

# NEW YORK’S GREEN AMENDMENT DILEMMA

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*Article I, Section 19 of the New York State Constitution—often referred to as the Green Amendment—guarantees each New Yorker’s right to “clean air and water, and a healthful environment.” This Note considers the possibility that Green Amendment litigation will slow the development of renewable energy projects in the state. New Yorkers have long worried about the environmental impact of renewables, and they have frequently used litigation and local politics to delay, modify, or block projects they believe will cause more harm than good. In August 2023, New York saw its first Green Amendment lawsuit over a solar energy facility. There will likely be more. I argue that New York courts should think of Green Amendment cases that pit climate action against fundamental environmentalist values such as community input, process, and conservation as involving conflicts of essentially incommensurate environmental rights, and that they should leave the question of how to balance them largely to the political branches. In doing so, I demonstrate the Green Amendment can accommodate the environmental tradeoffs that accompany rapid renewables development without reducing the provision to a constitutional triviality, leaving room for the robust judicial enforcement of Green Amendment rights in other cases.*

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## INTRODUCTION

In August 2023, the Association of Property Owners of Sleepy Hollow Lake (“APO SHL”) and the Sleepy Hollow Water Company filed a complaint alleging the Greene County Industrial Development Agency (“GCIDA”) had violated the Association members’ right to “clean water” and “a healthful environment” under Article I, Section 19 of the New York State Constitution.<sup>1</sup> Plaintiffs allege that the development agency had done so by “enabling” the construction and operation of a new power plant within the bounds of the Sleepy Hollow Lake watershed, which they allege will “unnecessarily cause dangerous contamination of Sleepy Hollow Lake.”<sup>2</sup> Prior to filing the complaint, association members had presented the GCIDA with an “expert report with supporting data and analysis” raising this concern, which the GCIDA disregarded.<sup>3</sup> Plaintiffs argue the GCIDA’s decision-making reflects a basic failure to fulfill its constitutional obligation to “consider the environment and our relationship to Mother Earth in the decision-making process.”<sup>4</sup> They request as relief that the court direct the developer to provide them the funds required to monitor the water quality of the Lake, which produces 40 million gallons of drinking water for the community each year.<sup>5</sup>

The facts plaintiffs allege mirror the events that initially inspired New York legislators to propose the Green Amendment in 2017.<sup>6</sup> Key among them was the controversy that followed the discovery of high levels of perfluorooctanoic acid (“PFOA”) in the water supply of Hoosick Falls, which residents feared was at the root of what appeared to be an unusually high rate of cancer in their community.<sup>7</sup> That discovery

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1. Complaint at 1-2, Ass’n of Prop. Owners of Sleepy Hollow Lake, Inc. v. Greene Cnty. Indus. Dev. Agency, No. EF2023-573 (Sup Ct. Greene County filed Aug. 11, 2023) [https://perma.cc/6LSB-RNFD] [hereinafter *Sleepy Hollow Lake Complaint*]. *Sleepy Hollow Lake* is one of the first cases to be brought under this provision. See Part II.B.

2. *Sleepy Hollow Lake Complaint*, *supra* note 1, at 25.

3. Plaintiffs’ Memorandum of Law in Opposition to Respondents’ Objections in Point of Law Seeking Dismissal of the Petition at 12, Ass’n of Prop. Owners of Sleepy Hollow Lake, Inc. v. Greene Cnty. Indus. Dev. Agency, No. EF2023-573 (Sup Ct. Greene County filed 2023) [https://perma.cc/VE33-7G3V] [hereinafter *Sleepy Hollow Lake Memo*].

4. *Id.* at 8 (quoting New York State Senate Session 147 (Jan. 12, 2021) [https://perma.cc/9DF9-TGUL] (Sen. Robert Jackson)).

5. *Sleepy Hollow Lake Complaint*, *supra* note 1, at 6.

6. See Part II.B.

7. Associated Press, *In Upstate NY village of Hoosick Falls, a trail of cancer leads to tap water*, SYRACUSE.COM (Jan. 26, 2021), https://www.syracuse.com/state/2016/01/hoosick\_falls\_cancer\_tap\_water\_epa.html [https://perma.cc/BG8K-E6RZ]. The New York State Department of Health later conducted an analysis of the New York State’s

was made by a resident who used his own money to test the water from his kitchen tap after the town refused to do the same.<sup>8</sup> Even after he reported his findings, state and local officials refused to warn residents against consuming Hoosick Falls water, only for Governor Andrew Cuomo to announce a State Superfund designation a few years later.<sup>9</sup>

Residents of Sleepy Hollow Lake feel their concerns have been dismissed in a similar way by the GCIDA and the New York State Board on Electric Generation Siting and the Environment (“Siting Board”).<sup>10</sup> After the Siting Board approved an expansion of the plant in 2021, the APO SHL President sent the Siting Board a letter accusing it of carrying on New York’s “long history of imposing the will of large corporations at the expense of drinking water and the people who live in various impacted communities (namely Love Canal,<sup>11</sup> Hoosick Falls, and now Albany, Schenectady, and Troy).”<sup>12</sup> Plaintiffs now aim to redirect the state toward a more environmentally just future by asserting

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Cancer Registry from 1995 through December 2014. It reported in 2017: “No statistically significant elevations of cancer were found for any of the cancer types associated with PFOA exposure. The only cancer found to have a statistically significant elevation was lung cancer, which has not been associated with PFOA exposure in any study.” N.Y. DEP’T OF HEALTH, *CANCER INCIDENCE INVESTIGATION: VILLAGE OF HOOSICK FALLS, RENSSELAER COUNTY, NEW YORK, REPORT SUMMARY* (May 2017) [<https://perma.cc/2FTT-QJV4>].

8. Associated Press, *supra* note 7. The reason the town refused was that New York State classified PFOA as an “unspecified organic contaminant” and did not require testing for it. *Id.*

9. Jesse McKinley, *Fears About Water Supply Grip Village That Made Teflon Products*, N.Y. TIMES (Feb. 28, 2016), <https://www.nytimes.com/2016/02/29/nyregion/fears-about-water-supply-grip-village-that-made-teflon-products.html> [<https://perma.cc/4KR7-7DX8>]. For information about past and ongoing litigation, see Ashley Hupfl, *DEC announces new settlement with Honeywell, Saint-Gobain for Hoosick Falls water contamination*, DAILY GAZETTE (May 15, 2023), [https://www.dailygazette.com/news/dec-announces-new-settlement-with-honeywell-saint-gobain-for-hoosick-falls-water-contamination/article\\_e7ea71ad-885d-595c-999c-9dc2ead623ee.html](https://www.dailygazette.com/news/dec-announces-new-settlement-with-honeywell-saint-gobain-for-hoosick-falls-water-contamination/article_e7ea71ad-885d-595c-999c-9dc2ead623ee.html) [<https://perma.cc/JQ6M-NT3W>]. For an explanation of New York’s State Superfund program, see *Inactive Hazardous Waste Disposal Site Program*, N.Y. DEP’T OF ENV’T CONSERVATION, <https://dec.ny.gov/environmental-protection/site-cleanup/brownfield-and-state-superfund-programs/state-superfund-sites> [<https://perma.cc/JE9J-C798>].

10. *Sleepy Hollow Lake Memo*, *supra* note 3, at 12 (alleging the GCIDA violated the Green Amendment by refusing to “independently consider Petitioner’s concerns” and instead “merely adopted the Siting Board’s assessment of them”).

11. See *Love Canal Niagara Falls, NY Cleanup Activities*, EPA, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0201290> [<https://perma.cc/6MHZ-TC4W>] (explaining that the discovery of the contamination of the Love Canal site in Niagara Falls, New York led to the enactment of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, which is commonly referred to as the Superfund law).

12. Letter from Janet Kaplan, Association of Property Owners of Sleepy Hollow Lake, to Hon. Michelle Phillips, Secretary to the Siting Board (Mar. 23, 2023) [<https://perma.cc/8YGN-Y4WN>].

their “participatory expectation and right” to manage their environment under the Green Amendment.<sup>13</sup> As one Sleepy Hollow Lake resident put it during a GCIDA hearing in 2022, “[W]e are here to protect our reservoir because our reservoir is...the future for our children and grandchildren.”<sup>14</sup>

The power plant plaintiffs are suing over is a solar farm. The Flint Mine Solar Project is a proposed 100 megawatt (“MW”) solar photovoltaic (“PV”) facility that may someday supply enough electricity for 21,000 homes while generating 1/50<sup>th</sup> the lifetime emissions per kilowatt hour of a natural gas plant.<sup>15</sup> That is perhaps why plaintiffs open their complaint by clarifying they “do not oppose the Project.”<sup>16</sup> Instead, they say they oppose only the GCIDA’s failure to condition the provision of tax benefits<sup>17</sup> on the creation of a relatively small fund capable of paying out \$50,000 to \$100,000 per year for independent water testing.<sup>18</sup> They stress that “Flint Mine Solar is free to construct the Project as approved by the Siting Board, but without the Financial Incentives [approved by the GCIDA].”<sup>19</sup>

Nevertheless, the fact remains that broad acceptance of plaintiffs’ legal theory would make it significantly more difficult to build solar energy facilities—or anything, really—in New York going forward.

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13. New York State Assembly Session 49 (Apr. 30, 2019) [<https://perma.cc/V48G-337G>] (Assemblymember Steven Englebright).

14. *Sleepy Hollow Lake Complaint*, *supra* note 1, at PDF page 125.

15. FLINT MINE SOLAR PROJECT, <https://www.flintminesolarproject.com/>, [<https://perma.cc/7PLB-756Y>] (“The Flint Mine Project will provide approximately 175,000 megawatt hours (MWh) of renewable energy produced from the sun, an amount roughly equivalent to the average annual electricity needs of the 21,000 homes in Greene County.”); Susan Tierney & Lori Bird, *Setting the Record Straight About Renewable Energy*, WORLD RESOURCES INST. (May 12, 2020), <https://www.wri.org/insights/setting-record-straight-about-renewable-energy> [<https://perma.cc/VE33-7G3V>] (“One study estimates that renewable energy sources typically emit about 50g or less of CO<sub>2</sub> emissions per kWh over their lifetime, compared to about 1000g CO<sub>2</sub>/kWh for coal and 475g CO<sub>2</sub>/kWh for natural gas.”).

16. *Sleepy Hollow Lake Complaint*, *supra* note 1, at 1.

17. *Id.* at 25. The tax benefits approved by the GCIDA appear to total over \$20 million. *Id.* at Exhibit E, page 20 (PDF page 88).

18. *Id.* at PDF page 317 (August 2022 letter from APO SHL to the GCIDA requesting they condition the provision of tax benefits to the Flint Mine project on the creation of a fund capable of distributing \$50,000–\$100,000 per water system per year for independent water testing).

19. *Sleepy Hollow Lake Memo*, *supra* note 3, at 2. *But see* Julia Rock, *How Unelected Local Officials Dole Out Wind and Solar Tax Breaks*, NEW YORK FOCUS (Nov. 7, 2023), <https://nysfocus.com/2023/11/07/tax-breaks-wind-solar-new-york> [<https://perma.cc/GN57-3T2>] (Daniel Spitzer, an attorney who has represented both renewable developers and municipalities in tax negotiations: “The local tax burden...is a very significant element in determining whether a project is financially viable. These are projects that would not get built but for the IDAs . . .”).

Plaintiffs aim to establish that the Green Amendment requires all government actors to conduct separate analyses of all possible environmental concerns raised by a project like Flint Mine Solar before taking any steps that could be construed as “enabling”<sup>20</sup> the project. Not only that: they are asking the court to impose this obligation on the state government prior to it having any idea which environmental risks or forms of environmental harm the Green Amendment violations.<sup>21</sup> The resulting regulatory uncertainty would likely dampen renewables development in the state and slow progress toward its decarbonization goals under the Climate Leadership and Community Protection Act (“CLCPA”) of 2019.<sup>22</sup>

*Sleepy Hollow Lake* therefore presents variant of what J.B. Ruhl and James Salzman refer to as the “Greens’ Dilemma.”<sup>23</sup> The phrase is Ruhl and Salzman’s label for the difficult decision whether to support permitting reform measures that streamline renewables development.<sup>24</sup> The reason Ruhl and Salzman call the choice a dilemma is that they sympathize with the environmental advocates that use “pinch points” in the development process (e.g., local ordinances, state and federal-level permitting) to oppose large renewable energy projects: wind and solar infrastructure is land-intensive, meaning its development raises serious concerns about the fouling of treasured viewsheds, the destruction of species habitats, and other serious environmental harms.<sup>25</sup> However, they argue this sort of environmental advocacy is ultimately self-defeating, given that climate change will also cause grave environmental harm if humanity fails to rapidly reduce its greenhouse gas (“GHG”) emissions.<sup>26</sup> The question *Sleepy Hollow Lake* raises is which version of environmentalism the Green Amendment stands for. Does it stand for

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20. *Sleepy Hollow Lake Complaint*, *supra* note 1, at 25.

21. As of 2024, New York’s Green Amendment case law consists of a few decisions concerning motions to dismiss. *See* Part II.B.

22. *See* Part II.C; *cf. also* Aidan Mackenzie, *How NEPA Will Tax Clean Energy*, INSTITUTE FOR PROGRESS (July 25, 2024), <https://ifp.org/how-nepa-will-tax-clean-energy/> [<https://perma.cc/86JQ-AFJX>] (“[The] long tail of NEPA delays affects developer and investor calculations: Developers cannot confidently predict when they will need to raise financing, and investors cannot know when their investments will begin making a return. Longer wait times also make it harder to account for the uncertainty associated with important market factors like demand, the cost of capital, or supply chains.”).

