes at some environmental cost because contemporary human life is currently extractive, resource intensive, and unsustainable.

Finally, it is unclear how this interpretative strategy for Montana’s ERA would be applied to private parties. Article IX, section 1, makes it clear that the ERA applies to private parties.³⁶⁵ However, the strict scrutiny framework makes little sense in the context of private action. There is no parallel in the private sector to a compelling state interest. The private sector in the United States is a realm of presumptively permissible actions which the market is supposed to incentivize (if socially desirable) or disincentivize (if socially undesirable). Further, it would be quite the shift in ideology to require private action that affects the environment to be closely tailored and the least onerous path to achieving its goals. That would be akin to imposing distinct environmental standards on private action that have no basis in either state or federal statutory law. It would be a wholly court-made doctrine.

Much of this is conjecture as there has not been a case in Montana where the court has been called upon to apply the ERA to a private party.³⁶⁶ It is possible that the court would develop a distinct interpretative strategy in applying the ERA to private parties. However, the broad issue of the ERA creating court-made environmental standards on private parties would likely remain. I move now to discuss Pennsylvania’s interpretative strategy.

B. Pennsylvania

The Pennsylvania Supreme Court has taxonomized its ERA into a prohibitory clause (individual environmental rights) and a non-

363. *Id.* at 211.

364. In the context of interpreting its own ERA, the Pennsylvania Supreme Court has called “development promoting the well-being of the citizenry” a “legitimate state interest.” *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 954 (Pa. 2013).

365. *See supra* Part I.

366. Recall that the discussion applying the ERA to a private party in *Cape-France* was in dicta and not the basis for the court’s decision. *See supra* notes 70–75 and accompanying text.

prohibitory clause (the public trust).³⁶⁷ Pennsylvania has developed two interpretative strategies, one for each clause of its ERA. I will discuss each interpretative strategy separately.

I start with the individual environmental rights clause, which, as a reminder, states: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”³⁶⁸ In a scholarly opinion, the *Robinson Township* court provided details regarding the nature of this right. The court explicitly stated that it functions as a limitation on state power, and it does not require the political branches to enact affirmative measures to promote clean air and pure water.³⁶⁹ However, the most notable interpretive language that the *Robinson Township* court provides suggests that the substantive environmental standards contained in the environmental rights clause are heavily informed by federal law, regulations, and agency expertise, although courts play an important role in enforcing the people’s environmental rights as a “bulwark against actual or likely degradation of . . . air and water quality.”³⁷⁰ Finally, the court states that economic development, although a legitimate state interest, “cannot take place at the expense of an unreasonable degradation of the environment.”³⁷¹

In many ways, *Robinson Township* lays out critical features of the environmental rights clause of the Pennsylvania ERA while leaving the interpretive machinery for applying the environmental rights clause somewhat obscure. The Commonwealth Court, in *Frederick v. Allegheny Township Zoning Hearing Board*,³⁷² provides a less scholarly and more legal interpretation of the environmental rights clause.³⁷³ The test articulated by the Commonwealth Court has some structural similarities to federal scrutiny analysis, but it is quite distinct.

The two-step dance first requires the trial court to hold an evidentiary hearing to determine whether the values in the environmental rights clause are implicated by the government’s action.³⁷⁴ This first step has two parts: a determination of the values contained within the environmental rights clause and a determination of whether the challenged government action implicates those values.³⁷⁵ This is distinct

367. See *Robinson Twp.*, 83 A.3d at 950–59.

368. PA. CONST. art. I, § 27.

369. *Robinson Twp.*, 83 A.3d at 951–52.

370. *Id.* at 953.

371. *Id.* at 954.

372. 196 A.3d 677 (Pa. Commw. Ct. 2018).

373. See *id.* at 694–95.

374. *Id.* at 695.

375. In an earlier case, the Commonwealth Court articulated an implication test by applying a three-part test it had announced in *Payne*. However, the *Payne* decision was abrogated by the Pennsylvania Supreme Court in *PEDF II*, 161 A.3d 911 (Pa. 2017),

from federal scrutiny analysis, which, as previously discussed, applies only in the context of privilege rights, and ERAs are not privilege rights. This implication analysis is more like Montana's: It is more explicit in terms of guidance to the lower courts than Montana's implication analysis because it asks the lower courts to affirmatively identify the values to be protected by the environmental rights clause separate from the question of implication. However, in practice, Montana's implication analysis is likely similar.

