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## Do it for the Kids: Protecting Future Generations from Climate Change Impacts and Future Pandemics in Maryland Using an Environmental Rights Amendment

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**DO IT FOR THE KIDS: PROTECTING FUTURE  
GENERATIONS FROM CLIMATE CHANGE IMPACTS AND  
FUTURE PANDEMICS IN MARYLAND USING AN  
ENVIRONMENTAL RIGHTS AMENDMENT**

**Johanna Adashek\***

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## I. INTRODUCTION

The 2020s must be the new environmental decade in order to avoid environmental catastrophe.<sup>1</sup> Anthropogenic climate change is causing global temperatures to rise.<sup>2</sup> Higher temperatures and subsequent increased precipitation, sea level rise, and intensified tropical storms are just the tip of the proverbial melting iceberg.<sup>3</sup> By the end of this century, Baltimore, Maryland could have the climate of Mississippi, averaging 9°F warmer and 58.5% wetter than current levels.<sup>4</sup>

Currently, the COVID-19 pandemic is enveloping the world. New data shows that the probability of future extreme pandemics is growing,

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1. The 1970s was coined the “Environmental Decade” before the decade had ended. See Gladwin Hill, *Midpoint of “Environmental Decade”: Impact of National Policy Act Assessed*, N.Y. TIMES (Feb. 18, 1975), <https://www.nytimes.com/1975/02/18/archives/midpoint-of-environmental-decade-impact-of-national-policy-act.html> [<https://perma.cc/N8KD-YKFD>]. See Barry E. Hill, *Environmental Rights, Public Trust, and Public Nuisance: Addressing Climate Injustices Through State Climate Liability Litigation*, 50 ENV’T L. REP., Dec. 2020, at 11022, 11028–29. The author hopes that the 2020s will encompass an even larger movement than the 1970s, filled with subnational, national, and international progress.

2. *The Effects of Climate Change*, NASA: GLOB. CLIMATE CHANGE, <https://climate.nasa.gov/effects/> [<https://perma.cc/Z8P8-WVAQ>] (last updated March 23, 2022).

3. *Id.*

4. The Center for Environmental Science’s interactive map shows how any given city could feel by the end of this century. Univ. of Md. Ctr. for Env’t Sci., *What Will Climate Feel Like in 60 Years?*, UNIV. OF MD., <https://fitzlab.shinyapps.io/cityapp/> [<https://perma.cc/4WPM-3JDK>] (last visited Apr. 4, 2022).

meaning future pandemics will be more frequent and more severe.<sup>5</sup> The impacts of climate change, combined with deforestation and land cultivation, are directly linked to zoonotic diseases, which are viruses that jump from animals to humans.<sup>6</sup> As the impacts of climate change worsen, future pandemics will likely increase in frequency. Warming weather across the globe allows animals to expand their geographic boundaries, which increases their interactions with humans, thus heightening the risk that an animal acting as a host to a deadly vector will infect the human population.<sup>7</sup>

Regulatory initiatives at the federal level to mitigate and adapt to climate change are important but not enough.<sup>8</sup> Climate action, at every level of government and among every entity, private and public, is necessary in order to protect the youth and future generations. Future generations are voiceless, but environmental rights will help give them a voice.

An Environmental Rights Amendment (“ERA”) is the codification of a substantive environmental right within a constitution.<sup>9</sup> ERAs currently exist in seven states, guaranteeing a substantive right to a “healthy” or “healthful” environment and often containing trusteeship provisions.<sup>10</sup> ERAs have helped citizens overcome strict common law

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5. Michael Penn, *Statistics Say Large Pandemics Are More Likely Than We Thought*, DUKE GLOB. HEALTH INST. (Aug. 23, 2021), <https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought> [<https://perma.cc/7CX3-2VNL>]; Eleni Smitham & Amanda Glassman, *The Next Pandemic Could Come Sooner and Be Deadlier*, CTR. FOR GLOB. DEV. (Aug. 25, 2021), <https://www.cgdev.org/blog/the-next-pandemic-could-come-soon-and-be-deadlier> [<https://perma.cc/8W9A-HB38>].

6. Abrahm Lustgarten, *How Climate Change Is Contributing to Skyrocketing Rates of Infectious Disease*, PROPUBLICA (May 7, 2020), <https://www.propublica.org/article/climate-infectious-diseases> [<https://perma.cc/8V9X-Y2NZ>]; *see infra* Part II.B.

7. Lustgarten, *supra* note 6; *see infra* Part II.B.

8. *See infra* Part III.

9. *See* Barry E. Hill, *supra* note 1, at 11027 n.40; *infra* Part IV.

10. Barry E. Hill, *supra* note 1, at 11027 n.40; Stacey Halliday et al., *New York Becomes the Third State to Adopt a Constitutional Green Amendment*, THE NAT’L LAW REVIEW (Dec. 10, 2021), <https://www.natlawreview.com/article/new-york-becomes-third-state-to-adopt-constitutional-green-amendment> [<https://perma.cc/7VPN-FV62>]; *infra* Part IV.

standing barriers in Illinois,<sup>11</sup> promoted environmental legislation in Pennsylvania,<sup>12</sup> provided strict scrutiny to laws interfering with the right to a clean and healthy environment in Montana,<sup>13</sup> and allowed citizens to enforce environmental laws in Hawaii.<sup>14</sup>

This article proposes that all states should adopt an ERA to combat climate change, address future pandemics more effectively, and provide a voice for the voiceless. It uses Maryland as a case study to explore how an ERA can act as a stopgap for missing and ineffective legislation, help enact new legislation, fight climate change, and protect future generations.<sup>15</sup> Part II describes the worsening impacts of climate change in Maryland and explains how increased climate change impacts can increase the frequency of pandemics.<sup>16</sup> Part III reviews existing gaps in legislation in Maryland, including the Maryland Environmental Policy Act (“MEPA”), and the lacunae created by the lack of climate change bills capable of protecting future generations.<sup>17</sup> Part IV provides examples of other state ERAs and briefly examines their important functions.<sup>18</sup> Part V posits that a Maryland ERA would help combat climate change, suggests language to include based on judicial interpretations of ERAs in other states, and addresses and responds to common arguments opposing ERAs.<sup>19</sup>

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11. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 962 N.E.2d 956, 967 (Ill. 2012) (holding “Section 2 of article XI does not create any new causes of action but, rather, does away with the ‘special injury’ requirement typically employed in environmental nuisance cases.”) (quoting *City of Elgin v. County of Cook*, 660 N.E.2d 875, 891 (Ill. 1995)).

12. *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1370 (Pa. 1986) (“That presumption is further strengthened in this case by the explicit purpose of the Act to implement Article I, section 27 of the Pennsylvania Constitution, a remarkable document expressing our citizens’ entitlement and ‘right to clean air, pure water, and—to the preservation of the natural, scenic, historic and esthetic values of the environment.’”).

13. *Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 988 P.2d 1236, 1246 (Mont. 1999) (“[T]he right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights . . . and that any statute or rule which implicates that right must be strictly scrutinized.”).

14. *In re Maui Elec. Co., Ltd.*, 408 P.3d 1, 16 (Haw. 2017) (“Article XI, section 9 thus guarantees to ‘[e]ach person’ an individual, private right to share in the benefit of environmental laws—regardless of whether the regulation describes a ‘tangible property interest.’”).

15. *See infra* Part V.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

## II. MARYLAND'S CLIMATE CHANGE IMPACTS AND THE RELATION TO FUTURE PANDEMICS

Anthropogenic climate change causes tremendous impacts that place all people and future generations in danger.<sup>20</sup> The effects of climate change are ongoing and can be seen, for example, in the increasing severity of tropical storms, flooding, and sea level rise. Part II.A examines the current and prospective impacts of climate change in Maryland.<sup>21</sup> Part II.B demonstrates the link between climate change and future pandemics and how climate change impacts promote more frequent and severe pandemics.<sup>22</sup>

### A. Current and Projected Climate Change Impacts in Maryland

The impacts of climate change are already visible in Maryland and will only worsen.<sup>23</sup> Maryland's annual mean temperature has increased more than 2°F since the 1980s.<sup>24</sup> Projections indicate that in the next 50 years, average summer and winter temperatures will be 6°F above preindustrial levels.<sup>25</sup> This means that in 50 years, no matter where a person resides, their climate will be unrecognizable. Specifically, in Maryland, summers will be 6°F warmer and 7.9% dryer.<sup>26</sup> The hottest summers experienced today, in 50 years, will be the coolest.<sup>27</sup> Rising temperatures also beget increased precipitation, which leads to many more environmental hazards.<sup>28</sup> Rising temperatures allow the air to hold more water vapor, contributing to heightened rainfall, flash flooding, and soil erosion.<sup>29</sup> In 2018, Maryland endured more rainfall than in recorded

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20. *The Effects of Climate Change*, *supra* note 2.

21. *See infra* Part II.A.

22. *See infra* Part II.B.

23. Raymond Bradley et al., *How Will Global Warming of 2°C Affect Maryland*, UNIV. OF MASS. AMHERST CLIMATE SYS. RSCH. CTR. (2015), [https://www.geo.umass.edu/climate/stateClimateReports/MD\\_ClimateReport\\_CSRC.pdf](https://www.geo.umass.edu/climate/stateClimateReports/MD_ClimateReport_CSRC.pdf) [<https://perma.cc/PMX5-TXJ9>].

24. *Id.*

25. *Id.*

26. Univ. of Md. Ctr. for Env't Sci., *supra* note 4.

27. Bradley, *supra* note 23.

28. Univ. of Md. Col. of Agric. & Nat. Res., *Climate Change Impacts in Maryland*, UNIV. OF MD., <https://extension.umd.edu/resource/climate-change-impacts-maryland> [<https://perma.cc/Y3R7-SAET>] (last updated Mar. 15, 2022).

29. *Id.*

history.<sup>30</sup> That same year, a historic flash flood tore through Ellicott City as eight inches of rain fell in just two hours.<sup>31</sup> Increased precipitation will continue to cause increased flooding, soil erosion, and landslides.<sup>32</sup> These hazards only worsen as the impacts of climate change grow and accumulate.

Higher levels of water vapor in the air and increased temperatures also brew mammoth storms.<sup>33</sup> In 2019, Hurricane Dorian expanded from Category 1 to Category 5 in just five days, making it the fifth most intense hurricane in the Atlantic to make landfall in recorded history.<sup>34</sup> Because of anthropogenic warming, future hurricanes will grow more intense and produce more rainfall.<sup>35</sup> Warmer air and surface temperatures increase storm speeds that become more powerful with more water vapor.<sup>36</sup> More ferocious hurricanes will reach locations normally unencumbered by storms, and, combined with sea level rise, Maryland will likely experience more frequent and severe storm activity.<sup>37</sup>

Sea level rise is already occurring in Maryland and will only worsen. In the last century, sea levels have risen 1 foot along Maryland's coast.<sup>38</sup> However, the sea level is rising exponentially, and by the end of this century, Maryland's coastal landmass will shrink as it disappears

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30. Ctr. for Am. Progress, *The Impacts of Climate Change and the Trump Administration's Anti-Environmental Agenda in Maryland*, CAP (May 21, 2020), <https://www.americanprogress.org/issues/green/reports/2020/05/21/485374/impacts-climate-change-trump-administrations-anti-environmental-agenda-maryland/> [<https://perma.cc/Q4ZK-2GSX>].

31. *Id.*

32. U.S. Geological Survey, *What is a Landslide and What Causes One?*, USGS, <https://www.usgs.gov/faqs/what-a-landslide-and-what-causes-one?> [<https://perma.cc/H3RD-X82N>] (last visited Apr. 4, 2022) (explaining that landslides are in part caused by precipitation).

33. Alan Buis, *How Climate Change May Be Impacting Storms Over Earth's Tropical Oceans*, NASA: GLOB. CLIMATE CHANGE (Mar. 10, 2020), <https://climate.nasa.gov/blog/2956/how-climate-change-may-be-impacting-storms-over-earths-tropical-oceans/> [<https://perma.cc/SYD6-9MZ8>] (“Hurricanes are fueled by heat in the top layers of the ocean and require sea surface temperatures (SSTs) greater than 79 degrees Fahrenheit (26 degrees Celsius) to form and thrive.”).