23. *See generally* J.B. Ruhl & James Salzman, *The Greens’ Dilemma: Building Tomorrow’s Climate Infrastructure Today*, 73 EMORY L. J. 1 (2023).

24. *Id.* at 45–46.

25. *Id.* at 7. *See also infra* notes 103–09 and accompanying text (discussion of renewables footprint in Part II.C).

26. *Impacts of Climate Change*, EPA, <https://www.epa.gov/climatechange-science/impacts-climate-change> [<https://perma.cc/V5C6-4WE6>].

the traditional values of “Cautious Greens”?<sup>27</sup> Or does it leave room for the tradeoffs that accompany rapid renewables development?

Perhaps unsurprisingly, the Greene County Supreme Court rejected the APO SHL’s “innovative” argument and dismissed the case.<sup>28</sup> But similar cases raising the same basic question about environmental tradeoffs will likely soon appear in New York courts. The Climate Action Council<sup>29</sup> estimates that New York must build 100 gigawatts (“GW”) of new renewable and “zero emissions”<sup>30</sup> capacity—the equivalent of 1,000 Flint Mine Solar Projects—by 2040 to achieve its goals under the CLCPA.<sup>31</sup> For reference, in 2023, New York installed just 0.8 GW of new large-scale renewables capacity,<sup>32</sup> and it issued permits for approximately the same amount.<sup>33</sup> In view of the relatively slow pace of development, the New York Comptroller concluded in a recent report that the state’s process for permitting renewable energy

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27. See Jerusalem Demas, *The Culture War Tearing American Environmentalism Apart*, THE ATLANTIC (Jan. 18, 2024), <https://www.theatlantic.com/ideas/archive/2024/01/housing-shortage-minneapolis-environmentalism/677165/> [<https://perma.cc/8ERU-DYLK>] (“[Cautious Greens are] suspicious of development and sweeping government action. They [see] environmentalism as encompassing varied lifestyle concerns and [are] thus much more focused on local impacts. But perhaps most telling, the Cautious Greens [are] apt to ask, with some bewilderment, *What’s the problem with just taking our time?*”). Demas contrasts Cautious Greens with “Crisis Greens,” who view environmentalism “largely through the lens of climate change and urgently demanded more government action to address the problem.” *Id.*

28. Ass’n of Prop. Owners of Sleepy Hollow Lake, Inc. v. Greene Cnty. Indus. Dev. Agency, No. EF2023-573 (Sup. Ct. Greene County July 23, 2024) [<https://perma.cc/RS8K-C92K>]. The court dismissed the case for lack of jurisdiction, as it amounted to a collateral challenge to a Siting Board decision. *Id.* at \*11.

29. The Climate Action Council is a 22-member body appointed to “prepare and approve a scoping plan outlining the recommendations for attaining the statewide greenhouse gas emissions limits in accordance with the [CLCPA].” N.Y. Env’t Conserv. Law § 75-0103 (2022).

30. See *infra* notes 51–54 and accompanying text (discussion of ZCFRs).

31. NEW YORK STATE CLIMATE ACTION COUNSEL, SCOPING PLAN, Technical Supplement Annex 2, Scenario 3 (2022), <https://climate.ny.gov/resources/scoping-plan/> [<https://perma.cc/3AEE-T8NR>] [hereinafter *Scoping Plan Annex 2*].

32. AMERICAN CLEAN POWER ASSOCIATION, ANNUAL MARKET REPORT 2023, 9 (2024) [<https://perma.cc/3KMG-FE6Q>]. New York ranks in 11<sup>th</sup> place for utility-scale renewables development; it installed less than 1/10<sup>th</sup> what Texas (1<sup>st</sup> place) installed in 2023 (9.9 GW). *Id.* New York’s installation rate has increased significantly over the past few years. AMERICAN CLEAN POWER ASSOCIATION, CLEAN POWER ANNUAL MARKET REPORT 2022, 11 (2022) [<https://perma.cc/L6AG-GHS7>] (Almost 0.3 GW of renewables installed in New York in 2022); AMERICAN CLEAN POWER ASSOCIATION, CLEAN POWER ANNUAL MARKET REPORT 2020, 12 (2020) [<https://perma.cc/KKJ6-7JD4>] (0.1 GW of renewables installed in New York in 2020).

33. This claim is based on a review of the permits that ORES issued in 2023. Those permits can be found at: <https://perma.cc/F5RQ-3EQH>.



facilities may need to be expedited.<sup>34</sup> But it is not clear that further permitting reforms are politically viable: even at the current pace of development, controversies about the economic and environmental impact of renewables development are already widespread, and they will likely proliferate if development accelerates.<sup>35</sup> It is reasonable to expect, then, that even if further reforms are enacted, the likelihood that they (along with the projects they enable) will be challenged under the Green Amendment is high.

I aim in this Note to establish that Green Amendment challenges to renewables development like *Sleepy Hollow Lake* ought to fail. I offer a few arguments for why, but the principal claim I aim to defend is that a case like *Sleepy Hollow Lake* and the stronger cases that are likely to follow it—call them Green Amendment Dilemma cases—present complex conflicts between constitutional interests that warrant judicial deference to the political branches. To be more specific, I claim they present conflicts between *environmental* constitutional interests—that is, between traditional environmentalist values like community input, process, and conservation on the one hand, and the right to a stable climate on the other. The Green Amendment Dilemma is not, in the end, a *true* dilemma<sup>36</sup>—or at least not one for the courts. Whether New York can implement policies that will enable rapid decarbonization is another question; I argue here only that courts should give them the chance to get it right.

This Note is divided into three parts. The purpose of Part I is to make plain the scale of the task that New York has set out for itself under the CLCPA, and to emphasize that New Yorkers have not yet begun to process the radical reset in environmental expectations that is required to achieve it. Part II provides an overview of environmental rights case law from New York and other states, and introduces the possibility of a Green Amendment Dilemma akin to the Greens' Dilemma described by Ruhl and Salzman. In Part III, I present the argument sketched above for why courts ought to show greater deference to the political branches and apply a permissive level of review in Green Amendment Dilemma cases. In arguing this point, I offer a way to treat the environmental tradeoffs that accompany rapid renewables development as broadly permissible while still leaving room for the robust judicial enforcement

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34. THOMAS DiNAPOLI, NEW YORK STATE COMPTROLLER, RENEWABLE ELECTRICITY IN NEW YORK STATE: REVIEW AND PROSPECTS 16 (August 2023) [<https://perma.cc/B84S-EWB8>]. See also *infra* note 91 (discussion of RAPID Act).

35. See Part I.B.

36. See Part III.B.

of the right to a healthful environment in other cases, namely those where environmental rights do not conflict.

## I. ENVIRONMENTAL TRADEOFFS AND TRADEOFF DENIAL

### A. *The Road Ahead*

New York's goal under the CLCPA is to reduce statewide GHG emissions to 60 percent of 1990 levels by 2030 and 15 percent of 1990 levels by 2050.<sup>37</sup> To support emissions reductions, the CLCPA requires the Public Service Commission ("PSC") to establish a program that will ensure that "renewable energy systems"<sup>38</sup> generate 70% of the electricity consumed in New York in 2030, and that the statewide electrical demand system is "zero emissions"<sup>39</sup> by 2040.<sup>40</sup> New York's renewable energy generation capacity currently totals approximately 8.0 GW (4.3 GW of hydro, 1.4 GW of pumped storage, 2.1 GW of wind, and 0.2 GW of solar) in 2023 and generates approximately one-quarter of New York's electricity—the vast bulk of that being hydroelectricity.<sup>41</sup>

According to the Climate Action Council, New York will need to build approximately 100 GW of new renewables and zero-emissions capacity by 2040 to achieve its CLCPA goals.<sup>42</sup> This new capacity is required to meet the increase in electricity demand that will accompany the electrification of New York's buildings and transportation sectors.<sup>43</sup>

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37. N.Y. ENV'T CONSERV. LAW § 75-0107(1)(b)(2022). Statewide emissions are currently around 90 percent of 1990 levels. *See* DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE, 2022 STATEWIDE GHG EMISSIONS REPORT IV (2022) [<https://perma.cc/LG7B-7XYR>].

38. The CLCPA states that "Renewable energy systems" are "systems that generate electricity or thermal energy through use of the following technologies: solar thermal, photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells which do not utilize a fossil fuel resource in the process of generating electricity." N.Y. PUB. SERV. LAW § 66-P(b) (2022).

39. As of 2023, the PSC has not yet determined what "zero emissions" means. *See* New York State Public Service Commission, Notice Seeking Further Comment (Case 15-E-0302) (Oct. 20, 2023) [<https://perma.cc/CN4L-XW35>].

40. N.Y. PUB. SERV. LAW § 66-P (2022).

41. NEW YORK INDEPENDENT SYSTEM OPERATOR, 2016 LOAD AND CAPACITY DATA: "GOLD BOOK" (April 2023) 109–10 [<https://perma.cc/2S3R-WA6D>]. New York also has a substantial amount of distributed solar capacity, which is not reflected in the NYISO report. As of January 2024, there are more than 200,000 projects across New York that together represent 5.1 GW of electricity generation capacity. *Statewide Distributed Solar Projects*, <https://www.nysesda.ny.gov/All-Programs/NY-Sun/Solar-Data-Maps/Statewide-Distributed-Solar-Projects> [<https://perma.cc/CYZ8-ATCY>].

42. *Scoping Plan Annex 2*, *supra* note 31, at Scenario 3.

43. NEW YORK STATE CLIMATE ACTION COUNSEL, SCOPING PLAN, Appendix G, Section I, page 23 (2022), <https://climate.ny.gov/resources/scoping-plan/> [<https://perma.cc/3AEE-T8NR>] [hereinafter *Scoping Plan Appendix G*].



The Council anticipates that most of New York's new capacity will comprise utility-scale<sup>44</sup> solar and wind facilities: in its "Scenario 3" projection,<sup>45</sup> it has New York add 15 GW of offshore wind, 6 GW of onshore wind, 28 GW of solar, and a small amount of hydro before 2040.<sup>46</sup> The main tool that the PSC will use to promote large-scale renewables development is a program known as the Clean Energy Standard ("CES"),<sup>47</sup> through which the state enters contracts for the purchase of Renewable Energy Credits ("RECs")<sup>48</sup> with developers. Renewables development has accelerated rapidly in recent years under the CES, from less than 0.1 GW of large-scale capacity per year in 2020 to 0.8 GW in 2023.<sup>49</sup> However, the state still has far to go: to actually hit its decarbonization goals, it will need to quickly achieve and sustain an installation rate close to 7 GW per year on average for the next fifteen years.<sup>50</sup>

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44. "Utility-scale" or "large-scale" electricity generation facilities are typically 5 MW or larger and are built primarily to supply wholesale electricity to the grid. NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, SOLAR BASICS AND FREQUENTLY ASKED QUESTIONS 10 [<https://perma.cc/9RNX-B3L2>].

45. The scenarios reported in the Climate Action Council Scoping Plan represent variations on a base scenario designed to represent the effects of recommendations made by various advisory panels, which the Council determined were insufficient to meet New York's emissions goals under the CLCPA. Scenario 3 is a variation on the base scenario that accelerates building and transportation electrification beyond advisory panels' recommendations and makes limited use of biofuels and hydrogen combustion. Scoping Plan Annex 2, *supra* note 31, at Scenario Detail.

46. Scoping Plan, Annex 2, *supra* note 31, at Scenario 3. Existing onshore wind, utility-scale solar, and distributed solar are excluded. NYISO GOLD BOOK 2023, *supra* note 42, at 109; *Statewide Distributed Solar Projects*, NYSERDA, <https://www.nyserd.ny.gov/All-Programs/NY-Sun/Solar-Data-Maps/Statewide-Distributed-Solar-Projects> [<https://perma.cc/CYZ8-ATCY>].

47. See *Clean Energy Standard*, NYSERDA, <https://www.nyserd.ny.gov/All-Programs/Clean-Energy-Standard> [<https://perma.cc/3RCR-8YFC>]; NYSERDA, *Toward a Clean Energy Future: A Strategic Outlook (2022 through 2025)* 20 (2022) [<https://perma.cc/X9KX-UWJT>] (explaining that CES "provides the framework" for achieving New York's CLCPA electricity generation goals); *Renewable Portfolio Standard*, NYSERDA, <https://www.nyserd.ny.gov/All-Programs/Clean-Energy-Standard/Clean-Energy-Standard-Resources/Renewable-Portfolio-Standard> [<https://perma.cc/4H7Z-52JS>] (program that the CES replaced).

48. RECs are instruments that represent a claim to the renewable aspect of electricity generated by renewables. One REC is created for each megawatt-hour (MWh) of electricity generated by renewables. Each can be sold independently from the underlying energy to a buyer seeking to make good on a commitment to an environmental goal. CENTER FOR RESOURCE SOLUTIONS, *THE LEGAL BASIS FOR RENEWABLE ENERGY CERTIFICATES* 3 (ver. 2.0, Apr. 2023), <http://resource-solutions.org/wp-content/uploads/2015/07/The-Legal-Basis-for-RECs.pdf> [<https://perma.cc/5LNM-GHXA>].

49. ANNUAL MARKET REPORT 2023, *supra* note 32, at 9.

50. To be more precise: in order to develop 100 GW of new renewables capacity over 15 years, New York would need to build an average of approximately 6.67 GW of new capacity each year.