The second step is where the Pennsylvania interpretive strategy deviates significantly from federal scrutiny analysis and Montana's scrutiny analysis. At the second step, the court must ask whether the governmental action unreasonably impairs the values contained within the environmental rights clause.³⁷⁶ A test that relies on the reasonability of the rights infringement is significantly less stringent of a hurdle to survive than either the federal or Montana scrutiny tests. *Frederick* itself is a case in point. The Commonwealth Court upheld the municipality's oil and gas zoning ordinance by deferring to the Zoning Board's decision to credit the industry expert's testimony.³⁷⁷

The Pennsylvania Supreme Court has not weighed in on this test. However, the fact that the test is one of reasonability should give us pause because the Pennsylvania ERA is a fundamental right. Nothing in federal constitutional jurisprudence suggests that infringement of fundamental rights is permissible, so long as the infringement is reasonable. In federal constitutional law, fundamental rights get the highest level of protection from infringement, and a reasonableness standard does not reflect this highest level of stringency. For example, in negligence, reasonableness can be interpreted through the Learned Hand formula, which asks whether it was economically efficient to not take precaution against the harm.³⁷⁸ If it was economically efficient to not take precaution, then failure to take precaution was not negligence.³⁷⁹ A similar appeal to economic efficiency can be seen in the doctrine of private nuisance when interpreting the requirement that there be an unreasonable interference with the use and enjoyment of the land of another. The Restatement interprets unreasonable interference as interference where the gravity of harm outweighs the benefit of the conduct,³⁸⁰ which is another variation on reasonableness as economic efficiency.

and so this should not be considered the current standard for determining when the ERA is implicated.

376. *Frederick*, 196 A.3d at 695.

377. *Id.* at 697-98.

378. *See Mesman v. Crane Pro Servs.*, 512 F.3d 352, 354 (7th Cir. 2008).

379. *Id.*

380. RESTATEMENT (SECOND) OF TORTS § 826(a) (A.L.I. 1979).

While I do not think that the Pennsylvania Supreme Court would approve of a purely economic efficiency interpretation of reasonability in the Commonwealth Court's test, the Commonwealth Court clearly interprets reasonability through some kind of deferential standard.³⁸¹ Such deference is not seen in federal fundamental rights jurisprudence. Nor is it seen in Montana's ERA jurisprudence, although Montana has not had similar challenges to the municipality decision-making that has occurred in Pennsylvania.

The second clause in the Pennsylvania ERA is the public trust clause, which states: "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."³⁸² It is important that scholars and activists recognize this as a *constitutional* public trust that may be related to, and yet distinct from, the *common law* public trust.³⁸³ Pennsylvania's interpretive strategy for its constitutional public trust makes this clear as it includes some themes that overlap with the common law public trust and some themes that expand beyond it. Furthermore, the Pennsylvania Supreme Court has pulled from federal constitutional jurisprudence by interpreting its constitutional public trust clause in its ERA, which places some unique parameters on Pennsylvania's constitutional public trust.

Similarly to the environmental rights clause, it is the *Robinson Township* court that provides an overview as to the nature of the constitutional public trust contained in Pennsylvania's ERA. The court first concluded that "public natural resources" is a narrower category than "clean air, pure water, and . . . the natural, scenic, historic and esthetic values of the environment" contained within the environmental

381. See *Frederick*, 196 A.3d at 694–95; see also *Murrysville Watch Comm'n v. Mun. of Murrysville Zoning Hearing Bd.*, No. 579 C.D. 2020, 2022 WL 200112, at *13 (Pa. Commw. Ct. Jan. 24, 2022) (holding that "in enacting an unconventional oil and gas well ordinance, a municipality need only demonstrate, through the ordinance's design or some other form of evidence, that it considered the citizens' rights under the ERA.").

