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Corporate Climate Litigation and Environmental Justice: How Green Amendments Can be Used to Advance Accountability and Equity

Noah Hines*

The term “Green Amendment” was first coined by author Maya van Rossum in her 2017 book *The Green Amendment: Securing Our Right to a Healthy Environment*,¹ in which she argues that modern environmental protection laws are fundamentally failing the most vulnerable people in society and proposes the creation of new constitutional rights as a solution.² The provisions van Rossum argues ought to be added to state constitutions as “Green Amendments” are also sometimes called “Environmental Rights Amendments,” and generally enumerate the right of all citizens to a clean or healthy environment.³ Green Amendments currently exist in Pennsylvania, Montana, Illinois, Hawaii, Massachusetts, Rhode Island, and New York.⁴ This Note will explain how those provisions have already changed the landscape of corporate and environmental law in those states while proposing that enacting more Green Amendments will reinforce those changes.

Specifically, this Note will focus on the current and potential future impact of Green Amendments on corporate climate liability litigation—particularly litigation involving large corporations that operate in multiple states—and on how Green Amendments advance environmental justice. Today, large corporations bear the bulk of responsibility for human-caused climate change and historically underserved populations bear the bulk of climate change’s harmful consequences.⁵ Constitutional provisions that enumerate a fundamental right to a clean environment therefore have potential to provide an opportunity for states to better

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¹ MAYA K. VAN ROSSUM, *THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT* (1st ed. 2017). Van Rossum has specific qualifications for what she considers to be true “Green” Amendments to state constitutions, and not all environmental rights amendments satisfy these qualifications. For the sake of consistency, I will be referring to all current and potential amendments to state constitutions that enshrine a right to a clean or healthful environment as “Green Amendments” in this Note.

² *Id.*; see also Samuel L. Brown, Maya K. van Rossum, Antoinette Cedilla Lopez, Terry A. Sloan & Artemisio Romero y Carver, *Green Amendments: Vehicles for Environmental Justice*, 51 ENV’T L. REP. 10903, 10904 (2021) (discussing shortcomings of current system of environmental protection laws and environmental racism).

³ Johanna Adashek, *Do It for the Kids: Protecting Future Generations from Climate Change Impacts and Future Pandemics in Maryland Using an Environmental Rights Amendment*, 45 PUB. LAND & RES. L. REV. 113, 129–30 (2022).

⁴ PA. CONST. art. I, § 27; MONT. CONST. art. IX, § 1; ILL. CONST. art. XI, § 2; HAW. CONST. art. IX, § 8; MASS. CONST. Amends. art. XLIX; R.I. CONST. art. I, § 17; N.Y. CONST. art. I, § 19.

⁵ See Paul Griffin, *CDP Carbon Majors Report 2017*, THE CARBON MAJORS DATABASE, at 7–8 (2017), <https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772>; William C.C. Kemp-Neal, *Environmental Racism: Using Environmental Planning to Lift People Out of Poverty, and Re-Shape the Effects of Climate Change and Pollution in Communities of Color*, 32 FORDHAM ENV’T L. REV. 295, 304 (2021).

protect those in vulnerable positions against the environmental damages caused by large corporations.

Part I will provide a brief overview of existing Green Amendments, their current role in the intersection of environmental law and corporate litigation, and the shortcomings of enacted Green Amendments in the context of environmental injustice. Part II will discuss the potential impact that more widespread adoption of Green Amendments could have on such litigation, and how such adoption could alter this legal landscape both directly and indirectly. The Conclusion will explain why Green Amendments that hold corporate polluters accountable are a powerful means of addressing environmental injustice.⁶

I. THE CURRENT LANDSCAPE

Green Amendments currently exist in seven states.⁷ In November 2021, the people of New York approved the most recent Green Amendment by passing a ballot initiative that added the right to a “healthful environment” to their state constitution.⁸ Other Green Amendments came about in various ways. Prior to New York, the last Green Amendment was enacted in Hawaii in 1978 after a statewide constitutional convention.⁹ Illinois enacted its Green Amendment in 1970 after a constitutional convention process that took over seven years to complete.¹⁰ Two years later, Montana’s Green Amendment was also enacted after a constitutional convention.¹¹ The people of Massachusetts voted to enact their Green Amendment in 1972 as well.¹² The people of Pennsylvania were the first to vote to enact their Green Amendment in 1971, just over one year after the first Earth Day.¹³ Rhode Island’s Green Amendment was enacted as part of its first state constitution and covers both fishery rights and shore privileges protected under its colonial charter,

⁶ While this Note does not discuss the various technical forms Green Amendments may or should take, van Rossum provides further explanation in both her 2017 book and in her contributions in *Green Amendments: Vehicles for Environmental Justice*. See *supra* notes 1–2 discussion and accompanying text.

⁷ Stacey Sublett Halliday, Daniel M. Krainin, Julius M. Redd, Sarah A. Kettenmann & Anthony G. Papetti, *New York Becomes the Third State to Adopt a Constitutional Green Amendment*, NAT’L L. REV. (Dec. 10, 2021), <https://www.natlawreview.com/article/new-york-becomes-third-state-to-adopt-constitutional-green-amendment>.

⁸ *Id.*

⁹ HAW. STATE CONST. CONVENTION CLEARINGHOUSE, *1978 Constitutional Convention*, https://hawaii.concon.info/?page_id=214 (last visited Nov. 11, 2022).

¹⁰ ILL. COMM’N ON INTERGOVERNMENTAL COOP., CHRONOLOGY OF EVENTS SURROUNDING THE 1970 CONST. CONVENTION 4 (1988), <https://www.ilga.gov/commission/lru/Chronology.pdf>.

¹¹ Genevieve Bombard, Joshua Kapczynski, Azania Maitland, Catherine Reed, Imari Roque & Hoshi Salcedo, *The Precedents and Potential of State Green Amendments*, THE ROCKEFELLER INST., July 2021, at 12, <https://rockinst.org/wp-content/uploads/2021/07/CLPS-green-amendments-report.pdf> [hereinafter THE ROCKEFELLER INSTITUTE].