In addition to new wind and solar capacity, New York also needs to build what the Climate Action Council calls “zero carbon firm resource” (“ZCFR”) capacity. The term refers to a class of technologies capable of supplying zero-emissions electricity when renewable energy production is low.<sup>51</sup> The Council estimates that New York needs to add 19 GW of ZCFR capacity by 2040 to guarantee a reliable supply of electricity year-round.<sup>52</sup> Despite the urgency of the state’s need for new ZCFR capacity, the PSC has not yet established a program akin to the CES for ZCFRs, nor has it made any indication that it will.<sup>53</sup> It has not yet even determined which technologies will count for purposes of CLCPA compliance.<sup>54</sup>

Suffice to say that New York is not on track to build a zero emissions electricity grid by 2040. As a matter of fact, it does not appear to be on track to achieve its more immediate (and significantly less ambitious<sup>55</sup>) goal of generating 70 percent of its electricity using renewables by 2030, as it does not have enough capacity under contract to achieve the goal, and it is struggling to find new developers that can promise they will complete their projects before the goal date.<sup>56</sup> For that reason, NYSERDA CEO Doreen Harris said in February 2024 that she hopes “people give us a little bit of squinting eye” with respect to New York’s progress toward its CLCPA goals.<sup>57</sup>

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51. *Scoping Plan Appendix G*, *supra* note 42, at 49 (“During a week with persistently low solar and wind generation, additional firm zero-carbon resources, beyond the contributions of existing nuclear, imports, and hydro, are needed to avoid a significant shortfall.”). Note that New York is set to become a “winter peaking system” due to the electrification of building heating and that renewable energy production is lowest in winter. NEW YORK INDEPENDENT SYSTEM OPERATOR, 2021–2040 SYSTEM & RESOURCE OUTLOOK (THE OUTLOOK) 27 (2022) [<https://perma.cc/CQ7X-NZF4>] [hereinafter NYISO OUTLOOK 2040].

52. *Scoping Plan Annex 2*, *supra* note 31, at Scenario 3.

53. Colin Kinniburgh, *New York Begins Exploring Non-Renewable Energy to Meet Climate Target*, N.Y. FOCUS (May 22, 2023), <https://nysfocus.com/2023/05/22/non-renewable-energy-hydrogen-nuclear-biofuels-ippny> [<https://perma.cc/ES67-R6BP>]. New York does have a Zero Emissions Credits (ZECs) program that subsidizes the continued operation of existing nuclear power plants. New York State Public Service Commission, Order Adopting a Clean Energy Standard (Case No. 15-E-302) at 19-20 (Aug. 1, 2016) [<https://perma.cc/F4DS-UV3W>].

54. See New York State Public Service Commission, Notice Seeking Further Comment (Case 15-E-0302) (Oct. 20, 2023) [<https://perma.cc/CN4L-XW35>].

55. NYISO estimates New York needs to install an additional 20 GW of renewable energy capacity over the next few years to hit its goal for 2030. NYISO OUTLOOK 2040, *supra* note 51, at 8.

56. Marie J. French, *Why New York’s ambitious climate goals are drifting away*, POLITICO (Feb. 7, 2024), <https://www.politico.com/news/2024/02/07/new-york-energy-climate-goals-00139979> [<https://perma.cc/R7RT-MHCX>].

57. *Id.*

### B. Local Opposition

A few different factors are holding back renewables development in New York. For one, high interest rates and persistent supply chain issues have made projects significantly more expensive, leading projects to cancel contracts and rebid for higher REC prices.<sup>58</sup> In addition, development is slowed by NYISO's interconnection process, which is one of the slowest in the United States, with wait times of over three years.<sup>59</sup> And the third major factor slowing renewables development is local opposition: as evinced by New York's lengthy entry in the Sabin Center's annual report on opposition to renewables development, New Yorkers frequently use litigation and local ordinances to keep wind, solar, and battery projects out of their communities.<sup>60</sup>

Local opposition to renewables development has long been an issue in New York. Soon after the state initiated its first REC program, the Renewable Portfolio Standard ("RPS"), in 2004, communities across the state enacted ordinances discouraging wind energy development.<sup>61</sup> One of them was Andes, New York<sup>62</sup>—home to the famed literary and legal theorist Stanley Fish. In a 2007 *New York Times* op-ed, Fish describes the residents of Andes as mainly "retirees and second homeowners who are educated, relatively well off...[i]n short, liberals...soldiers in Al Gore's army, into organic foods, hybrid cars, clean air, clean water, the whole bit."<sup>63</sup> He summarizes Andes' reasons for imposing the ordinance as follows:

Even if large wind farms were in place throughout the country, the electricity produced would be a very small percentage of the electricity we use. Because the turbines are huge, 400 feet or more, installing them involves tearing up the ridges on which they are placed. Once in operation, they cast shadows and produce noise. Their blades

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58. *Id.*

59. DiNAPOLI, *supra* note 34, at 2, 12.

60. Matthew Eisenson, *Opposition to Renewable Energy Facilities in the United States: May 2023 Edition*, SABIN CENTER FOR CLIMATE CHANGE LAW, COLUMBIA LAW SCHOOL, 124–139 (May 2023); *cf.* ROBI NILSON ET AL., U.S. DOE, SURVEY OF UTILITY-SCALE AND WIND AND SOLAR DEVELOPERS REPORT 9–22 (2024), <https://emp.lbl.gov/publications/survey-utility-scale-wind-and-solar> [<https://perma.cc/L4AK-Q8QW>].

61. John R. Nolon & Jessica A. Bacher, *Wind Power: An Exploration of Regulation and Litigation*, N.Y.L.J. (Feb. 20, 2008), at \*4, available at <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1665&context=lawfaculty> [<https://perma.cc/Q8WZ-6796>].

62. ANDES, N.Y., LOCAL LAW #3: WIND ENERGY DERIVING TOWER MORATORIUM LAW [<https://perma.cc/H7WU-ZLZ2>].

63. Stanley Fish, Opinion, *Blowin' in the Wind*, N.Y. TIMES (Aug. 26, 2007) <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2007/08/26/blowin-in-the-wind/> [<https://perma.cc/EYK3-7RPR>].

cause a ‘flicker’ effect, kill birds and interfere with migration. The outsized towers ruin scenic views and depress real-estate values.<sup>64</sup>

Ordinances like the one instituted in Andes proved to be a “significant contributing factor” in the overall slowdown of renewables development during the late 2000s<sup>65</sup>—the other major factor being the 2007–08 financial crisis.<sup>66</sup>

Years later, opposition to renewables development in New York remains strong. According to one recent survey, 42% of residents of western and northern New York oppose utility-scale solar projects in or near their communities.<sup>67</sup> News stories from across the state—everywhere from Cattaraugus County<sup>68</sup> to Greenpoint, Brooklyn<sup>69</sup>—suggest this statistic reflects something about New York’s view of renewables as a whole.<sup>70</sup>

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64. *Id.* See also, e.g., Andy Webster, *Turbines in the Backyard: The Sound and the Strobes*, N.Y. TIMES (Feb. 2, 2012), <https://www.nytimes.com/2012/02/03/movies/windfall-a-documentary-on-wind-turbines-by-laura-israel.html> [<https://perma.cc/7Z82-XF3W>] (reviewing “Windfall,” a documentary depicting “the perils of a booming [wind energy] industry and the bitter rancor it sowed among a citizenry [in upstate New York]”).

65. Danielle Sugarman, *The Power New York Act of 2011 Reauthorizes and Modernizes Article X of the Public Service Law*, CLIMATE LAW: A SABIN CENTER BLOG (June 28, 2011), <https://blogs.law.columbia.edu/climatechange/2011/06/28/the-power-new-york-act-of-2011-reauthorizes-and-modernizes-article-x-of-the-public-service-law/> [<https://perma.cc/969Z-2FRP>].

66. JACKSON MORRISON ET AL., NEW YORK’S RENEWABLE PORTFOLIO STANDARD: WHERE TO FROM HERE?, PACE ENERGY AND CLIMATE CENTER, PACE LAW SCHOOL, NEW YORK’S RENEWABLE PORTFOLIO STANDARD: WHERE TO FROM HERE? 10 (2013) [<https://perma.cc/57ZH-2TY8>].

67. Roberta S. Nilson & Richard C. Stedman, *Reacting to the Rural Burden: Understanding Opposition to Utility-Scale Solar Development in Upstate New York*, RURAL SOCIOLOGY 578 (March 16, 2023).

68. Thomas C. Zambito, *Betraying the bald eagles? New York state once fought hard to save the endangered species. Now, a clean energy project could kill dozens of the majestic birds*, JOURNAL NEWS (July 13, 2023) (via Factiva) (reporting on opposition to the Alle-Catt wind project in western New York).

69. Erin Conlon, *Battery Storage at 315 Berry Street Could Help Us Meet Climate Goals. Tenants Have Concerns.*, GREENPOINTERS (July 28, 2023), <https://greenpointers.com/2023/07/28/battery-storage-at-315-berry-street-could-help-us-meet-climate-goals-tenants-have-concerns/> [<https://perma.cc/4DL3-AY36>] (reporting on opposition to a battery storage facility on an apartment building rooftop in Greenpoint, Brooklyn).

70. See also Frederic M. Mauhs, *Preempting Local Zoning Codes Fuels Opposition to Renewable Energy in New York*, N.Y. BAR ASS’N (Feb. 2, 2022), <https://nysba.org/preempting-local-zoning-codes-fuels-opposition-to-renewable-energy-in-new-york/> [<https://perma.cc/5MTF-PFHV>] (upstate community land use planner stating “[t]here isn’t a town yet that I have worked with that isn’t already resentful against Albany – even very liberal, Democratic-oriented communities who otherwise would do everything they could to protect the environment”).

New Yorkers' reasons for opposing renewable energy projects remain essentially the same: they cite concerns about property values,<sup>71</sup> their health,<sup>72</sup> and about the impact on the local environment;<sup>73</sup> they complain about the unfairness of hosting large industrial projects<sup>74</sup> for the sake of energy demand elsewhere in the state;<sup>75</sup> and they express moral outrage at the idea of building renewables on agricultural or undeveloped land instead of on rooftops or brownfields.<sup>76</sup> These fears and resentments generate rhetoric that sometimes borders on the apocalyptic.<sup>77</sup> In an interview with *New York Focus*, one Long Beach resident framed her opposition to an offshore wind energy facility as a

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71. N.Y. STATE ASSEMBLY, ARI BROWN FLYER, [https://nyassembly.gov/write/upload/member\\_files/020/pdfs/20230829\\_0107265.pdf](https://nyassembly.gov/write/upload/member_files/020/pdfs/20230829_0107265.pdf) [<https://perma.cc/Z7BS-ZBTZ>] (flyer circulated by Assemblymember Ari Brown and State Senator Patricia Canzoneri-Fitzpatrick warning that a proposed offshore will lower property values).

72. Barbara O'Brien, *Southtowns residents mobilize against proposed wind farm: 'We all moved to the country to be in the country'*, BUFFALO NEWS (Sept. 14, 2023), [https://buffalonews.com/news/local/southtowns-residents-mobilize-against-proposed-wind-farm-we-all-moved-to-the-country-to-be/article\\_4f9d4b0c-4e50-11ee-9670-0b28f4845863.html](https://buffalonews.com/news/local/southtowns-residents-mobilize-against-proposed-wind-farm-we-all-moved-to-the-country-to-be/article_4f9d4b0c-4e50-11ee-9670-0b28f4845863.html) [<https://perma.cc/BC9S-LTRH>] (reporting that people living near the proposed site of a wind energy facility are "worried about sleep disturbance, headaches, nausea and other symptoms reported by people who live near wind turbines").

73. Barbara O'Brien, *Study, amid groundswell of opposition, shelves idea of wind turbines in Lake Erie: 'Now is not the right time'*, BUFFALO NEWS (Jan. 17, 2023), [https://buffalonews.com/news/local/study-amid-groundswell-of-opposition-shelves-idea-of-wind-turbines-in-lake-erie-now-is/article\\_5abde8ec-8c64-11ed-aaaa-a389ad0d0ccb.html](https://buffalonews.com/news/local/study-amid-groundswell-of-opposition-shelves-idea-of-wind-turbines-in-lake-erie-now-is/article_5abde8ec-8c64-11ed-aaaa-a389ad0d0ccb.html) [<https://perma.cc/GQ32-NPDD>] (Dave Adrian, an aquatic biologist and member of the Citizens Against Wind Turbines in Lake Erie stating "[g]reen energy at the cost of the environment is really not the goal of anybody").

74. Individuals and groups that oppose large renewable energy projects describe them using the adjective "industrial" with some frequency. See, e.g., Thomas C. Zambito, *NY created an agency to OK wind and solar projects quickly. Upstate towns aren't happy*, LOHUD. (Oct. 12, 2022), <https://www.lohud.com/story/news/2022/10/12/upstate-ny-towns-push-back-against-wind-and-solar-projects/65411544007/> [<https://perma.cc/4L7J-XRN7>].

75. Nilson & Stedman, *supra* note 67, at 16 (quoting survey participant: "You know this electricity is going somewhere else, whether it's going to New York City or where it's going, I do not know, but why do we have to ruin our community to send electricity somewhere else?").