382. PA. CONST. art. I, § 27.

383. See Erin Ryan, *A Short History of the Public Trust Doctrine and Its Intersection with Private Water Law*, 38 VA. ENV'T L.J. 135, 169 (2020) (noting that "[c]onstitutionalized versions of the doctrine thus provide additional means of protecting public trust resources and expanded recognition for new public trust values beyond those traditionally protected at common law"). The canonical article on the common law public trust is Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Professor Alexandra Klass has evaluated the common law public trust in the context of environmental right statutes. See Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENV'T L. 431, 459 (2015).

rights clause.³⁸⁴ This is important because “public natural resources” is what defines the trust corpus, regarding which the state has ERA obligations.³⁸⁵

In determining what counts as the trust corpus, the court did not look to the common law public trust doctrine at all. Instead, in the fashion of federal constitutional interpretation, the court looked to the history of the amendment and the drafters’ intent for the meaning of “public natural resources.”³⁸⁶ This is why the court concluded that “public natural resources” includes “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.”³⁸⁷ This interpretation is far broader than any state’s common law notion of the public trust corpus.³⁸⁸

In identifying the obligations on the state pursuant to the public trust clause in the ERA, the *Robinson Township* court first recognized the trust structure, where the state is the trustee in charge of the trust corpus, and the people of Pennsylvania are the beneficiaries.³⁸⁹ This trust structure is also how the common law public trust is interpreted.³⁹⁰ Where Pennsylvania deviates from the common law public trust doctrine is by applying (implicitly, not explicitly) federal constitutional law interpretative principles to the terms “trust” and “trustee.” The court interprets “trust” and “trustee” as “terms of art that carried legal implications well developed at Pennsylvania law at the time the amendment was adopted.”³⁹¹ This means that the court interprets the state’s trustee obligations through Pennsylvania trust law as it was in 1971.³⁹² Further leaning into private trust law to flesh out the nature of

384. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 955 (Pa. 2013) (quoting PA. CONST. art. I § 27).

385. *Id.* at 955–56.

386. *Id.* at 955 (“The drafters seemingly signaled an intent that the concept of public natural resources would be flexible to capture the full array of resources implicating the public interest, as these may be defined by statute or at common law.”).

387. *Id.*

388. *See* Ryan, *supra* note 383, at 166 (noting that “most [states] share the common principle of sovereign authority over lands beneath navigable waters held in trust for the public” and that “the doctrine has become increasingly associated not only with the protection of such traditional uses as boating, commerce, fishing, and swimming, but with environmental protection as well”); Klass, *supra* note 383, at 439 (noting 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.”).

389. *Robinson Twp.*, 83 A.3d at 956.

390. *See* Ryan, *supra* note 383, at 165.

391. *Robinson Twp.*, 83 A.3d at 956.

392. *See id.*

the state's trustee obligations, the court noted that those include a fiduciary duty to comply with the terms of the trust and a fiduciary duty to act towards the corpus of the trust with prudence, loyalty, and impartiality.³⁹³ So, this interpretation relies on a hidden version of original meaning jurisprudence and the wholesale adoption of another area of law (*i.e.*, private trust law). Because of this incorporation of private trust law into the court's interpretative strategy, the court's application of the public trust clause does not reflect the common law public trust jurisprudence.

Instead, the court explicitly states that the public trust clause of the ERA imposes both negative and affirmative trustee obligations on the state.³⁹⁴ It is this imposition of the negative trustee obligation as limitation on government power that solidifies the public trust clause as traditionally *constitutional*. It also explains why cases like *Robinson Township* and *PEDF II* were successful cases: They successfully challenged state statutes. On the affirmative obligation side, the court noted that state environmental statutes enacted by the General Assembly are examples of state action that satisfy the affirmative trustee obligation.³⁹⁵ It is common in state constitutional law for some constitutional provisions to function as enabling provisions authorizing the state legislature to legislate.