34. *Id.*

35. Tom Knutson, *Global Warming and Hurricanes*, GEOPHYSICAL FLUID DYNAMICS LAB. (Sept. 23, 2020), <https://www.gfdl.noaa.gov/global-warming-and-hurricanes/> [<https://perma.cc/874D-EBVY>].

36. United States Geological Survey, *How Can Climate Change Affect Natural Disasters?*, USGS, <https://www.usgs.gov/faqs/how-can-climate-change-affect-natural-disasters-1?> [<https://perma.cc/RYE4-PP7V>] (last visited Apr. 4, 2022).

37. *Id.*

38. Bradley, *supra* note 23.

under more than 3 feet of water.<sup>39</sup> Some studies estimate that Maryland could experience sea level rise up to 4.4 feet by 2100, resulting in the loss of 400,000 acres along its eastern coast.<sup>40</sup> Government estimates concur that intermediate flooding projections appear to be around 4 feet; additionally, the government estimates the high-level projection to be around 9 feet by 2100, and the extreme-level projection to be above 10 feet by 2100.<sup>41</sup> Rising sea levels, increased storms, and heavier precipitation will produce floods and storm surges causing property destruction, economic damage, injury, and death.<sup>42</sup> Extreme weather events and eroding coastlines are not the only concerns resulting from a warming climate. Zoonotic diseases pose a serious threat to our public health and economic stability. The ongoing COVID-19 pandemic exemplifies this dangerous truth.

### B. Climate Change and More Frequent and Severe Pandemics

Climate change and zoonotic diseases are inextricably linked.<sup>43</sup> There may be more than 3,200 zoonotic diseases primed for transfer to

39. *Id.*

40. Timothy Markle, *Climate Change: Cost of Inaction for Maryland's Economy*, CTR. FOR CLIMATE & ENERGY SOL'S 2 (Nov. 2015), <https://www.c2es.org/site/assets/uploads/2015/11/climate-change-cost-inaction-marylands-economy.pdf> [<https://perma.cc/AXB8-EZQW>].

41. Nat'l Oceanic and Atmospheric Admin. Office of Coastal Mgmt., *Sea Level Rise Viewer*, NOAA, <https://coast.noaa.gov/slr/#/layer/sce/4/8649569.647289164/4648693.6220696345/8/satellite/18/0.8/2100/interHigh/midAccretion> [<https://perma.cc/YB5U-Z7SN>] (last visited Apr. 4, 2022).

42. Univ. of Md. Col. of Agric. & Nat. Res., *The Effects of Climate Change in Maryland*, UNIV. OF MD., <https://extension.umd.edu/resource/climate-change-impacts-maryland> [<https://perma.cc/LC3H-YRRR>] (last updated Mar. 15, 2022). For a discussion of Maryland's dismal economic future in light of climate change, see Markle, *supra* note 40.

43. Lustgarten, *supra* note 6 (“Climate change is making outbreaks of disease more common and more dangerous.”); Neelam Sachan & V.P. Singh, *Effect of Climactic Changes on the Prevalence of Zoonotic Diseases*, 3 VETERINARY WORLD 519 (2010); James M. Mills, Kenneth L. Gage & Ali S. Khan, *Potential Influence of Climate Change on Vector-Borne and Zoonotic Diseases: A Review and Proposed Research Plan*, 118 ENV'T HEALTH PERSPECTIVES 1507, 1507 (2010) (citing NAT'L RESEARCH COUNCIL, UNDER THE WEATHER: CLIMATE, ECOSYSTEMS, AND INFECTIOUS DISEASES (D.C. Nat'l Academy Press 2001)) (“The concept that weather and climate are linked to the incidence of infectious diseases in humans has been recognized since the time of Hippocrates.”); Jitendra Mishra et al., *Linkages Between Environmental Issues and Zoonotic Diseases: With Reference to COVID-19 Pandemic*, 4 ENV'T SUSTAINABILITY 455, 456 (Mar. 29, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8005368/> [<https://perma.cc/T88G-KPG7>].



humans at any moment.<sup>44</sup> Climate change increases the frequency of zoonosis through multiple mechanisms. The most straightforward include: (1) range or geographic boundary shifting that brings disease-carrying animals, or host species, into areas that overlap with humans; and (2) changes in the host's population density resulting from either more idyllic habitat, decreased predator populations, or both.<sup>45</sup>

Based on the first mechanism, climate change forces animals to move into new areas and expand their geographic boundaries in order to survive.<sup>46</sup> Concurrently, as humans continue to expand and cultivate the last remnants of undeveloped land, they move further into the territory of vector-carrying species, such as bats.<sup>47</sup> Every incremental push onto untouched land increases the chances of transmission.<sup>48</sup> As climate change destroys species' native habitats and decreases biodiversity, zoonotic disease transmission may surge as a result of increased interface between human and non-human species.<sup>49</sup> Geographic shifting can lead to new habitats with potentially more food, room for growth, and fewer environmental stressors, like predators.<sup>50</sup> These idyllic circumstances for the host can lead to the second aforementioned mechanism: increased population density.<sup>51</sup>

Increased population density among host species poses a substantial threat to humanity because a higher density leads to a higher likelihood of disease-carrying members.<sup>52</sup> In addition to beneficial boundary shifting, population density can increase due to rising temperatures. For example, mosquitos, one of the most common zoonosis carriers, develop faster in warmer temperatures.<sup>53</sup> While changes in climate can cause both increases and decreases in a species population,

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44. Lustgarten, *supra* note 6.

45. Mills, *supra* note 43, at 1507–08.

46. Lustgarten, *supra* note 6.

47. *Id.*

48. *Id.* (“Epidemiologists tracking the root of disease in South Asia have learned that even incremental and seemingly manageable injuries to local environments—say, the construction of a livestock farm adjacent to stressed natural forest—can add up to outsized consequences.”).

49. *Id.*

50. For specific examples of range modification, see Mills, *supra* note 43, at 1508–09.

51. *Id.* at 1509.

52. *Id.*

53. Kenneth L. Gage et al., *Climate and Vectorborne Diseases*, 35 AM. J. OF PREVENTIVE MED. 436 (2008), <https://www.sciencedirect.com/science/article/pii/S074937970800706X> [<https://perma.cc/9MKT-HFRB>]; see Mills, *supra* note 43, at 1509.

scientists have recently documented an increased population density in host species found in North America.<sup>54</sup> For instance, higher temperatures, combined with increased precipitation from the Pacific Decadal Oscillation, are believed to have aided human-plague-carrying flea survival in the Western U.S.<sup>55</sup> Similarly, vegetation growth resulting from increased precipitation caused the population of the North American Deer Mouse, which carries the *Sin Nombre* virus, to rise.<sup>56</sup> This *Sin Nombre* virus causes Hantavirus Pulmonary Syndrome, which can cause acute viral pneumonia and even death.<sup>57</sup>

In addition to increasing zoonotic diseases, the impacts of climate change increase the likelihood of widespread viral diseases.<sup>58</sup> Severe weather events that create mass displacement also risk introducing and spreading viruses into new areas.<sup>59</sup> Similarly, disasters that cause mass evacuations and sheltering, including hurricanes, wildfires, and

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54. Mills, *supra* note 43, at 1509.

55. *Id.*

56. *Id.*

57. Dale Netski et al., *Sin Nombre Virus Pathogenesis in Peromyscus Maniculatus*, 73 J. OF VIROLOGY 585, 585 (1999); *Hantavirus Pulmonary Syndrome (HPS)*, AM. LUNG ASS'N, <https://www.lung.org/lung-health-diseases/lung-disease-lookup/hantavirus-pulmonary-syndrome> [<https://perma.cc/9SDH-T436>] (last visited Apr. 4, 2022).

58. Renee N. Salas, James M. Shultz & Caren G. Solomon, *The Climate Crisis and Covid-19 – A Major Threat to the Pandemic Response*, 383 NEW ENG. J. MED. 70(1) (2020).

59. *Id.* at 70(1) (explaining mass displacement requires large amounts of people to leave their homes and even a single event can displace over one million people, just as Hurricane Florence did in 2018).

disappearing islands, increase the risk of rapid transmission of diseases as a result of the moving and clustering of displaced and vulnerable people.<sup>60</sup>

Even the causes of climate change increase the severity of reactions to diseases.<sup>61</sup> Fossil fuel combustion and particulate matter air pollution, both of which contribute to climate change, intensify the prevalence of cardiovascular and chronic pulmonary diseases.<sup>62</sup> Similarly, many results of climate change, such as wildfire smoke, extreme heat, and ground level ozone, have been linked to cardiovascular and chronic pulmonary diseases.<sup>63</sup> For example, one recent study found that as little as one millionth of a gram in Particulate Matter, or PM<sub>2.5</sub>, is correlated with an 11% increase in the death rate from COVID-19.<sup>64</sup> The correlation between pollution and COVID-19 death rates demonstrates the dire need for swift climate change regulations, especially those that will protect future generations, as these impacts will only become more severe in the future.<sup>65</sup>

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60. *Id.* at 70(2). Importantly, this is an environmental justice problem as pollutants contributing to climate change cause more severe reactions to zoonotic diseases and COVID-19. Both climate change and zoonotic diseases disproportionately impact vulnerable populations, including minority and low-income communities. One study found a 49% increase in COVID-19 mortality rate with a standard deviation (14.1%) increase in the percentage of Black residents in the county. Xiao Wu et al., *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, SCI. ADVANCES. Nov. 20, 2020 at 1, 2. This massive increase in mortality rates associated with increased populations of Black residents—who disproportionately endure more air pollution due to their proximity to significant sources of pollution—demonstrates that not only will the impacts of climate change increase the severity of pandemics, but also the severity of pandemics for vulnerable populations. Linda Villarosa, *Pollution is Killing Black Americans: This Community Fought Back*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html> [<https://perma.cc/N3U7-RLWM>].

61. Salas et al., *supra* note 58, at 70(2).

62. *Id.*

63. *Id.*

64. Wu, *supra* note 60, at 1.

65. Kate Kellend, *Climate Change Exposes Future Generations to Life-Long Health Harm*, REUTERS (Nov. 13, 2019), <https://www.reuters.com/article/us-climate-change-health/climate-change-exposes-future-generations-to-life-long-health-harm-idUSKBN1XN2WQ> [<https://perma.cc/3Z7X-8AXF>].

### III. EXISTING LEGAL FRAMEWORK IN MARYLAND

For the last four years, proponents of ERAs have introduced bills that would place an ERA in Maryland’s Declaration of Rights.<sup>66</sup> None made it past committee.<sup>67</sup> Delegates have often questioned the need for an environmental right, contending that “MDE [Maryland Department of the Environment] already [has] the right/the ability/the authority . . . to protect the environment.”<sup>68</sup> Similarly, delegates doubt the utility of an ERA because the Maryland Legislature already passed environmental legislation.<sup>69</sup> While the Maryland Legislature has passed important bills with the potential to help the environment, gaps remain where environmental protection must improve.

In recent years, Maryland banned fracking and increased the Renewable Portfolio Standard to require 50% of the state’s electricity retail sales to originate from renewables by 2030.<sup>70</sup> Yet, in 2019, only 11% of Maryland’s energy came from renewables.<sup>71</sup> Six coal plants are active

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66. H.B. 0082, 2021 Leg., 442d Sess. (Md. 2021); H.B. 0517, 2020 Leg., 441st Sess. (Md. 2020); H.B. 0472, 2019 Leg. 440th Sess. (Md. 2019); S.B. 0872, 2018 Leg. 438th Sess. (Md. 2018).

67. *Legislation: SB0873*, MD. GEN. ASSEMB., <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/sb0873?ys=2018rs> [<https://perma.cc/LS5C-9WRG>] (last updated Feb. 3, 2020); *Legislation: HB0472*, MD. GEN. ASSEMB., <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0472?ys=2019rs> [<https://perma.cc/5658-24ZH>] (last updated Feb. 3, 2020); *Legislation: HB0517*, MD. GEN. ASSEMB., <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0517?ys=2020rs> [<https://perma.cc/7KD5-XAFS>] (last updated Sept. 22, 2020); *Legislation: HB0082*, MD. GEN. ASSEMB., <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0082> [<https://perma.cc/2PM9-EL3Y>] (last updated Apr. 1, 2021).