¹² *Article 97*, MCGREGOR LEGERE & STEVENS PC, <https://www.mcgregorlaw.com/Ithiareas-of-practice/105-article-97> (last visited Nov. 18, 2022).

¹³ PA. DEP’T CONSERVATION & NAT. RES., *The People’s Right to a Clean Environment* (May 12, 2021, 12:00 AM), <https://www.dcnr.pa.gov/GoodNatured/pages/Article.aspx?post=171>.

while also mandating that the State “adopt all means necessary and proper by law to protect the natural environment of the people of the state.”¹⁴

Existing Green Amendments have generally been placed outside of their state’s Bill of Rights, either having been added to the constitution in the form of a new article (as in Illinois¹⁵) or to an existing article that addresses issues related to public health (as in Hawaii¹⁶). New York’s new amendment joins the Green Amendments of Pennsylvania and Montana in its placement of the right to a healthful environment alongside other fundamental provisions in their constitutions’ Bills of Rights.¹⁷

These states’ Bills of Rights already impact corporations, either indirectly through legal doctrines developed in state courts or directly through regulations on state executives. As an example of the former, corporations involved in libel lawsuits have long faced legal standards that balance state-level constitutional rights similar to the First Amendment with the idea that those who suffer loss from untrue statements have some right of action.¹⁸ As a second example, Pennsylvania and many other states’ Bills of Rights include provisions addressing eminent domain, a power that is increasingly, albeit indirectly, wielded by private corporations.¹⁹ As an example of the latter, in New York, section seventeen of the State Bill of Rights limits the work week to five days for any laborers, including those subcontracted by private employers that are engaged in public work, and mandates that these employees receive competitive wages.²⁰ This New Deal era addition to the State Bill of Rights conflicted with more laissez-faire attitudes of the late 1990s, and the state legislature went to great lengths to minimize the number of workers legally considered to be engaged in public work.²¹ Green Amendments placed in a state’s Bill of Rights are therefore well positioned to impact corporations similarly.

New York’s decision to place its Green Amendment alongside rights as important as free speech and the right to trial by jury is important in the context of another indirect impact of Green Amendments relevant to corporations: public awareness. Ballot initiatives like New York’s require massive public support at the

¹⁴ R.I. CONST. art. I, § 17. Rhode Island did not officially adopt its state constitution until 1842.

¹⁵ ILL. CONST. art. XI, § 2.

¹⁶ HAW. CONST. art. IX, § 8.

¹⁷ PA. CONST. art. I, § 27; MONT. art. IX, § 1.

¹⁸ *Libel and the Corporate Plaintiff*, 69 COLUM. L. REV. 1496, 1498 (1969).

¹⁹ PA. CONST. art. I, § 10; Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455 (2007). By “indirectly,” I mean that private corporations effectively exercise the power of eminent domain after it is delegated to them by the state.

²⁰ N.Y. CONST. art. I, § 17 (adopted 1938).

²¹ Lauri Cohen, *Free Labor in the Name of Workfare: New York’s Reaction to the Brukman v. Giuliani Decision*, 64 BROOK. L. REV. 711, 724–27 (1998).

ballot box,²² and are popularized by public activists like van Rossum.²³ The constitutional convention that bore Illinois's Green Amendment involved no less than five approvals from the voters of Illinois in the form of various elections and ballot proposals.²⁴ New York is the first state to enact a Green Amendment since Hawaii in 1978, and the prominent placement of the new provision may reflect an increase in pro-climate public sentiment similar to the wave of environmentalism observed in the early 1970s.²⁵ Decision makers of publicly traded corporations have to be mindful of the prevailing public attitude toward their principle; recent changes in the way these companies present themselves in the context of climate change may signal that the same increase in climate-friendly sentiment that led to New York's Green Amendment may already be motivating corporations to alter their activities in ways that align with the principles of Green Amendments.²⁶

I emphasize that corporations taking pro-climate stances are not necessarily a direct result of enacting Green Amendments, but rather an indirect result of the way Green Amendments and the public nature of the discourse that surrounds them inevitably intersects with the many factors directors of corporations consider when making decisions. This relationship between public opinion, climate change, and corporate law will be further discussed in Part II. In the following subsections to Part I, I will focus on direct examples of Green Amendments being used by states to limit the polluting activity of corporations; I will then discuss how and why the seven existing Green Amendments have failed to adequately address the disparate impact corporate polluters have on marginalized communities.

A. *The Impact of Existing Green Amendments on Corporate Litigation*

Green Amendments have had varying impacts on corporate climate litigation. State courts interpret Green Amendments under the Public Trust Doctrine, which positions the public as the owner of certain natural or cultural resources and the government as their caretaker or defender.²⁷ Writing for the *Georgetown Environmental Law Review*, Sean Lyness explains how the Public Trust Doctrine is “technically [a] state-specific [doctrine],” but that “whatever its particular current

²² *New York Proposal 2, Environmental Rights Amendment (2021)*, BALLOTPEDIA, [https://ballotpedia.org/New_York_Proposal_2_Environmental_Rights_Amendment_\(2021\)](https://ballotpedia.org/New_York_Proposal_2_Environmental_Rights_Amendment_(2021)) (last visited Dec. 20, 2022). The ballot proposal that led to New York's Green Amendment received over two million “yes” votes, which constituted over seventy percent of the total vote. *Id.*

²³ Van Rossum's first book was successful enough to warrant a second edition, which came out during the writing of this note.

²⁴ ILL. COMM'N ON INTERGOVERNMENTAL COOP., *supra* note 10.

²⁵ David A. Skeel Jr., *Evangelicals, Climate Change, and Consumption*, 38 ENV'T L. REP. NEWS & ANALYSIS 10868, 10869 (2008) (explaining how this “wave” of pro-environment sentiment even encompassed conservative Evangelicals in the early 1970s, albeit not for long).

²⁶ See Justin Worland, *Why Big Business is Taking Climate Change Seriously*, TIME (Sept. 23, 2015, 11:10 AM), <https://time.com/4045572/big-business-climate-change/>.