On the whole, Pennsylvania's interpretative strategy for its ERA indicates a blended approach that incorporates principles from federal constitutional law and private trust law. However, as I noted previously, it is unclear whether the Pennsylvania Supreme Court will endorse the Commonwealth Court's reasonability test when applying the environmental rights clause. Such a test is a significant deviation from what we see in fundamental rights jurisprudence at the federal level, and it has great potential to reduce the weight that should be accorded the state's ERA as a fundamental right. Finally, there has yet to be a need to appeal to the fundamentality of the ERA when the court has applied the public trust clause. I mention this as merely a curiosity for someone else to take up because I now move to discuss Hawaii's interpretative strategy for its ERA.

C. Hawaii

Hawaii's interpretative strategy for its ERA is relatively straightforward compared to Montana, Pennsylvania, and New York. This is because the language of the Hawaii ERA directs the courts in how

393. *Id.* at 957. The *PEDF II* court provides even more detail as to how these public trustee obligations are to be interpreted as private trustee obligations. See *PEDF II*, 161 A.3d 911, 932–33 (Pa. 2017).

394. *Robinson Twp.*, 83 A.3d at 957–58.

395. *Id.* at 958.

they should interpret it. As a reminder, that language states: “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.*”³⁹⁶ This last phrase of the Hawaii ERA makes clear that the content of the ERA is pulled from state environmental law and that the courts should only look in that direction when adjudicating disputes brought pursuant to the ERA.³⁹⁷ The Hawaii Supreme Court has repeatedly relied on the Constitutional Convention of 1978 committee report to reach the conclusion that the environmental right “would be defined by environmental statutes, rules, and ordinances to lend flexibility to the definition of the right over time.”³⁹⁸

The main issue, then, in interpreting the Hawaii ERA is whether the claim is being brought pursuant to a “law relating to environmental quality.”³⁹⁹ In the first case where the Hawaii Supreme Court conducted this analysis, the court first looked at the language of the ERA for examples of laws relating to environmental quality, such as laws controlling pollution and laws relating to conservation, protection, and enhancement of natural resources.⁴⁰⁰ When evaluating whether a law meets this standard, the court looks to the purpose of the statute.⁴⁰¹

In *Ala Loop*, the statute at issue was Chapter 205, which was enacted in 1961 to regulate land development. It contains a provision explicitly articulating the statute’s purpose, which is “to preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare.”⁴⁰² Furthermore, the Hawaii Supreme Court looked to the committee report on the bill, which stated that the statute’s purpose was to “‘protect and conserve through zoning the urban, and agricultural and conservation lands within all counties’ in order to, inter alia, ‘conserve forests, water resources and land.’”⁴⁰³ From this, the court concluded that Chapter 205 is a law relating to environmental quality for the purposes of the ERA.⁴⁰⁴

396. HAW. CONST. art. XI, § 9 (emphasis added).

397. See *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1121 (Haw. 2010) (noting that the content of the ERA is “to be established not by judicial decision but rather ‘as defined by laws relating to environmental quality’”), *abrogated on other grounds by Tax Found. v. State*, 439 P.3d 127 (Haw. 2019).

398. *MECO*, 408 P.3d 1, 13 (Haw. 2017).

399. *Ala Loop*, 235 P.3d at 1121 (cleaned up); see also *MECO*, 408 P.3d at 13 (“Although a person’s right to a clean and healthful environment is vested pursuant to article XI, section 9, the right is defined by existing law relating to environmental quality.”).

400. *Ala Loop*, 235 P.3d at 1121.

401. *Id.* at 1121–22.

402. *Id.* at 1121 (cleaned up).

403. *Id.* (cleaned up).

404. *Id.* at 1121–22.

In *MECO*, the court had to perform the same analysis on Chapter 269 regarding the PUC's obligations.⁴⁰⁵ Instead of looking to the explicit statutory purpose in Chapter 269, the court traced the evolution of the PUC's obligation to consider greenhouse gas emissions in its decision-making process.⁴⁰⁶ The legislative history of the original version of Chapter 269 made it clear that the legislature intended a "[s]tate policy of prioritizing the utilization of renewable energy sources."⁴⁰⁷ The specific provision at issue in *MECO* regarding the PUC considering the need for increased renewable energy was first adopted in 2007 as permissive for the PUC to consider.⁴⁰⁸ That provision was amended in 2011 to make the consideration of the need for renewable energy mandatory for the PUC.⁴⁰⁹ Through this construction of Chapter 269, the court concluded that it was a law relating to environmental quality.⁴¹⁰