68. *Constitutional Amendment – Environmental Rights: Hearing on HB0472 Before the H. Comm. on Environment and Transportation*, 2019 Leg., 440th Sess. (Md. 2019) (at 03:35:30).

69. *Constitutional Amendment – Right to a Healthy Environment and Communities: Hearing on HB0517 Before the H. Comm. on Environment and Transportation*, 2020 Leg., 441st Sess. (Md. 2020) (at 00:39:20) (Delegate Barve doubted the utility of an ERA in 2020 stating: “Maryland has taken hard actions to protect the Chesapeake Bay, we’ve leaned on our farmers, we’ve leaned on our cities with respect to stormwater runoff, we’ve banned fracking, we have enabled offshore wind, we have functionally banned offshore oil drilling, and we don’t have this constitutional amendment . . . and this is completely unnecessary.”).

70. *Profile Analysis*, ENERGY INFO. ADMIN., <https://www.eia.gov/state/analysis.php?sid=MD> [<https://perma.cc/7WWC-NFR6>] (last updated Nov. 18, 2021). Renewable Portfolio Standards dictate the percentage of electricity that must be sourced from eligible “renewable” sources.

71. *Id.*

in Maryland as of early 2021,<sup>72</sup> and most construction and infrastructure projects do not require an Environmental Effects Report (“EER”), which would detail the environmental impacts of proposed state actions.<sup>73</sup> Further, Maryland has no state legislation governing or requiring consideration of the cumulative impacts of projects or pollution from the compounding of sources.<sup>74</sup> The following sections discuss two areas of Maryland law that will benefit from an ERA.

#### A. MEPA Imparts No Substantive Requirements

MEPA,<sup>75</sup> while on its face is full of potentially strong policy language, has not lived up to what its text purports.<sup>76</sup> MEPA’s language requires “all state agencies” to “identify, develop, and adopt methods and procedures” that: (1) ensure environmental resources are given appropriate consideration “along with economic and technical considerations,” (2) study alternatives when “significant adverse environmental effects” are at stake, and (3) require that actions with environmental effects are undertaken with the utmost public involvement.<sup>77</sup> Yet, while MEPA was enacted in 1973, as of 2015, only three Maryland agencies adopted the required methods or procedures detailed above.<sup>78</sup>

Section 1-304 of MEPA requires state agencies to prepare EERs for each proposed state action significantly affecting the quality of the environment.<sup>79</sup> However, any substantial promise purported by the text of § 1-304 was unfulfilled in the courts. Since its enactment in 1973, only three cases interpret the statute’s substance.<sup>80</sup> In the first, *Pitman v. Washington Suburban Sanitary Commission*,<sup>81</sup> the Maryland Court of

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72. *Coal in Maryland*, SIERRA CLUB MD. CHAPTER, <https://www.sierraclub.org/maryland/coal-in-md> [<https://perma.cc/VDQ5-ACPB>] (last visited Apr. 4, 2022). Legislation that would have phased out Maryland’s coal-fired powerplants over the next decade and attempted to reduce economic hardship for displaced workers was unsuccessful in the Maryland Legislature in 2021. Maryland Coal Community Transaction Act of 2021, S.B. 0148, 2021 Leg., 442d Sess. (Md. 2021).

73. *See infra* Part III.A.

74. *See infra* Part III.B.

75. MD. CODE ANN. Nat. Res. §§ 1-301 to 1-305 (2021).

76. Russell B. Stevenson, Jr., *The Maryland Environmental Policy Act: Resurrecting a Tool for Environmental Protection*, ENV’T L. REP., 2015, at 10074, 10078–80.

77. MD. CODE ANN. Nat. Res. § 1-303.

78. Stevenson, *supra* note 76, at 10075.

79. MD. CODE ANN. Nat. Res. § 1-304.

80. Stevenson, *supra* note 76, at 10075.

81. 368 A.2d 473 (Md. 1977).

Appeals construed the term “proposed state action” in accordance with its narrow definition in MEPA as “requests for legislative appropriations or other legislative actions that will alter the quality of the air, land, or water resources.”<sup>82</sup> This interpretation officially constricted the EER requirement to actions involving legislative appropriations requests.<sup>83</sup> In *Mayor & City Council of Baltimore v. State*,<sup>84</sup> the Maryland Court of Appeals affirmed *Pitman* and held that the Department of Public Safety and Correctional Services did not have to produce an EER for a project requested by legislation from the General Assembly.<sup>85</sup>

Going in for the hat trick, the Court of Appeals, affirming *sub nom* a decision of the Court of Special Appeals, held that MEPA did not confer an enforceable right, despite the explicit language that “[e]ach person has a fundamental and inalienable right to a healthful environment.”<sup>86</sup> Because of this constricted reading, an ERA would help fill the gaps in MEPA’s lack of power and reach.

#### *B. Maryland’s Pollution Control Laws Do Not Sufficiently Protect Future Generations from Climate Change Impacts*

Diligently combating climate change requires a plethora of laws, especially ones that can address problems before the result comes to fruition. Currently, Maryland laws do not contain the tools necessary to meaningfully address climate change. Examples of laws that would help mitigate climate change include a cumulative impacts bill requiring the consideration of pollution emitted from multiple sources and a bill creating a timetable for carbon neutrality. This section reviews examples of bills that could have helped address climate change, but did not survive the 2021 Maryland Legislature. It also examines the need for a bill that proactively addresses carbon emissions, and surveys bills in other states that, if enacted in Maryland, would help the state combat climate change.

Multiple bills targeting climate change were proposed in Maryland in 2021, but most did not make it through committee. One such

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82. *Id.* at 475 (citing MD. CODE ANN. Nat. Res. § 1-301(c)).

83. *Id.*

84. 378 A.2d 1326 (Md. 1977).

85. *Id.* at 1333, 1337; *see also* Stevenson, *supra* note 76, at 10075.

86. MD. CODE ANN. Nat. Res. § 1-302(d); *Leatherbury v. Peters*, 332 A.2d 41, 43 (Md. Ct. Spec. App. 1975), *aff’d sub nom*; *Leatherbury v. Gaylord Fuel Corp.*, 347 A.2d 826 (Md. 1975) (“We hold that accomplishment of the purposes sought to be subserved by Sections 1-301 to 1-304, inclusive, of that Article (Ch. 702, Acts of 1973) was committed by the Legislature to ‘State Agencies’ as therein defined. The Legislature did not intend to create new or enlarged actionable rights under the statute.”).

bill would have established an Office on Climate Change, within the Office of the Governor, to facilitate the implementation of recommendations from the Maryland Commission on Climate Change.<sup>87</sup> This bill would have required state agencies to address active measures to mitigate the causes of climate change and work with local governments to implement climate change plans.<sup>88</sup> The bill died in committee.<sup>89</sup> Another bill authorizing the Maryland Attorney General to investigate and prosecute entities whose tortious or unlawful conduct contributed to climate change also died in committee.<sup>90</sup> An important bill calling for statewide greenhouse gas reductions and carbon neutrality before 2050 nearly passed.<sup>91</sup> This bill, called the Climate Solutions Now Act, required reductions of statewide greenhouse gas emissions by 60% from 2006 levels by 2030 and carbon neutrality by 2045.<sup>92</sup> Further, it required the Maryland Department of Labor to adopt energy conservation requirements for certain buildings and establish a tree planting goal.<sup>93</sup> The Climate Solutions Now Act passed committee in both houses but died prior to review in the original chamber.<sup>94</sup> These are just a few examples of the environmental bills that failed to become law during the 2021 Maryland Legislative session.

Maryland also lacks a cumulative impacts act. Such an act would require the Maryland Department of the Environment (“MDE”) to consider cumulative impacts when reviewing project permitting applications.<sup>95</sup> State proponents introduced cumulative impacts bills in 2014 and 2015 but were unsuccessful.<sup>96</sup> The Permit Determinations Cumulative Impacts Assessment Bill, introduced in 2014, required certain permit applicants to conduct and submit cumulative impact assessments

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87. H.B. 503, 2021 Leg., 442nd Sess. (Md. 2021).

88. *Id.*

89. *Legislation*, MD. GEN. ASSEMBLY, <https://mgaleg.maryland.gov/mgaweb/Legislation/Details/hb0503/?ys=2021rs> [<https://perma.cc/NH78-V2U3>] (last updated Apr. 1, 2021).

90. H.B. 1078, 2021 Leg., 442nd Sess. (Md. 2021).

91. S.B. 0414, 2021 Leg., 442nd Sess. (Md. 2021).

92. *Id.* § 2.

93. *Id.*

94. *Id.*

95. *See, e.g.*, Assoc. of Env’t Professionals, *Topic Paper: Cumulative Impacts*, CEQA PORTAL, [https://ceqaportal.org/tp/AEP%20CEQA%20Portal\\_Cumulative%20Impacts.pdf](https://ceqaportal.org/tp/AEP%20CEQA%20Portal_Cumulative%20Impacts.pdf) [<https://perma.cc/RQ63-S3FR>] (describing the California Environmental Quality Act itself and important cases involving cumulative impacts and the California Environmental Quality Act) (last updated Dec. 18, 2020).

96. Devon C. Payne-Sturges et al., *Framing Environmental Health Decision Making: The Struggle Over Cumulative Impacts Policy*, INT. J. ENV. RES. AND PUB. HEALTH, Apr. 9, 2021, at 2.

prior to the determination of the permit application.<sup>97</sup> The cumulative impact assessments required in this bill served as a means to address the impact on humans and the environment resulting from incremental effects of pollution from different sources.<sup>98</sup> This bill also failed.<sup>99</sup> In 2015, the Cumulative Air Impacts Analysis Bill was introduced.<sup>100</sup> This Bill focused on environmental justice, requiring MDE to conduct a Cumulative Air Impact Analysis for proposed projects in a “protected community.”<sup>101</sup> The Bill further called for a public participation process accompanying air quality permit applications and required MDE and the Maryland Department of Health to study the detrimental effects of cumulative impacts of pollution.<sup>102</sup> Cumulative impact bills are especially important because emissions from one source may not, on its own, seem harmful to the environment; however, accounting for all polluting sources in a region provides a better idea of how the multiple, aggregate sources are contributing to climate change.<sup>103</sup> No cumulative impact bills of note have been proposed since 2015.<sup>104</sup>

More than a dozen states require cumulative impact assessments during certain permitting processes, including California and New

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97. S.B. 0706, 2014 Leg., 436th Sess. (Md. 2014).

98. *Id.* § 1.

99. *Id.*

100. H.B. 0987 2015 Leg., 437th Sess. (Md. 2015); Evan M. Isaacson, *Fiscal and Policy Note: HB 987*, MD. GEN. ASSEMBLY (2015), [https://mgaleg.maryland.gov/2015RS/fnotes/bil\\_0007/hb0987.pdf](https://mgaleg.maryland.gov/2015RS/fnotes/bil_0007/hb0987.pdf) [<https://perma.cc/SA4B-HSZ3>] (“A ‘protected community’ is defined as an area within a zip code that that has (1) an economic disadvantage, as demonstrated by either a Medicaid enrollment rate above the median value for all zip codes in the State or a Special Supplemental Food Program for Women, Infants, and Children participation rate above the median value for all zip codes in the State and (2) poor health outcomes, as demonstrated by either a life expectancy below the median value for all zip codes in the State, or a percentage of low birth weight infants above the median value for all zip codes in the State. Alternatively, an area can qualify as a protected community if MDE determines the area should be protected based on negative impacts of pollution and other stressors on the community.”).

101. Payne-Sturges et al., *supra* note 96, at 4.

102. *Id.*

103. Erik Stokstad, *Deadly Air Pollution is Blowing Into Your State From a Surprisingly Large Source*, SCI. (Feb. 12, 2020), <https://www.sciencemag.org/news/2020/02/deadly-air-pollution-blowing-your-state-surprisingly-large-source> [<https://perma.cc/LR3F-HEH9>].

