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# Environmental rights amendments: Misconceptions and application

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Several states have recently enacted—or are considering enacting—constitutional amendments protecting a right to a clean and healthful environment, often referred to as Green Amendments or environmental rights amendments (ERAs). Most recently, on November 2, 2021, the people of New York ratified an amendment that ensured that “Each person shall have a right to clean air and water, and a healthful environment.” N.Y. Const., Art. 1, § 19. Montana and Pennsylvania have similar (though varying) protections, and multiple other states have constitutional protections to a clean environment that are not in the form of a fundamental individual right. Activist groups, led by [Green Amendments for the Generations](#), often lead the efforts to adopt ERAs, and, as expected, ERAs generally face pushback from

business and industry. The arguments underlying this resistance are myriad, but two that appear frequently are based on a poor understanding of the purpose and nature of ERAs.

## The imaginary flood of litigation

Prior to enactment, ERAs face claims that they will be a boon to plaintiffs' attorneys, creating endless litigation against industry that will cripple economies and chase businesses from the state. This argument is factually unfounded. The effect of ERAs has been studied, and the results unambiguously show that the feared flood is barely a trickle. When one considers what an ERA is, this result is not at all surprising.

State constitutions, like the U.S. constitution, protect the people from infringement of their rights *by the government*. The constitution defines the powers that the state government has. In the context of fundamental rights of the people such as an ERA, typically found in a "bill of rights" under a constitution, amendments explicitly say what the government *cannot* do. So, ERAs, constitutional amendments describing the rights of the people, ensure that the *government* cannot infringe the peoples' fundamental right to a clean environment. Constitutional amendments do not provide any cause of action for one private citizen against another citizen or a corporation. This is a common misunderstanding people have concerning what our fundamental rights are. Just as I can't sue Twitter for violating my free speech rights, I can't sue ChemCorp for

violating my constitutional right to a clean environment.

That is not to say that private industry will never have to deal with litigation related to ERAs. Where there is an intersection between a business, private citizens *and* the government, then the ERA may result in litigation that burdens the private business. A clear example of this is in the context of permitting or approvals for business operations. In this context (and others), the second layer of pushback from industry—also based on a misunderstanding of the reason for ERAs—comes to light.

## The imaginary need for statutory or regulatory specifics

By definition, ERAs must be stated in general terms. They promise “clean” or “healthful” environments without specifics as to any particular contaminant. Consequently, when citizens attempt to rely on ERAs by arguing that a government is depriving them of their right to a clean or healthful environment by (for example) permitting a particular activity by industry, the argument in response is often something along the lines of, “until the legislature or the state environmental agency enacts specific limits and definitions establishing what is ‘clean and healthful,’ the ERA is unenforceable.” This argument has some facial appeal but ignores the purpose and context of a properly enacted ERA.

If the ERA is adopted as a fundamental right in a constitution (like New York’s), and if it is implemented for the same reasons that gave rise to the New York amendment, then the

argument that it requires additional legislative or regulatory action should fail. First, fundamental rights, as a general matter, are self-executing. One does not need further laws or regulations defining governmental restrictions on our speech or our right to free exercise of religion. These rights are effective without the need for further statutes or regulations.

Second, one key reason for an ERA precludes an interpretation that further legislative or regulatory action is necessary. As is clear from the legislative history, one of the driving motivations for the New York amendment was in response to the tragic impacts of chemicals that remain unregulated. Newly developed chemicals in this country can be put to use without first establishing their safety. As we have seen, this sometimes leads to people facing long-term exposure to toxic substances with no remedy from their governments. This set of facts played out catastrophically in Hoosick Falls, New York, where residents were drinking water contaminated with perfluorooctanoic acid (PFOA, a type of per- and polyfluoroalkyl substance, or PFAS) for years because PFOA was unregulated and untested for water providers with under 10,000 users.

This regulatory “gap” was one of the driving forces behind New York’s amendment: What happens when a substance that is harmful to health is not covered by existing statutes and regulations? An ERA is supposed to fill this gap and give the people a way to compel action and protection by environmental governmental agencies, even when existing statutes and regulations may not cover exposure to a harmful pollutant. The argument that an ERA can have no

force and effect unless and until statutes and regulations are passed defining the scope and limits of the ERA turns this context on its head. It uses the lack of regulation that gave rise to the need for an ERA as a weapon to neuter it. To be sure, defining what “clean” or “healthful” means in the absence of numbers and charts will require some work by agencies and the judiciary, and it will certainly lead to some uncertainty for industry. But that is what the people have asked for: protection of their environment even in the absence of specific statutes and regulations. Uncertainty is one result, but it is not a reason to make the ERA a useless, albeit well-meaning, aspiration.

ERAs certainly will create some additional litigation, uncertainty, and burden on business and industry. But they are being enacted precisely to address the uncertainty and burden that currently falls on the people due to risks from unregulated exposures. This is the burden shift underlying and motivating the recent enactment of ERAs. For this reason alone, ERAs would appear to be justified. The question remains, will this be sufficient to curtail business and industry efforts to avoid or neuter them moving forward?

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