²⁷ Barry E. Hill, *Environmental Rights, Public Trust, and Public Nuisance: Addressing Climate Injustices Through State Climate Liability Litigation*, 50 ENV'T. L. REP. 11022, 11032 (2020).

status—statutory, constitutional, or otherwise—the public trust doctrine maintains a common law dimension.”²⁸ State courts, therefore, are empowered by the Public Trust Doctrine to affect significant changes through their decisions. Many of these decisions involve both Green Amendments and corporations, and have already impacted the ability of corporations to engage in activities that contribute to both climate change and environmental injustice.

One of the first cases involving Pennsylvania’s Green Amendment involved a corporation’s planned construction of an observation tower near the historic Gettysburg Battlefield.²⁹ The State argued the construction of the tower would disrupt the historic and aesthetic values protected under the state’s new Green Amendment, of the environment of that hallowed ground.³⁰ Although the State of Pennsylvania was not involved in the deal that led to the planned construction, the State argued that the Green Amendment was self-executing (meaning the amendment itself, absent any additional legislation, established the people of Pennsylvania’s right to the maintenance of the historic and aesthetic values of their environment) and the State was therefore entitled to bring the lawsuit.³¹ The court declined to extend this kind of meaning to the amendment, finding that it was not self-executing because Pennsylvania had no supporting legislation defining what values the amendment protects.³² But the court noted that the state’s Green Amendment expanded rather than limited the power of the State to “conserve and maintain [the state’s public natural resources] for the benefit of all the people.”³³

This expansion of state regulatory power over corporate actions that impact the environment is also evident in the 2021 Pennsylvania case *Commonwealth v. Monsanto Company*. Here, Pennsylvania brought six allegations against a large multinational agrochemical corporation.³⁴ Pennsylvania argued that Monsanto’s manufacture, distribution, and sale of products containing harmful chemicals to citizens of Pennsylvania implicated a duty of the State found in the last sentence of its Green Amendment: “As trustee of [Pennsylvania’s public natural resources], the Commonwealth shall conserve and maintain them for the benefit of all the people.”³⁵ This case is ongoing, but at this stage the court agreed with the State, holding that Pennsylvania’s Green Amendment provided standing for the State to pursue most of its claims.³⁶

²⁸ Sean Lyness, *The Local Public Trust Doctrine*, 34 GEO. ENV’T L. REV. 1, 11 (2021).

²⁹ THE ROCKEFELLER INSTITUTE, *supra* note 11, at 10.

³⁰ *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 589 (Pa. 1973).

³¹ *Id.* at 589, 591. The construction of the tower was the result of a deal struck between the National Park Service and National Gettysburg Battlefield Tower, Inc., a private corporation.

³² *Id.* at 595.

³³ *Id.* at 594.

³⁴ 269 A.3d 623, 635 (Pa. Commw. Ct. 2021) (indicating that Pennsylvania filed claims for public nuisance, trespass, design defect, failure to warn and instruct, negligence, and unjust enrichment).

³⁵ *Id.* at 641.

³⁶ *Id.* at 641–42. The claims of trespass and unjust enrichment were struck down by the court. *Id.* at 655, 679.

Courts in other states with Green Amendments have handed down similar decisions limiting the ability of corporations to pollute local ecosystems. In 2016, Rhode Island's Green Amendment was cited by the state supreme court in upholding an administrative decision to punish a corporation for petroleum leaching from its pipelines without having to show that they had knowledge of the leaching.³⁷ In that case, a corporation challenged a fine imposed on them by the state Department of Environmental Management for the oil leaching out of pipelines located on land owned by the corporation, alleging that the Department did not have the authority to impose the fine without showing causation.³⁸ The court held that, in light of the state's Green Amendment, the law that the Department cited in issuing the fine "combines the need to conserve natural resources and protect the environment with the desire to protect the citizens of this state," interpreting the statute to authorize penalizing the corporation for the oil that leaked from its pipeline without having to show that the corporation permitted or was even aware of the leak.³⁹

In 2020, the Supreme Court of Montana examined a case involving a Canadian corporation seeking a license for mining exploration near Yellowstone.⁴⁰ The corporation initially obtained the license from the state Department of Environmental Quality, and a 2011 legislative amendment to Montana's Constitution prohibited courts from issuing injunctions in permitting situations like this one.⁴¹ The state supreme court, in upholding a state district court decision, not only agreed that the Department's decision to issue the permit should be remanded "for additional analysis,"⁴² but also held that the prohibitive legislative amendment was unconstitutional because it conflicted with the state's Green Amendment (which guarantees "the right to a clean and healthful environment"⁴³) and with another constitutional provision that requires its legislature to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."⁴⁴ Here, provisions in Montana's Constitution that protect the public's environment were doubly effective; they both provided standing for the State to bring charges in the first place and strengthened the legal processes involved in the prevention of environmental degradation by overpowering provisions limiting courts' power in this context.⁴⁵

³⁷ *Power Test Realty Co. v. Coit*, 134 A.3d 1213, 1219–20 (R.I. 2016).

³⁸ *Id.*

³⁹ *Id.* at 1221.

⁴⁰ THE ROCKEFELLER INSTITUTE, *supra* note 11, at 17.

⁴¹ *Id.*

⁴² *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 477 P.3d 288, 299 (Mont. 2020).

⁴³ MONT. CONST. art. II, § 3.

⁴⁴ MONT. CONST. art. IX, § 1.

⁴⁵ *Park Cnty. Env't Council*, 477 P.3d at 296.

The Supreme Court of Hawaii recently connected its state constitution's guarantee of due process to its Green Amendment.⁴⁶ In 2017, the Sierra Club challenged Hawaii's Public Utilities Commission's approval of a permit issued to an electric company that, according to the Sierra Club, over relied on burning fossil fuels.⁴⁷ The Commission initially denied the Sierra Club's motion to intervene in the permitting process, and, in turn, the Sierra Club argued that it (specifically, several of its members who lived near the site that the electric company wanted to use) had a due process right to participate in the hearing because the coal-burning allowed by the permit would harm Sierra Club's members' "health, aesthetic, and recreational interests."⁴⁸ The lower court ruled against the Sierra Club without considering its due process argument, but the Supreme Court held that the Sierra Club had asserted a protectable interest in a clean environment and that the lower court erred in not applying due process in the context of the right to a clean and healthful environment enumerated in the state constitution.⁴⁹ Here again, the impact of Hawaii's Green Amendment on the activities of a corporation was twofold; not only does the Green Amendment establish the right to a clean environment for each of its citizens, but it also alters the legal landscape in holding corporations accountable for their pollution by expanding the scope of due process to cover those asserting their right to a clean environment.