104. Payne-Sturges et al., *supra* note 96, at 2 (although no cumulative impact bills of note were proposed since 2015 at the time of this writing, this article only includes review through the 2021 Maryland legislative season).



York.<sup>105</sup> They vary in effectiveness.<sup>106</sup> New Jersey recently passed what some consider “the strictest and likely most effective state law addressing environmental justice.”<sup>107</sup> The New Jersey Environmental Justice Cumulative Impacts Act<sup>108</sup> (“the NJ Act”) took more than one decade to pass, repeatedly succumbing to industry opposition until it passed in 2020.<sup>109</sup> The NJ Act broadly applies to any “major source[s] of air pollution” proposed to be placed in any “overburdened community,” and requires the New Jersey Department of Environmental Protection to prepare an Environmental Justice Impact Statement and conduct public meetings with the impacted community.<sup>110</sup>

The NJ Act’s anticipated strength is rooted in its stipulation that a permit request for a facility that disproportionately affects an overburdened community *shall* be denied unless it can show a compelling public interest.<sup>111</sup> The permitting requirement applies to sewage treatment plants, incinerators, power plants, landfills, and large recycling complexes.<sup>112</sup> While still untested, the strong language and broad applicability of the NJ Act will likely prohibit certain facilities from exacerbating the pollution problems already occurring in many

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105. Samantha Maldonado, *How a Long-Stalled ‘Holy Grail’ Environmental Justice Bill Found Its Moment in New Jersey*, POLITICO (Aug. 27, 2020), <https://www.politico.com/states/new-jersey/story/2020/08/27/new-jersey-legislature-sends-groundbreaking-environmental-justice-bill-to-governors-desk-1313030> [<https://perma.cc/UR45-2WD7>]; see California Environmental Quality Act, CAL. PUB. RES. CODE § 21000 (2021); New York State Environmental Quality Review Act, N.Y. ENV’T CONSERV. LAW § 8-0101 (2021).

106. *Id.*

107. Isaac Kort-Meade, *State-Sponsored Environmental Justice: New Jersey’s Cumulative Impacts Act*, L. J. FOR SOCIAL JUST. (Oct. 18, 2020), <https://lawjournalforsocialjustice.com/2020/10/18/state-sponsored-environmental-justice-new-jerseys-cumulative-impacts-act/> [<https://perma.cc/76YL-A57Q>].

108. S. 232, 2020 Leg., 219th Sess. (N.J. 2020).

109. Maldonado, *supra* note 105.

111. Kort-Meade, *supra* note 107.

111. *Id.*

112. New Jersey Environmental Justice Cumulative Impacts Act, N.J. STAT. C.13:1D-158 (2021); see also Maldonado, *supra* note 105.

environmental justice communities.<sup>113</sup> State bills, such as those discussed in this section, and countless others, could help protect future generations from the impacts of climate change. An ERA will likely help fill the gaps in Maryland's current legislation and regulations, and it will promote the enactment of laws addressing climate change.

#### IV. ENVIRONMENTAL RIGHTS AMENDMENTS IN THE UNITED STATES

The year 1970 kickstarted the iconic environmental decade when the Clean Water Act, Clean Air Act, National Environmental Policy Act, and many other important federal environmental protection initiatives were passed, in addition to the first Earth Day and the creation of the Environmental Protection Agency.<sup>114</sup> Also, during the 1970s, some states took it upon themselves to enact constitutional provisions conferring environmental rights upon their citizens. These ERAs, often referred to as Green Amendments,<sup>115</sup> confer a substantive right to something amounting

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113. *Id.*; see also Kort-Meade, *supra* note 107. The Environmental Protection Agency defines “Environmental Justice” as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. U.S. Env’t Prot. Agency, *Learn About Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> [<https://perma.cc/BR5B-KWWA>] (last visited Apr. 4, 2021). Environmental Justice communities are low-income communities and communities of color that experience disproportionate environmental impacts and even see fewer environmental benefits. See, e.g., Dana Rowangould et al., *Identifying Environmental Justice Communities for Transportation Analysis*, 88 TRANSP. RES. 151 (2016).

114. Barry E. Hill, *supra* note 1, at 11028–29.

115. See generally MAYA K. VAN ROSSUM, *THE GREEN AMENDMENT* (2017).

to a healthy or healthful environment.<sup>116</sup> Starting in the 1970s, seven<sup>117</sup> states enacted ERAs in their respective state constitutions.<sup>118</sup>

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116. Barry E. Hill, *Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where Do We Go from Here?*, ENV'T L. REP., 2015, at 10362, 10370–71 [hereinafter *Time for New Age*].

117. It is debated exactly how many states have ERAs. In a report by the New York State Bar Association on their proposed ERA, the authors claimed that only three states “have enacted constitutional provisions to protect environmental values.” N.Y. State Bar Assoc. Env’t and Energy Law Section, *Report and Recommendations Concerning Environmental Aspects of the New York State Constitution*, 38 PACE L. REV. 182, 189 (2017). The three states included in the New York State Bar Association’s paper are Pennsylvania, Montana, and Hawaii. *Id.* However, other academics list Hawaii, Illinois, Massachusetts, Montana, New York, Pennsylvania, and Rhode Island, or some variation of those states, as states with ERAs in their state constitutions. *Time for a New Age*, *supra* note 116, at 10371.

118. HAW. CONST. art. XI, § 9 (“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.”); ILL. CONST. art. XI, § 2 (“Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.”); MASS. CONST. art. XCVII (“The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights.”); MONT. CONST. art. II, § 3 (“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.”); PA. CONST. art. I, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”); R.I. CONST. art. I, § 17 (“[T]hey shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.”).

ERAs are different from the policy declarations or procedural environmental amendments that approximately 20 state constitutions contain.<sup>119</sup> Policy declarations normally include some iteration of the following language: “[I]t shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings,”<sup>120</sup> or “The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people.”<sup>121</sup> These policy declarations can appropriate funds or direct legislatures to implement the policy adopted in the amendment.<sup>122</sup> However, unlike ERAs, these policy declarations and procedural amendments do not confer a right to the people.

ERAs are much more powerful, versatile, and have high potential in the future for environmental protection. A crucial function of ERAs is assisting the passage of environmental protection bills. For example, in Illinois, under the directive of its ERA, the legislature enacted Illinois’s Environmental Protection Act.<sup>123</sup> This comprehensive bill helps protect and restore the environment and created Illinois’s Environmental

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119. See ALA. CONST. art. XI, § 219.07(1); CAL. CONST. art. X, § 2; COLO. CONST. art. XVIII, § 6; FLA. CONST. art. II, § 7; IDAHO CONST. art. XV, § 1; LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52; MINN. CONST. art. III, § 37(b); MO. CONST. art. XIII, § 12; MONT. CONST. art. IX, § 1; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, §§ 3, 4; N.C. CONST. art. XIV, § 5; OHIO CONST. art. VIII, § 2; OR. CONST. art. XI-H, § 1; TEX. CONST. art. XVI § 59; UTAH CONST. art XVIII, § 1; VA. CONST. art XI, § 1.

120. VA. CONST. art. XI, § 1.

121. MICH. CONST. art. IV, § 52.

122. LA. CONST. art. IX, § 1 (“The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.”).

123. Environmental Protection Act, 415 ILL. COMP. STAT. 5/1–160/999 (2021).

Protection Agency and the Pollution Control Board.<sup>124</sup> The Illinois ERA also helps these environmental entities fulfill their objectives as evidenced in *Town and Country Utilities, Inc. v. Pollution Control Board*,<sup>125</sup> where the Supreme Court of Illinois upheld the Pollution Control Board's reversal of a city-approved landfill permit because the site was not designed, located, and proposed to ensure the protection of the public health, safety, and welfare.<sup>126</sup>

In Pennsylvania, the Supreme Court declared that the Solid Waste Management Act—the basis of at least four cases before the Supreme Court of Pennsylvania that discussed the state's ERA—was enacted to implement the will of the people according to the ERA.<sup>127</sup> Perhaps because of this, the Solid Waste Management Act has been read flexibly in order to implement its purpose under the Pennsylvania Constitution.<sup>128</sup> In 2002, the Supreme Court of Pennsylvania used the ERA to illustrate the public policy upholding the Solid Waste Management Act and to justify holding *anyone* liable for dumping solid waste without a permit.<sup>129</sup>

Now, almost 50 years after the enactment of the first ERAs, New York is the seventh state to enact one.<sup>130</sup> For a bill to become a

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124. *Town and Country Utils., Inc. v. Pollution Control Bd.*, 866 N.E.2d 227, 229–230 (Ill. 2007) (“The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.” ILL. CONST. 1970, art. XI, § 1. In accordance with this directive, the General Assembly adopted the Environmental Protection Act in 1970. 415 ILL. COMP. STAT. 5/1 *et seq.* (West 2002). The purpose of the Act is ‘to establish a unified, statewide program’ which, along with other remedies, is ‘to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them.’ 415 ILL. COMP. STAT. 5/2(b) (West 2002). Further, the legislature intended the Act to be liberally construed so as to effectuate its purposes. 415 ILL. COMP. STAT. 5/2(c) (West 2002). The legislature established the Illinois Environmental Protection Agency (‘IEPA’) (415 ILL. COMP. STAT. 5/4 (West 2002)) and the independent Pollution Control Board (415 ILL. COMP. STAT. 5/5 (West 2002)) to implement the Act.”); *see also* *County of Will v. Pollution Control Bd.*, 135 N.E.3d 49 (Ill. 2019).

125. 866 N.E.2d 227 (Ill. 2007).

126. *Id.* at 239.

127. *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1362 (Pa. 1986).

128. *Id.*; *Commonwealth Dep’t of Env’t Res. v. Blosenski Disposal Servs.*, 566 A.2d 845 (Pa. 1989).

129. *Commonwealth v. Packer*, 798 A.2d 192, 199 (Pa. 2002) (“Reading section 610(1) to apply to employees does not produce absurd results, but punishes all that are involved in the unpermitted dumping of solid waste. The SWMA imposes strict liability on offenders.”).

130. N.Y. CONST. art. I, § 19.

constitutional amendment in New York, it must pass two consecutive legislative sessions and then pass a vote by the people.<sup>131</sup> The bill passed in the second consecutive legislative session on November 2, 2021.<sup>132</sup> New York added § 19 to their Bill of Rights: “Each person shall have a right to clean air and water, and a healthful environment.”<sup>133</sup>

In 2021, there was a massive influx of interest in ERAs. Aside from Maryland and New York, Maine, Oregon, and New Mexico saw ERAs introduced in their legislatures.<sup>134</sup> Outside of the U.S., almost 150 nations’ constitutions include explicit environmental rights, place environmental responsibilities on the government, or both.<sup>135</sup> This began in the 1970s; every year since, the number of countries with environmental provisions in their constitution grows.<sup>136</sup> Over 90 of those nations stipulate a substantive right to environmental protections, with language including “healthy,” “healthful,” “clean,” “safe,” “pure environment,” and other iterations of this vital premise.<sup>137</sup> Based on the progress made in 2021, the 2020s could very well be the new environmental decade, and environmental rights may soon appear in most states and countries. Thus, already enacted state ERAs can be considered experiments that both demonstrate the importance of ERAs and identify the most effective language to protect future generations.

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131. David Carlucci, *Green Amendment Passes in the New York State Legislature*, N.Y. ST. S. (Apr. 30, 2019), <https://www.nysenate.gov/newsroom/press-releases/david-carlucci/green-amendment-passes-new-york-state-legislature> [<https://perma.cc/M9AW-HCE7>].

132. David G. Mandelbaum & Steven C. Russo, *The New Environmental Rights Amendment to the New York Constitution*, NAT’L L. REV. (Nov. 8, 2021), <https://www.natlawreview.com/article/new-environmental-rights-amendment-to-new-york-constitution> [<https://perma.cc/N963-9JL4>].

133. N.Y. CONST. art. I, § 19.

134. L.D. 489, 130th Leg., 1st Reg. Sess. (Me. 2021); S.J. RES. 5, 81st Leg. Assemb., Reg. Sess. (Or. 2021); S.J. RES. 3, 55th Leg., 1st Sess. (N.M. 2021).