In a recent case, *Nakoa v. Governor of Hawaii*,⁴¹¹ the court was called upon to determine whether Hawaii Revised Statutes (HRS) section 46-4 was a law relating to environmental quality.⁴¹² HRS section 46-4 governs county zoning in Hawaii,⁴¹³ and the governor had suspended HRS section 46-4 by executive order.⁴¹⁴ The Hawaii Supreme Court held that HRS section 46-4 was a law relating to environmental quality because counties "have the option to engage in conservation efforts via zoning,"⁴¹⁵ and the ERA explicitly says that it applies to laws that govern the "conservation, protection and enhancement of natural resources."⁴¹⁶

To determine whether the statute being analyzed comes within the scope of the ERA, the Hawaii Supreme Court also looks to whether there is a fee recovery provision that accompanies it. This began in the *Ala Loop* decision.⁴¹⁷ There, the court was discussing HRS section 607-25, which is a fee recovery provision for plaintiffs who sue to stop developers who undertake development without the proper permits.⁴¹⁸ The court quoted extensively from the statute's legislative history.⁴¹⁹ In that history,

405. *MECO*, 408 P.3d 1, 13–14 (Haw. 2017).

406. *Id.*

407. *Id.* at 14.

408. *Id.*

409. *Id.*

410. *Id.* at 16.

411. 575 P.3d 506 (Haw. 2025).

412. *Id.* at 521.

413. *Id.* at 520–21.

414. *Id.* at 514.

415. *Id.* at 521.

416. HAW. CONST. art. XI, § 9.

417. *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1122 (Haw. 2010), *abrogated on other grounds by Tax Found. v. State*, 439 P.3d 127 (Haw. 2019).

418. *Id.*

419. *Id.*

the legislature made clear that one of the reasons it included such a fee recovery provision was because article XI, section 9 “*has given the public standing to use the courts to enforce laws intended to protect the environment*.”⁴²⁰ However, the legislature finds that the public has rarely used this right and that there have been increasing numbers of after-the-fact permits for illegal private development.⁴²¹ Furthermore, the state agencies struggle to enforce permitting requirements.⁴²¹ So, the legislature intended this fee recovery statute to facilitate private enforcement of those permit requirements by financially incentivizing private parties to bring suit. The Hawaii Supreme Court also applied this reasoning in *Nakoa* in its analysis holding that HRS section 46-4 is a law relating to environmental quality.⁴²²

None of the interpretative methodology rings of what we see in constitutional jurisprudence. It all sits squarely within standard statutory interpretation. Perhaps the most constitutional aspect of Hawaii’s ERA is the fact that the court has determined that the state laws relating to environmental quality under the ERA constitute a protected property interest. This entitles private citizens to due process protections, which include notice and an opportunity to be heard during state administrative decision-making that implicates the relevant state statute.⁴²³ This is critical in structuring Hawaii ERA claims against the government, rather than against private parties. For example, in *Ala Loop*, the homeowner-plaintiffs were simply trying to compel a charter school to apply for and receive the permit required by HRS section 205.⁴²⁴ Many of the other successful ERA cases—*MECO*, *HELCO*, *Nakoa*, *Sierra Club*—involved plaintiffs trying to hold the government to its environmental obligations under state law. The relationship between people and government is one of the hallmarks of the constitutional relationship.

I now turn to New York’s interpretative strategy for its ERA.

D. New York

New York’s case law is much less voluminous than Pennsylvania’s, Montana’s, or Hawaii’s. This is a product of New York’s ERA being the youngest ERA of the four states, having been ratified only in November 2021 and taking effect in January 2022. It takes time for a jurisprudence to develop interpreting a new constitutional provision. Even so, multiple

420. *Id.* (quoting 1986 Haw. Sess. Laws 104–05) (emphasis added).

421. *Id.* (citing 1986 Haw. Sess. Laws 104–05).

422. *Nakoa v. Governor of Haw.*, 575 P.3d 506, 520–21 (Haw. 2025).