76. See Part I.C.

77. See, e.g., Michelle Hinchey, *Senators Hinchey and Harckham Send Letter to ORES Outlining Threats to Farmland and Environment by Proposed Copake Solar Development*, N.Y. STATE SENATE (Aug. 25, 2023), <https://www.nysenate.gov/newsroom/press-releases/2023/michelle-hinchey/senators-hinchey-and-harckham-send-letter-ores> [<https://perma.cc/U63F-JTDW>] ("While we understand the necessity and support the practice of building renewable energy projects to meet the needs of our state, we cannot exchange an energy crisis for a food crisis, a water crisis, or a conservation crisis.").

fight for basic survival. “We should have the same protections as, say, the piping plover,” she proposed.<sup>78</sup>

New York has responded to the issue of local opposition to renewables development by creating an Office of Renewable Energy Siting (“ORES”) with the authority to disregard local laws it deems “unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.”<sup>79</sup> So far, it has used its preemption authority for 87 percent of permits, including every single permit issued since the start of 2022.<sup>80</sup>

ORES has faced one legal challenge so far. In early 2021, a coalition of New York municipalities and wildlife groups filed a lawsuit alleging that ORES had violated the “home rule” provision of the New York Constitution by waiving local ordinances.<sup>81</sup> Plaintiffs said in a public statement that the litigation was inspired in part by a solar project in Copake that ORES had approved despite a local ban on large solar projects.<sup>82</sup> The Albany County Supreme Court dismissed the complaint,<sup>83</sup> and in 2023, the Appellate Division for the Third

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78. Julia Rock, *Long Island Politicians Claim Victory for Hochul Wind Power Veto*, NEW YORK FOCUS (Oct. 26, 2023), <https://nysfocus.com/2023/10/26/wind-turbines-energy-long-island-democrats-republicans> [<https://perma.cc/VK9K-SBQK>]. Apocalyptic rhetoric is somewhat common. See also Hinchey, *supra* note 77 (“While we understand the necessity and support the practice of building renewable energy projects to meet the needs of our state, we cannot exchange an energy crisis for a food crisis, a water crisis, or a conservation crisis.”).

79. N.Y. EXEC. LAW § 94-c(5)(e) (McKinney 2023). Under the Power NY Act of 2011, the Siting Board also has a similar authority to waive local laws it deems “unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality.” N.Y. PUB. SERV. LAW § 168(3)(e) (McKinney 2011). The Siting Board has had similar preemption authority since 2011, but it was initially reluctant to use it. Alexander Fields, *Will Section 94-C Enable Renewable Energy Project Siting and Help New York State Achieve Its Energy Targets?*, 46 COLUM. J. ENV’T. L. 125, 158 (2020). As it turns out, the Flint Mine Solar Project is one of the few projects for which it has used its preemption authority to approve a permit. *Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, Application of Flint Mine Solar*, N.Y. STATE BD. ON ELEC. GENERATION SITING AND THE ENV’T, 70 (Aug. 4, 2021) [<https://perma.cc/RMC5-74FP>].

80. This claim is based on a review of every siting permit ORES has issued as of mid-2024. I have saved those permits at the following URL: <https://perma.cc/F5RQ-3EQH>. The relevant language in each permit is highlighted.

81. Kevin Oklobzija, *Towns, wildlife groups suing state over renewable energy project standards*, DAILY RECORD (July 2, 2021) (via Factiva). See also N.Y. CONST. art. IX, § 2 (home rule provisions).

82. *Litigation Against New York State*, SENSIBLE SOLAR FOR RURAL N.Y., <https://sensiblesolar.org/litigation-against-new-york-state/> [<https://perma.cc/qq2d-wx26>].

83. *Town of Copake v. N.Y. State Off. of Renewable Energy Siting*, 2021 N.Y. Misc. LEXIS 20715, at \*18 (N.Y. Sup. Ct. Oct. 7, 2021); *Town of Copake v. N.Y. State Off. of Renewable Energy Siting*, 2021 N.Y. Misc. LEXIS 20716, at \*50 (N.Y. Sup. Ct. Sept. 22, 2021) (denying preliminary injunction).



Department affirmed, stating definitively that “where State interests are involved to a substantial degree, in depth or extent[,] the State may freely legislate without home rule approval, notwithstanding the legislation’s impact on local concerns.”<sup>84</sup>

Opponents of the project that gave rise to the lawsuit say they are “still fighting,”<sup>85</sup> and support for their cause appears to be growing: after paying a visit to the project site, State Senators Michelle Hinchey and Pete Harckham—both strong advocates for curbing emissions to slow climate change<sup>86</sup>—banded together with locals to urge ORES to find another location for the “ill-proposed project.”<sup>87</sup> In a public letter, Senator Hinchey warned: “[This project] is slated to engulf 216 acres of prime New York farmland, clear-cut 40 acres of forestland, encroach on Class 1 wetlands, and pose a risk to the drinking water of residents in the City of Hudson and the surrounding area.”<sup>88</sup>

Meanwhile, the New York State Comptroller concluded in a 2023 report that the permitting process for renewable energy projects “may need to be further expedited in a manner that continues to be protective of the environment and community concerns” if New York is to have any hope of achieving its CLCPA goals.<sup>89</sup> So far, the Legislature and the Hochul Administration have demonstrated limited interest in taking up the Comptroller’s advice. In the past several years, New York legislators have proposed just one bill that would streamline the permitting process specifically for small solar projects (<0.002 GW) sited atop parking lots in public parks. The bill passed the Senate in

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84. *Town of Copake v. N.Y. State Off. of Renewable Energy Siting*, 216 A.D.3d 93, 105 (N.Y. App. Div. 2023) (quoting *Citizens for the Hudson Valley v. N.Y. State Bd. on Elec. Generation Siting*, 281 A.D.2d 89, 95 (N.Y. App. Div. 2001)).

85. Rick Karlin, *Shepherd’s Run solar farm in Columbia County wins draft approval from state*, TIMES UNION (Oct. 31, 2023, 1:43 PM), <https://www.timesunion.com/business/article/shepherds-run-copake-draft-approval-18457570.php> [https://perma.cc/5R67-3MQT].

86. *About Michelle Hinchey*, THE N.Y. STATE SENATE, <https://www.nysenate.gov/senators/michelle-hinchey/about> (last visited Dec. 28, 2023) [https://perma.cc/7ABL-GHV3?type=image]; *About Pete Harckham*, THE N.Y. STATE SENATE, <https://www.nysenate.gov/senators/pete-harckham/about> (last visited May 15, 2024) [https://perma.cc/WL5S-K8QJ].

87. Michelle Hinchey, *Senators Hinchey and Harckham Send Letter to ORES Outlining Threats to Farmland and Environment by Proposed Copake Solar Development*, THE N.Y. STATE SENATE (Aug. 25, 2023), <https://www.nysenate.gov/newsroom/press-releases/2023/michelle-hinchey/senators-hinchey-and-harckham-send-letter-ores> [https://perma.cc/3928-679E?type=image].

88. *Id.*

89. DiNAPOLI, *supra* note 34, at 19.

March 2024, and was then delivered to the Assembly, where it has yet to come to a vote.<sup>90</sup>

### C. *Tradeoff Denial*

During the final round of Assembly debate over the CLCPA, Assemblymember Mark Walczyk asked Assemblymember Englebright “where the additional power is going to come from” in order for New York to achieve the goals outlined in the bill.<sup>91</sup>

Englebright seemed frustrated by the question.<sup>92</sup> “What additional power?” he asked. “We are not envisioning a need for endless growth in power.”<sup>93</sup> He then explained that improvements in energy efficiency within the residential sector would obviate the need for much new energy capacity, and that remaining demand could be covered by “significant new sources of renewable energy from offshore wind and community-based solar.”<sup>94</sup>

Englebright’s reply reflects a point of view that is somewhat common among environmentalists. Like others, he emphasizes reducing energy demand rather than increasing clean energy supply, and he assumes that all or most of this future energy demand can be met by investing in resources with minimal environmental impact, such as rooftop solar and projects sited on brownfields and landfills.<sup>95</sup>

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90. *Senate Bill S1179 (2023-2024 Legislative Session)*, <https://www.nysenate.gov/legislation/bills/2023/S1179> [<https://perma.cc/LB7C-M7AH?type=standard>]. Recently, however, New York has succeeded in streamlining electricity transmission development by enacting the Renewable Action Through Project Interconnection and Deployment (“RAPID”) Act, which brings transmission projects under ORES’s jurisdiction and grants ORES the authority to preempt local ordinances that limit transmission development as well as those that limit renewables development. *See* N.Y. DIVISION OF THE BUDGET, FY 2025 NEW YORK STATE EXECUTIVE BUDGET 150 (2024), <https://www.budget.ny.gov/pubs/archive/fy25/ex/artvii/ted-bill.pdf> [<https://perma.cc/7HTG-YJWB>].

91. *N.Y. State Assemb., Session Transcript*, 435 (June 19, 2019) [<https://perma.cc/ZF87-4ASV>].

92. *N.Y. State Assemb., Session, Part 3*, at 25:30 (June 19, 2019), [https://nystateassembly.gov/mediaplayer.php?view\\_id=6&clip\\_id=518](https://nystateassembly.gov/mediaplayer.php?view_id=6&clip_id=518).

93. *N.Y. State Assemb., Session Transcript*, 435 (June 19, 2019) [<https://perma.cc/ZF87-4ASV>].

94. *Id.* at 436.

95. *See, e.g., id.* at 411–412 (Englebright focusing on opportunities for rooftop solar); *N.Y. State Assemb., Session Transcript*, 117 (June 1, 2016) [<https://perma.cc/KE2X-AA9X>] (Englebright: “[Y]ou can’t use solar with impunity if it’s going to compromise the viewshed or the sense of place of a community.”); TBR Staff, *Potential of Shoreham solar farm leads Brookhaven Town to take action*, TBR NEWSMEDIA (Mar. 16, 2017), <https://tbrnewsmedia.com/potential-of-shoreham-solar-farm-leads-brookhaven-town-to-take-action/> [<https://perma.cc/9EJT-JCLW>] (Englebright, discussing a proposed solar facility sited on the land surrounding a decommissioned nuclear power plant: “This is a native forest in essentially pristine condition...it’s a museum piece of natural land...[I]t was never my intent to see environmental atrocities committed in the name of renewable

This may or may not be the preference of Americans in general: one poll has found that 74 percent of Americans say it is important for the United States to mitigate the effects of climate change, but at the same time, 79 percent agree with the statement “We should roll out renewable energy slowly to ensure natural land or wild animals aren’t harmed, even if it means taking longer to reduce greenhouse-gas-producing emissions.”<sup>96</sup> Another poll found that roughly the same proportion of New Yorkers care about climate change as do Americans in general.<sup>97</sup> That fact, in combination with knowledge of the state’s history of local opposition to renewable energy development, leads to the conclusion that New Yorkers find themselves at least as conflicted about decarbonization as the rest of the nation. Which raises the question: Why should New York’s decarbonization strategy not align with the apparent preferences of New Yorkers? Why not deemphasize utility-scale solar projects and focus instead on rooftop solar?

The simple answer to that question is that it would not be a particularly effective decarbonization strategy. First, it would be significantly more expensive due to the loss of economies of scale and the additional engineering challenges.<sup>98</sup> Second, it may not even be a

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energy. I’m offended, as the father of solar energy in this state, that they are attempting to so thoroughly abuse the premise of what solar is meant to be.”). Cf. Jerusalem Demsas, *Why America Doesn’t Build*, THE ATLANTIC (Oct. 27, 2023), <https://www.theatlantic.com/ideas/archive/2023/10/wind-farms-community-opposition/675791/> [<https://perma.cc/8HE6-7HBG>] (“Marion Gee, an executive director of the Climate Justice Alliance, sees a problem with scale. She believes that instead of reforming our processes to speed up the development of large new projects, we should question whether we need them at all . . . Gee thinks that the path forward looks like rooftop solar, energy-efficiency investments, and reduced demand for energy.”).

96. Robinson Meyer, *Protecting Nature Is More Important Than ‘Quickly’ Building Renewables, Most Americans Say*, HEATMAP (Mar. 23, 2023), <https://heatmap.news/climate/protecting-nature-is-more-important-than-quickly-building-renewables-most-americans-say> [<https://perma.cc/G58J-LLVV>]. The full results of the poll are available at: <https://perma.cc/E4YK-U2UT>.

97. NEW YORKERS FOR AFFORDABLE ENERGY, SIENA COLLEGE RSCH. INST. POLL (Feb. 5–9, 2023) [<https://perma.cc/BTU9-GL3Z>].

98. LAZARD, LCOE LAZARD 37 (April 2023) [<https://perma.cc/5TFA-FPPB>] (reporting that the cost for rooftop residential ranges between \$117 and \$282 per MWh, as compared to \$24 and \$96 for utility-scale solar); Ciara Nugent, *The Overlooked Solar Power Potential of America’s Parking Lots*, TIME (Dec. 8, 2022, 9:55 AM), <https://time.com/6239651/solar-parking-lots-france-us/> [<https://perma.cc/S6Z5-3JY3>] (reporting that installing solar over parking lots is significantly more expensive than installing it on rooftops); Alex Kuffner, *R.I.’s solar sprawl dilemma*, PROVIDENCE J. (Mar. 17, 2018, 11:40 PM), <https://www.providencejournal.com/story/news/environment/2018/03/16/worry-over-solar-sprawl-spreads-across-rhode-island/12965856007/> [<https://perma.cc/S6Z5-3JY3>] (Paul Raducha, senior developer for a solar energy company discussing landfill projects stating “It’s harder. You have more development costs. There’s more review by [state agencies]. You have additional engineering.”).

theoretical possibility: experts estimate that solar projects sited in every possible location within urban areas could supply only a quarter or a third of current energy demand.<sup>99</sup> For these reasons, Judy Dunscomb, a senior conservation scientist from the Nature Conservancy in Virginia, has concluded, “We can’t really brownfield our way out of this.”<sup>100</sup> Energy researcher Chris Clack similarly concludes, “Realistically, 80% [of renewable energy capacity] is going to end up being utility grid no matter what.”<sup>101</sup>

That new utility-scale capacity will have a massive environmental impact. A back-of-the-envelope calculation based on the Climate Action Council’s numbers suggests that the capacity New York needs to build for 2050 would cover an area close to 4,000 square kilometers in size,<sup>102</sup> or around 67 times the size of Manhattan.<sup>103</sup> Were New York

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99. Sammy Roth, *Can rooftop solar alone solve climate change? Here’s the answer*, L.A. TIMES (June 29, 2023), <https://www.latimes.com/environment/newsletter/2023-06-29/can-rooftop-solar-alone-solve-climate-change-heres-the-answer-boiling-point> [<https://perma.cc/G9AS-44BQ>]. For further perspective, note that Climate Action Council’s estimate for the total amount of electricity generation capacity New York will need by 2050 is approximately 160 GW, or around four times its current installed capacity including fossil fuel plants—and that is under the assumption that New York cuts total energy consumption by 55 percent. *Scoping Plan Annex 2*, *supra* note 31, at Scenario 3. One article advocating for reducing energy demand via economic “degrowth” found that energy demand reductions that steep raise “substantial [concerns] regarding political feasibility.” Lorenz T. Keyßer & Manfred Lenzen, *1.5 °C degrowth scenarios suggest the need for new mitigation pathways*, NATURE COMM’NS 2 (2021).