The Green Amendments of Illinois and Massachusetts, compared to the preceding examples, have not led to doctrines that are notably effective in curbing the polluting activities of corporations. Illinois's amendment was passed as part of a constitutional convention, and Illinois passed a sweeping Environmental Protection Act the same year of the convention.⁵⁰ This Act, rather than its constitutional counterpart, provides the legal basis for claims brought by the State against alleged violators.⁵¹ However, Illinois courts have looked to the state's Green Amendment as a source of guidance when interpreting the Environmental Protection Act. In a case which involved the City of Chicago suing a waste disposal company for violating certain provisions of the Environmental Protection Act pertaining to waste disposal, the state court of appeals wrote about how "the public policy of the State of Illinois as articulated in the 1970 Constitution concerning waste disposal" was properly considered by the trial court in ruling for the city.⁵² The people of Massachusetts

⁴⁶ *In re* Application of Maui Elec. Co., 408 P.3d 1, 5–6 (Haw. 2017).

⁴⁷ *Id.*

⁴⁸ *Id.* at 6–7.

⁴⁹ *Id.* at 5.

⁵⁰ ILL. COMM'N ON INTERGOVERNMENTAL COOP., CHRONOLOGY OF EVENTS SURROUNDING THE 1970 CONSTITUTIONAL CONVENTION 4 (1988), <https://www.ilga.gov/commission/lru/Chronology.pdf>.

⁵¹ Illinois courts explicitly reject the argument that the state's Green Amendment, which declares "the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations," creates any new causes of action: "[T]he Illinois Supreme Court has decisively held that section 2 of article XI does not create any [n]ew causes of action, but merely eliminates the 'special injury' requirement typically mandated in environmental nuisance cases." *NBD Bank v. Krueger Ringier, Inc.*, 686 N.E.2d 704, 709 (Ill. App. Ct. 1997) (citing *City of Elgin v. County of Cook*, 660 N.E.2d 875 (1995)).

⁵² *City of Chicago v. Krisjon Constr. Co.*, 617 N.E.2d 21, 26 (Ill. App. Ct. 1993).

enacted its Green Amendment after a referendum in 1972 by adding Article 97 to their Constitution,⁵³ but the state supreme court lamented over fifty years later that “[r]eported cases interpreting art. 97 are scarce.”⁵⁴ Massachusetts’ Green Amendment is therefore similar to Illinois’s in that claims brought against corporate polluters are properly based in other existing environmental protection laws.⁵⁵ However, unlike Illinois, Massachusetts case law does not disallow new causes of action based on the state’s Green Amendment.⁵⁶

Pro-climate environmental regulation achieved through legislation, rather than through constitutional amendments, is not necessarily less effective. *Site Selection Magazine* ranks Massachusetts and Illinois as the third and fourth top states for “Sustainable Development.”⁵⁷ The magazine considered both environmental regulation laws and other factors indirectly impacted by states’ general approach to pro-climate policies, such as grants awarded to clean up brownfields and prevalence of climate-friendly building designs.⁵⁸ However, efforts to promote pro-climate policies have been politicized both today and in the past.⁵⁹ In the context of corporate policy, government efforts to either promote or prohibit the consideration of ESG factors like pro-climate corporate policies in corporate decision-making are increasingly polarized.⁶⁰ Therefore, the fact that Green Amendments, like any other amendment to a state constitution, are more difficult to enact or undo than mere legislation is an important differentiator when comparing the legal framework of state environmental protection based on Green Amendments and environmental protection based solely on legislation.⁶¹

⁵³ MASS. CONST. art. XCVII.

⁵⁴ Mahajan v. Dep’t of Env’t Prot., 984 N.E.2d 821, 828 (Mass. 2013). Currently, five cases on Westlaw reference art. 97.

⁵⁵ Hootstein v. Amherst-Pelham Reg’l Sch. Comm., 361 F. Supp. 3d 94, 114 (D. Mass. 2019) (dismissing claim that Massachusetts’ Green Amendment enables plaintiffs to enforce their right to clean water).

⁵⁶ *Id.* at 114–15. The court dismissed plaintiff’s claim under the state Green Amendment because “he has not provided any cases supporting the proposition that he can sue to enforce the right to clean water . . . It is up to the courts of Massachusetts, not this Court, to make that choice.”

⁵⁷ Adam Bruns, *Top Locations for Sustainable Development*, SITE SELECTION MAGAZINE (July 2019), <https://siteselection.com/issues/2019/jul/sustainability-rankings-top-locations-for-sustainable-development.cfm>.

⁵⁸ *Id.* (“Site Selection’s rankings comprise indices . . . that blend standard green metrics such as LEED-certified buildings, renewable energy use and green building incentives with unique inputs such as areas’ corporate social responsibility profiles (based on data from CSRHub), brownfield redevelopment, corporate facility investments in sectors with green connections, commercial real estate environmental, social, and governance (ESG) data.”).

⁵⁹ David A. Skeel Jr., *supra* note 25, at 10870 (explaining how the “wave” of pro-environment sentiment of the 1970s encompassed conservative Evangelicals, a group rarely associated with environmentalism today; their support for environmentalism plummeted in just a few years as ideological shifts within the evangelical community occurred).

⁶⁰ Tim Quinson, *There are Two Americas When It Comes to ESG*, BLOOMBERG (Nov. 2, 2022), <https://www.bloomberg.com/news/articles/2022-11-02/there-are-two-americas-when-it-comes-to-esg-green-insight?leadSource=verify%20wall>.