423. *See, e.g., Sierra Club v. Bd. of Land & Nat. Res.*, 575 P.3d 472, 484–85 (Haw. 2025) (holding that HRS 205A via the ERA created a protected property interest in plaintiffs that entitles them to notice and a hearing).

424. *Ala Loop*, 235 P.3d at 1105.

decisions provide some insight into how the New York courts are developing the state's ERA.

For example, in *Seneca Lake Guardian, Inc.*, the New York Department of Environmental Conservation (DEC) argued that the state's ERA functioned like other enumerated rights in the state's bill of rights—that is, merely as protection for individuals against government infringement.⁴²⁵ The DEC maintained that as a negative right, the ERA places no affirmative obligations on the DEC.⁴²⁶ Despite this great opportunity to interpret the ERA, the Supreme Court of Albany County did not directly address these assertions from DEC in deciding the case, and the plaintiffs tried to avoid the mandamus issue by seeking only a declaratory judgment from the court rather than an order against DEC to do something in particular.⁴²⁷ Because this was the second case where plaintiffs were trying to get DEC to enforce permits against a landfill and deny requests to expand the permits for the landfill, the court looked to precedent in *Fresh Air for the Eastside* to decide the case.⁴²⁸ The court construed the request for declaratory judgment as effectively a request for mandamus and dismissed the ERA claim.⁴²⁹

In *Marte v. City of New York*, the plaintiffs asserted the ERA to stop a housing development project.⁴³⁰ The Supreme Court of New York County construed the ERA claim as a second “bite at the apple”—that is—as plaintiffs challenging the Final Environmental Impact Statement (FEIS) that had already survived challenge.⁴³¹ So, in interpreting the ERA specifically, the court noted that it does not function to: (1) create a new avenue to challenge a FEIS, (2) extend the statute of limitations, or (3) create a new statute of limitations.⁴³² The court was ambivalent about how the ERA would ultimately be interpreted, suggesting that it could function as creating a substantive environmental right.⁴³³ At the same time, however, the court was quite reluctant to allow the ERA any role inside of the administrative law that governed the permitting for this housing project.⁴³⁴ This opens up questions of the constitutional nature of

425. *Seneca Lake Guardian, Inc. v. Seneca Meadows, Inc.*, 236 N.Y.S.3d 519, 540 (Sup. Ct. 2025).

426. *Id.*

427. *Id.* at 540–41.

428. *See id.*; *see also Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d 1217, 1217, 1219 (N.Y. App. Div. 2024). (holding that plaintiffs could not compel DEC to enforce permit conditions against a landfill).

429. *Seneca Lake Guardian*, 236 N.Y.S.3d at 542.

430. *Marte v. City of New York*, No. 159068/2022, 2023 WL 2971394, at *1 (N.Y. Sup. Ct. Apr. 12, 2023).

431. *Id.* at *1, *3.

432. *Id.* at *3.

433. *Id.*

434. *Id.* at *3–4.

the ERA and where it can be expected to play a role in the administration of New York's environmental laws.

Perhaps the most interesting case to date out of New York interpreting the state's ERA is *Western New York Youth Climate Council v. New York State Department of Transportation*.⁴³⁵ In that case, the plaintiffs brought numerous challenges, including an ERA challenge, against the state's project for redeveloping the Kensington Expressway.⁴³⁶ The reason this case produced an interesting interpretation of the ERA is because the Kensington Expressway is almost sixty years old and in need of repair.⁴³⁷ The court summed up the dilemma of the plaintiffs' position succinctly.

Is it the Petitioners' position that the State should abandon its responsibility for the Expressway's maintenance and let it go into a state of disrepair? That does not seem to be a reasonable solution. The only other alternative Petitioners offer is to dismantle existing highways. The Court fails to see how this can be done without the same impact on traffic, noise, and air the Petitioners seek to avoid.⁴³⁸

This case poses perhaps one of the more challenging opportunities for interpreting an ERA because the ERA is being asserted squarely against a project that would appear necessary for public welfare.