100. Gabriel Popkin, Op-Ed, *Are There Better Places to Put Large Solar Farms Than These Forests?*, N.Y. TIMES (Sept. 21, 2022), <https://www.nytimes.com/2022/09/21/opinion/environment/solar-panels-virginia-climate-change.html> [<https://perma.cc/8EP5-ZQYY>].

101. Sammy Roth, *Solar sprawl is tearing up the Mojave Desert. Is there a better way?*, L.A. TIMES (June 27, 2023, 5:00 AM), <https://www.latimes.com/environment/story/2023-06-27/solar-panels-could-save-california-but-they-hurt-the-desert> [<https://perma.cc/785P-E4ZQ>].

102. *Scoping Plan Annex 2*, *supra* note 31, at Scenario 3 (10 GW of onshore wind capacity and 48 GW of utility-scale solar capacity for 2050); Sean Ong et al., *Land-Use Requirements for Solar Power Plants in the United States*, NAT’L RENEWABLE ENERGY LAB’Y, 18 (June 2013), <https://www.nrel.gov/docs/fy13osti/56290.pdf> [<https://perma.cc/76P4-B2EP>] (reporting that utility-scale solar facilities have a capacity of 34 MW per square kilometer on average); Dylan Harrison-Atlas et al., *Dynamic land use implications of rapidly expanding and evolving wind power deployment*, 17 ENV’T RSCH. LETTERS 6 (2022), <https://iopscience.iop.org/article/10.1088/1748-9326/ac5f2c/pdf> [<https://perma.cc/XYB9-K3GC>] (reporting that wind energy facilities have a capacity of 4.3 MW per square kilometer on average).

103. NEW YORK METROPOLITAN TRANSPORTATION COUNCIL, COORDINATED PUBLIC TRANSIT-HUMAN SERVICES TRANSPORTATION PLAN FOR NYMTC REGION 3-16, *available at* [<https://perma.cc/H6YS-6EXH>] (reporting that Manhattan has a land area of 23 square miles). It is theoretically possible that the footprint could be much smaller. *See* THE NATURE CONSERVANCY, POWER OF PLACE NATIONAL: EXECUTIVE

to accomplish this enormous feat, treasured landscapes across the state would be disfigured;<sup>104</sup> species habitats would be totally destroyed;<sup>105</sup> new communities would fear for the safety of their water<sup>106</sup> or the ill effects of “shadow flicker;”<sup>107</sup> and many of those affected would likely struggle to perceive the environmental benefits that were gained in exchange for what feel to them like local environmental disasters.<sup>108</sup>

I highlight these concerns to make plain that decarbonization is an ugly, difficult business involving substantial tradeoffs between citizen voice<sup>109</sup> and rapid renewables development, and between local environmental risks and global environmental benefits. A failure to accept these tradeoffs is what Michael Gerrard calls “tradeoff denial.”<sup>110</sup> New York has overcome its denial to an extent through the creation of ORES, which affected a massive tradeoff between community control and climate action. At the same time, the fact that New York depends so heavily on the preemption of local ordinances to permit anything

SUMMARY 8 (May 2023) [<https://perma.cc/B9UG-BNBB>] (exploring various options for reducing the footprint of renewables including the co-location of wind and solar infrastructure and the use of fixed-tilt solar panels and finding that the total amount of land required for renewables could, in theory, be reduced by as much as 46%).

104. Cf. *Landscapes Lost: Endless Sea of Mega-Wind Turbines Destroying Rural Vistas Around The World*, STOP THESE THINGS (Nov. 21, 2019), <https://stopthesethings.com/2019/11/21/landscapes-lost-endless-sea-of-mega-wind-turbines-destroying-rural-vistas-around-the-world/> [<https://perma.cc/6HFE-RWNR>].

105. Cf. Jane Marsh, *How Renewable Energy Impacts Biodiversity*, ENDANGERED SPECIES COALITION (Mar. 17, 2023), <https://www.endangered.org/how-renewable-energy-impacts-biodiversity/> [<https://perma.cc/2WPP-DNVZ>].

106. Cf. Dave Williams, *Giant solar farms proving a mixed bag for rural Georgia*, GPB NEWS (Oct. 25, 2022), <https://www.gpb.org/news/2022/10/25/giant-solar-farms-proving-mixed-bag-for-rural-georgia> [<https://perma.cc/BTU6-GAJ2>].

107. Cf. Zayna Syed, *An Israeli wind project draws scrutiny on turbines and people's health*, POPULAR SCIENCE (July 26, 2023), <https://www.popsci.com/environment/wind-turbines-effects-health/> [<https://perma.cc/DH5E-L6BN>]. “Shadow flicker” refers to the strobing shadow that large turbines cast when the sun passes behind them. See, e.g., Matthias Metzger, *Shadow Flicker*, YOUTUBE (Apr. 27, 2017), <https://www.youtube.com/watch?v=OQksc1-5Zoc&t>.

108. Cf. Stanley Fish, *Opinion, Blowin' in the Wind*, N.Y. TIMES (Aug. 26, 2007) <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2007/08/26/blowin-in-the-wind/> [<https://perma.cc/EYK3-7RPR>] (“Even if large wind farms were in place throughout the country, the electricity produced would be a very small percentage of the electricity we use.”).

109. This phrase is borrowed from: Leah Brooks & Zachary Liscow, *Infrastructure Costs*, 15 AM. ECON. J. POL'Y 1, 22–25 (2022) (finding that a significant cause of the threefold increase in spending-per-mile for the Interstate Highway System from the 1960s to the 1980s was likely the increase in “citizen voice” in government decision-making enabled by new state and federal environmental statutes).

110. Michael B. Gerrard, *A Time for Triage*, 39 ENV'T F. 38, 39-40 (2022), [https://scholarship.law.columbia.edu/faculty\\_scholarship/3867/?utm\\_source=scholarship.law.columbia.edu%2Ffaculty\\_scholarship%2F3867&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://scholarship.law.columbia.edu/faculty_scholarship/3867/?utm_source=scholarship.law.columbia.edu%2Ffaculty_scholarship%2F3867&utm_medium=PDF&utm_campaign=PDFCoverPages) [<https://perma.cc/4EW4-LULQ>].

is a dire signal that tradeoff denial nonetheless remains pervasive in the state. New projects will continue to face opposition, as will further legislative efforts to promote renewables development. Which is to say that courts ought to expect to see more cases like *Sleepy Hollow Lake*.

## II. GREEN AMENDMENTS

The question at the heart of this Note concerns the permissibility of the environmental tradeoffs that accompany decarbonization under New York's Green Amendment. The purpose of the preceding Part was to provide context concerning New York's progress toward its goals under the CLCPA and the prevalence of tradeoff denial in the state. I move on now to provide additional background information about Green Amendment case law from other states, and the current protean state of Green Amendment jurisprudence in New York.

### A. *The Original Green Amendments*

In the early 1970s, five states —Pennsylvania,<sup>111</sup> Montana,<sup>112</sup> Hawaii,<sup>113</sup> Massachusetts,<sup>114</sup> and Illinois<sup>115</sup>—adopted environmental

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111. 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.”).

112. 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 . . .”); *id.* at art. XI, § 1 (“The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. . . . The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation . . .”).

113. 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. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”).

114. 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 relevant article is also referred to as Article XLIV.

115. 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.”).



rights provisions to their constitutions.<sup>116</sup> As Amber Polk documents in her article, *The Unfulfilled Promise of Environmental Constitutionalism*, only three of these states—Pennsylvania, Montana, and Hawaii—have developed “successful” environmental constitutional jurisprudences in the sense that that they have generated a fair amount of case law and plaintiffs have sometimes won.<sup>117</sup>

Polk puts the word “successful” in scare quotes because she is disappointed that courts in these jurisdictions have failed to articulate or enforce “substantive” constitutional standards for air quality, water quality, ecological stability, or any other measure of environmental quality.<sup>118</sup> Instead, courts have focused almost entirely on “procedural” environmental rights, such as “citizens’ access to information, participation in decisionmaking, access to justice, and remedies for environmental harms.”<sup>119</sup>

The most significant state constitutional environmental rights decision to date, *Robinson Township v. Commonwealth*,<sup>120</sup> illustrates the general pattern Polk describes in *The Unfulfilled Promise*. The case concerned a set of amendments to Pennsylvania’s oil and gas laws known as Act 13 that required local governments “to authorize oil and gas operations . . . in all zoning districts throughout a locality.”<sup>121</sup> The Court

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116. Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 HASTINGS L.J. 123, 127 (2023).

117. *Id.* at 155.

118. Environmental constitutionalists frequently draw a distinction between “procedural” and “substantive” environmental rights. *See id.* at 165-66, n.341 (“The procedural-substantive rights distinction in environmental constitutionalism has not been as robustly defended or criticized as it has been in legal theory more generally.”).

119. *Id.* at 166. *See, e.g.,* Mont. Env’t Info Ctr. v. Dep’t of Env’t Quality (MEIC), 988 P.2d 1236, 1237 (Mont. 1999) (holding that a statute allowing discharges from monitoring wells absent a nondegradation review implicates the Montana Constitution’s environmental rights provisions); *In re Application Maui Elec. Co., Ltd.*, (MECO) 408 P.3d 1 (Haw. 2017) (holding that petitioners “asserted a protectable property interest in a clean and healthful environment” by requesting a due process hearing regarding an application for approval of a power purchase agreement between Maui Electric and a power plant that burned fossil fuels).

120. 83 A.3d 901 (Pa. 2013); *see also* Michael Gerrard, *Environmental Rights in State Constitutions*, (Aug. 31, 2021), <https://blogs.law.columbia.edu/climatechange/2021/08/31/environmental-rights-in-state-constitutions/> [<https://perma.cc/BT8C-UFGK>] (explaining that environmental rights provisions in state constitutions “received relatively little attention until a 2013 decision by the Pennsylvania Supreme Court, *Robinson Township v. Commonwealth*.”); James R. May & Erin Daly, *Judicial Handbook on Environmental Constitutionalism*, 10 U.N. ENV’T PROGRAMME at 14 (May 2017) [https://works.bepress.com/james\\_may/100/](https://works.bepress.com/james_may/100/) [<https://perma.cc/Q9S2-WBYF>] (describing *Robinson Township* as “a potentially important corrective to judicial under-engagement of environmental constitutionalism” that “may represent a significant step forward for American constitutional environmental rights in particular”).

121. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 971 (Pa. 2013).

held that Act 13 was unconstitutional because the law “displace[d] . . . prior planning, and derivative expectations, regarding land use, zoning, and enjoyment of property,”<sup>122</sup> leaving open the possibility that local governments themselves could approve the environmentally-destructive development that plaintiffs were ultimately seeking to prevent.<sup>123</sup>

The recent trial court decision in *Held v. Montana*<sup>124</sup> also keeps with the pattern. The decision is the first in the United States to recognize the effects of climate change as constitutional injuries,<sup>125</sup> and it has been lauded as a “historic victory for climate action.”<sup>126</sup> However, the decision does not prohibit any actions that contribute to climate change, and it does not identify an obligation on the part of the Montana state government to mitigate Montana’s contribution to GHG emissions. Instead, it declares two statutes unconstitutional: one that prohibits Montana agencies from considering GHG emissions when conducting environmental reviews, and another that eliminated equitable remedies for litigants challenging decisions under the Montana Environmental Protection Act (“MEPA”) on the basis of a failure to consider GHG emissions.<sup>127</sup> Plaintiffs’ complaint originally included a more substantive request for relief in the form of a court

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122. *Id.* at 972. See also *id.* at 1001 (Baer, J., concurring) (“I . . . view the primary argument of challengers to Act 13 to be that the General Assembly has unconstitutionally . . . usurped local municipalities’ duty to impose and enforce community planning, and the concomitant reliance by property owners, citizens, and the like on that community planning.”). Only a plurality of the court framed their determination in the case as an application of Pennsylvania’s Environmental Rights Amendment. Justice Baer instead invoked substantive due process doctrine. *Id.*

123. See *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 691, 701 (Pa. Commw. Ct. 2018), *appeal dismissed*, 208 A.3d 462 (Pa. 2019) (holding that a local ordinance enabling oil and gas development in all zoning districts was permissible under *Robinson Township* because it “expressed the will of the Township’s residents by their elected Board of Supervisors”).