135. Barry E. Hill, *supra* note 1, at 11027 (“Today, more than three-quarters of the world’s national constitutions (149 out of 193) include explicit references to environmental rights and/or the central government’s environmental responsibilities.”); *Time for a New Age*, *supra* note 116, at n.6 (“This includes the majority of nations in Africa, Central and South America, Asia-Pacific, Europe, and the Middle East/Central Asia. The U.S. Constitution does not include an environmental rights provision.”).

136. David R. Boyd, *The Status of Constitutional Protection for the Environment in Other Nations*, DAVID SUZUKI FOUND. (2013) <https://davidssuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf> [<https://perma.cc/E3CJ-SR5X>].

137. Barry E. Hill, *supra* note 1, at 11027.

## V. ENACTING ERAS TO PROTECT FUTURE GENERATIONS FROM THE IMPACTS OF CLIMATE CHANGE

As demonstrated in Part III, Maryland's laws do not sufficiently protect future generations from the impacts of climate change.<sup>138</sup> An ERA could help protect future generations from climate change impacts by acting as a stopgap when legislation is lacking, by overcoming inconsistencies in legislation and regulations, and by promoting the enactment of climate change legislation. Part V.A reviews examples of cases where ERAs helped plaintiffs produce environmental wins.<sup>139</sup> Part V.B suggests textual recommendations to maximize ERAs' capacity to protect future generations.<sup>140</sup> Part V.C addresses common counterarguments used to oppose ERAs.<sup>141</sup>

### A. Using ERAs to Address Climate Change

ERAs can be used to fight climate change. This is perhaps especially true in Maryland since cumulative impacts are not sufficiently monitored by MEPA and Maryland has no climate change bill capping future emissions.<sup>142</sup> Hawaii provides a prime example of how an ERA can be used to address future emissions and cumulative impacts. In 2017, Maui Electric Company sought a new Power Purchase Agreement ("PPA") from a coal-burning electricity provider.<sup>143</sup> Hawaii law allowed the utility company to recover all purchase costs from customers with approval from the Public Utility Commission ("Commission").<sup>144</sup> This statute also directed the Commission to consider Hawaii's need to reduce fossil fuels and transition to renewable energy.<sup>145</sup> The Sierra Club moved to intervene

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138. *See supra* Part III.

139. *See infra* Part V.A.

140. *See infra* Part V.B.

141. *See infra* Part V.C.

142. *See supra* Part III.

143. *In re Maui Elec. Co., Ltd.*, 408 P.3d 1, 5 (Haw. 2017).

144. *Id.* Public utility commissions that "regulate electric, gas, telecommunications, water and waste water utilities . . . are charged with assuring that utilities provide reasonable, adequate and efficient service to customers at just and reasonable prices."; U.S. Env't Prot. Agency, *An Overview of PUCs for State Environment and Energy Officials*, EPA (May 20, 2010), [https://www.epa.gov/sites/default/files/2016-03/documents/background\\_paper.pdf](https://www.epa.gov/sites/default/files/2016-03/documents/background_paper.pdf) [<https://perma.cc/P5A4-ZMF3>]; HAW. REV. STAT. § 269 (2021).

145. HAW. REV. STAT. § 269-6(b) (stating that the "public utilities commission shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation.").

or participate in the PPA.<sup>146</sup> However, the Commission refused, holding that the Sierra Club did not meet standing requirements because it did not have an interest different from the general public; the Commission also decided that the Sierra Club did not possess a due process claim in the matter.<sup>147</sup>

The Supreme Court of Hawaii reversed the Commission's decision. It first held that the plaintiffs possessed standing stemming in part from their legally protected interest in Hawaiians' constitutional right to a healthful environment established by the state ERA.<sup>148</sup> The Supreme Court of Hawaii further held that the Sierra Club had a protected due process property interest in a clean and healthful environment and could participate in the hearing for the determination of the PPA.<sup>149</sup> In 2019, this holding was affirmed when a different environmental group was awarded the same opportunity to intervene in a PPA.<sup>150</sup> In 2020, the Supreme Court of Hawaii rejected the Commission's decision to limit consideration to greenhouse gas emissions within the boundaries of Hawaii and instead required consideration of cross-boundary greenhouse gases.<sup>151</sup> In these cases, Hawaii's ERA helped environmental groups overcome standing, allowed them to participate in Hawaii's power sourcing decisions, and required the state to consider transboundary pollution when purchasing power sources.<sup>152</sup>

ERAs also add extra protection in environmental claims because courts are forced to recognize that a plaintiff's interest in the environment is raised to a constitutional level.<sup>153</sup> In 2018, Rhode Island initiated a lawsuit against 21 oil and gas companies.<sup>154</sup> In addition to state tort claims,

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146. In re Maui Elec. Co., Ltd., 408 P.3d at 6.

147. *Id.* at 7.

148. *Id.* at 22–23.

149. *Id.* at 12–13 (“This substantive right is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process.”).

150. In re Hawaii Elec. Light Co., 445 P.3d 673, 677 (Haw. 2019).

151. In re Gas Co., 465 P.3d 633, 650–51 (Haw. 2020).

152. See In re Maui Elec. Co., Ltd., 408 P.3d at 13, 22–23; In re Hawaii Elec. Light Co., 445 P.3d at 700; In re Gas Co., 465 P.3d at 645–52.

153. See generally *Pioneer Processing Inc. v. EPA*, 464 N.E.2d 238 (Ill. 1984); *People ex. rel. Scott v. Chi. Park Dist.*, 360 N.E.2d 773 (Ill. 1976); *Franklin Township v. Dep't of Env't Res.*, 452 A.2d 718 (Pa. 1982); *Commonwealth v. Harmor Coal Co.*, 306 A.2d 308 (Pa. 1973).

154. Complaint ¶¶ 1–12, *State v. Chevron Corp., et al.*, No. PC-2018-4716, 2020 R.I. Super. LEXIS 67 (R.I. Super. Ct. 2020), [http://blogs2.law.columbia.edu/climate-changelitigation/wp-content/uploads/sites/16/case-documents/2018/20180702\\_docket-PC-2018-4716\\_complaint.pdf](http://blogs2.law.columbia.edu/climate-changelitigation/wp-content/uploads/sites/16/case-documents/2018/20180702_docket-PC-2018-4716_complaint.pdf) [<https://perma.cc/Z2JL-2S4R>].



state environmental claims, and public nuisance claims, Rhode Island sought to hold the oil and gas companies “liable for causing climate change impacts that adversely affected the state’s natural resources, as well as the rights of its inhabitants’ access to and use of those natural resources in violation of the state’s Environmental Rights Amendment.”<sup>155</sup> The case is pending, but it has the potential to be revolutionary for climate change litigation.<sup>156</sup> As demonstrated by the proceedings in Hawaii and Rhode Island, by elevating environmental interests to a constitutional level, ERAs can provide enhanced protection for environmental claims.

### *B. Proposed Language Based on Other States’ ERAs*

Differing language across ERAs results in varying levels of protection for citizens and the environment. The following three sections analyze how state courts have interpreted their respective state ERAs. Based upon these analyses, Part V.B.1 recommends state ERAs use the term “future generations,” Part V.B.2 recommends state ERAs use words like “clean” and “healthy” to replace “healthful,” and Part V.B.3 recommends that the amendment should appear in a state constitution’s bill or declaration of rights.<sup>157</sup>

#### *1. The Term “Future Generations” Should be Included to Ensure Proactive and Precautionary Environmental Protection*

Future generations will be extremely vulnerable to climate change. A warmer world is more susceptible to a host of issues, including heatwaves, food shortages, storms, flooding, and pandemics.<sup>158</sup> Additionally, future generations will be more vulnerable to the health-related effects of pollution and climate change.<sup>159</sup> Children are especially vulnerable because their immune systems are not fully developed, thus

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155. Barry E. Hill, *supra* note 1, at 11022 n.4.

156. For an in-depth review of this case as of 2020, see generally Barry E. Hill, *supra* note 1.

157. See *infra* Parts V.B.1, V.B.2, V.B.3.

158. See *supra* Part II.A.; see also Kellend, *supra* note 65.

159. See Kellend, *supra* note 65.

making youths more susceptible to diseases that can have life-long effects.<sup>160</sup>

Scholars have argued that without constitutional provisions, the consideration of future generations will not be adequately protected.<sup>161</sup> Edith Brown Weiss posited that the present generation's obligation to future generations is rooted in the reciprocal welfare of other human beings and in intergenerational equity.<sup>162</sup> The intergenerational equity theory is founded on the premise that the present generation inherited the planet in a livable condition, and, therefore, the present generation owes the next generation, at a minimum, the level of planetary resources and environmental health that present generations inherited, save for compelling reasons not based in profit or greed.<sup>163</sup>

Present generations are predisposed to put their needs above the interests of future generations and to consume resources at the expense of future generations.<sup>164</sup> Thus, some scholars argue that “the legislative process proves inadequate to protect” future generations.<sup>165</sup> Others argue that the U.S. needs greater political will in order to produce progressive environmental policies.<sup>166</sup> No matter which viewpoint is correct in a state or national legislature, a rights-based approach, particularly a

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160. *Id.* See Columbia University's Mailman School of Public Health, *Children Are Highly Vulnerable to Health Risks of a Changing Climate*, SCIENCE DAILY (Aug. 6, 2018), <https://www.sciencedaily.com/releases/2018/08/180806151856.htm> [<https://perma.cc/UJH9-YWWP>] (“Because of their small surface to body ratio infants and children are particularly vulnerable to dehydration and heat stress. Additionally, children are more likely to be affected by respiratory disease, renal disease, electrolyte imbalance and fever during persistent hot episodes. Heat waves have also been shown to exacerbate allergens and air pollution which impact children more severely than adults because of their underdeveloped respiratory and immune systems and their relatively high rates of respiration.”).

161. *An Environmental Right for Future Generations: Model State Constitutional Provisions & Model Statute*, SCI. AND ENV'T HEALTH NETWORK & THE INT'L HUM. RTS. CLINIC AT HARV. L. SCH. (Nov. 2008), <http://static1.squarespace.com/static/5ad8bb3336099bd6ed7b022a/5b5606108290855de08a94fb/5b5606028290855de08a9283/1532364290776/Model-State-Constitutional-Provision-and-Model-Statute.pdf?format=original> [<https://perma.cc/6QMD-SC3J>].

162. Edith Brown Weiss, *What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198, 207 (1990).

163. *Id.* at 206.

164. *Id.* at 204.

165. N.Y. State Bar Assoc., *supra* note 117, at 191.

166. Symposium, *Global Perspective on Climate and Energy Justice*, ENV'T L. REP., 2021, at 10469.

constitutional right, has more potential to protect future generations because it cannot fall as easily to the whims of the legislature.<sup>167</sup> An ERA, due to broad language and applicability, is more capable of addressing problems that require consideration of humans not yet on this planet.<sup>168</sup> Examples of issues requiring proactive consideration include: persistent hazardous and nonhazardous waste disposal, non-renewable natural resource exhaustion, and climate change.<sup>169</sup> Therefore, including the term “future generations” will help to fill legislative gaps and strengthen the usage of existing legislation in the judiciary to address such environmental burdens.<sup>170</sup>

Further, using the term “future generations” can help to ensure the prospective and precautionary application of ERAs. In *Robinson Township v. Commonwealth*,<sup>171</sup> the Pennsylvania Supreme Court analyzed and applied the state ERA to ensure both “protection from harm or damage and to ensure the maintenance and perpetuation of an environment of quality for the benefit of future generations.”<sup>172</sup> The Pennsylvania Supreme Court held that Pennsylvania, as trustee, must balance the interests of present and future generations, including their consumption and protection of natural resources, and the pollution that consumption often causes versus conservation.<sup>173</sup> Importantly, it highlighted that the state’s responsibility requires a forward-looking approach to trusteeship requirements and permits “not only reactive but also anticipatory protection of the environment for the benefit of current and future generations.”<sup>174</sup> Additionally, the Pennsylvania Supreme Court recognized that the term “future generations” pertains to actions causing small or incremental increases in overall pollution, which requires cumulative impacts consideration.<sup>175</sup> Given these existing examples, including “future generations” in a state’s ERA has significant potential to provide proactive, anticipatory, precautionary environmental protection,

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167. N.Y. State Bar Assoc., *supra* note 117, at 191.

168. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157, 198 (2003).

169. *Id.*

170. See *An Environmental Right for Future Generations: Model State Constitutional Provisions & Model Statute*, *supra* note 161.

171. 83 A.3d 901 (Pa. 2013).

172. *Id.* at 951.

173. *Id.* at 958–59; John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II – Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 133–34 (1999).

174. *Robinson Township*, 83 A.3d at 959, 963.

175. *Id.*

as well as protection from cumulative impacts, all of which are vital to ensure intergenerational equity.

2. *Considering “Healthful” Versus “Healthy” or More Descriptive Terminology*

Taking a purely anthropocentric approach to environmental rights will likely not provide enough protection to future generations. One potential factor for this is the differentiation between “healthful” as compared to “healthy” or “clean.” Illinois’s ERA uses the descriptor “healthful” as the sole adjective before environment.<sup>176</sup> The Illinois Supreme Court held that the meaning of a “healthful environment” does not include a right to protect endangered species, or even a conclusory statement of interest in the matter.<sup>177</sup> The Illinois Supreme Court explained that the purpose of using “healthful” compared to “healthy” was because “healthful” describes the environment in terms of its direct effect on human life.<sup>178</sup> Montana similarly construed “healthful” alone as measuring the environmental destruction or pollution as compared to the environment’s effect on humans. However, during Montana’s 1972 Constitutional Convention, the delegates decided against using “healthful”

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176. ILL. CONST. art. XI, § 2 (“Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.”).

177. *Glisson v. Marion*, 720 N.E.2d 1034, 1045 (Ill. 1999).

178. *Id.* at 1042 (“The Committee selects the word ‘healthful’ as best describing the kind of environment which ought to obtain. ‘Healthful’ is chosen rather than ‘clean’, ‘free of dirt, noise, noxious and toxic materials’ and other suggested adjectives because ‘healthful’ describes the environment in terms of its *direct effect on human life* while the other suggestions describe the environment more in terms of its physical characteristics.”) (emphasis added in original).

as a sole adjective, arguing that “healthful” alone would allow destruction up until humans could no longer survive in their environment.<sup>179</sup>

While some scholars treat “healthy” and “healthful” as the same,<sup>180</sup> others do not.<sup>181</sup> The Montana Supreme Court recognized that “healthful” alone would not provide the level of protection that the delegates envisioned when it interpreted the meaning of “clean and healthful environment” in *Montana Environmental Information Center v. Department of Environmental Quality*<sup>182</sup> (“MEIC”). The Montana Supreme Court based its determination primarily on the Constitutional Convention transcripts and the delegates’ intent, finding that their intent was to bar further degradation,<sup>183</sup> to be anticipatory, and to provide remedies.<sup>184</sup> The delegates worried that the term “healthful” alone was too weak and would allow pollution until the point when humans could barely walk or breath.<sup>185</sup> In the end, the delegates agreed that “clean” and “healthful” together embodied the anticipatory and preventative language they sought.<sup>186</sup> As such, the Montana Supreme Court held that the

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179. Compare *id.* with *Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 988 P.2d 1236, 1246 (Mont. 1999) (quoting Montana Constitutional Convention Proceedings vol. 4, 1201 (Mont. Legis. & Legis. Council 1972) (available at [https://courts.mt.gov/external/library/mt\\_cons\\_convention/vol4.pdf](https://courts.mt.gov/external/library/mt_cons_convention/vol4.pdf)) [hereinafter Const. Convention Vol. 4] (Delegate McNeil stating: “The majority felt that the use of the word ‘healthful’ would permit those who would pollute our environment to parade in some doctors who could say that if a person can walk around with four pounds of arsenic in his lungs or SO<sub>2</sub> gas in his lungs and wasn’t dead, that that would be a healthful environment. We strongly believe[,] the majority does[,] that our . . . proposal is stronger than using the word ‘healthful.’”).

180. See, e.g., Lauren E. Bartlett, *Human Rights Guidance for Environmental Justice Attorneys*, 97 U. DET. MERCY L. REV. 373, 399 n.168 (2020) (“Some states refer to a right to a ‘healthy’ environment and others to a ‘healthful’ environment. This article treats these as identical and therefore refers to the right to a ‘healthy(ful)’ environment to capture both wording choices.”).

181. Neil A. F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENV’T L. J. 338, 346 (1996).

182. 988 P.2d 1236, 1236, 1245–49 (Mont. 1999).

183. *Id.* at 1247 (citing Const. Convention Vol. 4, *supra* note 179, at 1205).

184. *Id.* (citing Const. Convention Vol. 4, *supra* note 179, at 1206).

185. *Id.* at 1248 (citing Montana Constitutional Convention Proceedings vol. 5, 1201 (Mont. Legis. & Legis. Council 1972) ([https://courts.mt.gov/external/library/mt\\_cons\\_convention/vol5.pdf](https://courts.mt.gov/external/library/mt_cons_convention/vol5.pdf)) (Delegate Foster stating: “The federal government will see to it one way or another, if it’s in its power, that we have an environment in which we can manage to crawl around or to survive or to in some way stay ‘alive.’”).

186. *Id.* at 1249.

“delegates did not intend to merely prohibit that degree of environmental degradation that can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked.”<sup>187</sup>

Comparing Illinois to Montana, in Montana, the addition of the word “clean” in the phrase a “clean and healthful environment”—instead of “healthful” as the sole adjective in Illinois—was chosen purposefully to ensure that environmental quality be maintained above the baseline level of not harming human health.<sup>188</sup> One scholar posited that

[t]he most direct and comprehensive way to promote and develop a rights-based approach to environmental protection may be the federal recognition of a basic right to a safe environment. A ‘healthful’ environment means an environment conducive to human health, whereas a ‘healthy’ environment means an environment that is itself healthy.<sup>189</sup>

This rationale exists in other states, like Louisiana, where the constitutional environmental amendment uses the term “healthful” and explicitly defines the term to mean “insofar as possible and consistent with the health, safety, and welfare of the people.”<sup>190</sup>

In order to curb emissions and efficiently address climate change, ERAs should avoid using “healthful” and use more descriptive terms like “healthy” or “clean” in order to prohibit degradation well before the standard would reach a level that is uninhabitable for humans; this is especially true as pollution spreads beyond its source state.<sup>191</sup> Looking to Montana’s ERA as an example, states will benefit if ERAs contain clear and descriptive adjectives preceding the word “environment.” Further, like the Constitutional Convention transcripts that clearly enshrine the delegates intent in Montana, states enacting ERAs should provide thoughtful explanations about how the selected adjectives are intended to provide the utmost protection for the environment.

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187. *Id.*

188. JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 220 (2014).

189. *See* Popovic, *supra* note 181, at 346.

190. LA. CONST. art. IX, § 1.

191. Stokstad, *supra* note 103.

### 3. Placing the ERA in the Declaration of Rights

It is imperative for states to place their prospective ERAs in their declaration or bill of rights. Amendments within a declaration or bill of rights are more likely to be considered a fundamental right,<sup>192</sup> which is one of the foundational benefits of an ERA compared to an Environmental Rights Act.<sup>193</sup> Fundamental rights constitutionally provide for strict scrutiny of laws contrary to the fundamental right.<sup>194</sup> Under federal law, strict scrutiny requires the government to show that government action: (1) furthers a compelling governmental interest, and (2) the means are narrowly tailored to achieve the governmental interest.<sup>195</sup> This is a high standard to meet, unlike the alternative, rational basis review, which only requires: (1) a legitimate governmental purpose, and (2) means that are rationally related to such purpose.<sup>196</sup> Overall, placing ERAs in bills of rights—making them fundamental rights—is imperative to ensure that strict scrutiny is applied. This is exemplified by juxtaposing Montana and Illinois case law.

In *MEIC*, the Montana Supreme Court held that the state's ERA constituted a fundamental right: “[T]he right to a clean and healthful

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192. This is exemplified by both Montana and Pennsylvania. *See* *Robinson Township v. Commonwealth*, 83 A.3d 901, 947 (Pa. 2013) (plurality opinion) (“Specifically, ours is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution.”); MONT. CONST. art. II, § 3.

193. An Environmental Rights Act has many similarities to an Environmental Rights Amendment, but in some cases, it offers additional benefits. *E.g.*, Minnesota has an Environmental Rights Act (“MERA”). MINN. STAT. ANN. § 116B.01–13 (2021). MERA has basically replaced and strengthened Minnesota’s public trust doctrine, specifically providing standing for citizens to challenge state, local, and private actions, and has had many successes in the Minnesota courts. *See also* Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Trust Laws: A Case Study*, 45 ENV’T. L. 431, 447 (2015); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 722–23 (2006). Unlike most, if not all, Environmental Rights Amendments, MERA provides a cause of action, specifically confers standing, and has even been the sole cause of action in an environmental case. *See, e.g.*, *State ex rel. Wacouta Township v. Brunkow Hardwood Corp.*, 510 N.W.2d 27 (Minn. 1993). Yet, what MERA can never do is provide a fundamental right. So, while an environmental right in act form or amendment form has benefits, and either are better than nothing, what is best for the future of the environment and humans is both.

194. Maxwell L. Stearns, *Obergefell, Fisher, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1046 (2017).

195. *Id.* at 1046, 1050.

196. *Id.* at 1051.

environment is a fundamental right because it is guaranteed by the Declaration of Rights . . . and that any statute or rule which implicates that right must be strictly scrutinized.”<sup>197</sup> Like strict scrutiny under federal law, the Montana Supreme Court requires the state to show: (1) a compelling governmental interest, and (2) the means closely tailored to that compelling governmental interest.<sup>198</sup> In addition, the Montana Supreme Court added a third qualifier for strict scrutiny review: that the government take the least onerous path to reach the state’s objective.<sup>199</sup> Placing ERAs in bills of rights makes it incredibly more likely that the ERA will be considered a fundamental right and entitled to strict scrutiny.

Conversely, Illinois’s ERA is not located within its Bill of Rights,<sup>200</sup> and the courts have failed to reach a consensus as to whether the right is fundamental.<sup>201</sup> In *Glisson v. Marion*,<sup>202</sup> the Supreme Court of Illinois quoted the legislative committee for the Illinois ERA: “The Committee determined that the right to a ‘healthful environment’ is a ‘fundamental right’ and that expression of this right ‘provides the vehicle for the individual to prosecute a violator.’”<sup>203</sup> However, merely because the committee stated that the ERA conveys a fundamental right does not automatically make it so. In *Illinois Pure Water Committee, Inc. v. Director of Public Health*,<sup>204</sup> the Supreme Court of Illinois held that the Illinois ERA did not confer a fundamental right, and therefore, the environmental interests at stake were not entitled to strict scrutiny review.<sup>205</sup> Thus, by looking to Montana and Illinois as examples, it is clear

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197. *Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 988 P.2d 1236, 1246 (Mont. 1999).

198. *Id.*

199. *Id.*

200. Illinois’s ERA is located within Article XI, titled “Environment,” instead of Article I, which contains the Bill of Rights. ILL. CONST. art. XI, § 2.

201. Compare *Glisson v. Marion*, 720 N.E.2d 1034, 1044–45 (Ill. 1999), with *Ill. Pure Water Comm., Inc. v. Dir. of Pub. Health*, 470 N.E.2d 988, 992 (Ill. 1984).

202. 720 N.E.2d 1034 (Ill. 1999).

203. *Glisson*, 720 N.E.2d at 1042.

204. 470 N.E.2d 988 (Ill. 1984).