⁶¹ Of course, ideological shifts regarding environmentalism within a state that are large enough could result in a Green Amendment being undone or overruled by a subsequent amendment. Judicial decisions of state

Currently, no cases have been decided in New York that reference the state's new Green Amendment. Scholars are keeping tabs on the state, and note that "[t]he full extent of the amendment's impact . . . will be shaped by the courts in coming years."⁶² New York courts thus have a great deal of leeway at this early stage of the youngest Green Amendment's case law. New York may produce doctrine that enables states to aggressively pursue corporate polluters like other states do, such as Pennsylvania, Rhode Island, Montana, and Hawaii. New York may produce more limited doctrine, like Illinois and Massachusetts, that sees its Green Amendment serve a supporting role behind other environmental laws or not much of a role at all. In any event, all existing Green Amendments still fail to solve the overarching problems of the disparate responsibility of corporations toward climate change and address the unequal impact of climate change felt by marginalized populations.

B. Why Some Green Amendments Are More Effective Than Others

The preceding cases offer individual examples of corporations being limited in their ability to pollute and show how state-level corporate law often intersects with Green Amendments. However, in a larger context, modern environmental protection laws have so far failed to address the disparate impact that large corporations' activities have in worsening the climate to the detriment of society's most vulnerable people.⁶³ The idea of environmental justice has played a role in the way environmental regulators at the federal level have formed policy since 1994, when President Bill Clinton issued an executive order mandating that federal agencies incorporate environmental justice in their missions.⁶⁴ Growing awareness about the polluting activities of multinational corporations has "globalized" environmental justice.⁶⁵ Pro-climate legal provisions, including the seven existing Green Amendments, provide the basis for some sort of legal relief for residents of certain states, however the effectiveness of these positive changes fails when assessed in a larger context. The negative effects of climate change in the 2020s continue to fall disproportionately on poor people and communities of color both in the United States and internationally,⁶⁶ and large corporations continue to emit the

supreme courts or even the United States Supreme Court could also effectively nullify the impact of Green Amendments, however no Green Amendment has ever been undone in either of these ways. In fact, no enacted Green Amendment has ever been removed from a state constitution.

⁶² 9 Joan L. Matthews, Christine Fazio, Michael Murphy, John Paul & Sarah Kettenmann, *New York Practice Series* § 5:59 (Phillip Weinberg ed., 2d ed. 2022) (drawing attention to *Fresh Air for the Eastside Inv. v. State of New York et al.*, filed in Monroe County on Jan. 28 of 2022).

⁶³ Jeff Todd, *A "Sense of Equity" in Environmental Justice Litigation*, 44 HARV. ENV'T. L. REV. 169, 184 (2020); Samuel L. Brown, et al., *supra* note 2, at 10904 (statement of van Rossum) ("We don't have to undertake a full investigation into our system of laws to understand that it is fundamentally flawed; we can literally just look at what's happening on the ground to see that our current system of laws is fundamentally failing us.").

⁶⁴ Raina Wagner, *Adapting Environmental Justice: In the Age of Climate Change, Environmental Justice Demands a Combined Adaptation-Mitigation Response*, 2 ARIZ. J. ENV'T. L. & POL'Y 153, 158 (2011).

⁶⁵ Todd, *supra* note 63, at 178–79.

⁶⁶ Kemp-Neal, *supra* note 5.

most greenhouse gases.⁶⁷ In *A “Sense of Equity” in Environmental Justice Litigation*, Jeff Todd discusses the difficulties of environmental justice litigation at length.⁶⁸ Todd draws attention to the fact that engaging courts with constitutional arguments, despite existing shortcomings in the legality of environmental justice claims in an effort to change the law, “simultaneously allow[s] advocates to highlight those shortcomings and to argue for new interpretations and creative extensions of the law.”⁶⁹ The impact of Green Amendments on state corporate law doctrines are examples of such changes to the law. However, each individual Green Amendment is only part of the solution to environmental injustice.

Simply put, states that enshrine the right to a clean environment for all citizens are few and far between, leaving corporations with plenty of room to continue operating in ways that are harmful to the environment. In addition, Green Amendments are not uniform in their wording or in the way they fit into the legal doctrines of their respective states. While the Green Amendments of Pennsylvania, Rhode Island, Montana, and Hawaii have all created new legal avenues for private parties or public entities to use litigation as a means of curbing corporate pollution, the Green Amendments of Illinois and Massachusetts have not.⁷⁰ The lack of a uniform interpretation by courts in different states of their respective Green Amendment is not surprising; legal doctrines take slightly different forms from state to state as a feature of our federal form of government. However, the inadequacies of the Green Amendments of Illinois and Massachusetts may also be due, in part, to their wording. While Pennsylvania’s Green Amendment mandates that “the Commonwealth shall conserve and maintain . . .” the public natural resources,⁷¹ Illinois’s requires that “each person” enforce their right to a clean environment “through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.”⁷² Montana’s Green Amendment concludes with the statement that “[i]n enjoying [the right to a clean and healthful environment], all persons recognize corresponding responsibilities,”⁷³ while Massachusetts’s declares similar rights but goes on to list specific powers the general court shall exercise in preserving those rights.⁷⁴ The textual makeup of the Green Amendments in Illinois and Massachusetts therefore limit their applicability, while the more open-ended textual makeup of Green Amendments in other states have enabled creative arguments regarding the

⁶⁷ Todd, *supra* note 63, at 179.

⁶⁸ *Id.*

⁶⁹ *Id.* at 199.

⁷⁰ As discussed on pages ten and eleven.

⁷¹ PA. CONST. art. I, § 27.

⁷² ILL. CONST. art. XI, § 2.

⁷³ MONT. CONST. art. II, § 3.

⁷⁴ MASS. CONST. art. XLIX.

application of the public's right to a clean environment to enter corporate climate liability litigation.⁷⁵

Of course, a complete understanding of exactly why certain Green Amendments carry more legal weight than others requires a more detailed analysis of the histories of their enactments, the way state courts differ in interpreting them, and other considerations not covered by this Note. It is the mere existence of these differences, in combination with the relatively small number of states that have enacted Green Amendments, that support the idea that more states must enact effective Green Amendments. To ensure corporate polluters are held accountable for their actions, the number of jurisdictions that protect the right of all people to a clean environment must grow so large that corporations are incentivized to operate in ways that respect that right.