124. *Held v. Mont.*, No. CDV-2020-307 (1<sup>st</sup> Dist. Ct. Mont., Aug. 14, 2023) [<https://perma.cc/XF9W-MB8T>].

125. See Matthew Grabianski, *What Held v. Montana immediately offers for Constitutional Environmental Rights*, GEO. ENV’T L. REV. (Nov. 16, 2023), [https://www.law.georgetown.edu/environmental-law-review/blog/what-held-v-montana-immediately-offers-for-constitutional-environmental-rights/#\\_ftn4](https://www.law.georgetown.edu/environmental-law-review/blog/what-held-v-montana-immediately-offers-for-constitutional-environmental-rights/#_ftn4) [<https://perma.cc/5RTP-DSJQ>]. See also Micah Drew, *‘This changes everything’: Experts respond to Held v. Montana climate ruling*, MONTANA FREE PRESS (Aug. 17, 2023), <https://montanafreepress.org/2023/08/17/this-changes-everything-experts-respond-to-landmark-youth-climate-ruling/> [<https://perma.cc/E2PR-DJ74>] (“Supreme Court Justice Jim Nelson called the case a ‘slam dunk home run’ and said he expects the state’s high court will have a difficult time overturning the decision.”).

126. Meher Bhatia, *Held v. Montana Is a Historic Victory for Climate Action— but Also Human Rights*, THE NATION (Aug. 16, 2023), <https://www.thenation.com/article/archive/held-v-montana-human-rights-climate-change-lawsuit/> [<https://perma.cc/HWS8-DMV3>].

127. *Held*, No. CDV-2020-307 at \*102-3.

order directing the Montana state government to create and implement a “remedial plan or policies that adequately reduce GHG emissions to a constitutionally permissible level,”<sup>128</sup> but the judge dismissed the claim prior to trial, citing the political question doctrine.<sup>129</sup>

### B. *New York's Green Amendment*

In late 2016, New York environmental groups began working with state legislators on an amendment to the New York State Constitution establishing a right to “clean air and water.”<sup>130</sup> The impetus appears to have been the Hoosick Falls incident,<sup>131</sup> as well as various environmental hazards affecting residents of Ezra Prentice Homes, a public housing project on the south end of Albany.<sup>132</sup> Assemblymember Steven Englebright and Senator David Carlucci introduced a concurrent resolution proposing the amendment in March 2017.<sup>133</sup> The resolution easily passed the Assembly in April 2017,<sup>134</sup> but the Senate refused to vote on it until after Democrats regained control of the HOUSE in 2019.<sup>135</sup> That year, the resolution passed the Senate 45 to 17.<sup>136</sup> In accordance with the New York State Constitution, the resolution was presented to the legislature once more in 2021, and it passed both houses again.<sup>137</sup> An environmental rights amendment to the New York Constitution appeared as a ballot proposal before New York voters during a statewide

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128. Order on Motion to Dismiss (Aug. 4, 2021), at \*21, *Held*, No. CDV-2020-307 [https://perma.cc/6VYB-PUB6].

129. *Id.* at \*19 (“Courts may not review controversies...which revolve around policy choices and value determinations constitutionally committed for resolution to other branches of government or to the people in the manner provided by law.”) (internal quotation marks and citation omitted).

130. *BC-NY--New York News Coverage Advisory*, NY, ASSOCIATED PRESS (Dec. 28, 2016) (via Factiva).

131. *See supra* notes 8–10 and accompanying text (Hoosick Falls discussion in Introduction).

132. *See e.g.*, Environmental Advocates NY, *NY needs an environmental Bill of Rights*, YOUTUBE (Jan. 30, 2017), https://www.youtube.com/watch?v=FxqKCrqNsMs&t=266s.

133. *See* Assemb. Con. Res. 6279, 2017-18 Sess. (Ny. 2017) [https://perma.cc/364U-CP5Q]; *see also* S. Con. Res. 5287, 2017-18 Sess. (Ny. 2017) [https://perma.cc/DF88-R5T3].

134. *See* Assemb. Con. Res. 6279, 2017-18 Sess. (Ny. 2017) [https://perma.cc/364U-CP5Q].

135. Vivian Wang, *Democrats Take Control of New York Senate for First Time in Decade*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/nyregion/democrat-ny-senate.html [https://perma.cc/5RDH-KDXU].

136. S. Con. Res. 2072, 2019-20 Ses. (Ny. 2019), https://www.nysenate.gov/legislation/bills/2019/S2072 [https://perma.cc/E74K-ZVDW?type=image].

137. *See* Assemb. Con. Res. 1368, 2021-22 Sess. (Ny. 2021) [https://perma.cc/6XM2-58LF]; *see also* S. Con. Res. 528, 2021-22 Sess. (Ny. 2021) [https://perma.cc/6XM2-58LF].

general election in November 2021. 70% of voters—around 2.1 million New Yorkers—approved the proposal.<sup>138</sup> Article I, Section 19 officially became a part of the New York State Constitution on January 1, 2022. The provision states, in full:

§19. Environmental rights. Each person shall have a right to clean air and water, and a healthful environment.<sup>139</sup>

As of mid-2024, plaintiffs have invoked New York’s “Green Amendment” in at least one dozen cases.<sup>140</sup> Alleged violations include the emission of odors and GHGs from a landfill in Perinton and Macedon; the approval of a highway interchange reconstruction project in Syracuse; the issuance of a permit for a waste transfer facility in Cayuta; the approval of a large housing development on Manhattan; the continued operation of a hazardous waste incineration facility near Troy; the absence of fluoride in Buffalo drinking water; the issuance of a Negative Declaration of Environmental Significance concerning the removal of several dozen trees from a park in Brooklyn; and the GCIDA determination concerning the Flint Mine Solar Project that I discussed in the Introduction of this Note.<sup>141</sup>

So far, there have only been a few decisions concerning motions to dismiss. The first two were rendered in the landfill case. In these decisions, Judge John J. Ark makes clear he thinks that determining when and where the Green Amendment is implicated is not a particularly difficult task,<sup>142</sup> and that it is fairly obvious the “malodourous suffering” of residents living near the landfill constitutes a violation of the provision.<sup>143</sup> In an opinion dismissing the housing development case, Judge Arlene Bluth of the New York County Supreme Court treats the question of implication as equally obvious, noting that some of plaintiffs’ allegations are “simply part of living in Manhattan,” and that, ultimately, “[t]he construction of [the] buildings does not evince the same sort of

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138. *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)) [<https://perma.cc/CL8Z-MW4S>].

139. N.Y. CONST. art. 1, § 19 [<https://perma.cc/ZQ92-MP54>].

140. *See Green Amendment Cases*, PACE U. ELISABETH HAUB SCHOOL OF LAW, <https://nygreen.pace.edu/cases/> [<https://perma.cc/9GNJ-HNZ3>].

141. *See id.*; *see also supra* 1–22 and accompanying text.

142. *Fresh Air for the Eastside, Inc. v. State*, No. E2022000699, slip op. at \*17 (N.Y. Sup. Ct. 2022) [<https://perma.cc/3KS2-E3GU>] (“The legislative history is interesting, but unnecessary to decide whether there has been a constitutional violation, since there is no ambiguity in the plain language of the Green Amendment.”).

143. *See id.* at \*17–18.

environmental concerns that might accompany, for example, a landfill or a toxic waste site.”<sup>144</sup>

The Fourth Department of the Appellate Division is currently considering Judge Ark’s decisions on appeal.<sup>145</sup> And they have plenty to consider. Among other things, Judge Ark found that the Green Amendment is self-executing;<sup>146</sup> that plaintiffs need not exhaust all administrative remedies before bringing a Green Amendment claim;<sup>147</sup> that the appropriate statute of limitations for bringing a Green Amendment claim is the same as for any other constitutional claim—six years—rather than the four-month statute of limitations that applies to Article 78 claims;<sup>148</sup> and that a government action may violate the Green Amendment even if it complies with all relevant statutes and regulations.<sup>149</sup> Michael Gerrard and Andrew McTiernan predict that New York will see “a lot more” Green Amendment cases if these findings are affirmed.<sup>150</sup> They note that it would lead to “great uncertainties for the regulated community” as well—renewables developers included.<sup>151</sup>

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144. *Marte v. City of New York*, No. 159068/2022, slip op. at \*7-8, (N.Y. Sup. Ct. 2023), [https://perma.cc/YTN7-SAV3].

145. Peter Mantius, *In New York, a Legal Debate Over the State’s New Green Amendment*, INSIDE CLIMATE NEWS (Feb. 27, 2024), https://insideclimatenews.org/news/27022024/new-york-legal-debate-over-states-new-green-amendment/ [https://perma.cc/4JSF-7ECR].

146. *Fresh Air for the Eastside*, slip op. at \*12.

147. *Id.* at \*16.

148. *Id.* at \*14.

149. *Fresh Air for the Eastside, Inc. v. Town of Perinton*, Index No. E2021008617, at \*9 (N.Y. Sup. Ct. 2022) [https://perma.cc/FK6J-VDFa] (“There is no ‘grandfathering’ of actions previously permitted by government.”) (quoting Nicholas A. Robinson, *A New Era of Environmental Jurisprudence* 17 (Jan 25, 2022) [https://perma.cc/9TVZ-4Z23]).

150. Michael B. Gerrard & Edward McTiernan, *New York’s Green Amendment: The First Decisions*, N.Y.L.J. (Mar. 7, 2023), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=4924&context=faculty\_scholarship [https://perma.cc/TL68-XNAK].

151. *Id.* See also Todd Ommen, *Environmental rights amendments: Misconceptions and application*, ABA (Oct. 28, 2022), https://www.americanbar.org/groups/environment\_energy\_resources/resources/trends/2022/environmental-rights-amendments-misconceptions-application/ [https://perma.cc/R2QJ-D96P] (“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.”); James B. Meigs, *A Dangerously Seductive Idea*, CITY JOURNAL (Oct. 19, 2021), https://www.city-journal.org/article/a-dangerously-seductive-idea [https://perma.cc/WA4P-RARE] (reporting that Tom Stebbins, executive director of the Lawsuit Reform Alliance of New York (LRANY), “believes the Green Amendment will dramatically increase such suits, making it harder for the state to achieve its decarbonization goals.”).

### C. *A Green Amendment Dilemma?*

The Green Amendment stands as an invitation for New York courts to reify and augment what Ruhl and Salzman call in *The Greens' Dilemma* the “Grand Bargain of environmentalism”: a cleaner, healthier environment in exchange for slower, more costly infrastructure development due to permitting and litigation.<sup>152</sup> Ruhl and Salzman argue that the threat of climate change has rendered this Bargain unworkable, and that it is necessary to forge a “New Grand Bargain” that “places climate impact on par with (and potentially ahead of) conservation, distributional equity, and social justice.”<sup>153</sup> A case like *Sleepy Hollow Lake*, which aims to strengthen the environmental review process at the expense of rapid renewables development, presents the same question again as one about constitutional rights. It turns Ruhl and Salzman’s Greens’ Dilemma into a Green Amendment Dilemma.

A fiscal impact statement prepared by the New Mexico legislature’s Legislative Finance Committee reaching a similar conclusion about the possibility of a Green Amendment Dilemma appears to have temporarily derailed efforts to add a Green Amendment to the New Mexico Constitution. The report observes: “The legal uncertainty the amendment could create might result in costly litigation that could impact the financial feasibility of certain energy projects” and potentially delay New Mexico’s renewable energy transition.<sup>154</sup> Following the release of the report in March 2023, one of the bill’s co-sponsors decided to pull it from discussion.<sup>155</sup>

Developers will have less reason to worry if New York follows Montana and Pennsylvania’s lead and declines to read the Green Amendment as affording meaningful substantive environmental rights<sup>156</sup> (e.g., by imposing expensive mitigations and offsets on projects). But other concerns would still remain. Recall that renewable energy development in the state depends heavily on ORES’s ability to preempt local ordinances.<sup>157</sup> In view of *Robinson Township*, that preemption

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152. Ruhl & Salzman, *supra* note 23, at 24.

153. *Id.* at 68.

154. N.M. LEGIS. FIN. COMM., FISCAL IMPACT REPORT: ENVIRONMENTAL RIGHTS, at 3 (Mar. 14, 2023), <https://www.nmlegis.gov/Sessions/23%20Regular/firs/SJR06.PDF> [<https://perma.cc/CQ7F-GS69>].

155. Vanessa Montalbano, *How a state analysis derailed a green amendment in New Mexico*, WASH. POST (Mar. 22, 2023), <https://www.washingtonpost.com/politics/2023/03/22/how-state-analysis-derailed-green-amendment-new-mexico/> [<https://perma.cc/U3NZ-RS3K>]. State Senator Antoinette Sedillo Lopez, the legislator who pulled the bill, called the report “misinformation.” *Id.*

156. *See* Part II.A

157. *See supra* note 81 and accompanying text.



authority has the look of a *prima facie* violation of New Yorkers' procedural environmental rights, meaning it would not be surprising to see another lawsuit challenging it under New York's Green Amendment instead of its home rule provisions.<sup>158</sup>

One also wonders about the additional permitting reforms that the Comptroller has suggested are needed.<sup>159</sup> If the Green Amendment guarantees something like a constitutional minimum of community input during the development process, it might be the case that the permitting regime required to accelerate renewables development is actually unconstitutional.