205. *Ill. Pure Water Comm., Inc.*, 470 N.E.2d at 992 (“Plaintiffs cite no authority for the proposition that sections 1 and 2 of article XI create a ‘fundamental’ right to a healthful environment, and do not explain why we should subject statutes affecting the environment to a higher level of scrutiny. In the absence of more persuasive reasoning, we decline to do so.”).



that ERAs should be placed within a state constitution's bill of rights to achieve the highest level of environmental protection.<sup>206</sup>

### C. Overcoming Over-the-Counter Counterarguments

Opponents to ERAs, particularly in Maryland, rely on the same handful of over-the-counter arguments in state committee hearings. These overly common arguments from ERA opponents are used excessively, particularly in situations for which they are not prescribed. The most common counterarguments misrepresent the effects of ERAs based on misinformation. The three most common arguments include: (1) ERAs will open the floodgates of litigation, (2) ERAs will usurp power from the legislature, and (3) ERA rights are too vague and ill-defined.<sup>207</sup>

#### 1. Opening up Standing and Floodgates of Litigation

Opponents commonly argue that ERAs will open the floodgates of litigation.<sup>208</sup> Of the parties that submitted written testimony for Maryland's proposed ERA in 2021,<sup>209</sup> 15 entities asked for an unfavorable report from the committee.<sup>210</sup> Of the 15 parties requesting an unfavorable report, 13 relied on standing<sup>211</sup> as an argument against the enactment of an

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206. Placement in the declaration of rights may also help prevent a judicial interpretation that the ERA is not self-executing. See Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENV'T L. 135, 175–76 (2005) (internal citation omitted).

207. See *infra* Parts V.C.1, V.C.2, V.C.3.

208. Constitutional Amendment – Environmental Rights: Written Testimony on S.B. 151 Before the S. Comm. on Judicial Proceedings, 442nd Sess. (Md. 2021) [available upon request to Maryland Legislature] [hereinafter Written Testimony]. See also *NY Environmental Rights Amendment Heads to Voters*, PUB. NEWS SERVICE (Feb. 12, 2021), <https://www.publicnewsservice.org/2021-02-12/environment/ny-environmental-rights-amendment-heads-to-voters/a73152-1> [<https://perma.cc/VR25-AQ5L>] (announcing the passage of New York's ERA in the 2021 Legislative session: “Opponents of the amendment say more environmental regulations aren't needed, and predict it could lead to a flood of lawsuits claiming environmental rights have been violated.”).

209. S. 0151, 2021 Leg., 442nd Sess. (Md. 2021).

210. See generally Written Testimony, *supra* note 208.

211. While some states have deviated, many states' standing jurisprudence coincides with federal jurisprudence. For an overview of federal standing law, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–62 (1992).

ERA.<sup>212</sup> This section will respond to these arguments and demonstrate that ERAs do not lead to significant increases in litigation.

An ERA will not “provide standing to all individuals.”<sup>213</sup> For example, in Illinois, courts often recognized that the Illinois ERA helped plaintiffs seek relief by eliminating Illinois’s special injury requirement, which previously made it more difficult for environmental plaintiffs to overcome the injury prong of standing; however, the Illinois ERA did not establish a new remedy.<sup>214</sup>

In 2020, the Illinois courts reaffirmed this proposition in *Alliance for the Great Lakes v. Illinois Department of Natural Resources*.<sup>215</sup> In *Alliance for the Great Lakes*, environmental groups contested the Department of Natural Resource’s decision to increase the district’s water allocation permits. The First District Appellate Court of Illinois held that the environmental groups had standing and reiterated that the Illinois ERA broadens the law of standing by eliminating the traditional special injury

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212. Written Testimony, *supra* note 208, at 101–34; see Rick Karlin, *New Yorkers Will Vote on Green Amendment in November*, TIMES UNION (Mar. 19, 2021), <https://www.timesunion.com/news/article/Voters-in-November-will-vote-on-Green-Amendment-15940897.php> [<https://perma.cc/TPS2-TJ9R>] (explaining the amendment’s opposition: “‘This proposed Green Amendment will lead to an explosion of litigation,’ said Tom Stebbins, executive director of the Lawsuit Reform Alliance of New York.”); see also Written Testimony, *supra* note 208, at 102 (“This legislation would blow the State’s existing standing statute wide open and leave local governments completely vulnerable to the whim of any person living anywhere in the State with a real or perceived environmental impact which would likely result in legal action.”); *id.* at 105–06 (“In Maryland standing to appeal environmental permits is broadly granted, and similar to federal rules appeals are reviewed based on the administrative record. The proposed amendment does not limit review to the record and would allow challengers to ‘surprise’ defendants with new allegations at the last minute.”); *id.* at 112 (“The concept of legal ‘standing’ exists so that courts deal with cases where individuals can show specific and measurable harm. If the courts must now deal with every trivial complaint, people with measurable and serious complaints will compete with the trivial complaints for timely justice from the courts.”); *id.* at 124 (“[T]his Constitutional Amendment would essentially provide standing to all individuals to intervene in virtually any action related to protecting the rights established by the bill, whether or not the individual is impacted by the action.”).

213. Written Testimony, *supra* note 208, at 124.

214. *Glisson v. Marion*, 720 N.E.2d 1034, 1043 (Ill. 1999); see also *All. for the Great Lakes v. Ill. Dep’t of Nat. Res.*, 161 N.E.3d 293 (Ill. App. Ct. 2020); *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 962 N.E.2d 956 (Ill. 2012); *Helping Others Maintain Env’t Standards v. Bos*, 941 N.E.2d 347 (Ill. App. Ct. 2010); *People v. Pollution Control Bd.*, 473 N.E.2d 452 (Ill. App. Ct. 1984); *Morford v. Lensey Corp.*, 442 N.E.2d 933 (Ill. App. Ct. 1982).

215. 161 N.E.3d 293 (Ill. App. Ct. 2020).

requirement in an environmental action.<sup>216</sup> This eased the archaic ideology that “distinct and palpable injury refers to an injury that cannot be characterized as ‘a generalized grievance common to all members of the public,’” allowing a plaintiff to sue for an injury the public endures as well.<sup>217</sup> While the *Alliance for the Great Lakes* plaintiffs overcame injury-in-fact standing, they still could not use the Illinois ERA as their sole cause of action.<sup>218</sup> The plaintiffs challenged the Department of Natural Resource’s decision under the Illinois Administrative Review Law; thus, while the Illinois ERA supported the cause of action, it was not in itself the cause of action.<sup>219</sup> To reiterate, the Illinois ERA does not provide an independent cause of action.<sup>220</sup>

In other states, like Pennsylvania, an ERA did help local government overcome standing. In *Franklin Township v. Department of Environmental Resources*,<sup>221</sup> Franklin Township and Fayette County appealed the approval of a sanitary landfill permit to the Environmental Hearing Board, which dismissed the appeal for lack of standing. On appeal, the Supreme Court of Pennsylvania looked to the Pennsylvania ERA as a constitutional charge in protecting and enhancing the quality of life of all of its citizens.<sup>222</sup> As a result, the Supreme Court of Pennsylvania held that the local governmental entities did possess a substantial and direct interest in the location of the landfill, and—contrary to the Environmental Hearing Board’s ruling—had standing to contest the permit.<sup>223</sup> Although opponents argue that ERAs expose local governments to excessive lawsuits, that did not occur in Pennsylvania; rather, the

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216. *Id.* at 303–04.

217. *Id.* at 304.

218. *Id.* at 313–14.

219. See Complaint ¶ 3, *All. for the Great Lakes v. Ill. Dep’t of Nat. Res.*, No. LMO-14-5 (2017), 2017 CH 05445.

220. *City of Elgin v. County of Cook*, 660 N.E.2d 875, 891 (Ill. 1995) (“Section 2 of article XI does not create any new causes of action but, rather, does away with the ‘special injury’ requirement typically employed in environmental nuisance cases. . . . Thus, while a plaintiff need not allege a special injury to bring an environmental claim, there must nevertheless still exist a cognizable cause of action.”).

221. 452 A.2d 718, 719 (Pa. 1982).

222. *Id.* at 721–22.

223. *Id.* at 723.

Pennsylvania ERA helped the local government fulfill its purpose and protect its citizens.<sup>224</sup>

Finally, litigation in Hawaii provides a particularly apt example of why an ERA does not “provide standing to all individuals.”<sup>225</sup> The Hawaii Legislature determined that their citizens not only deserved the right to a healthful environment, but that

this important right deserves enforcement and has removed the standing to sue barriers, which often delay or frustrate resolutions on the merits of actions or proposals, and provides that individuals may directly sue public and private violators of statutes, ordinances and administrative rules relating to environmental quality. The proposal adds no new duties but does add potential enforcers. This private enforcement right complements and does not replace or limit existing government enforcement authority.<sup>226</sup>

As is currently the case in Maryland, prior to the enactment of Hawaii’s ERA, private sector actors argued that an ERA would open the floodgates of litigation.<sup>227</sup> The Supreme Court of Hawaii in *County of Hawaii v. Ala Loop Homeowners*<sup>228</sup> noted that “the experience to date in Hawai’i with the provision, as well as that in other states (such as Illinois) with similar provisions, did not justify those concerns.”<sup>229</sup> In fact, Hawaii saw so little use of their ERA, and increasing numbers of after-the-fact permits for illegal development, that the legislature enacted a law to encourage the use of Hawaii’s ERA by awarding attorneys’ fees to public interest groups in select circumstances.<sup>230</sup>

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224. Often, an ERA’s only impact in a lawsuit is bolstering an environmental claim by tangentially showing the people have an interest in the environment, so much so that they raised it to a constitutional level. *See, e.g., Pioneer Processing, Inc. v. EPA*, 464 N.E.2d 238 (Ill. 1984); *People ex. rel. Scott v. Chi. Park Dist.*, 360 N.E.2d 773 (Ill. 1976).

225. Written Testimony, *supra* note 208, at 124.

226. *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1125–26 (Haw. 2010) (citing Hawaii Constitutional Convention Proceedings vol. 1, 689–90 (Haw. Legis. 1978) (available at <https://digitalcollections.hawaii.gov/docs/concon/1978/1978%20Con%20Con%20Journal%20Vol-1%20Journal.pdf>)).

227. 235 P.3d at 1127.

228. *Id.*

229. *Id.*

230. *Id.* at 1122 (citing 1986 Haw. Sess. Laws Act 80, § 1 at 104–05).

In Hawaii, and other states with ERAs, courts still utilize a multi-prong test to determine standing.<sup>231</sup> For example, in *Ala Loop*, the Supreme Court of Hawaii employed the traditional standing test, asking: “(1) [H]as the plaintiff suffered an actual or threatened injury . . . , (2) is the injury fairly traceable to the defendant’s actions, and (3) would a favorable decision likely provide relief for plaintiff’s injury.”<sup>232</sup> Thus, plaintiffs do not bypass the standing requirement simply because Hawaii has an ERA; similarly, in Maryland, if an ERA is enacted, plaintiffs must still establish standing.

Maryland’s current environmental standing doctrine is complex and includes a mixture of case law and statutory law. This complexity is evident in the opposition’s arguments against an ERA. For example, Columbia Gas of Maryland asserted

[u]nder Maryland law, an individual only has standing to bring court action against another party if that individual is aggrieved personally and specifically, in a manner that differs from the general public . . . Senate Bill 151, part F, substantially departs from existing law in that it would provide any individual with the right to bring a court action against another party if the individual alleges interference with a ‘clean and healthy environment,’ even if that individual is not personally aggrieved. In other words, an individual will be able to sue simply for an alleged injury to the environment, not an injury to him/herself.<sup>233</sup>

If a court were to apply Maryland’s common law standard, Columbia Gas would be correct in saying an individual only has standing if they are personally and specifically aggrieved in a manner that differs from the

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231. See, e.g., *Franklin Township v. Dep’t of Env’t Res.*, 452 A.2d 718, 719 (Pa. 1982) (“This court confirmed that to have standing, a party must (a) have a substantial interest in the subject-matter of the litigation; (b) the interest must be direct; and (c) the interest must be immediate and not a remote consequence.”).

232. *Ala Loop Homeowners*, 235 P.3d at 1134 n.43.