Green Amendments are a powerful means of achieving this. Maya van Rossum, who first used the term "Green Amendment," emphasizes her goal of seeing a Green Amendment enacted in as many states as possible.⁷⁶ This ambitious goal, if achieved even partially, could have major implications for corporate climate change litigation nationwide because it would reduce the burden on any individual state's Green Amendment. Further, widespread adoption of Green Amendments across the United States could, directly and indirectly, see corporations reduce polluting activities and overcome the individual shortcomings of any one Green Amendment.

II. THE POTENTIAL IMPACTS OF WIDESPREAD GREEN AMENDMENT ADOPTION

Widespread adoption of Green Amendments at the state level would have several impacts on corporate law. The primary impact of the adoption of Green Amendments is the increased ability of state governments to take legal action against corporate polluters. As explained in Part I, existing Green Amendments examined by state courts are interpreted within the scope of the common law public trust doctrine, which enable states to bring suit against corporations whose actions harm their citizens' natural environment. States do not need Green Amendments to pass environmental protection legislation and state courts do not need Green Amendments to cultivate a public trust doctrine friendly to plaintiffs in corporate climate liability cases.⁷⁷ However, Part I explains how Green Amendments do have the capacity to expand the regulatory power of states in the context of holding corporations accountable for their contributions to climate change in several ways,

⁷⁵ *Power Test Realty Co. v. Coit*, discussed on page eight, is a particularly good example of this. Here, the Supreme Court of Rhode Island found a polluting corporation liable without requiring proof that the corporation was certain its activities were causing pollution. *Power Test Realty Co. P'ship v. Coit*, 134 A.3d 1213, 1219 (R.I. 2016). While this case arose from a leak of petroleum substances, a similar ruling in the context of GHG emissions could have much further-reaching implications.

⁷⁶ Samuel L. Brown, et al., *supra* note 2, at 10904–10907.

⁷⁷ Even states with Green Amendments do not always rely on them in corporate climate liability litigation, exemplified by the relatively small role the Green Amendments of Illinois and Massachusetts play in such litigation.

including enabling due process claims for non-state parties who wish to challenge transactions between the state and a corporation that will contribute to climate change (as in *In re Application of Maui Electric Co.*) and enabling courts to overrule other laws that make it easier for corporations to pollute ecosystems (as in *Park County Environmental Council v. Montana Department of Environmental Quality*). In addition, widespread adoption of Green Amendments could cause several indirect impacts in the form of corporate officers and shareholders taking private actions to reduce corporate contributions to climate change.

A. How Green Amendments Could Impact State Corporate Law

Corporate law doctrines are generally formed at the state level, and some states play larger roles than others. Delaware is particularly influential in national corporate law,⁷⁸ and the adoption of a Green Amendment in Delaware could empower that state's government to work the right of its citizens to a clean environment into its highly influential corporate law doctrine. While corporations are subject to the laws of any jurisdiction they operate in, the internal affairs doctrine holds that the jurisdiction an entity is incorporated in provides the controlling laws for internal issues.⁷⁹ Summer Kim, professor at the University of California, Irvine, School of Law, explains:

The internal affairs doctrine provides that a single set of laws will govern the internal affairs of a corporation, and that that [sic] those laws will generally be the laws of the state of incorporation . . . an entity's decision to incorporate in a state also gives that state the power to set the laws that govern the internal affairs of that corporation.⁸⁰

Kim goes on to explain Delaware's importance to corporate law in the context of this doctrine.⁸¹ I argue that a Green Amendment in Delaware, the state in which some of the largest corporate contributors to climate change are chartered,⁸² would therefore be highly influential in the way issues of corporate control and governance intersect with climate change. This intersection will be discussed in the next subpart.

⁷⁸ See Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57 (2009).

⁷⁹ Summer Kim, *Corporate Long Arms*, 50 ARIZ. ST. L. J. 1067, 1069 (2018).

⁸⁰ *Id.*

⁸¹ *Id.* ("Delaware has emerged as the winner in the competition for corporate charters in the United States. Nearly two-thirds of the Fortune 500 companies in 2016 (up from 58% in 2000) are incorporated in Delaware.").

⁸² See *id.*; see also Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 889–890 (1990).

Outside of Delaware, enacting more state-level Green Amendments would still have significant impacts on corporate climate liability litigation.⁸³ However, it is important to differentiate states passing constitutional amendments that codify the people's right to a clean environment from mere environmental protection legislation. The process of amending a state constitution is not simple in practice; new legislation is far more common than new constitutional amendments. However, once enacted, state constitutional amendments become just as difficult to remove as they are to enact.⁸⁴ In states like Massachusetts and Illinois, with both Green Amendments and consistent legislative support for pro-climate policies, the relative permanence of a Green Amendment may result in the Green Amendment merely providing support for legislation that addresses specific environmental issues.⁸⁵ But in states with less consistent legislative support for pro-climate policies, this relative permanence means that a Green Amendment, once enacted, is more immune to political shifts that disfavor environmental protection than mere legislation. The nature of constitutional amendments, as provisions that are difficult to enact but equally difficult to get rid of, thus opens the possibility for more state governments to take action against corporate polluters over time. State actors can proceed with corporate climate liability litigation when political conditions allow it, and temporary shifts away from pro-climate principles will be less of a setback.⁸⁶

In sum, the more states where the right of the people to enjoy a healthy environment is enshrined in state constitutions, the smaller the list of places where corporations can continually pollute. A Green Amendment in Delaware would be particularly influential in light of the internal affairs doctrine, but the capacity for corporations to continue their disproportionate contributions to climate change is reduced any time a state adopts a Green Amendment. The conclusion of this Part will provide an overview of the possible indirect impacts of widespread adoption of Green Amendments.

⁸³ With the exception of New York and its brand-new Green Amendment, Part I includes example cases from every state with a Green Amendment; as such, this part will not reiterate specific ways states have used Green Amendments to hold corporate polluters accountable or prevent them from polluting in the first place.

⁸⁴ See Samuel L. Brown, et al., *supra* note 2, at 10914–10915 (on the difficulty of amending state constitutions in the context of Green Amendments).

⁸⁵ See *City of Chicago v. Krisjon Constr. Co.*, 617 N.E.2d 21, 26 (Ill. App. Ct. 1993); see also *Hootstein v. Amherst-Pelham Reg'l Sch. Comm.*, 361 F. Supp. 3d 94, 114 (D. Mass. 2019).