Maya K. van Rossum, a named plaintiff in the *Robinson Township* decision and the person responsible for coining the term "Green Amendment,"<sup>160</sup> rejects the idea that Green Amendments will slow renewables development.<sup>161</sup> Under her understanding of constitutional environmental rights, renewables development delivers environmental benefits that developers can raise as cognizable defenses in Green Amendment litigation.<sup>162</sup> This observation suggests a doctrine analogous to the rule of reason in antitrust law, under which courts weigh the

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158. Scott Fein & Tyler Otterbein, *New York's New Constitutional Environmental Bill of Rights: Impact and Implications*, ALBANY L. SCHOOL GOV. L. CENTER, <https://www.albanylaw.edu/government-law-center/new-yorks-new-constitutional-environmental-bill-rights-impact-and> [<https://perma.cc/W7HW-4R8J>] ("It [] bears note that the Green Amendment may enhance local authority to limit land use."); Karen Meara & Christopher Rizzo, *Environmental Amendment to NYS Constitution Will Be on the Ballot in November*, N.Y.L.J. (Jun. 22, 2021), <https://www.law.com/newyorklawjournal/2021/06/21/environmental-amendment-to-nys-constitution-will-be-on-the-ballot-in-november-2021/> [<https://perma.cc/ST72-TDW4>] ("There is a very real possibility that municipalities will invoke the constitutional right to a 'healthful environment' to restrict some of the most controversial land-use initiatives in the state—affordable housing, high-density development, wind and solar facilities, electric transmission lines, etc. However, if government proponents of these initiatives include vigorous environmental protections and public review procedures, they will probably avoid the overreach that doomed the Pennsylvania fracking legislation in *Robinson Township*"); see also *supra* notes 82–89 and accompanying text (discussion of *Copake* lawsuit and Hinchey's letter).

159. DiNAPOLI, *supra* note 34.

160. Telephone interview with Maya K. van Rossum (Nov. 23, 2023). See also *Our Founder*, FOR THE GENERATIONS, <https://forthe generations.org/our-founder/> [<https://perma.cc/FY9J-HWP7>].

161. Vanessa Montalbano, *How a state analysis derailed a green amendment in New Mexico*, WASH. POST (Mar. 22, 2023), <https://www.washingtonpost.com/politics/2023/03/22/how-state-analysis-derailed-green-amendment-new-mexico/> [<https://perma.cc/U3NZ-RS3K>].

162. *Id.*

anticompetitive harms of defendants' action against its procompetitive benefits.<sup>163</sup>

At its core, this Note is an elaboration of this insight. My basic claim is that a case like *Sleepy Hollow Lake*—a case that pits effective climate action against fundamental environmentalist values like community input, process, and conservation—should be viewed as involving a conflict between constitutional rights that are potentially incommensurable.<sup>164</sup> I argue in the next section that such cases call for deference to the political branches, and that courts should assume that government actions in support of renewables development are broadly permissible.

### III. ENVIRONMENTAL TRADEOFFS UNDER THE GREEN AMENDMENT

#### A. *Tradeoffs, Balancing, and Deference*

The question at hand can be formulated as follows: What sort of environmental tradeoffs, exactly, are allowed under the Green Amendment?

A simple answer to this question is that the Green Amendment permits all environmental tradeoffs that withstand strict scrutiny. The Montana Supreme Court has held that government actions that implicate the Montana Constitution's environmental rights provisions are subject to strict scrutiny,<sup>165</sup> and the New York Court of Appeals could hold the same with respect to the Green Amendment. It is possible that many permit approvals for large renewable energy projects would survive that level of scrutiny, as would the AREGCBA and future permitting reforms, given that addressing climate change is a compelling end, and accelerating renewable energy development is a suitable means for achieving it.

Arguably, the proper standard of review is actually lower in a Green Amendment case that specifically concerns government actions in support of renewables development. Judges and law scholars sometimes talk about constitutional rights having “cores,” and how the protection offered by a right falls off as one moves farther from its core.<sup>166</sup> (Consider,

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163. Cf. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 928, 930 (2016).

164. Cf. Rebecca C. Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 4 (2016) (observing a similar incommensurability issue in the realm of antitrust).

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

166. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 801 (2001) (“A lot of scholarly and judicial language suggests that ‘political speech’ is

for instance, the difference in how courts consider commercial speech versus political or artistic expression.) A leading candidate for the “core” of the Green Amendment is the protection of human health: the mischief<sup>167</sup> that gave rise to the campaign for a Green Amendment was a set of health risks faced by New York residents,<sup>168</sup> and the main pitch that legislators gave for the Green Amendment during debate was that it would protect New Yorkers’ health.<sup>169</sup> If protecting human health is, indeed, the core concern of the Green Amendment, then it is conceivable that a government action that presents a smaller overall health risk does not require compelling justification. Instead, depending on the magnitude of the health risks imposed, governmental ends that are merely significant or rational may suffice as justifications. Under this approach, government actions that support renewables development (e.g., permitting reform, the approval of an individual project, etc.) might, in the end, receive a lower level of scrutiny than actions that support the development of, say, new highways or waste incineration plants, which may raise more substantial health concerns.<sup>170</sup>

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the true core of the First Amendment and that words moving away from this core are entitled to proportionately less constitutional protection.”).

167. See generally Samuel L. Bray, *The Mischief Rule*, 109 GEO. L. J. 967 (2021).

168. See *supra* notes 7–9 and accompanying text (discussion in Introduction about Hoosick Falls); NY State Assembly Sess., 30 (Apr. 24, 2017), <https://nyassembly.gov/av/session/> [<https://perma.cc/P2SK-84PZ>]. (Assemblymember Englebright: “And, certainly, there have been recent events that have reminded us of the need for this, in places like Hoosick Falls...where...there have been really horrific insults to the environment and to the communities’ well-being and to the health of individuals.”).

169. See, e.g., NY State Assembly Sess., 61 (Apr. 24, 2017), <https://nyassembly.gov/av/session/> [<https://perma.cc/P2SK-84PZ>] (Assemblymember Deborah Glick: “We cannot continue to have bad air and water that results in health implications that cost us in lung disease and in various types of neurological and [endocrinological] issues that we are seeing happening. Children are developing earlier. We have more infertility. That is a signal from nature that there’s a problem.”); NY State S. Sess., 151 (Jan. 12, 2021) [<https://perma.cc/9DF9-TGUL>] (Senator Michelle Hinchey: “This constitutional amendment is critical to the health and safety of New Yorkers . . . .”); *id.* at 146–47 (Senator Robert Jackson: “I hope these rights will soon be constitutional rights for all New Yorkers and will safeguard our ability to sustain healthy lives.”). Cf. *Glisson v. City of Marion*, 720 N.E.2d 1034, 1042 (Ill. 1999) (concluding after a review of the legislative history that the phrase “healthful environment” in Article XI of the Illinois Constitution was intended to refer to the relationship between the environment and human health).

170. *Health and Safety Benefits of Clean Energy*, U.S. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, <https://www.energy.gov/eere/health-and-safety-benefits-clean-energy> [<https://perma.cc/JZY4-CAB7>]; U.S. EPA, NEAR ROADWAY AIR POLLUTION AND HEALTH: FREQUENTLY ASKED QUESTIONS, [https://www.epa.gov/sites/default/files/2015-11/documents/420f14044\\_0.pdf](https://www.epa.gov/sites/default/files/2015-11/documents/420f14044_0.pdf) [<https://perma.cc/A9BY-CZCZ>]; Peter W. Tait et al., *The health impacts of waste incineration: a systematic review*, 44 EPIDEMIOLOGY 40 (2020).

Another reason for a government action to receive a lower level of scrutiny in a Green Amendment case is that it implicates competing constitutional interests. Justice Breyer argues for the general claim that cases featuring “complex” constitutional rights call for intermediate scrutiny and judicial deference in his concurrence in *Nixon v. Shrink Missouri Government PAC*, a First Amendment case concerning a state statute limiting campaign contributions.<sup>171</sup> “The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many—in Congress, for example, where constitutionally protected debate . . . is limited to provide every Member an equal opportunity to express his or her views,” he observes. “Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate.”<sup>172</sup>

Government actions that support the acceleration of renewables development can be thought of as implicating competing environmental rights in similarly complex ways. Let us stick for now with the idea that the Green Amendment is a right against exposure to health risks. Renewables development does, indeed, further the fulfillment of this right by addressing climate change, which introduces all sorts of new health risks to the world.<sup>173</sup> It also improves air quality by replacing electricity generation facilities that burn fossil fuels, and by enabling the electrification of buildings and vehicles by increasing the overall supply of electricity. In its Scoping Plan, the Climate Action Council estimates that the health co-benefits resulting from the improvements to air quality that accompany decarbonization could total up to \$110 billion between 2020 and 2050.<sup>174</sup> In more concrete terms: “[T]ens of thousands of premature deaths, thousands of non-fatal heart attacks, thousands of other hospitalizations, thousands of asthma-related emergency room visits, and hundreds of thousands of lost workdays” would be avoided due to electrification and renewables development.<sup>175</sup> So, it would appear that government actions in support of renewables development—development that may introduce new health risks to the local environment, such as the water pollution risk raised in *Sleepy*

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171. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring). Breyer notes that “[w]here a legislature has significantly greater institutional expertise . . . the Court in practice defers to empirical legislative judgments. . . .” *Id.*

172. *Id.*

173. Climate Change and Urban Health, EPA, <https://www.epa.gov/climateimpacts/climate-change-and-human-health> [<https://perma.cc/JSN7-3KAV>].

174. *Scoping Plan Appendix G*, *supra* note 43, at 30.

175. *Id.*

*Hollow Lake*—are really examples of the kind of mixed conduct<sup>176</sup> that Breyer thinks renders fears about “balanc[ing] away . . . freedoms”<sup>177</sup> incoherent and the categorical, “rights-as-trumps” frame of strict scrutiny<sup>178</sup> review inapposite.

A similar conclusion follows from the premise the Green Amendment enshrines *multiple* core values. During debate over the Green Amendment, legislators spoke about goals besides reducing New Yorkers’ exposure to environmental health risks; these include conservation,<sup>179</sup> environmental justice,<sup>180</sup> protecting the rights of future generations,<sup>181</sup> and securing a stable climate.<sup>182</sup> Assuming these concerns are embedded in the meaning of the Green Amendment, we observe similar environmental rights conflicts in the cases that concern us: the approval of a large solar energy facility, for example, may raise legitimate conservation and health risk concerns at the local level; at the

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176. This term is borrowed from Hemphill, *supra* note 163, at 928.

177. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 399.

178. See Jamal Greene, *Rights as Trumps?*, 132 Harv. L. Rev. 30, 32–33 (2018).

179. NY State Assembly Sess., 34 (Apr. 24, 2017), <https://nyassembly.gov/av/session/> [<https://perma.cc/P2SK-84PZ>] (Assemblymember Steven Englebright stating that the Green Amendment stands in part for the idea that “the air and the water . . . and the creatures that live thereon and within[] deserve to be essentially in a balanced state of equilibrium . . .”).

180. NY State S. Sess., 146 (Jan. 12, 2021) [<https://perma.cc/9DF9-TGUL>] (Senator Robert Jackson: “Adding this amendment to the current New York Bill of Rights will provide important protections that advance environmental justice.”).

181. NY State S. Sess., 149 (Jan. 12, 2021) [<https://perma.cc/9DF9-TGUL>] (Senator Rachel May: “The Haudenosaunee Confederacy is a system of governance based on a world view that always considers the effects of your decisions on seven generations to come . . . I am very proud to support moving our understanding of the rights of New Yorkers closer to that traditional view that the Haudenosaunee have given to us . . .”); NY State S. Sess., 3193 (Apr. 30, 2019) [<https://perma.cc/72NU-N2VT>] (Senator David Carlucci: “Look, we could either pay now or we’ll be paying the cost later. And this constitutional amendment is about enshrining those rights so that generations to come, they will be inheriting an environment that’s healthy.”).

182. NY State Assembly Sess., 60 (Apr. 24, 2017), <https://nyassembly.gov/av/session/> [<https://perma.cc/P2SK-84PZ>] (Assemblymember Alicia Hyndman: “I think this amendment is so important to making sure we address what’s coming, because as we know on the Federal level, we are faced with someone who does not believe in climate change.”); NY State Assembly Sess., 49 (Apr. 30, 2019), <https://nyassembly.gov/av/session/> [<https://perma.cc/72NU-N2VT>] (Assemblymember Steven Englebright: “I think that [the Green Amendment] is an expression of optimism that is good news . . . in a time when our State is assaulted by climate change . . .”); NY State S. Sess., 3193–94 (Apr. 30, 2019) [<https://perma.cc/72NU-N2VT>] (Senator David Carlucci: “We have to get real about what climate change is doing to our communities . . . Particularly in a time when the federal government unfortunately is withdrawing us from the Paris Agreement . . . this is a way for us to . . . make sure that New York is showing . . . other states a way forward on how to protect our environment.”); NY State S. Sess., 151 (Jan. 12, 2021) [<https://perma.cc/9DF9-TGUL>] (Senator Michelle Hinchey: “This constitutional amendment . . . is a needed step in combating climate change.”).

same time, its approval furthers the environmental interests of future generations and contributes to the global effort to stabilize the climate. Again, it seems the court will need to apply some sort of balancing approach to reach a decision. This time, however, it is even less clear what that would look like. It might be possible to frame each of the environmental values at stake as derivatives of a single value—human health, for instance—and the court could decide the case by reaching a conclusion concerning the “net” health effect of the government action at issue.<sup>183</sup> But it is more plausible to think these values are, in some sense or another, incommensurable<sup>184</sup>—that they express conceptually distinct concerns, and that it is difficult or impossible to resolve conflicts between them through deductive argument, or by deriving the right equation and plugging values into it.<sup>185</sup> Scalia once remarked that weighing Congress’s interests against a state’s in a Dormant Commerce Clause case is like “judging whether a particular line is longer than a particular rock is heavy,” and that such cases are generally “ill suited to the judicial function.”<sup>186</sup> The same may be true of Green Amendment cases involving environmental rights conflicts.