In an interesting move, the court relies entirely in rules of statutory construction to interpret the ERA in this case.⁴³⁹ The legal issue devolved into a question of whether the ERA has retroactive effect, even though the ERA was being asserted against a proposed redevelopment plan—not necessarily against the mere existence of the Kensington Expressway.⁴⁴⁰ Furthermore, the ERA is a *constitutional* provision, not a statutory provision, so the question of *statutory* retroactivity is mismatched to the nature of the provision being interpreted by the court.

In its reasoning rejecting the plaintiffs' ERA claim, the court noted that canons of statutory construction in New York require the legislature to explicitly state or clearly indicate when a statutory amendment applies retroactively.⁴⁴¹ Absent such an explicit statement or clear indication, all statutory amendments are presumed to apply prospectively in New York.⁴⁴² Because nothing in the ERA explicitly states or clearly indicates

435. 224 N.Y.S.3d 790 (Sup. Ct. 2024).

436. *Id.* at 795.

437. *See id.* at 805.

438. *Id.*

439. *Id.* at 805.

440. *Id.* at 804–05 (citations omitted).

441. *Id.* (citations omitted).

442. *Id.* at 805 (citations omitted).

that the ERA applies retroactively, the court concluded that the ERA applies only prospectively.⁴⁴³ Because of this, somehow (the logic of the court is not entirely clear) the state's nondelegable duty to maintain roads and highways prevents the ERA from being at all applicable to the proposed Kensington Expressway project.⁴⁴⁴ The court noted that the ERA is not "remedial legislation"; it is "merely a state law that protects environmental rights."⁴⁴⁵

On the one hand, *Western New York Youth Climate Council* is perhaps the most confused of the ERA cases because of the court's interpretative strategy that treats the ERA like a statutory amendment rather than a constitutional amendment. On the other hand, the use of the ERA to impede needed highway construction on an important highway in Western New York⁴⁴⁶ is perhaps the kind of substantive balancing that the courts do not want to get into in these ERA cases.⁴⁴⁷

New York's ERA jurisprudence has a way to go in its development. Currently, it does not seem that any case has successfully asserted the New York ERA, so it is hard to know its potential uses. Furthermore, it is open-ended what kind of interpretative strategy the New York Court of Appeals will take when a case finally reaches it. New York can follow Montana and Pennsylvania in their negative rights ERA jurisprudence and use New York's scrutiny analysis. Of course, similar issues that I mentioned earlier in regard to that interpretative strategy would be likely to arise. But because New York's ERA lacks a public trust clause or language relating the ERA to the state's environmental laws, scrutiny analysis might be the best suited for interpreting the ERA.

CONCLUSION

The purpose of this Article was to explore some of the recent ERA jurisprudence across the four states with the most ERA activity in their courts: Montana, Pennsylvania, Hawaii, and New York. The goal was to demonstrate ways in which these ERA provisions are truly constitutional provisions, in that they reflect legal relationships between the people and their government. They play a role in facilitating the people's participation in their own self-governance. This is entirely

443. *Id.*

444. *Id.*

445. *Id.*

446. The Kensington Expressway serves about 80,000 cars daily. *See Governor Hochul Announces Unprecedented Investments to Reconnect Communities Across New York State as Part of Proposed State Capital Plan*, N.Y. ST.: GOVERNOR KATHY HOCHUL (Jan. 22, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-unprecedented-investments-reconnect-communities-across-new-york> [https://perma.cc/Q7UV-W5JR].

447. *See supra* Section II.B.

distinct from facilitating substantive environmental outcomes. I showed this in three ways. First, I discussed against whom the ERAs are assertable. Despite Montana's and Hawaii's ERAs being assertable against private parties, most of the litigation in those states name government defendants. Then, I discussed the kinds of claims being brought pursuant to these ERAs. Notably, most of the successful claims assert the ERAs as a negative right limiting government power, and most of the unsuccessful claims assert the ERA as a substantive environmental obligation. I concluded with a discussion of the interpretative strategies that the state courts have employed in applying their ERAs, noting where federal constitutional jurisprudence exerts an influence. These are still relatively young provisions in terms of jurisprudential development. However, a clear constitutional, rather than environmental, direction is beginning to form in the case law. This is important for environmental advocates as they decide when and how to structure lawsuits brought pursuant to an ERA.