⁸⁶ See *Park Cnty. Env't Council v. Montana Dep't of Env't Quality*, 477 P.3d 288, 294–295. Montana passed its Green Amendment in the early 1970s, but subsequent shifts in Montana's politics included the state legislature passing a law limiting the ability of courts to overrule permitting decisions made by the state Department of Environmental Management. Then, in 2017, the court in this case held that Montana's Green Amendment superseded the newer law, ultimately preventing mining exploration in the Yellowstone Valley. See also THE ROCKEFELLER INSTITUTE, *supra* note 11, at 17.

B. Private Corporate Actions and Green Amendments

Green Amendments could indirectly drive corporations to adopt more pro-climate positions. Amending a constitution is a very public event, involving approval from voters in the form of statewide referendums or constitutional conventions.⁸⁷ The public nature of the enactment of Green Amendments is particularly relevant today. Those holding positions of power in the corporate world have gradually shifted their attitudes regarding climate change in the past few decades.⁸⁸ Larry Fink, CEO of the world's largest asset management company, has publicly called for other leaders within the corporate world to take various pro-climate stances in preparation for a "fundamental reshaping of finance" triggered by shifting public (and investor) attitudes regarding climate change.⁸⁹ This increase in pro-climate sentiment at the highest echelons of the corporate world opens the door to many possibilities for aligning the actions of large corporations to the values expressed in Green Amendments.

Officers of a corporation, or a majority of shareholders within a corporation, could seek to align a corporation's activities with the idea that all people ought to have access to a clean environment through a plethora of internal mechanisms. Shareholders could demand greater disclosure of corporate activities related to climate change, elect board members dedicated to sustainable practices, or even change the corporation's bylaws or articles of incorporation to reflect pro-climate policy goals. Officers within a corporation would have much more direct authority to enact pro-climate policies. Of course, any actions taken by officers of a corporation must be done under the limitation that those officers act according to their fiduciary duty to the corporation itself. While this may restrict some methods involving internal corporate actions that reduce a corporation's contribution to climate change,⁹⁰ recent changes in the calculation of financial risk in the context of climate change arguably support the idea that officers of a corporation must look to limit their contributions to climate change in order to uphold their fiduciary duty.⁹¹ Actions like these are the kind governed by the internal affairs doctrine.⁹² As previously discussed, a Green Amendment being enacted in Delaware could carry

⁸⁷ See the beginning of Part I on page two, which discusses the historical enactments of Green Amendments.

⁸⁸ See *Consumers Expect Brands to Address Climate Change*, WALL ST. J. (Apr. 20, 2021, 3:00 PM), <https://deloitte.wsj.com/articles/consumers-expect-brands-to-address-climate-change-01618945334>.

⁸⁹ Larry Fink, *Larry Fink's 2020 Letter to CEOs*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter> (last visited Oct. 26, 2022).

⁹⁰ I do not suggest that corporate officers' fiduciary duty prevents them from taking any of the actions described in this paragraph, or even more impactful actions like a complete divestment from fossil fuels. However, with so-called "degrowth" economic philosophies gaining popularity it is important to be mindful of the fiduciary duty in general. Officers of fossil fuel companies, for example, could not enact extreme policies like simply not selling any of their products without risking a violation of their fiduciary duty.

⁹¹ *Climate Risk, Climate Change*, J.P. MORGAN ASSET MANAGEMENT, <https://am.jpmorgan.com/us/en/asset-management/adv/about-us/investment-stewardship/climate-change/> (last visited Oct. 26, 2022).

⁹² Kim, *supra* note 79, at 1070.

significant indirect impacts on internal issues like these since many corporations are chartered in that state.

Green Amendments themselves would not directly govern the internal actions of corporations. However, increased integration of Green Amendments into state corporate law doctrine would add further momentum to the already increasing wave of pro-climate sentiment within the private sector. Corporations are bound by the laws of the states they are chartered in and the laws of the states they operate in, but they are also effectively bound by the views of their shareholders and officers. In turn, shareholders and officers of corporations must be mindful of shifts in public opinion; the increase in pro-climate stances espoused by major corporations like BlackRock exemplify this attitude.⁹³ It is possible that some corporations may seek to capture the financial support of those not interested in environmentalism. The reaction of nineteen state Attorneys General to increased expressions of pro-climate sentiment among BlackRock's leadership shows that there is significant support for the belief that it is bad for corporate officers to prioritize environmental concerns in their decisions.⁹⁴ However, public opinion generally favors the views expressed by BlackRock and opposes those expressed by the Attorneys General.⁹⁵ The enactment of Green Amendments, very public manifestations of the very public topic of climate change, therefore puts additional pressure on corporations to acknowledge and reduce their disproportionate contributions to climate change.

CONCLUSION: CLOSING THE GAP

No matter the form it may take, any alignment of the actions of large corporations with the principle that everyone ought to have access to a clean and healthy environment will directly benefit marginalized populations. These populations both bear the brunt of the negative impacts of climate change and experience the most difficulties in accessing legal resources, particularly in the context of environmental law. Kim Ferraro, in writing the Hoosier Environmental Council's *amicus* brief for a case involving a tightening of the evidentiary standard required by the Indiana Environmental Regulatory Agency, explains how the "justice gap" that sees low-income citizens struggle to afford representation is more severe in environmental litigation than in other realms of civil law.⁹⁶ As a result,

⁹³ Fink, *supra* note 89.

⁹⁴ *AG Reyes Calls Out Potentially Unlawful Market Manipulation by Investment Firm*, OFFICE OF THE ATTORNEY GENERAL STATE OF UTAH, <https://attorneygeneral.utah.gov/ag-reyes-calls-out-potentially-unlawful-market-manipulation-by-investment-firm/> (last updated Aug. 5, 2022).

⁹⁵ Researchers from Yale University estimated that seventy percent of Americans support the statement that "Corporations should do more to address global warming." Jennifer Marlon, Liz Neyens, Martial Jefferson, Peter Howe, Matto Mildenerger & Anthony Leiserowitz, *Yale Climate Opinion Maps 2021*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (Feb. 23, 2022), <https://climatecommunication.yale.edu/visualizations-data/ycom-us/>.