233. Written Testimony, *supra* note 208, at 114.

general public.<sup>234</sup> However, Maryland's Environmental Standing Act ("MESA")<sup>235</sup> sought to expand standing and allows

[a]ny other person, regardless of whether he possesses a special interest different from that possessed generally by the residents of Maryland, or whether substantial personal or property damage to him is threatened. However, an individual citizen either shall reside in the county or Baltimore City where the action is brought, or shall demonstrate that the alleged condition, activity, or failure complained of affects the environment where he resides.<sup>236</sup>

Further, MESA limits standing to only allow actions for mandamus or equitable relief, including declaratory relief, against a state agency in two discrete categories of cases.<sup>237</sup>

The limitations that MESA places on environmental standing makes it stricter than federal standing in environmental lawsuits.<sup>238</sup> The current federal standing doctrine allows "an individual standing to sue for an aesthetic or recreational injury and permit an organization to have standing to sue on behalf of its members who have suffered an aesthetic or recreational injury."<sup>239</sup> Yet, neither Maryland's common law standing nor MESA allows for aesthetic or recreational injury, or an organization to sue on behalf of a person with an aesthetic or recreational injury, unless that person has a property interest.<sup>240</sup> It is unclear exactly how an ERA in

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234. Johanna Gnall, *Addressing Maryland's Restrictive Environmental Standing Law: Maryland's Environmental Standing Law Must be Reformed to Allow an Individual to Have Standing to Sue Based on an Aesthetic or Recreation Injury and to Permit an Organization to Have Standing to Sue on Behalf of a Member Asserting an Aesthetic or Recreational Injury*, 16 U. BALT. J. ENV'T L. 151, 163 (2009).

235. MD. CODE ANN., Nat. Res. § 1-503.

236. *Id.* § 1-503(a)(3).

237. *Physicians for Soc. Resp. v. Hogan*, 2019 Md. App. LEXIS 987, \*13 n.8 (Md. Ct. Spec. App. 2019) (citing MD. CODE ANN., Nat. Res. § 1-503(b) (where the plaintiff alleges: (1) that the agency has failed to perform a nondiscretionary ministerial duty imposed upon it "under an environmental statute, ordinance, rule, regulation, or order"; or (2) the agency has failed to enforce "an applicable environmental quality standard for the protection of the air, water, or other natural resources of the State.")).

238. Gnall, *supra* note 234, at 152–59.

239. *Id.* at 152.

240. *Id.*

Maryland will interact with common law and MESA. However, based upon the experiences in other states, an ERA will likely alleviate the strict injury-in-fact requirements, but will not provide a cause of action. As such, plaintiffs are required to bring suit with additional, supplemental legislation.<sup>241</sup>

While an ERA will not throw open Maryland's current environmental standing doctrine "provid[ing] standing to all individuals,"<sup>242</sup> it could help plaintiffs overcome certain barriers to standing, at least to the point that the federal standing doctrine currently allows. A tool to alleviate the high standing barriers would help plaintiffs enforce environmental statutes that they previously could not.<sup>243</sup> The Hawaii Legislature said it best in response to concerns that the Hawaii ERA would result in a "flood of frivolous lawsuits": "[I]f environmental law enforcement by government agencies is adequate in practice, then there should be few additional lawsuits, given the barriers that litigation costs present."<sup>244</sup>

## 2. Usurp Power from the Legislature

Another common argument from ERA opponents is that "it will be the courts that will ultimately set public policy on environmental issues as opposed to the legislature,"<sup>245</sup> or that the ERA "will diminish [the legislature's] role as the policy making body to balance and make decisions pragmatically."<sup>246</sup> Opponents have also voiced their anxiety that "the courts will be involved."<sup>247</sup> These arguments are easily overcome by

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241. See *City of Elgin v. County of Cook*, 660 N.E.2d 875, 891 (Ill. 1995) (explaining that plaintiffs need not allege a special injury to bring an environmental claim, but they must still have a cognizable cause of action; fear of environmental damage alone is not enough).

242. Written Testimony, *supra* note 208, at 124.

243. In Illinois, the legislative committee wished to help citizens overcome difficult standing requirements for environmental laws and proclaimed that "Section [2], therefore, allows the individual the opportunity to prove a violation of his right even though that violation may be a public wrong, or one common to the public generally." *Glisson v. Marion*, 720 N.E.2d 1034, 1043 (Ill. 1999) (quoting Sixth Illinois Constitutional Convention vol. 6, 703 (Ill. Const. Convention 1970)). This is an opportunity that Maryland citizens do not currently have, and if the courts held that Maryland's future ERA does provide this opportunity, then citizens would be able to bring cases they currently are unable to file.

244. *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1126 (Haw. 2010).

245. Written Testimony, *supra* note 208, at 114.

246. *Hearing on HB0517*, *supra* note 69, at 00:58:45.

247. *Id.* at 01:01:10.

factoring in the overarching purpose of the judiciary and separation of powers principles.

Legislatures authorize laws and courts interpret those laws. Chief Justice John Marshall, over 200 years ago, explained in *Marbury v. Madison*<sup>248</sup> that it is “emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>249</sup> Even before *Marbury*, the framers of the U.S. Constitution knew that “the interpretation of the laws is the proper and peculiar province of the courts.”<sup>250</sup> The basic premise of checks and balances requires that the judiciary interpret the law. Thus, an ERA is no different from the other provisions within Maryland’s Declaration of Rights and should no more provide for judicial discretion than any other constitutional provision.

States with ERAs have not experienced a radical shift in policy making power from the legislature to the judiciary.<sup>251</sup> This is exemplified in at least Montana, Hawaii, and Pennsylvania.<sup>252</sup> When interpreting ERAs, courts have historically preserved the intent of constitutional framers and legislatures.<sup>253</sup> For example, the Montana Supreme Court almost exclusively relied on the history of the 1972 Constitutional Convention and the delegates’ intent when interpreting the definition and scope of “a clean and healthful environment.”<sup>254</sup> Additionally, in Hawaii’s seminal case interpreting its ERA, the Supreme Court of Hawaii interpreted the amendment as courts typically do, looking first to the plain meaning of the text, following up with the legislative intent, and confirming its interpretation of the plain meaning at almost every

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248. 5 U.S. (1 Cranch) 137 (1803).

249. *Id.* at 177.

250. PUBLIUS (ALEXANDER HAMILTON), THE FEDERALIST PAPERS, NO. 78, 525 (1788).

251. N.Y. State Bar Assoc., *supra* note 117, at 192–93.

252. *Id.* at 193 (describing the status quo in the three states: “In Montana, judicial intervention has been relatively limited and reserved for cases presenting unusual and compelling facts. In Hawaii, judicial intervention to enforce constitutional environmental rights has been more common and involved, but is perhaps best characterized as requiring dialogue about and attentiveness to environmental values. And in Pennsylvania, while the judiciary has twice invoked constitutional environmental rights to strike down State statutes, both cases involve disputes about the appropriate development of the State’s natural gas reserves through fracking, a factual situation that closely parallels the concerns about environmental damage associated with historical exploitation of Pennsylvania’s natural resources that motivated the adoption of its Environmental Rights Amendment.”).

253. *Id.*

254. *Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 988 P.2d 1236, 1236, 1245–49 (Mont. 1999).



juncture.<sup>255</sup> Therefore, it is evident that legislatures will naturally maintain policy making power because of separation of powers and the weight and deference courts give to legislative history and intent.

### 3. *The Rights are Vague and Ill-Defined*

Opponents also argue that this particular right, the environmental right, is overly broad and vague.<sup>256</sup> For example, in 2018 and 2019, opponents to Maryland's ERA argued that the descriptive words like "clean" or "pure" have no specific definition or plain meaning and will leave interpretation up to the judiciary.<sup>257</sup> Similarly, in 2021, opponents in Maryland claimed that "[u]nlike a statute that provides some direction, [the Maryland ERA proposal] essentially grants the courts broad discretion to interpret what the rights mean and what the enforcement standard will be."<sup>258</sup> However, constitutional provisions are intentionally broad because these rights must be allowed to evolve with society and because constitutions more permanently ensure rights to the people, especially compared to legislation subject to political whims.<sup>259</sup>

The proposed language for the 2021 Maryland ERA, and the language of its past iterations, is no broader than the language of other rights within Maryland's Declaration of Rights. For example, Article 12 provides: "That for redress of grievances, and for amending, strengthening and preserving the Laws, the Legislature ought to be frequently convened."<sup>260</sup> The term "frequently" is vague, and likely intentionally so. Similarly, Article 6 establishes the right of the people to reform or establish a new government, specifically when "the ends of Government

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255. *County of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103, 1119, 1125 (Haw. 2010) (citations omitted) (interpreting the amendment, the court held "This interpretation of the plain language of article XI, [§] 9 is confirmed by an examination of the intent of its framers, as reflected in the proceedings of the 1978 Constitutional Convention.").

256. Written Testimony, *supra* note 208, at 102–24; *Hearing on HB0517* *supra* note 69, at 00:58:45.

257. *Constitutional Amendment – Right to a Healthy Environment and Communities: Hearing on SB0872 Before the S. Comm. on Education, Health, and Environmental Affairs*, 2018 Leg., 438th Sess. (Md. 2018) (at 3:10:38); *Hearing on HB0472*, *supra* note 68, at 03:26:30; *but see* *Ala Loop Homeowners*, 235 P.3d at 1122 ("That determination is particularly pertinent since article XI, section 9 does not itself define the substantive content of the right to a clean and healthful environment, but rather leaves it to the legislature to determine.").

258. Written Testimony, *supra* note 208, at 112.

259. James R. May, *Constituting Environmental Rights Worldwide*, 23 PACE ENV'T L. REV. 113, 118 (2003).

260. MD. CONST. DECLARATION OF RIGHTS art. 12.

are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual.”<sup>261</sup> Every aspect of Article 6 is ambiguous, with no clear direction. Article 6 can be considered an imperative aspect Maryland’s Constitution as it gives the people the right to establish a new government, but it leaves open a very important question: when are the ends of government perverted? And when is the public liberty manifestly endangered? As demonstrated by the previous examples, an ERA, like other constitutional provisions, is broad and malleable—but not problematically so.

## VI. CONCLUSION

The world is already seeing the impacts of climate change in warmer average temperatures, melting icebergs, and increasing severity of tropical storms.<sup>262</sup> Moreover, the world may see more pandemics, potentially caused by the impacts of climate change, land use, and degradation.<sup>263</sup> The United States, and states individually, need stronger laws addressing the causes of climate change. Maryland specifically lacks legislation policing the environmental effects of construction and infrastructure projects and has no proactive law regulating the cumulative impacts of pollutants. An ERA could effectively address these issues.<sup>264</sup>

In order to more effectively combat climate change, prevent future pandemics, and provide a voice for the voiceless, Maryland should adopt an ERA to fill legislative gaps, ensure the consideration of cumulative impacts, help enact new environmental legislation, and fight climate change to protect future generations.<sup>265</sup> ERAs can aid in this protection by explicitly including the term “future generations.”<sup>266</sup> This article also recommends using more descriptive language like “clean” or “healthy” as compared to “healthful,” for which potential language and thoughtful rationale can be found in Montana’s ERA.<sup>267</sup> Finally, to be considered a fundamental right, ERAs should be placed in the state’s bill or declaration of rights.<sup>268</sup>

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261. *Id.* art. 6.  
262. *See supra* Part II.  
263. *See supra* Part II.  
264. *See supra* Part III.  
265. *See supra* Part V.A.  
266. *See supra* Part V.B.1.  
267. *See supra* Part V.B.2.  
268. *See supra* Part V.B.3.

The common arguments opposing ERAs lack legal support.<sup>269</sup> An ERA will not grant standing to every individual with an environmental grievance, as demonstrated above, and none of the states examined in this paper have experienced significantly increased litigation.<sup>270</sup> Further, an ERA will not diminish the role of the legislature as the policy making body, nor will it allow courts to usurp the legislative power; courts will undertake their duty to interpret the ERA, as they do with every other law and constitutional provision.<sup>271</sup> Finally, the ERA's conferred right is no more vague or ill-defined than other constitutional provisions, and its breadth will allow the provision to evolve as needed.<sup>272</sup> Overall, an ERA is a necessary environmental protection mechanism for the citizens of all states, including Maryland, to protect current and future generations.

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269. *See supra* Part V.C.

270. *See supra* Part V.C.1.

271. *See supra* Part V.C.2.

272. *See supra* Part V.C.3.