I mention the Scalia comment to raise the possibility that the appropriate standard of review in a case concerning the approval of a

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183. During legislative debate, Assemblymember Englebright made a few statements framing various environmental concerns as derivatives of human health concerns. *See, e.g.*, the following exchange:

MR. GOODELL: Other [environmental rights provisions] reference certainly excessive unnecessary noise, natural, scenic, [historic], esthetic qualities. Was it your intent that the reference to healthful environment incorporated all those other provisions?

MR. ENGLEBRIGHT: Of course. The totality of all of these parts and pieces of our experience from our five senses is to give us a sense of well-being. And biologically...if we take care of the environment, the environment will take care of us.

NY State Assembly Sess., 35–36 (Apr. 24, 2017), <https://nyassembly.gov/av/session/> [<https://perma.cc/P2SK-84PZ>].

184. *See generally* HSIEH, NIEN-HÊ & HENRIK ANDERSSON, INCOMMENSURABLE VALUES, Stan. Encyc. of Phil. (Edward N. Zalta ed., Fall 2021), <https://plato.stanford.edu/entries/value-incommensurable/#MeasComp> [<https://perma.cc/NLG5-34P6>].

185. *Cf.* G.A. COHEN, RESCUING JUSTICE & EQUALITY 4 (2008) (“We expect to find, moreover, as we approach the completion of our task, that the normative requirements that we recognize present themselves in competitive array: they cannot all be satisfied all the time, nor do we have a method for systematically combining them. Discursively indefensible trade-offs are our fate.”). *But see* Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 509–513 (1989) (presenting a “waves of duty” model of thinking through rights conflicts); Andrew Cheung, *Conflict of Fundamental Rights and the Double Proportionality Test*, 49 HONG KONG L.J. 835, 838–39 (2019) (presenting a “double proportionality analysis” approach to thinking through rights conflicts).

186. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).



permit application for a renewable energy facility or the enactment of legislation streamlining the permitting process for renewables might be even lower than is suggested by the reasoning of the Breyer concurrence quoted above. In view of the possibility that such cases involve a conflict of constitutional interests that are fundamentally incommensurable, the right approach might instead be rationality review. It might be that courts ought to start from the assumption that Green Amendment Dilemma cases present instances of mixed conduct that are generally permissible in the sense that the political branches are better suited to working through the constitutional conflicts that inhere within them.

Ultimately, I think this is the correct position. In general, I find compelling the proposition that hard questions about tradeoffs are best handled by democratic institutions.<sup>187</sup> And in the specific context of Green Amendment Dilemma cases, there exists a somewhat unique concern about timeliness. Litigation is time-consuming, and the sort of “procedural” remedies courts are most comfortable awarding in the environmental rights context<sup>188</sup> generally function to make the permitting process more time-consuming as well. So long as one thinks that the Green Amendment guarantees something like a right to a stable climate, there is a real concern that using litigation to hash out the environmental tradeoffs involved in rapid renewables development is inherently counterproductive and inequitable, given that addressing climate change requires quick and decisive action.<sup>189</sup>

Another consideration that weighs in favor of courts showing greater deference in Green Amendment Dilemma cases is the meaning of the word “environment” itself. The important thing to know about the word is that it was not particularly popular until after it took on a specific meaning in the mid-twentieth century.<sup>190</sup> Around that time, its meaning shifted from “encirclement” or “surroundings”<sup>191</sup> to something

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187. See James D. Nelson & Micah Schwartzman, *Second-Order Decisions in Rights Conflicts*, 109 VA. L. REV. 1095, 1125 (2023).

188. See Polk, *supra* note 116, at 123.

189. Cf. Ruhl & Salzman, *supra* note 23, at 19 (“Delay Embeds More Warming”).

190. See John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1, 55 (2009) (“People did not often speak of ‘the environment’ before the environmental movement of the 1960s.”); Ngram Viewer, *Environment, pollution*, GOOGLE BOOKS [https://perma.cc/4HZX-EK7H] (mapping how frequently the words “environment” and “pollution” appear in published materials over time).

191. Originally, “environment” was a gerund that referred to the act of surrounding or circling something, as in: “Drivers seeking parking spots environment the block.” *Environment*, Oxford English Dictionary, [https://www.oed.com/dictionary/environment\\_n?tl=true](https://www.oed.com/dictionary/environment_n?tl=true) [https://perma.cc/F3TP-T7MH]. After some time, it came to refer synecdochally to the set of things that surround a person or a thing, as in: “She was a product of her environment.” *Id.*

like “the natural world”—but not quite. The difference comes down to the emphasis placed on externalities—on the idea that the effect your actions have on your immediate surroundings might reverberate around the world in unexpected ways.<sup>192</sup> Historians Paul Warde, Libby Robin, and Sverker Sörlin identify William Vogt’s *Road to Survival*, a bestselling neo-Malthusian treatise published in 1948, as the point of origin for this new use of the word.<sup>193</sup> This idea was “embedded” in the term by the American environmental movement of the 1960s and 70s, they argue.<sup>194</sup> And they are right.<sup>195</sup>

The observation that the term “environment” today carries connotations of an interconnected and interdependent world leads back to the idea that there exist under the Green Amendment instances of mixed conduct that are common, and that are generally permissible. An allegation that a particular project makes the environment less healthful solely because of its effect on the local environment seems incomplete absent an allegation that the project fails to deliver environmental benefits somewhere else, or that those benefits are clearly insufficient to justify the environmental harms it imposes; suggesting otherwise appears to indulge the fallacy of composition<sup>196</sup> in an age of tradeoffs. Then there is the timeliness concern raised above. To countenance the tradeoff effected by litigating Green Amendment cases concerning renewables projects at length (or the tradeoff effected by a remedy intensifying the environmental review process for renewables, or one mandating uneconomic mitigation measures) requires what looks like a willful, myopic misreading of the term “environment.”

Looking to Assemblymember Englebright’s past comments about utility-scale solar,<sup>197</sup> as well as Senators Hinchey and Hackham’s statement concerning the Copake solar project,<sup>198</sup> it is possible legislators

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192. WILLIAM VOGT, *ROAD TO SURVIVAL* 14–15 (1948) (“All of them have one thing in common. The lot of each, from the Australian sea captain to biochemist, is completely dependent on his or her global environment, and each one of them in greater or less degree influences that environment . . . [W]e live in one world in an ecological—an environmental—sense.”).

193. PAUL WARDE ET AL., *THE ENVIRONMENT: A HISTORY OF THE IDEA* 11–12 (2018) (identifying the publication of *Road to Survival* by William Vogt in 1948 as a marker of “the beginning of a revolution in thinking” that produced our current concept of “the environment”).

194. *Id.* at 18.

195. *Cf. supra* note 183 (Assemblymember Englebright discussing interconnectedness of natural world and human wellbeing).

196. *See Fallacies of composition/division*, Oxford Reference, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095629632> [<https://perma.cc/B4P8-2R9E>].

197. *See* TBR Newsmedia, *supra* note 95.

198. *See* Hinchey, *supra* note 77 (Letter to ORES).

who drafted and voted for the Green Amendment did not intend for the word “environment” to have a particularly expansive meaning, or for the provision to generally permit the local environmental impact that accompanies the development of large renewable energy projects. But if that is the case, they declined to make that view explicit during legislative debate. That they did not is notable, as Republican opponents of the Green Amendment repeatedly raised the possibility that the adoption of the new provision would generate litigation against renewable energy projects.<sup>199</sup> Green Amendment supporters said nothing at all in response to these comments. In fact, over several years of debate, they never once mentioned the CLCPA, Article 10, ORES, or renewable energy in general.

Even if the Green Amendment were intended (or explicitly drafted) to focus entirely on local environmental impacts, it ought not make any practical difference for judges. Climate change impacts everything, everywhere: New Yorkers across the state are already experiencing the negative effects of increased heavy precipitation, longer heatwaves, and sea level rise.<sup>200</sup> At the same time, many thousands of New Yorkers living in urban areas suffer the negative health effects of breathing air polluted by tailpipe emissions.<sup>201</sup> It is difficult to think of a way to address both issues at the same time absent renewables development at the scale outlined in the Climate Action Council’s Scoping Plan. A reading of the Green Amendment rendering that level of development unconstitutional is, on its face, absurd. Whether New York will adopt policies that enable it is another matter entirely. I insist only that courts at least give them the chance.

### B. *The Green Non-Dilemma*

By this point I have hopefully made clear that the interpretive decision I called the Green Amendment Dilemma is not, in the end, a

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199. See, e.g., NY State Assembly Sess., 41–43 (Feb. 8, 2019), <https://nyassembly.gov/av/session/> [<https://perma.cc/M3N5-4XYK>] (Assemblymember Phil Palmesano: “I think my concern is the unintended consequences of what this legislation will do . . . [It is] certainly going to [contribute] to, you know, a possible slowing down to the goals . . . in support of the CLCPA.”).

200. Climate Change Effects and Impacts, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, <https://www.dec.ny.gov/energy/94702.html> [<https://perma.cc/5HQ2-5KYK>].

201. Liz Donovan, *Vehicle Pollution Caused an Estimated 2,000 New Yorkers’ Deaths in One Year: Study*, CITY LIMITS (June 10, 2021), <https://citylimits.org/2021/06/10/vehicle-pollution-caused-an-estimated-2000-new-yorkers-deaths-in-one-year-study/> (The study itself is available at: <https://perma.cc/84CW-875F>).

*true* dilemma.<sup>202</sup> Technically speaking, a dilemma is a choice between two options that are equally undesirable, meaning the choice cannot be made in a rational way. Given that I argue in this Note (hopefully rationally) for one option over another—i.e., to interpret the Green Amendment as permitting rapid renewables development, rather than forbidding it—my use of the word “dilemma” in this Note is somewhat inapt.

In actuality, I have been using the word “dilemma” in a more colloquial sense to refer to what is really just a difficult but obvious choice. The choice is difficult because, as I explained in Part I, New York remains mired in tradeoff denial, meaning that if, by some political miracle, it begins to take real steps to accelerate renewables development, litigation is likely to follow, and decisions that disempower environmental advocates for the sake of enabling that acceleration would likely prove controversial. At the same time, it is painfully obvious that courts are the wrong venue for hashing out the environmental tradeoffs that accompany rapid renewables development. New York’s judiciary can resolve the Green Amendment Dilemma by rejecting ownership over it, and they would be right to do it.

I hope also to have demonstrated a method for applying the Green Amendment to hard cases without reducing it to a triviality. A simple approach to interpreting the Green Amendment that would enable rapid renewables development is to treat it in the same manner as the New York Court of Appeals has treated other positive constitutional rights, such as the right to welfare, education, or a balanced budget. The Court has consistently held that conduct implicating these rights receive rational basis review;<sup>203</sup> it could do the same with the Green Amendment. My proposal is distinct: I argue instead that courts ought to show deference specifically in cases where environmental rights conflict, meaning I do *not* argue against the possibility of applying a stricter standard of review in cases that do not present environmental rights conflicts, such as a case concerning the approval of a new natural gas plant, or the decision

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202. See *Episode 49: J.B. Ruhl and Jim Salzman*, DIGGING A HOLE: THE LEGAL THEORY PODCAST, at 21:00 (Sept. 29, 2023), <https://www.diggingaholepodcast.com/episodes/ruhl-salzman> (discussing the meaning of the word “dilemma”).

203. Bd. of Educ., Levittown School Dist. v. Nyquist, 57 N.Y.2d 27, 42 (1982) (applying rationality review to local control of schools); Campaign for Fiscal Equity, Inc. v. New York (CFE III), 8 N.Y.3d 14, 28 (2006) (applying rationality review to the state’s method of calculating a district’s funding needs); Barie v. Lavine, 40 N.Y.2d 565, 568 (1976) (applying rationality review to a law barring the provision of assistance or care to those who refused to accept employment); Wein v. Carey, 41 N.Y.2d 498, 505 (1977) (applying rationality review to state budget question).

to spend federal funds on highways instead of public transportation,<sup>204</sup> or perhaps even a failure on the part of the government to control the odors coming from a landfill.

#### CONCLUSION

New York's judiciary holds the power under the Green Amendment to significantly delay decarbonization. It will hold that power for as long as New Yorkers remain ambivalent toward renewables development. The choice to mirror and amplify that ambivalence by treating all facets of renewables development as difficult, fact-intensive constitutional questions is not mandatory. In fact, as a matter of constitutional adjudication, the choice is somewhat aberrant. Life is complicated, rights frequently conflict, and judges acknowledge that reality by dropping the Dworkinian rights-as-trumps frame when it becomes unworkable.<sup>205</sup> This is a situation that calls for it. We live in an era of triage.<sup>206</sup> Courts should give New York the chance to recognize that and act accordingly.

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204. See Sam Mellins, *Flush With Biden's Infrastructure Cash, New York Is Choosing Highways Over Public Transit*, N.Y. FOCUS (Feb. 5, 2024), <https://nysfocus.com/2024/02/05/biden-infrastructure-law-highways-public-transit> [<https://perma.cc/L2AE-7ZCJ>].

205. Joseph Blocher, *Response: Rights as Trumps of What?*, 132 HARV. L. REV. FORUM 120, 121 (2019) ("The underlying question in U.S. constitutional law... is usually not whether to embrace the rights-as-trumps frame, but when and why.").

206. Gerrard, *supra* note 110, at 40.