⁹⁶ Brief for HEC as Amicus Curiae at 12, *Southwestern Ind. Citizens for Qual. Of Life, Inc. v. Ind. Office of Env. Adj.* (filed May 5, 2021) (No. 49D13-2101-PL-001599); *see also* Susan Kostal, *Solo and Small Firm*

those with the most pressing claims against corporate polluters are in the worst position to bring those claims to court, and those well-resourced populations which may be more able to sue a corporation are less likely to have the claims best suited to win.⁹⁷ The state, arguably in control of more legal resources than any one party, must be empowered by Green Amendments to defend a clean and healthful environment for its most vulnerable citizens in order to achieve true environmental justice.

Green Amendments are uniquely suited to address the justice gap in Environmental Law. They enable state governments to pursue corporate polluters in a number of ways, interacting with the legal doctrines of their respective states to create unique legal landscapes that are friendlier to plaintiffs seeking to curb corporate pollution. Compared to statutes, Green Amendments are better suited to endure political shifts in state legislatures regarding the role of the state government in encouraging equitable pro-climate policies within corporations. Enacting Green Amendments also has the capacity to bring positive change indirectly, potentially pushing corporate decision makers to adopt pro-climate policies without costly and time-consuming litigation. Most importantly, enacted Green Amendments and their various impacts on corporations are difficult to eliminate. So far, no Green Amendment has ever been removed from a state constitution.

A national Green Amendment, which could also help close the justice gap in environmental law, becomes more imaginable as more state-level Green Amendments are passed. In 1968, amidst the national wave of environmentalism that produced the first state-level Green Amendments, an amendment was proposed in Congress that would protect the right to “clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of [the people’s] environment.”⁹⁸ Congressional support for this proposal proved insufficient, possibly because environmental legislation like the Clean Water Act and the creation of the EPA convinced members that a broadly worded constitutional amendment would be less effective than these more specific measures.⁹⁹ However, support for constitutional protections for environmental rights was great enough in the early 1970s to prompt the ABA to publish an article by Rutherford H. Platt that opens by expressing how “[n]ational anxiety concerning the state of the environment is a matter of almost unparalleled consensus” and concludes by stating “[t]here is no question that constitutional amendments

Hourly Rates: Winners and Losers, by State and Practice Area, ATTORNEYATWORK, <https://www.attorneyatwork.com/solo-and-small-firm-lawyer-hourly-rates/> (Oct. 27, 2022).

⁹⁷ Brief for HEC as Amicus Curiae, *supra* note 96.

⁹⁸ H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968); Similar attempts to codify the right to a clean environment in the Constitution failed in the 1990s. J.B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, 11 NAT. RES. & ENV'T 46–49 (1997).

⁹⁹ See J.B. Ruhl, *supra* note 99, at 47 (“What little support existed for [the 1968 proposal] quickly eroded as it became apparent that the legislative antipollution framework was in place and beginning to work effectively.”).

expressing environmental objectives are coming into vogue.”¹⁰⁰ Just as the activities of corporations, though not necessarily governed by Green Amendments, may be indirectly impacted by the public nature of enacting a Green Amendment, public pressure to enact a national Green Amendment becomes stronger as more states enact their own.

The adoption of existing Green Amendments has not progressed without opposition. Those who oppose Green Amendments often raise several concerns, namely the risk of a dramatic and inefficient increase in litigation and the risk of adding vague and ill-defined rights to states’ foundational documents.¹⁰¹ These arguments often misunderstand the way courts interpret Green Amendments and undervalue the role that broadly worded constitutional provisions play in creating doctrines that persist through multiple generations.¹⁰²

In addition, opponents of Green Amendments may argue that they are unnecessary in light of existing environmental regulations. J.B. Ruhl, in an article titled *An Environmental Rights Amendment: Good Message, Bad Idea*, posits that it was this concern that killed the proposed national Green Amendment of 1968.¹⁰³ However, legal frameworks centered around legislation that addresses specific environmental issues are inferior to Green Amendments when it comes to addressing environmental injustice. The access to justice gap in environmental law, which has formed in an era when most environmental protection efforts come from legislation, already sees those who suffer the most from climate change possess insufficient legal resources to remedy those claims. It is thus also a “bad idea” to rely on state legislatures to detect, understand, and remedy environmental injustice with legislation that serves the interests of marginalized populations instead of corporate polluters.¹⁰⁴ Rather, we must first recognize that all people, regardless of their proximity to the legislative process, have a right to a clean and healthy environment, and then deliberate the specifics of how this right is best reflected in environmental regulation.

The problems that may arise from enacting more Green Amendments are small compared to the risk of what will happen if climate change continues to worsen, aided in large part by the activities of corporations. Although a global issue,

¹⁰⁰ Rutherford H. Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A. J. 1061–64 (1970). Platt points to Illinois’s and Massachusetts’s enactment of their Green Amendments as examples of local popular support for constitutional environmental protection signaling the plausibility of a national environmental rights amendment.

¹⁰¹ Adashek, *supra* note 3, at 144–153 (addressing in greater detail specific concerns raised by opponents of Green Amendments).

¹⁰² *Id.*

¹⁰³ Ruhl, *supra* note 98.

¹⁰⁴ It is clearly possible that some state legislatures are capable of this. Illinois and Massachusetts provide examples of states that have had relative success combatting environmental issues without necessarily relying on their Green Amendments, however, enacting Green Amendments is a better general strategy for addressing environmental issues in a way that will both hold corporate polluters accountable and promote environmental justice.

the United States continues to disproportionately contribute to climate change.¹⁰⁵ Finding a way to balance the continuance of the economic system that has seen American industry flourish with the reality of climate change is a tall order, but scholars and activists like van Rossum have already taken the crucial initial steps toward a workable solution. Green Amendments have the potential to alter and improve corporate law in ways that benefit everyone; all we must do is give them a chance to work.

¹⁰⁵ Kevin Loria, *How Much has the US Contributed to Climate Change?*, BUSINESS INSIDER (June 1, 2017), <https://www.businessinsider.com/us-effect-on-climate-change-co2-emissions-warming-2017-6>.